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No. MCS/149/2016-18 / R.N.I. No. MAHENG/2012/47041 - Total Pages: 172

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A Monthly Journal of

The Chamber of Tax Consultants

THE CHAMBER'S JOURNAL

Vol. VII | No. 2 November 2018

YOUR MONTHLY COMPANION ON TAX & ALLIED SUBJECTS

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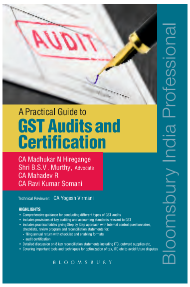
Just released! The most comprehensive book on GST Audits and Certification

A Practical Guide to GST Audits and Certification



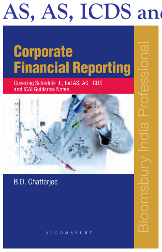
The book has been written with a perspective to enable the taxpayers to ensure compliance with the applicable laws. The vast experience of the four authors in consulting, adjudicating, judging and implementation of indirect taxes would help the professionals implement GST provisions and getting audit done in an easier way. This book covers:

- Comprehensive guidance for conducting different types of GST audits
- Provisions of key auditing and accounting standards relevant to GST
- Practical tables giving Step by Step approach with Internal control questionnaires, checklists, review program and reconciliation statements for:
  - filing annual return with checklist and enabling formats
  - audit certification
- Detailed discussion on 8 key reconciliation statements including ITC, outward supplies etc.
- Important tools and techniques for optimization of tax, ITC etc to avoid future disputes

CA Madhukar N Hiregange, Shri B.S.V. Murthy, CA Mahadev R and CA Ravi Kumar Somani

Pages 750; September 2018; INR 995/-

Corporate Financial Reporting – Covering Schedule III, Ind AS, AS, ICDS and ICAI Guidance Notes

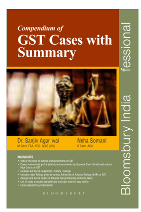


The regulatory environment in India is governed by various statutory authorities. In today's parlance corporate enterprises have to comply with provisions of Companies Act, 2013, Accounting Standards, Indian Accounting Standards, ICAI pronouncements and Income Computation and Disclosure Standards. Accordingly, the level of corporate financial reporting has gone through a metamorphosis of change and ushered in a whole new level of complexity.

B D Chatterjee, B.Com (Hons), ACA, ACMA, ACS, Dip IFR (ACCA - UK)

INR 2,295/-

Compendium of GST cases with summary

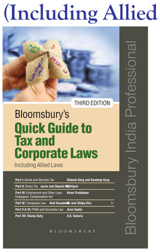


This is an updated and much required compendium of GST cases, with summary. The reader can access the cases, through party name, section number of GST Act, topic, or the pronouncing authority. This is a must-have book for all chartered accountants, professionals in the industry and lawyers to help interpret the law and find precedents.

Dr. Sanjiv Agarwal and Neha Somani

INR 1,695/-

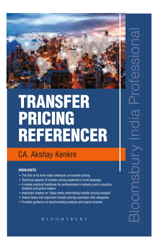
Bloomsbury's Quick Guide to Tax and Corporate Laws (Including Allied Laws)



This publication is a very useful referencer and a guide for all the professionals to get insights into the significant taxation, corporate laws, securities laws and employment laws, applicable in India for a quick and easy understanding of the compliances under various laws.

INR 1,295/-

Transfer Pricing Referencer

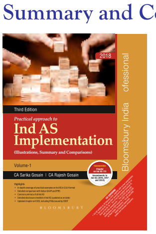


One may like to use the book as a guide in transfer pricing analysis and cross-border transactions, where the literature would hand-hold you in navigating through the turbulent tax times. It would be useful for tax directors, CFOs, regulators, professionals, policy makers and researchers of taxation.

CA. Akshay Kenkre

INR 795/-

Practical approach to Ind AS Implementation (Illustrations, Summary and Comparisons) (3rd Edition) (2 vols.)



Covers provisions of Ind AS in two volumes. The first volume contains 42 chapters comprehensively covering convergence strategy, each Ind AS in detail with practical examples and comparison with IFRS and existing Indian GAAP. The book is written in a lucid manner in order to help readers spot the differences between AS and Ind AS and plan towards Ind AS transition efficiently.

CA Sarika Gosain and CA Rajesh Gosain

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Over 1850 FAQs covering tax, levy, charge, valuation, supply, CGST, SGST, IGST, UTGST, ITC, Invoices, Returns, Refunds,etc. and other procedural aspects, backed by the authors' practical experience.

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CONTENTS

Vol. VII No. 2 | November – 2018

THE CHAMBER OF TAX CONSULTANTS
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The Chamber's Journal

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MEMBERSHIP FEES & JOURNAL SUBSCRIPTION FOR THE F.Y. 2017-18

Sr. No.	Membership Type		Fees	GST 18%	Total
1.	Life Membership (W.e.f. 1-7-2017)	₹	12000	2160	14160
2.	Journal Subscription (Life Members)	₹	1200	0	1200
					₹ 15360
3.	Admission Fees – Ordinary Members	₹	500	90	590
4.	Ordinary Membership Fees	₹	2200	396	2596
					₹ 3186
5.	Admission Fees – Associate Members	₹	1000	180	1180
6.	Associate Membership Fees	₹	5000	900	5900
					₹ 7080
7.	Journal Subscription (Non Members)	₹	2100	0	₹ 2100
8.	Student Membership Fees	₹	250	45	₹ 295
9.	Journal Subscription	₹	700	0	₹ 700

Editorial

Wishing you all a very happy, prosperous and peaceful Vikram Samvat year 2075. The new year arrives at a positive note. As per the World Bank's Doing Business 2019 survey, India ranks at 77th place. Thus, it has jumped 23 ranks from the ranking it got in the last survey. It is an achievement and makes one optimistic that things can and are improving in our country. I am reminded of the observation of a celebrated author Mr. Gurcharan Das at page 121 of his book titled – 'India Grows At night-A Liberal Case for A Strong State' published in the year 2012 that "Where the State is desperately needed in ensuring the citizen's basic needs security, law and order, education, health and drinking water – it performs appallingly. Where it is not needed, it is hyperactive in tying the citizen in miles of red tape and harassing him through the 'inspector raj'". It would be interesting to know the views of the author on the current status of the Indian State.

Audit professional have just emerged out of the tax and statutory audit. As soon as the Diwali festivities conclude they have to brace the maiden annual GST audit and returns. In the post colonial era, India has experienced one of the most important tax reform in the form of introduction of Goods and Services Tax (GST). Introduction of GST has helped the Government in mopping up higher revenues which will be available for spending on welfare projects and provide better quality of life to the citizens. The GST revenue collection has rebounded and it exceeded Rupees one lakh crore during the month of October 2018. However, it is a debatable issue whether the implementation of the GST could have been more organised and better prepared if the same was not hurried through on 1st July 2017. The MSME business suffered the maximum due to lack of clarity on many issues and glitches in the implementation. The Government claims that "Demonetisation and implementation of the GST curbed cash transactions in a big way. An increase in digital transactions is visible. This formalisation of the economy has led to the tax payer base increase from 6.4 million in the pre-GST regime to 12 million tax payers in the post-GST regime. The actual consumption of goods and services being recorded as a part of the tax net has now increased. This has given a buoyancy to the indirect tax growth in the economy."

Annual Audit by the professionals under direct taxes was introduced way back in 1984. But under indirect tax it was introduced only after the introduction of State Value Added Tax in 2002. Such audit helped the tax administration in ensuring voluntary compliance of the tax laws. Audit under Central Excise and Service tax is carried out by the Revenue-officers themselves. However, there was no concept of an annual audit. Recently Constitutional validity of service tax audit by revenue has been challenged before various High Courts. Sub-rule 2 of Rule 5A of the Service Tax Rules, 1994, as substituted by notification dated December 25, 2014, was declared *ultra vires* by the High Court in case of Mega Cabs.

The initial year of implementation the GST had been turbulent for the tax payers as well as the tax professionals. The whole system of the GST has been based upon use of technology. The data analytics plays a key role. The Government has recently introduced a GST audit report format. GST audit is applicable to all GST tax payers whose turnover exceeds Rupees two crores in the financial year. GST Audit report is required to be submitted along with GST Annual Return and due date for submission of annual return is 31st December 2018. GST audit would be carried out by a chartered accountant or a cost accountant. In the first year tax payer would be subject to both VAT as well as GST Audit. The implementation of the GST was surrounded by confusion, interpretation issues, inadequate implementation guidance, tax regime, etc. The GST audit would provide an opportunity to test whether stands taken by them are in compliance with the law or not. Neither the annual return nor the GST audit provides a mechanism to rectify errors made by tax payers in their monthly compliance. However, the report asks for the reconciliation statement reconciling the value of supplies declared in the return furnished for the financial year with the audited annual financial statement.

I thank all the eminent professionals for taking out time from their busy schedules to contribute to the Chamber's Journal's November 2018 issue. Once again wishing you all a very Happy Deepawali.

K. GOPAL
Editor

From the President

멈추지 말고 계속 해나가기만 한다면 늦어도 상관없다.

Meomchuji malgo gyesok haenagagiman handamyeon neujeodo sanggwaneopda.

It does not matter how slowly you go as long as you do not stop.

In the series of Languages Link the World, we will cover another oldest language of the world, i.e., Korean language.

The traditional culture of Korea has its mythical beginnings 5000 years ago. The legend of Dangun, the mythical founder of Korea, makes an impact upon Korean culture to this day. Add to that the profound impact of Shamanism, Buddhism, Daoism, Confucianism and Christianity, and it yields the varied and colourful culture that is Korea. According to the legend, Princess Suriratna from Ayodhya (UP), also known as Heo Hwang-Ok, went to Korea in 48 AD, some 2000 years ago, and started the Karak dynasty by marrying a local Korean king. On 6th November 2018 on the eve of Deepavali celebration, South Korean first lady, Kim Jung-sook laid the foundation stone for the expansion and beautification of the existing memorial of Ms. Heo Hwang-Ok in Ayodhya.

Entire country is eagerly awaiting to celebrate Diwali festival and Hindu New Year. Diwali is a festival of lights and one of the most popular festivals of Hinduism. Diwali symbolises the spiritual "victory of light over darkness, good over evil and knowledge over ignorance". In northern India, they celebrate the story of King Rama's return to Ayodhya after he defeated Ravana by lighting rows of clay lamps. Southern India, celebrates it as the day that Lord Krishna defeated the demon Narakasura.

Most of our members had to burn midnight oil to complete Audit and Tax filing assignments and deal with pressure and suspense maintained by CBDT over extension of due date for Tax Audit. My colleagues and members will get long deserved break during Diwali to relax and enjoy with family, friends, near and dear ones. Sometimes what you need is simply to unwind, to see something beautiful, to rest, to taste good things, to feel comfortable and to have time where you don't have to think or work.

Education is not the learning of facts, but the training of mind to think – Albert Einstein.

If the mind is intensely eager, everything can be accomplished.
Mountains can be crumbled into atoms – Swami Vivekananda.

The above quotes of Albert Einstein and Swami Vivekananda are relevant for India. India is the world's seventh-largest economy home to 1.34 billion people – 18% of the world's population, sitting between France and Italy. By 2050, India's economy is projected to be the world's second-largest. It has the world's largest youth population, but isn't yet fully capturing this potential demographic dividend – over 30% of India's youth are NEETs (not in employment, education or training), according to the OECD.

Ease of doing business Index

India climbed another 23 points in the World Bank's ease of doing business index to 77th place, becoming the top ranked country in South Asia for the first time and third among the BRICS. In the last two years the country has climbed 53 notches, a performance matched in the past only by Bhutan. However, we still rank very much behind in indicator-wise rankings for starting a new business and enforcing contracts

Record increase in tax filers and tax to GDP ratio for India

The number of income tax return (ITR) filings surged 71 per cent to 5.42 crore till August 31 — the last date for submission for financial year 2017-18. This was led by a massive eight-fold jump in returns filed by entities under the presumptive tax scheme and 54 per cent increase in e-filing by salaried individuals. Almost 34.95 lakh returns were e-filed on August 31, 2018. We need to improve the tax/GDP ratio as still 6 to 7% of entire population pays income tax. The tax-to-GDP ratio reached its highest level of 11.6 per cent in 2017-18. The Niti Aayog has forecast direct tax to GDP ratio at 5.8 per cent, 6 per cent and 6.3% in 2017-18, 2018-19, and 2019-20 respectively. Most countries in EU have minimum tax to GDP ratio exceeding 40% with Norway and Finland exceeding 55%.

CBDT Central Action Plan 2018-19

The CBDT has issued a Central Action Plan 2018-19 in which it is *inter alia* stated that there are 3,21,843 appeals pending before the CIT(A) as on 1-4-2018. The demand involved in these appeals is a whopping ₹ 6.38 lakh crore.

The CBDT has also offered incentives to CIT(A) for passing "quality" orders. Incentives are offered where the CIT(A) enhances the assessment, strenghtens the stand of the AO or levies penalty u/s. 271(1)(c) of the Act.

As per the targets set by CBDT in the Central Action Plan, each individual CIT(A) shall be expected to dispose a minimum of 550 appeals or achieve a minimum of 700 units during the financial year. For passing such 'quality orders', the CIT(A) shall be given additional credit of two units for each quality order.

The CIT(A), in order to dispose of the appeals as per the targets set and to earn more credit units, instead of adjudicating appeals in a fair, judicious and unbiased manner, would be more interested in strengthening the tax officer's order and/or dismissing such appeals. The CIT (A) may also indulge in making enquiries from the taxpayers for making enhancement, thus leading to increase in resentment and loss of faith in the judicial structure.

Although the ruling Government promised tax friendly policies and eradication of the tax terrorism image of the revenue authorities, the aforesaid direction in the said Central Action Plan seems contrary to the approach. The Chamber has filed representation to Finance Ministry and Finance Secretary against such Action Plan and shall take up necessary cause with higher authorities and forums.

Our student Members and children of Members must be appearing for CA exams now. They need to keep themselves motivated with positive thoughts and vibrant vigour.

"Aim for success, not perfection. Never give up your right to be wrong, because then you will lose the ability to learn new things and move forward with your life. Remember that fear always lurks behind perfectionism."

CTC NEWS AND EVENTS

GST is the flavour for various conferences, and The Chamber has planned many outstation programmes with local Tax Association on ***"GST Annual Return and GST Audit Report"*** at Kolhapur, Solapur, Pune, Ulhasnagar etc. in November.

There is a steep increase in number of penalty and prosecution cases as a follow-up measure of demonetisation and to increase the tax base. Several amendments like insertion of sections 269ST, 271AAC, 271DA, section 270A, amendment of section 115BBE etc. from AY 2017-18. The Chamber has organised a ***Half Day Seminar on Penalty & Prosecution*** on 1st December, 2018. The seminar will focus on the intricate legal issues and the practical approach to tackle penalty and prosecution proceedings.

The MCA on June 13, 2018 had notified section 22 of the Companies (Amendment) Act, and also issued Companies (Significant Beneficial Owners) Rules, 2018. MCA proposes 20 further Amendments in Companies Act to review offences through Companies (Amendment) Ordinance, 2018 on 2nd November, 2018. To update members on above amendments, we have planned ***Lecture meeting on SBO and recent amendments in Companies Act*** on 20th November, 2018.

Our Annual feature of ***"Intensive Study Course on FEMA"*** with about 15 sessions with Brains' Trust is planned on 14th, 21st and 22nd December, covering entire gamut of FEMA. This course will also help existing professionals in FEMA practice and in industry to equip and update themselves with the relevant provisions, procedures and various issues affecting day-to-day practice to assist them while executing transactions under FEMA.

Accounting and compliance documents have to be retained as per the relevant laws. ***The seminar on "RECORDS RETENTION: LEGAL PROVISIONS AND DOCUMENT MANAGEMENT SOLUTIONS"*** presents a complete solution covering legal as well as technology aspects.

Registrations are open for ***Dastur Essay Competition – 2019*** with current and relevant topics. We had huge response last year from entire India with more than 115 students submitting their essays. The topics for the current year are as under:

1. Feminism, a Misunderstood Concept Today
2. Trade Wars or Territorial Wars – The Next Global Battle
3. Right to Privacy, its Sanctity in India

We request students to take part and send their enrolments before 31st January, 2019.

The Chamber has announced both ***RRCs at Lucknow*** (28th February to 3rd March, 2019) **for Direct Tax** and **Hyderabad** (24th to 27th January, 2019) for GST and members can take benefit of special pricing in early bird offer.

Final announcements for ***5th International Study Tour to East Europe*** is finalised and will depart on 25th May, 2019 for 10 days with very attractive price offer covering Munich, Salsburg with Zell Am see, Slovenia with Lake Bled, Zagreb, Budapest, Vienna etc.

Special Story for the Month on "Audit/Certifications under GST Act" will serve as useful practical guide to all members. I thank Mr. Mandar Telang and Mr. Kush Vora for preparing the design and structure of the Special Story and above all authors for their contribution.

We generally repeat special story in Journal only after 3 years, unless it is necessary. The Chambers Journal is a prized collection and good reference value for every reader and subscriber. We are finalising attractive offer for e-Journal and other offers for outstation members very shortly.

We welcome Members to send their feedback, suggestions and observations for any matter related to The Chamber by sending e-mail on office@ctconline.org or hineshdoshi67@gmail.com.

감사합니다.

Thank you

Hinesh R. Doshi
President

The Chamber of Tax Consultants

Vision Statement

The Chamber of Tax Consultants (The Chamber) shall be a powerhouse of knowledge in the field of fiscal laws in the global economy.

The Chamber shall contribute to the development of law and the profession through research, analysis and dissemination of knowledge.

The Chamber shall be a voice which is heard and recognised by all Government and Regulatory agencies through effective representations.

The Chamber shall be pre–eminent in laying down and upholding, among the professionals, the tradition of excellence in service, principled conduct and social responsibility.

Mr. Deepak Mata, *Asst. Director*, NACIN

Role of Auditor in GST

The overall scheme of GST, it being a destination based consumption tax, albeit an indirect one, is such that the businesses are not required to bear any taxes. They are simply required to collect tax from their customers and deposit with the Government. To that extent, the tax collection function is outsourced to the businesses and they can be considered as partners of Government in this regard. There is a Russian proverb – "Trust but verify". The Government needs to verify the compliance by taxpayers and auditors help the Government in undertaking this function. In addition, they assist the taxpayer as well in ensuring that true and correct tax is collected.

In a presentation before GST Council in its 26th meeting dated 10th March, 2018, the chairperson, CBIC had mentioned about the limitation in the number of tax officers who could take up audit and scrutiny. In one year, the Central tax administration was able to do audit of about 40,000 units, return scrutiny of about 30,000 units and anti-evasion cases of about 10,000 units. He stated that the maximum intervention possible by the Central administration would be about 1,00,000 cases. States could possibly make about 2,00,000 interventions in a year as they have similar number of assessing officers but double the number of support staff. This implied that the Central and the State administrations put together could intervene in only about 3,00,000 cases in a year against a taxpayer base of more than one crore. With indefinite postponement of invoice matching and filing of GSTR-2/3 and, the much hyped self-policing concept having taken a backseat, the role of auditors becomes all the more important and difficult as well.

The auditor is one of the important channels of communication between the department and the taxpayer for compliance verification in GST. The CGST Act, 2017 defines audit u/s. 2(13) as "the examination of records, returns and other documents maintained or furnished by the registered person under CGST Act, or the rules made thereunder or under any other law for the time being in force to verify correctness of turnover declared, taxes paid, refund claimed and Input Tax Credit (ITC) availed and to assess his compliance with the provisions of this Act or the rules made thereunder."

An auditor especially CA is responsible to the taxable person, department as well as ICAI – each having different demands and expectations from him. While department may want him to assess the extent of compliance of law by verifying the correctness of turnover declared, taxes paid, refund claimed and input tax credit (ITC) availed, taxpayer would want him to educate and help him in complying with the law by pointing out the errors. ICAI would want him conform to the auditing standards and keep its image high by showing professional brilliance. An attempt is being made to list various roles of auditor in the context of audit under GST as below:

(i) He should carry out his duties with utmost sincerity, integrity and diligence; and exhibit high level of excellence and professional capability. He should establish and maintain a good professional relationship with the taxpayer and try to make him believe that the process will help him better equipped to comply with the laws and the relevant procedures in terms of the preparation of prescribed returns and self-assessment and/or will result in reduction of potential disputes.

(ii) He should be well versed in GST law, should have good knowledge of accountancy and should know about the nature/complexity/nuances of the business carried by the auditee. He should have knowledge of the accounts and records required to be maintained as per the GST law, accounting standards and their linkages with the GST law like AS-18 and Rule 28 of CGST Rules, 2017 w.r.t. related party transactions; and the accounting policies being adopted by the auditee. Each business specifically in new age services like insurance, banking, media, internet/digital companies etc. have their own peculiarities with regard to the way transactions are conducted. Many a times money and benefits flow in different and multiple directions. Therefore, an auditor should get familiar with the business of the auditee as well before conducting audit. In addition, he should have knowledge of computer based audit tools for auditing in the IT environment as GST is largely system driven and most of the data is in digital format.

(iii) He is expected to play a key role in promoting voluntary compliance by the assessees/taxpayers. During the course of the audit, if certain technical infractions, arising due to *bona fide* oversight or ignorance of the assessee/taxpayer, are noticed, the assessee/taxpayer should be guided for immediate correction. He should apprise the taxable person to take advantage of such provisions like non-issue of show cause notice or deemed conclusion of proceedings in case of voluntary payments as enshrined in sections 73(5) & 73(6), 74(5) & 74(6), 74(8) & 74(9) of CGST Act, 2017 in order to avoid disputes and litigation.

(iv) He should conduct the audit process in a systematic, transparent and consultative manner. He should take into account the explanation from the assessee/taxpayer regarding all points of dispute, before taking the final view.

(v) The audit under GST Act requires an auditor to examine the books of account and express an opinion as to whether the turnover declared or taxes paid or refund claimed or ITC availed by the tax payer corresponds to such books of account, returns and documents or not. Part B of GSTR-9C therefore requires a GST auditor to report whether the tax payer has maintained the books of account, records and documents as required by the GST laws.

(vi) The auditor should document all of his audit findings including proper reasons/ explanations in the working papers. The documentary evidence which has been relied upon in arriving at certain conclusion should invariably be cited.

(vii) He should use his judgment and experience to determine the materiality of any discrepancies and/or irregularities observed and decide what action is necessary under the circumstance.

(viii) The auditor should be tactful to gain the goodwill and confidence of the taxpayer. Where there is lack of co-operation or deliberate failure to provide information and records by the taxpayer or in case of other exigency, the auditor should inform the department for possible conversion of audit into suitable enforcement action.

(ix) Confidentiality is of utmost importance to a taxpayer from the point of view of business secrets, customer data etc. An auditor should maintain utmost secrecy in respect of sensitive and confidential information furnished to an auditor during the course of audit. If required, he may take non-confidential summary of the information considered as confidential by the taxpayer. All records submitted to the audit parties in an electronic or manual format, should be used only for verification of the tax compliance.

(x) Audit should normally be distinct from anti-evasion operation in as much as it can detect irregularities only to the extent of their reflection in the books of accounts

(xi) A tax officer relies on the audit certification provided by the auditor who has audited the books of account, records and documents which the tax payer is required to maintain under that tax law. Hence tax auditor has to make sure that, his audit findings are expressed in his report in unambiguous manner.

(xii) The auditor's role is not to sit in judgment as to whether any position of law adopted by the tax payer is correct or incorrect. His role is to ascertain the correctness of the facts. Hence, where the taxpayer has adopted a particular view based on his legal interpretation, the auditor's role would be to ensure that, having accepted such an interpretation, whether the particulars declared in the returns by such a tax payer could be said to be true and correct or not. This essentially means that, where there is a difference of view between tax payer and auditor as to determination of tax liability of any transaction, such a transaction, may not necessary be a reconciliation item resulting in additional tax liability in the hands of the tax payer. However, a suitable disclosure in that regard by the auditor in his certification is expected. Part B of GSTR-9C categorically provides for a place where the auditor is required to report his observations/ comments/ discrepancies/ inconsistencies, if any. Needless to mention, if errors are pointed by the auditor in the course of his audit, and such errors are acceptable to the tax payer, due cognisance thereof should be taken while finalising the GSTR-9C.

(xiii) The provisions of GST law, also require auditor to certify the reconciliation statement under section 44(2) of the CGST Act which is required to be submitted along with annual return. A tax payer is required to file his returns based on the books of account which are required to be maintained under GST law. In my view, there is thus an additional obligation on the auditor, not only to carry out audit of books of account which are required to be maintained under the provisions of GST Act, but also to analyse the differences between financial records i.e., general purpose financial statements prepared by the tax payer and his books of account maintained under GST.

(xiv) Strictly speaking, provisions of Section 35(5) of CGST Act, 2017 read with rule 80(3) of CGST Rules, 2017 requires registered persons having turnover exceeding ₹ 2 crore to submit the copy of audited accounts along with reconciliation statement. This requires a lot of data analysis, reconciliation of figures of transactions. Part B requires such auditor to express an opinion on the balance sheet, the profit and loss/ income and expenditure account and the cash flow statements prepared under the general purpose reporting framework of such other statute/ as per generally accepted accounting principles prescribed by ICAI or such other accounting bodies. On the other hand, where the statutory auditor and GST auditor are different, GST auditor is expected to rely upon such financial statements which are audited by the other professional. It therefore appears that, while section 44(2) contemplates a reconciliation value of supplies declared in the return furnished for the financial year with the audited financial statements, the GST auditor is not responsible for correctness of the figures reported in such financial statements and consequently reported in GSTR-9C, unless such financial statements are also audited by him. In such cases, what is expected out of GST auditor is only an assurance that the reasons for differences between audited financial statements and annual return stated in GSTR-9C are correct and to the extent that it has implications on determination of tax liability, the same has been appropriately disclosed either in GSTR-9C or in Part B of the said form.

Tax authorities are always in need of support from accounting professionals in understanding the accounting adjustments made by the tax payers in their financial statements. At times it may be difficult to assess whether transactions appearing in books of account are also duly captured in the returns, for reading of accounts of the tax payer also requires understanding and knowledge of accounting principles and accounting frameworks. What is expected out of auditor is to explain as to how the tax payer has treated a particular transaction reported in his books of account in his returns filed under GST Act. GSTR-9C certified by the GST auditor would thus serve this purpose.

An important question may arise as to whether the scope of GST audit would be verification of 100% transactions for the purpose of ascertaining the truth and correctness thereof. Needless to mention that audit of GST books of account continues to be the responsibility of the GST Auditor and hence he is expected to have knowledge of all provisions of GST law which have bearing on turnover, output tax, input tax eligibility and refund of taxes. However, in my view, the true and correct assurance is expected only as regards the particulars mentioned in GSTR-9C. This is clear from the wording of para 5 of Part B-(I) and para 4 of Part B(II). As regards the audit of GST books of account, the generally accepted auditing principles and procedures shall become equally applicable and the auditor is expected to perform his audit procedure accordingly.

In nutshell, an auditor needs to be a thorough professional conducting pre-audit research for deciding the audit approach, strategy and plan, educating the taxpayers in tax compliance & avoiding future penalty and interest, helping the tax collectors in compliance verification and sometimes encroaching a bit into investigation before passing on the baton to the enforcement agency.

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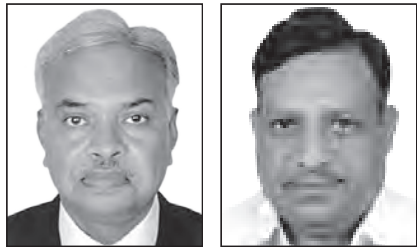

CA Sushil Solanki & CA Govind G. Goyal

Reconciliation Statement (Form GSTR-9C) – Some Issues

Section 35(5) of the Central Goods and Services Act, 2017 (CGST Act) requires that every registered person, whose turnover during a financial year exceeds the prescribed limit, shall get his accounts audited by a chartered accountant or a cost accountant and shall submit a copy of the audited annual accounts, the reconciliation statement under sub-section (2) of section 44 and such other documents in such form and manner as may be prescribed.

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

Section 44(1), which is applicable to almost all registered persons, requires every registered person, other than an Input Service Distributor, a person paying tax under section 51 or section 52, a casual taxable person and a non-resident taxable person, shall furnish an annual return for every financial year electronically in such form and manner as may be prescribed on or before the thirty-first day of December following the end of such financial year.

Although, plain reading of above referred provisions may look like a simple requirement of electronically submitting the following, by the prescribed due date:

1) Annual Return (in Form GSTR-9).
2) Copy of audited annual accounts.
3) **Reconciliation statement,** reconciling the value of supplies declared in the return furnished for the financial year with the audited financial statements, in **Form GSTR-9C**, duly certified by an accountant.
4) Such other particulars, as may be prescribed.

The due date prescribed for submitting above forms, along with necessary documents, is 31st December 2018, for Financial Year 2017-18.

However, when one goes through the prescribed forms (GSTR-9 and GSTR-9C) and instructions therein, the tax payer as well as the accountant realises the challenges, which one will have to face in compiling and analysing the data in a manner in which it is required to be reported in the above said forms. The challenges are far more complicated for FY 2017-18, may be due to following reasons:-

1. The GST has been implemented in our country w.e.f. 1st July 2017, i.e. in between a financial year.
2. Before introduction of GST, a tax payer may or may not have been liable to pay tax under the earlier provisions of indirect taxes (such as Excise, Service Tax, State VAT, Central Sales Tax, etc.)
3. The operative provisions of GST laws have been amended numerous times during this short period of 15 months (1st July 2017 to 30th September 2018).
4. The process of filing appropriate returns, by various types of registered persons, has not yet been properly established.
5. There are unusually large number of notifications and circulars, issued from time-to-time. And in addition there are replies through tweets and FAQs.
6. There are several provisions, in the law, which still need clarification.
7. This being first year of implementation, the Department as well as the dealers (registered persons) are still trying to understand the real impact of change and the processes involved therein.

These are some of the issues, which are general in nature. Real challenges are ahead for various types of organisations depending upon business modules and nature of transactions, whether it is supply of goods or supply of services or both, the concepts like supply, time of supply, place of supply, location of supplier and the recipients thereof needs to be understood carefully. Multi State operations, identification and valuation of self supplies, mixed supplies, composite supplies, inventories, job works, rate/s of tax (an impact of change in between), Input tax credit, b/f or unutilised credits of earlier laws, c/f of credits, impact of debit notes/credit notes, exports (with payment of tax/without payment of tax), supplies to SEZ (within the State/ outside the State), advances received, inward supplies (from registered person/s, unregistered person/s, composition dealers), cross utilisation of credit (IGST/CGST/SGST), etc., are some of the aspects, which will need utmost attention in compiling data from various sources, for the purposes of reporting.

Apart from others, a major challenge being faced by all is interface with latest technology. In GST, almost all processes are through Information Technology Network. The compatibility of accounting software/s, being used by businesses, is the biggest challenge. The earlier methods or practices may not be useful in the GST regime. Generating appropriate reports from existing accounting software may be a Herculean task. And the GSTIN do have its own methods of data processing. There are debates going on whether technology can override the law? The debates apart, technological glitches have been a major cause of concern during this entire period of 15 months. Many dealers (registered persons) have been facing various kinds of difficulties in uploading the data in time. And there are still doubts that whether the details uploaded, through various online forms, have been accepted or rejected by GSTIN. For example, the invoices data, uploaded through GSTR-1, may have been rejected by the portal due to various reasons (sometimes even for fractional differences in decimal points). Thus, the concept of data matching may not be able to work accurately for these months and the year gone by. There are certain registered persons, who still have to upload their returns (in GSTR-3B). The Department has allowed them time up to 31st December 2018.

While one may say that the businesses have to adapt the latest technology, the methods, practices and software, etc. need appropriate modifications to match the changing requirements, there are certain issues, which the GST Department will have to address in the spirit of ease of compliance. The time line and the design of various forms, prescribed for the purposes of reporting, is a major cause of concern. Appropriate modifications may be necessary. Although, there are various matters, which need clarification and suitable instructions, some of the issues concerning Form GSTR-9C are highlighted here as follows:

1.1 In terms of Section 44(2) of the CGST Act, 2017 read with Rule 80(3) of the CGST Rules, 2017, Form GSTR-9C (Reconciliation Statement) has been notified. As per the said provisions, every registered person who is required to get his accounts audited, (whose aggregate turnover during the financial year exceeds ₹ 2 crore) is mandated to furnish the said Reconciliation Statement along with the copy of audited annual accounts. The said Statement is meant for reconciling the value of supplies declared in the Annual Return (GSTR-9) with the information as per audited Financial Statement of the registered person.

1.2 There seems to be certain deficiencies or problems in understanding various particulars given in the said Form GSTR-9C. The said problems could be with regard to interpretation of certain details or with regard to the responsibilities of a Chartered Accountant who is required to certify the correctness of the said Reconciliation Statement.

2.1 **Complete lack of clarity about Auditor's responsibility towards verification of compliance of various provisions of GST Law:** The first and foremost issue which comes to the mind of an auditor is that whether he is required to verify correctness of compliance to various provisions of the GST Law while certifying the true and correct nature of the said GSTR-9C? Whether a tax payer has correctly applied the rate of tax or has correctly declared the activities of Deemed Supply in terms of Schedule I to the CGST Act or has correctly availed the input tax credit in terms of provisions of Sections 16 and 17 or has correctly determined the value in terms of provisions of Section 15 and the relevant rules etc., are required to be examined by the auditor or not, or his responsibility is only to confirm various details as per financial records and compare with details declared in the Annual Return (GSTR-9). And find out the reasons for difference and give his views about additional liability, if any. This fundamental issue about role and responsibility of auditor is not clear from the instructions or from the contents of the Form GSTR-9C and the Report.

2.2 One view is that the auditor is required only to reconcile the turnover, tax paid and the input tax credit as per Annual Return (GSTR-9C) with what is reported in the Financial Statements. In case of difference, his responsibility is to find out the difference and report the difference with reasons. As per this school of thought, the auditor is not required to examine the transactions and financial records to verify as to whether the tax payer has correctly taken decisions or interpretations as per the provisions of the GST Law. This view gets support from the legal provisions and formats of audit reports prescribed under the Companies Act or under the Income-tax Act. Under the Companies Act, the report itself prescribes the areas or the aspects required to be verified by the auditor and his comments thereon. Similarly, the format of Audit Report under Section 44AB of the Income-tax Act also very clearly specifies various factual and legal aspects which are required to be verified by the auditor. In contrast, the format of Reconciliation Statement and the Auditor's

Certification (GSTR-9C), does not provide for any specific verification to be done by the auditor with regard to specific provisions of GST law.

2.3 Another possible view is that the auditor is required to verify the correctness of the stand taken by the tax payer with regard to specific transactions required to be reported in Form GSTR-9C. Therefore, for reporting the correctness of transactions of deemed supply under Schedule I (Entry 5D) or value of exempted / Nil rated, Turnover, (Entry 7B) or Input Tax Credit availed as per Financial Statement (Entry 12D), the auditor is required to verify the transactions from the financial records and give his opinion.

2.4 Instruction 7 to GSTR-9C mentions that *"the auditor shall also recommend if there is any other amount to be paid for supplies not included in the Annual Return"* It means that auditors are required to verify the transactions of the tax payer to verify as to whether they paid taxes on all the transactions which satisfy the definition of "supply" as per GST Law.

3.1 **Entries relating to Credit Notes** – Entry 5E & 5J in the Reconciliation Statement pertains to adjustment with regard to Credit Notes issued by a taxpayer. Entry 5E is reproduced below –

> ***"Credit Notes issued after the end of Financial Years but reflected in Annual Return -- (+)"***

The purpose of Reconciliation Statement is to *inter alia* reconcile the total Turnover as per Financial Records (P & L Account)(Entry 5A of GSTR 9C)) and Turnover as per Annual Returns as per GSTR-9C (5Q). The scope of entry "Turnover as per Annual Return" has been explained in the instructions given for Entry 5Q. The said instruction is reproduced below –

Table No	***Instruction***
5Q	*Annual turnover as declared in the Annual Return (GSTR-9) shall be declared here. This turnover may be derived from Sr. No. 5N, 10 and 11 of Annual Return (GSTR-9).*

3.2 The above instruction shows that the Annual Turnover as per GSTR-9 is required to be determined considering the Entries made in Tables 10 and 11 of said Annual Return. Table 11 is regarding Credit Notes pertaining to previous Financial Year but issued in the current Financial Year up to September, 2018. Therefore, the total Annual Turnover as per GSTR-9 would include the adjustment made for Credit Notes issued up to September month in the next Financial Year. To illustrate, the turnover of all output supply (including exempt supply) of one Entity is ₹ 1 crore in a year, however, credit notes of ₹ 10 lakh for providing annual discounts are issued in the month of June. In that case, the Turnover as per Annual Return (GSTR-9) would be ₹ 90 lakh. It is also a common accounting practice that sales value is reduced in the Profit & Loss Account by making suitable provisions for giving discount by issue of such credit notes issued in the next financial year. Therefore, in the present illustration, the turnover recorded in the Books of Account would be ₹ 90 lakh and Turnover as per GSTR-9C would also be ₹ 90 lakh. Therefore, in view of the author, there is no requirement of any adjustment to be made for credit notes issued after the end of financial year which has been reflected in the financial records. **Accordingly, it may be suggested that Entry 5E needs to be deleted from the Reconciliation Statement.**

3.3 **Entry 5J in the Form GSTR-9C:** This entry reads as *"Credit Notes accounted for in the audited Annual Financial Statement but are not permissible under GST"* with proposal for reduction (minus) from the turnover as per

Financial Statement. Generally, such type of credit notes may be issued for the following transactions:

a) Post supply discount not permitted under GST law [Section 15(3)(b)].

b) Credit notes pertaining to transaction of earlier financial years, e.g., credit note issued in 2019-20 for sale made in 2017-18. (Section 34 (2).

Reconciliation proposed in Table 5 of GSTR-9C is between the turnover declared in the annual financial statement and the turnover as per Annual Return (GSTR-9). As the credit notes have been issued in the current financial year and recorded in the financial records, the turnover of the entity as per the financial statement has already been reduced to that extent. At the same time, the turnover as per the Annual Return (GSTR 9) does not capture such credit notes, therefore there appears to be no need to make any adjustment in Reconciliation Statement (GSTR-9C).

To illustrate, a company's gross turnover is ₹ 100 lakh and credit note for ₹ 1 lakh has been issued in same financial year, which are not permissible under GST. In that case, turnover as per financial statement would be ₹ 99 lakhs. However, the turnover as per GSTR-9 would be ₹ 100 lakh as these credit notes would not be required to be disclosed in the Annual Return. **It may therefore be suggested that value for Entry at Entry 5J of GSTR-9C should be added (+) in the turnover declared as per financial records.**

4. **Input tax credit on employee cost**: Table 14 of the GSTR 9-C provides for declaration of availment of input tax credit against various expenses incurred by the tax payers. Entry 14H is with reference to employees cost. There is no requirement of payment of GST on employees cost as the same has been placed in the Negative List under Schedule III of the CGST Act. Therefore, it creates doubt in the minds of tax payer as well as the auditor regarding the rationale and scope of this entry.

5. **Tax Liability under Tables 5 & 6:** Table 5 of the Form provides for reconciliation of turnover between the Financial Statement and the Annual Return. Table 6 requires reasons for unreconciled differences. Further, Tables 7 and 8 are regarding unreconciled differences in taxable turnover. Table 11 prescribes additional amount payable but not paid due to reasons specified under Tables 6, 8 and 10. In view of the author, additional amount payable is reflected only in Tables 8 & 10 and Table 6 is only for overall reconciliation of turnover. Therefore, Table 11 should not give reference to additional amount payable for the reasons specified under Table 6 to avoid any confusion.

6. Conclusion

Most important and basic fundamental lapse in the format of GSTR 9-C is complete lack of clarity regarding the role and responsibility of auditor. Whether the auditor is required to verify transactions of the auditee to confirm the compliance with the provisions of GST Law is a big unanswered question. Some of the auditors may insist on verification of all transactions which may be resisted by tax payer. Some of the entries regarding adjustment for credit notes appear to be incorrect and need deletion and amendment. It is high time that the Government comes out with clear instructions for smoothening the process of audit and the report thereof to avoid any kind of future questioning and raising of demands by the GST department.

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CA Naresh K. Sheth

Statutory Provisions under CGST Act Governing Audit / Certifications, Role and Responsibility of Auditors

Preamble

"GST Audit" is most talked about topic today in trade, industry and amongst professionals. The Government has notified Annual Return (Form No. GSTR-9) on 4-9-2018 and Reconciliation Statement (Form No. GSTR-9C i.e., audit report) on 13-9-2018. Statutory due date for filing GSTR-9 and GSTR-9C for F.Y. 2017-18 is 31-12-2018.

Mandatory audit by chartered accountants u/s. 44AB of the Income-tax Act is an old concept. Section 35(5) of Central Goods and Services Tax Act ("CGST Act" or "the Act") mandates compulsory GST Audit for taxpayers whose turnover exceeds prescribed limit. It will be a challenging task to conduct and complete GST Audit in a meaningful manner before the prescribed due date. However, one will definitely agree that it provides a wonderful professional opportunity for practicing chartered accountants and cost accountants.

Historical background of Audit under erstwhile Indirect Tax legislations:

Erstwhile Legislations	Mandatory Audit by External professional	Depart-mental Audit	Special Audit
Service tax	No	Yes	Yes
Central Excise	No	Yes	Yes
Customs	No	Yes	Yes
VAT	Yes	Yes	No
Octroi	No	No	No
Entertainment tax	No	No	No
Luxury tax	No	No	No
Entry tax	No	No	No

It can be seen from above table that the concept of audit by an external professional never existed in Central Tax legislations such as Excise, Customs, Service Tax etc. Such concept was very much in vogue at State level VAT legislation. The Government, in its own wisdom, has adopted the VAT audit concept, their philosophy and framework in GST legislation with objective of equipping its officers with effective tools for efficient and strong tax administration.

This article deals with the statutory provisions governing GST audit and roles and responsibility of the auditor.

Audits under GST Legislation

CGST Act prescribes following audits:

- **Audit u/s. 65** – This section empowers Commissioner to authorise any officer to conduct departmental audit of accounts and records of a registered person for a financial year or multiples thereof. This audit is usually carried out by departmental officers at place of business of registered person. The audit team verifies correctness of turnover exemptions, deductions, tax rates applied, availment and utilisation of input tax credits, refund claims etc. Proper officer is entitled to raise demand and initiate recovery proceeding u/ss. 73 and 74 of Act on detection of non-payment or short payment of tax, erroneous refund, wrong availment or utilisation of input tax credit.
- **Special Audit u/s. 66 –** Officer not below the rank of Assistant Commissioner can direct conduct of this audit when he is of the opinion that registered person has not disclosed the correct taxable value or where input tax credit claim is not within normal limits. This power can be exercised only after obtaining prior approval of Commissioner. Officer can direct registered person to get his records examined and audited by Chartered Accountant or a Cost Accountant nominated by the Commissioner. Proper officer is entitled to raise demand and initiate recovery proceeding u/ss. 73 and 74 of Act on detection of non-payment or short payment of tax, erroneous refund, wrong availment or utilisation input tax credit.
- **Audit u/s. 35(5)** – It is a mandatory audit for registered person having turnover exceeding ₹ 2 crores in a financial year. Such audit is to be conducted by Chartered Accountant or Cost Accountant appointed by registered person. The registered person is required to file audit report in Form No. 9C before 31st December following the end of financial year.

Scope of the article is restricted to audit u/s. 35(5) of the Act

Statutory Provisions mandating GST audit.

Section 35(5) of the CGST Act mandates GST audit. It reads as under:

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

Rule 80(3) of CGST Rules prescribes that every registered person shall get his accounts audited if his aggregate turnover exceeds ₹ 2 crore in a financial year and shall furnish a copy of audited annual accounts and reconciliation statement duly certified in Form GSTR-9C.

Person eligible to conduct GST audit

Chartered accountants and cost accountants are qualified to conduct GST audit prescribed u/s. 35(5) of the Act.

<u>Cost Accountant</u>

Cost accountant' is defined u/s. 2(35) of the Act to mean *a cost accountant as defined in clause (c) of sub-section (1) of Section 2 of the Cost and Works Accountants of India Act, 1959.*

<u>Chartered Accountant</u>

'Chartered accountant' is defined u/s. 2(23) of the Act to mean *a chartered accountant as defined in clause (b) of sub-section (1) of Section 2 of the Chartered Accountants Act, 1949.*

'Chartered accountant' is defined u/s. 2(1)(b) of the Chartered Accountants Act, 1949 *to mean a person who is a member of the Institute*.

Only member in practice is entitled to carry out GST audit. Section 2(2) of the Chartered Accountants Act, 1949 provides that a member shall be deemed to be in practice if he engages himself, for a consideration, in the specified activities, which includes *inter alia*, audit.

Institute of Chartered Accountants of India has laid down code of conduct and has issued various guidelines for ethical practice. Chartered accountant is expected to comply with code of conduct and the guidelines in letter and spirit while accepting assignment and discharging his duties as GST auditor.

Readers are requested to refer article of CA C. N. Vaze which deals with the topic in great detail.

Person liable to get accounts audited

Every registered person having turnover exceeding ₹ 2 crore in a financial year is obliged to get his accounts audited under GST legislation.

Under the GST legislation, a person carrying on business in different States are required to obtain separate registration for each State. Similarly, a person who has multiple business verticals within the same State has option to obtain separate registration for each such business vertical. Person having multiple registrations are treated as separate registered persons. Audit will have to be done for each such registered entity provided turnover of such entity exceeds ₹ 2 crore.

Meaning of the term "turnover"

Section 35(5) of the Act mandates GST audit and Rule 80(3) of the Rules prescribes the threshold turnover limit for GST audit.

Section 35(5) of the Act uses the term "turnover" while Rule 80(3) of the Rules uses the term "aggregate turnover". Is there any material difference between these two terms?

Aggregate turnover is defined u/s. 2(6) of the CGST Act. It means the aggregate value of taxable supplies, exempt supplies, nil rated supplies, non-taxable supplies, export of goods or services or both and inter-State supplies computed on all India basis of person having same PAN. Term 'aggregate turnover' would mean PAN India turnover of a supplier and not the turnover of specific State for which he is filing the annual return.

While calculating aggregate turnover one has to exclude value of inward supply on which tax is payable on reverse charge by supplier and also CGST, SGST, UTGST, IGST and Cess charged and recovered from customers/clients.

Term **"turnover in State"** is defined u/s. 2(112) of CGST Act. It means the aggregate value of taxable supplies, exempt supplies, nil rated supplies, non-taxable supplies, etc., made within the state and also export of goods or services or both and inter-State supplies made from the State. It is not to be computed on all India basis for person having the same PAN.

Issue is whether one should consider "aggregate turnover" or "State turnover" for deciding threshold limit for GST audit of entity registered in a particular State?

Consider the following situations:

Supplier having registration in 10 States	Turnover in each State ₹ 25 lakh	If one considers aggregate turnover for threshold, each registered entity will be liable to GST audit even though each registered entity has turnover much below threshold limit. If one considers turnover in State, none of the registered entity will be liable to GST audit.
Supplier having registration in Maharashtra and 10 other States	Turnover in Maharashtra is ₹ 3 crore and in each other State ₹ 5 lakh	If one considers aggregate turnover for threshold, all 11 registered entities will be liable to GST audit even though 10 other registered entities have turnover much below threshold limit. If one considers turnover in State, only the registered entity in Maharashtra will be liable to GST audit.

The Rule speaks of "aggregate turnover" and Act speaks of "turnover". Section 35(5) should prevail over Rule 80(3) for calculating the threshold limit for audit. This seems to be a better view as it is settled jurisprudence that Rule cannot override the Act.

This view gets support from the fact that annual return is to be filed State-wise and even late fees for delay in filing of return is computed as percentage of turnover in State.

Following table will explain the inclusions / exclusions for calculating threshold turnover:

Medical practitioner having medical practice of ₹ 1.90 crore and shop rental income of ₹ 20 lakh	Exempt supplies as well as taxable supplies both are to be included in definition of turnover. Even though doctor is exempted from paying tax on medical practice, he will be liable to GST audit.
Law firm having legal services billing of ₹ 1.98 crore and scrap sales of ₹ 3 lakh	Legal service is a taxable supply as defined u/s. 2(108) of the Act. This needs to be included in calculating the turnover for the threshold purpose. Even though law firm does not discharge tax liability on legal services, it would be liable to GST audit.
Petrol Pump with turnover of ₹ 50 crore and revenue of ₹ 5 lakh from PUC, repairs and sale of lubricants	Petroleum products are non-taxable supplies under GST. However, turnover is defined to include the exempt supplies which *inter-alia* include non-taxable supply. In view of this, petrol pump will be liable to GST audit.
Share broker having brokerage income of ₹ 50 lakh and own share trading of ₹ 10 crore	Securities is excluded from the definition of goods as well as service. Consequently, it gets excluded from the definition of supply. It is not a taxable, exempt or non-taxable supply and hence share trading need not be included in turnover. In view of this, share broker will not be liable to GST audit.
Builder / developer having sale of land of ₹ 50 crore in the FY and not having any other income	Schedule III of CGST Act provides that sale of land is neither a supply of goods nor a supply of service. Hence on the basis of reasoning given above for securities, sale of land should not be considered for calculation of turnover.
Export house having exclusive export turnover of ₹ 100 crore	Export of goods or services is to be specifically included in turnover as defined u/s. 2(6) and 2(112) of the Act. Thus export house is liable to GST audit.

Whether turnover means turnover as per accounts or turnover declared in GST returns?

The turnover definition speaks of aggregate value of the supplies. The term 'value' is defined u/s. 15 of the Act read with Rules 27 to 35 of CGST Rules. One, therefore, should take value as declared in GST returns for calculating threshold limit for GST audit.

For Example – Inter-State branch transfers will not form part of turnover reflected in accounts. However, it will be a taxable supply as declared in GST returns. Hence the turnover for threshold purpose should include value of such branch transfers though it does not form part of turnover reflected in accounts.

Rule 32 of CGST Rules prescribe presumptive valuation for certain suppliers such as forex dealers, air travel agents, life insurance companies and dealer in second hand goods. The presumptive value for tax levy is much lower than actual transaction value.

Whether one should take "actual turnover" or "presumptive value" for considering threshold limit? For example, value of the tickets sold by travel agent would be ₹ 10 crore but taxable value of such services under Rule 32(3) might be ₹ 75 lakh. Presumptive value is the value of supply as defined in the Act/Rules. Hence, presumptive value should be considered for deciding the threshold limit for GST audit and not the actual turnover.

Ambiguity for First Financial Year 2017-18

Section 35(5) and Rule 80(3) speak of turnover in financial year. Term 'Financial year' is not defined in the Act or Rules. Two possible views in this regard are as under:

- Consider turnover for full year April 2017 to March 2018 even though GST was not applicable during the period April 2017 to June 2017; or
- Consider turnover only for the period July 2017 to March 2018

Take the example of registered person whose turnover during the period April to June 2017 is ₹ 110 lakh and during the period July 2017 to March 2018 is ₹ 95 lakh.

If the first view is taken, such a registered person is required to get his accounts audited under VAT and also under GST legislation. If second view is taken, GST audit is not applicable.

Term "Turnover" should be interpreted considering value as defined u/s. 15 of CGST Act. Section 15 was not on statute book during the period April to June 2017. In view of this, turnover of pre-GST period should not be included for calculating threshold limit for GST audit.

It is high time that the Government should come out with appropriate clarification in this regard.

Statutory Definition of "Audit" and scope of Audit

Section 2(13) of CGST Act defines Audit to mean:

"Examination of records, returns and other documents maintained or furnished by the registered person under this Act or the rules made thereunder or under any law for the time being in force to verify the correctness of turnover declared, taxes paid, refund claimed, input tax credit availed and to assess his compliance with the provisions of Act or rules made thereunder."

If one goes strictly by above statutory definition of audit, the scope of audit would be very wide and onerous. This would imply that auditor is duty bound to examine records, returns, books of account, stock records and other supporting documents maintained or furnished by the auditee under GST legislation or any other law such as Companies Act, Income-tax Act, Societies Act, Trust Act or any such Acts.

If one goes by literal interpretation of definition of audit given u/s. 2(13), auditor is duty bound to verify and affirm whether auditee has:

- Determined taxability of Goods and / or services correctly
- Done proper classification of goods and / or services
- Done proper valuation of goods and / or services
- Applied correct tax rates
- Determined time of supply correctly
- Determined place of supply properly
- Availed and utilised Input tax credit correctly
- Claimed exemptions and refunds correctly
- Complied with all provisions and rules including:
  - o Registration and amendments

- o Maintenance of accounts records
- o Tax Deducted at Source
- o Tax Collected at Source
- o Payment of tax
- o Invoicing, etc.

Auditor practically assumes the responsibility of assessment without powers of assessing officer.

However, when one looks at the prescribed Form of audit report (Form GSTR-9C), one gets feeling that scope of audit is not as wide as provided in Section 2(13) of CGST Act.

Whether GST audit report prescribed in Form GSTR-9C is in consonance / sync with statutory definition of audit as defined u/s. 2(13) of CGST Act?

Prescribed audit report in Form GSTR 9C consists of two parts – Part A and Part B.

On perusal of part A of form GSTR-9C (prescribed audit report) one gets the feeling that the job of the auditor is to verify and certify various reconciliations prescribed in the said form. It prescribes reconciliation of gross turnover, taxable turnover, input tax credit, etc. as stated in audited financial statements with annual return filed by the auditee. Form GSTR 9C also asks for reconciliation of rate wise tax liability and taxes paid by the auditee. Reasons for various unreconciled differences are to be given in the form.

In Part A, the auditor is expected to solemnly affirm and declare (by way of verification) that:

- Information given in reconciliation form is true and correct; and
- Nothing has been concealed in the said form.

Audit report (Form GSTR 9C) does not require auditor to report on various matters specified in Section 2(13) of the Act defining the term "audit".

One really wonders whether role of auditor is only to certify the arithmetical accuracy of the reconciliation statement or whether auditor is expected to verify the correctness of GST returns filed, tax liability discharged and compliances by the auditee. Does this mean that the auditor should take the audited annual financial statement and annual return of auditee as sacrosanct and need not verify the correctness of both these documents?

This non-clarity and confusion as to the scope of GST audit arises as section 35(5) of the Act requires every registered person to get his accounts **audited** by chartered accountant or cost accountant. If section 35(5) is read with section 2(13) which defines the term audit, then the scope of the audit becomes very wide and onerous. Auditor is bound to assess whether auditee has correctly discharged all his tax obligations under GST.

From the perusal of prescribed audit form, Government's intention seems to restrict the scope of audit to verification of reconciliation of annual return with audited financial statements of the auditee. If this is so, Government should clearly delink the section 2(13) defining audit from section 35(5) of the CGST Act. The applicability of section 2(13) should be restricted only to departmental audit u/s. 65 and special audit u/s. 66 of CGST Act.

The use of phrase **"solemnly affirm"** in the verification clause in Part A of Form GSTR-9C is one major cause of concern for GST auditor. Tax audit report u/s. 44AB of Income-tax Act, Audit report under Companies Act or any other Act does not require this kind of solemn affirmation by the auditor. A "solemn affirmation" is ratification under a statute. It has same legal effect as an oath. There is a serious apprehension that auditor might face criminal proceedings for erroneous reporting.

Title of Part B of form GSTR-9C clearly says that it is a certification. Part B of form GSTR-9C prescribes format of **"Certification"** to be issued by the auditor. It prescribes different format of certification for following scenarios where:

- Auditor of Financial statements and GST auditor is same;
- Auditor of Financial statements and GST auditor is different.

The heading suggests that reconciliation statement is to be drawn up by the auditor. It does not provide for signature of the auditee. It is to be signed by the auditor alone. This indicates that Government intends to make auditor responsible for authentic and accurate compilation of reconciliation statement. This seems to be illogical and irrational. The responsibility of compiling reconciliation should be on the auditee and job of the auditor should be to certify the correctness of such compilation.

Whether GST Audit is a Certification assignment or audit assignment?

Difference between term "Certificate" and "Report" is explained by ICAI in Para No. 2.2 of its "Guidance Note on Audit Report and Certificates for Special Purpose" published in 1984 (revised 2016) as under:

- "**Certificate** is a written confirmation of the accuracy of facts stated therein and does not involve any estimate or opinion."
- "**Report**, on the other hand, is a formal statement usually made after an enquiry, examination or review of specified matters under report and includes the reporting auditor's opinion thereon".

Chartered Accountant assures factual accuracy of contents to the users of certificate. Chartered Accountant, through his audit report, expresses his opinion on truth and fairness of contents.

GST Audit Report (Form GSTR-9C) is not an expression of opinion but it certifies the correctness of reconciliation of annual return and audited financial statements of the auditee. It seems that GST report (form GSTR-9C) tilts more towards certificate than the audit report. If it is certificate, it has to be accurate as to the last decimal.

Reports / Statements to be furnished and its due date

The registered person is required to furnish a copy of audited annual accounts and a reconciliation statement, duly certified, in FORM GSTR-9C, electronically through the common portal either directly or through a Facilitation Centre notified by the Commissioner [Rule 80(3)].

Section 35(5) read with Rule 80(3) requires auditee to submit the following after conclusion of audit:

- Annual return in form GSTR-9 [u/s. 44(1)]
- Audited annual accounts / financial statements
- Reconciliation statement in Form GSTR-9C [u/s. 44(2)]

There is no express provision which prescribes the due date for submission of Audit Report in Form GSTR-9C. Section 44(1) of CGST Act mandates assessee to furnish an annual return on or before the 31st day of December following the end of financial year. Section 44(2) of CGST Act mandates assessee liable to get his accounts audited to furnish annual return along with the audited annual accounts and a reconciliation statement duly certified in Form GSTR-9C (Audit Report).

On conjoint reading of above provisions, it can be inferred that the due date for submission of Audit Report is 31st Day of December following the end of Financial Year.

There is no provision for filing revised annual return or revised reconciliation statement consequent upon error in original filing or revision or changes in financial statements.

Whether following persons are required to file GST audit report?

Section 44(1) of the Act mandates every registered person to file annual return except following persons:

- Input Service Distributor (ISD) registered u/s. 24(viii) of the Act
- Person deducting and paying tax u/s. 51 of the Act (Registered u/s. 24(vi) of the Act)
- Person collecting tax at source and paying it u/s. 52 of the Act (Registered u/s. 24(ix) of the Act)
- Casual taxable person registered u/s. 24(ii) of the Act
- Non-resident taxable person registered u/s. 24(v) of the Act

It is obvious that ISD, tax deductor at source and Tax collector at source is required to take separate registration in this capacity. It will not have any turnover and hence GST audit for such registration will not be applicable. However same person will have normal registration as taxpayer. He will be liable to GST audit if his turnover for normal registration exceeds prescribed limits.

Section 35(5) mandates audit of every registered person having turnover exceeding ₹ 2 crore. It does not carve out any exception for casual taxable person and non-resident taxable person. There could be a situation where casual taxable person and non-resident taxable person may have turnover exceeding ₹ 2 crore. He is obliged to get his accounts audited under GST but not required to file annual return and consequently filing of GST audit report in Form GSTR 9C. This seems to be unintentional anomaly and can be removed only with appropriate amendment in the Act or through proper clarification from Government.

Penal Provisions

For Auditee

It is mandatory for auditee to file annual return along with audit report in Form GSTR-9C. The delay in obtaining audit report will result into delay in filing of annual return.

Such delayed filing of annual return will attract late filing fees which is ₹ 100 per day during which such failure continues subject to a maximum of quarter per cent of his turnover in the State / Union Territory. This is late fee prescribed under CGST Act. Similarly, SGST Act and UTGST Act also provides for such late fees. IGST Act does not prescribe any such late filing fees.

Practically the late fees payable for delay in filing annual return would be ₹ 200 per day (₹ 100 under CGST Act and ₹ 100 under SGST / UTGST Act) during which such failure continues subject to a maximum of 0.5% (0.25% under CGST Act and 0.25% under SGST / UTGST Act) of his turnover in the State / Union Territory.

There is no specific provision prescribing penalty for not getting accounts audited or non-filing of audit report in Form No. GSTR 9C. Section 125 of the Act provides for residuary penalty of ₹ 25,000/- for contravention of any provision of the Act or Rules for which no penalty is prescribed.

Residuary penalty u/s. 125 can be initiated for following defaults:

- Not getting accounts audited as required u/s. 35(5) of the Act; and
- Non-submission of GSTR-9C as required u/s. 44(2) of CGST Act.

Penalty of ₹ 25,000/- can be levied for each of above default. Thus the penalty u/s. 125 of CGST Act for above two defaults would be ₹ 50,000/-.

Similar penal provisions are prescribed under SGST / UTGST Acts. This would mean that penalty of ₹ 50,000/- can be levied under SGST / UTGST Acts.

Even IGST Act provides for such residuary penalty. Proviso to section 20 of IGST Act provides that where the penalty is leviable under CGST Act and SGST / UTGST Act, penalty under IGST Act shall be sum total of said penalty. This would mean that penalty under IGST Act would be ₹ 1,00,000/- for above referred defaults.

The aggregate penalty under GST legislation for not getting accounts audited and non-submission of annual return may go up to ₹ 2,00,000/-.

<u>For Auditor:</u>

The debate is on as to whether auditor can be implicated under any of the penal provisions prescribed under GST legislation. There are all chances that auditor may be summoned to give explanation or clarification with regard to certificate issued by him in Form GSTR-9C. Any failure to attend such summons will attract penalty of ₹ 25,000/- u/s. 122(3)(d) of CGST Act. Similar penal provisions are prescribed in SGST / UTGST Act and also IGST Act.

The aggregate penalty under GST legislation may amount to ₹ 1,00,000/- for non-appearance pursuance to summons.

Conclusion

GST laws, systems and administration is yet to stabilise. Annual return and audit forms are notified in the month of September 2018 only. Till today, online facility of uploading and submitting GST audit report and annual return is not available on GSTN portal. Annual return and audit report requires furnishing of voluminous details which assessees were not aware while designing their accounting and tax software. Many such details will not be directly available from accounting records / software. This will require manual intervention resulting into high compliance cost and it will be a time consuming process.

Moreover, there are many ambiguities as to scope of GST audit, role and responsibilities of GST auditor. GST audit would pose a great challenge for taxpayers (auditees) as well as professionals (auditors). It seems that it will be difficult task to complete GST audit in meaningful manner and file annual return along with audit report on or before 31-12-2018.

In view of haphazard and chaotic manner of GST implementation in the first year, Government in all fairness should waive the GST audit requirement for F.Y. 2017-18. If not waived, the Government should extend the due date for submission of annual return as well as audit report to 31st March 2019. This will give great relief to much stressed auditees as well as auditors.

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The powers of the mind should be concentrated and the mind turned back upon itself; as the darkest places reveal their secrets before the penetrating rays of the sun, so will the concentrated mind penetrate its own innermost secrets.

— *Swami Vivekananda*

CA Rajat Talati

Books of Account, Documentations and Records and GST Act

Importance of maintenance of accounting records and documents in support of such records cannot be undermined. More so in case where fiscal law is designed on principal of self-assessment. The accounting under the GST Act is yet another challenge the businesses will have to accept so as to be ready for compliances in GST regime.

The GST auditors who carry out the audit of account and the reconciliation statements, certifies, *inter alia* the true and correctness of the particulars of the information/reconciliation statements in part A of Form GSTR-9C. Thus, the scope of the audit requires the GST auditor to not only go through the returns submitted by the registered person [RP] but also accounts and other documents & records maintained for the purposes of compliances under the GST laws. In this background also, the importance of the accounts/record keeping is of paramount importance.

In view of the peculiar design of the annual return [GSTR-9] and the GST audit [Form GSTR 9C] notified recently, the generation of records and statements required for the purposes of such compliances are also discussed hereunder.

Statutory Provisions

Provisions under the GST Act require maintenance of records, uploading or reporting of the same and producing the same on demand.

Chapter VIII of the Act contains provisions in respect of maintenance of accounting records under the Act. The rules issued also provide for certain additional compliances and maintenance of documents.

Accounts and records to be maintained by all registered persons

In view of section 35(1), every registered person should maintain books of account and other records relating to each place of business at the respective place of businesses. This section requires maintenance of a true and correct account of the following records:

a. Production or manufacture of goods

b. Inward and outward supply of goods or services or both

c. Stock of goods

d. Input tax credit availed

e. Output tax payable and paid, and

f. Such other particulars as may be prescribed

Registered person may keep and maintain accounts and other particulars in electronic form. Although the provision states that the records in respect of each of the POB be maintained at such places, it also provides for keeping the data in digital/electronic formats. Thus, if the remote access is provided at locations to the centralised data, one may say the records and accounts are kept at each POB. The extent of such access to the data at the branch/depot or warehouse level may provide some practical challenges. Moreover, the back-up of the digitally kept records should be maintained and in case of destruction of digital records accidentally or by natural disaster, should be able to restore the records in reasonable period.

Additional requirements

CGST Rules [56 to 58] in respect of accounts and records also require the registered person to keep account and other relevant documents including invoices, bills of supply, delivery challan, credit and debit notes, receipt vouchers, payment vouchers, refund vouchers and e-way bills. Besides this, he is also to maintain records in respect of imports and exports of supplies and the cases where tax is payable on Reverse Charge basis.

The rule also requires the RP to maintain the record separately for **each activity** including manufacturing, trading and provision of services. For the persons other than those have opted for composition scheme under section 10, the stock records are also to be maintained. This includes data/documents in respect of the stock which is lost, stolen issued as gift or free samples. In case of manufacturer the records of raw material, finished goods, generation of scrap and wastage should also be maintained. Under the GST law, besides information and records to be maintained as discussed hereinabove, these persons shall be required to maintain accounts in respect of advances received and adjusted, liability under the reverse charge mechanism, ITC claimed, name and addresses of vendors and customers, places where the goods are stored including for transit storage etc. The record should maintain audit trail in case of records maintained in electronic format.

Warehouse keeper/transporter

The owner or operator of warehouse or godown, used for storage of goods and the transporter is also required to maintain records of the container, consignee and other relevant details of goods.

Section 35(6) provides that if the records are not maintained properly or the amount of tax payable on goods or services are not accounted for, then the proper officer will determine the amount of tax payable on the goods or services as if the said goods or services were supplied as such by the person. Moreover, section 35(6) also provides that in an event, where the records are not kept as per section 35(1), the proper officer shall determine the amount of tax payable on goods or services or both that are not accounted for, as if such goods or services or both are supplied by such person. In such a case, provisions of section 73 and 74 would apply. Therefore, in a case of visit by the investigation, the proper officer would be in a position to take an adverse stand for want of keeping/recording transactions which are not accounted for.

Service provider

Service provider should also maintain records in respect of goods used in rendering of services, input service utilised and services supplied.

In case of a **works contractor** [Rule 56(14)] the records separate for works contract showing:

(a) The names and addresses of the persons on whose behalf the works contract is executed;

(b) Description, value and quantity (wherever applicable) of goods or services received for the execution of works contract;

(c) Description, value and quantity (wherever applicable) of goods or services utilised in the execution of works contract;

(d) The details of payment received in respect of each works contract; and

(e) the names and addresses of suppliers from whom he received goods or services.

Does that mean that a works contractor needs to maintain records for each contract separately? Well practically, records, to some extent are maintained site-wise, however, such records may not be 100% accurate in as much as, transfer of materials between sites or common services are not attributed. However, say, in the case of small plumbing contractor, who carries out miscellaneous jobs, may not have such sitewise/ contractwise records at all.

Agent & Principal

As per Rule 57(11), every agent should also maintain records showing the:

(a) particulars of authorisation received by him from each principal to receive or supply goods or services on behalf of such principal separately;

(b) particulars including description, value and quantity (wherever applicable) of goods or services received on behalf of every principal;

(c) particulars including description, value and quantity (wherever applicable) of goods or services supplied on behalf of every principal;

(d) details of accounts furnished to every principal; and

(e) tax paid on receipts or on supply of goods or services effected on behalf of every principal.

Therefore, the records to be maintained by an agent to *inter alia* include records in respect of authorisation received by him from each principal to receive or supply of goods/ services on behalf of such principal, the particulars of the value and quantity of goods or services received, value and quantity of goods or services supplied, details of accounts furnished and the taxes paid on receipt or on supply of goods or services on behalf of every principal.

Since the agent, typically earns his commission only, the revenue accounts maintained by such an agent would be only in respect of the commission earned. The records in respect of activities carried out by such an agent would be part of his memorandum registers/ records not forming part of the prime books of account.

Similarly, carrier of goods, consignment sales Agent, clearing forwarding agent should also maintain records in respect of delivery/dispatch of goods, records in respect of the goods handled by him on behalf of the registered person.

Owner or operator of godown or warehouse and transporters

As per Rule 58, every owner or operator of godown or warehouse and a transporter should maintain accounts and submit details regarding his business electronically on common portal in Form **GST ENR-01**. On submission of such information, a **unique enrolment number** shall be generated and communicated to the said person that is owner/operator of godown or a transporter. Such enrolment once granted in one State or Union Territory would be deemed as registration by such person in all the States or Union territory. Moreover, the operator of the godown should store the goods in such manner that they can be identified item wise and owner wise and should facilitate physical verification for inspection by the proper officer on demand. Such transport to also maintain records separately of goods transported, delivered and stored in transit along with UEI of each of its branches. Such records would also have data about the period for which particular goods remained in the godown.

Records to be retained/preserved

These records including the records in respect of invoices, bills of supply etc. to be retained for a period of 72 months from the due date of furnishing of annual return for the year pertaining to such accounts and records. Thus, the records are to be maintained for a period of six years from the year end plus for the period of time available for filing annual return that is till the 31st December of the subsequent year. Therefore, effectively, records are to be maintained for six years and nine months from the end of the year.

In case of matters which are pending in appeal or other proceedings including enforcement actions, records are to be kept till the matters are settled plus a period of 1 year from the date of orders in such appeals/other proceedings.

It is clear from the above that the GST Act and the Rules provide for elaborate guidelines for maintenance, retention and production of accounts and records to facilitate determination of correct liability under the GST Act. The other objective is to maintain records in such manner that it facilitates cross-matching of information when processed on the common portal. The data to be uploaded on the common portal requires transaction wise, HSN code wise, State wise data of the outward supplies. Moreover, the portal now enables the inward supplies data in the form of GSTR-2A based on the uploading of the outward supplies by the RP's vendors. Therefore, transaction wise data as per financials requires to be matched to identify the errors or omissions in claiming the ITC. Thus, RP was required to reorganise its accounting department, the information technologies software as also train its staff who create or generate this information in the organisation.

Obviously, in view of the above legal requirements to maintain accounts and records by the RP, the GST auditor is expected to design its audit programme to factor the availability/need for maintaining accounting records vis-a-vis the reporting requirements in Form GSTR-9C.

Account keeping – Chart of accounts

Under GST, ledger accounts in respect of input taxes paid and output taxes collected requires to be created. Moreover, these accounts have to be maintained separately for CGST, SGST and IGST for each GSTN. Typically, following account heads are required:

Input CGST a/c, Output CGST a/c, Input SGST a/c, Output SGST a/c, Input UTGST a/c, Output UTGST a/c, Input IGST a/c, Output IGST a/c, Electronic Cash Ledger (to be maintained on Government GST portal to pay GST), Electronic Credit Ledger (to be maintained on Government GST portal to pay GST).

Periodic adjustment of credits available in IGST account against SGST or CGST etc. also should be recorded appropriately in books of account.

Please note, these are to be maintained state wise and hence if a person has registration under the GST Act in say five states, the above charts of accounts need to be multiplied five times.

Accounts to be maintained under GST Regime

To summarise, every registered taxable person shall keep and maintain, at his principal place of business, a true and correct account of production, inward and outward supply and such other records as specified under Goods and Services Tax Act.

Accounts/ Records	Information required	By whom?
Register of Goods Produced	Account should contain detail of goods manufactured in a factory or production house	Every assessee carrying out manufacturing activity
Purchase/Inward supplies	All the purchases made within a tax period for manufacturing of goods or provision of services	All assessees

Accounts/ Records	Information required	By whom?
Sales/Outward supplies	Account of all the sales made/service provided within a tax period must be maintained	All assessees
Stock Register	This register should contain a correct stock of inventory available at any given point of time.	All assessees
Input Tax Credit availed	This register should maintain the details of Input Tax Credit availed for a given tax period.	All assessees
Output Tax Liability	This register should maintain the details of GST liability outstanding to be adjusted against input credit or paid in cash.	All assessees
Output Tax Paid	This register should maintain the details of GST paid for a tax period/ off set.	All assessees
Other Records specified	Government can further specify by way of a notification, additional records and accounts to be maintained	Specific business as notified by the Government

Having discussed the basic records to be maintained and chart of accounts required, let's discuss other challenges, some of them in respect of transition to the GST, in book keeping.

Annual Return, GST Audit and Reconciliation statements [Form 9C]

All RP [barring persons required to obtain registration for deducting TDS/collecting TCS, ISD or a casual taxable person] shall file Annual return in terms of Section 44(1) of the CGST Act. Annual return in Form GSTR 9 [applicable to most of the RP] is now notified.

Moreover, every RP who is required to get his accounts audited as per Section 35(5) of the GST Act has to upload electronically, besides annual return in GSTR-9, a report form GST auditor in Form GSTR-9C along with host of reconciliation statements. These reconciliation statements require elaborate exercise by the accounting team of the RP to make available the reconciliation of various records as per the returns filed vis-a-vis the Audited Financial Statements to the GST Auditor.

Before such reconciliation Statements are attempted to be filed by an accountant, some basic exercise of capturing information will have to be carried out.

A. Reconciliation of financial records maintained at GSTN portal

Since the concept of supply is so wide that practically speaking, everything debited to Profit & Loss A/c & credited to Profit & Loss A/c barring exceptions like salaries and wages, interest and depreciation all are either inward supply or outward supply. [There could be cases like amortisation of expenses, where two opinions are possible about it being 'supply or not'. The assessee's stand on such issues to be clearly understood]. Moreover, despatches to / from branches, addition and disposal of assets etc. are also added to the aggregate supply. In the circumstances, there would be differences between financial books of account and the 'aggregate turnover' reported in GSTR-1. Ideally, businesses should undertake such reconciliations on an ongoing basis as a part of internal control process.

However, the type of transactions which will get reflected in the reconciliation statement would increase. To highlight one, in case of where the head office placing order on the vendor asking the vendor to directly despatch the goods to the branch outside the State, would require generating an additional document between head office and the respective branch and treat that transaction as 'supply' in view of section 10(1)(b) of the IGST Act. Obviously, the financial accounting system do not recognise this type of peculiar transaction. Similarly, the reconciliation exercise should also involve the amount lying in the tax credit ledger maintained at the Government portal. Typically, the credit reversed on account of mismatches, orphaned entry or non-payment to vendor will get reflected only on the GSTN portal however, in the financial books these items will continue as claimable credits. Therefore, reconciliation of these numerous entries and taking appropriate decisions in each of these cases is very important.

Since there are separate articles in this issue of journal dealing with various reconciliation statements that are certified by the GST Auditor as 'true and correct' in his audit report in Form 9C, these are not discussed herein.

However, some other aspects of reconciling/ cross-matching the financial records with the returns filed under the GST Act and some critical areas that requires our attention and related IT/ software support required in such cases is discussed hereunder.

B. Reconciliation of GSTR with the financial / MIS reports

The GSTR-1 requires reporting of the transaction wise and HSN wise information. Thus, aggregate of the turnover of sales as per particular HSN code – say bulk drug should tally with the sales reflected of bulk drug in the financial accounts. The disposal of assets in the financial books and its valuation and/or taxability under the GST Act will be quite different. This may also require reconciliation.

Listed below are some of the transactions or documents that require cross-references, tracking, taking corrective actions and/or review at regular intervals. The accounting team and the persons in the organisation who created those records, will have to get involved in the process so that these transactions are attended at the earliest. Help from the accounting software and other MIS reports generated in his respect will certainly help in the process. Needless to say, allowance of ITC, credit notes/debit notes, credits for TDS and TCS etc. is dependent on the actions from the vendor/customer of the company. Early resolution of these entries goes a long way in proper accounting and determination of liability of payment of taxes, profitability as also drawing of state of affairs on the balance sheet day.

As mentioned hereinabove, IT support would facilitate to a great extent in compiling the information required and its reporting need while filing the GSTR. Some of these challenges are enumerated/ highlighted hereunder:

- Linkages of debit note/ credit note with original invoices.
- Adjustment of advance received against a supply and tracking of receipt voucher and payment voucher.
- Generation of electronic way bill and mention thereof on the supply invoice. Reconciliation of e-way bill with outward supplies.
- Tracking and monitoring of mismatches / unmatched orphaned entries for claim of ITC. Although, in view of the press release dated 18-10-2018, RP may claim ITC even if the Form GSTR 2A downloaded from the portal does not include certain inward supplies provided the claimant is in possession of relevant documents and is eligible for ITC.
- Claiming of ITC in case of proportionate allowance on a provisional basis while filing the returns and the review therefore to carry out adjustments, if any, at the year end.
- Tracking transactions/information normally not part of the financial books of account but are required as 'supply'

to be reported in GSTR-1 e.g., barter and exchange, free issues, supplies without consideration etc., do not get captured in the financial records. However, these are now required to be reported in GSTR-1.

- Cancellation of invoices: ERP packages normally do not allow cancellation of invoice once generated. To nullify the wrong issuance of invoices, credit note is required to be issued. Care should be taken that such wrong issuance of invoices and rectifying credit notes, do not get reported in the GSTR.
- The invoicing / accounting software should have built in rule / concept to determine transactions like Interstate and intra-State, rate of tax, RCM – inward supply, bill to ship-to-type of transaction etc.
- Adjustments in respect of D/N or C/Ns, made during the current year and the subsequent years which pertain to the current year.
- Maintenance of records in respect of TDS and TCS.
- Maintenance and distribution of ISD – input service credit.
- Inter branch reconciliation.
- Policy determination in respect of inter-branch service billing and its valuation.
- State wise Trial Balance.
- Back up documents and reconciliation statements in support of TRAN-1 and data / documents / statement required for submission of TRAN-1.
- Accounting challenge in case of goods return in GST period where the sale was effected in the pre-GST period. As per the provision of section 142(1), if the goods return effected by the registered dealer, it would be treated as independent supply under the GST and the customer would charge the applicable GST say SGST and CGST. This will get reflected in the GSTR-1 of the customer as also supplier. However, in the financial books, the entry would be reversal of the original sales / service income. On GSTN portal this would be tracked as ITC claimable and appropriate adjustment would happen in the electronic credit ledger. In the financial books, actually speaking, the original VAT or the service tax payable will have to be reversed. As against this the GSTR–1 would show fresh purchases / inward in the hands of supplier and fresh outward supply in hands of the customer. Surely, the financial books will not recognise this and would result into reconciliation item with financial books. Please note, hundreds of such types of transactions will be required to be tracked and this would have to be tracked state-wise based on the original sales offered under the respective State VAT / service tax returns. It is quite possible that the return could be intra state whereas the original sales was intra sales and was booked in the CST return. All these situation would complicate the tracking mechanism.
- Credit note in respect of scheme of discount pertaining to pre-GST period be passed in the pre-GST period so that the reduction in the VAT liability, if any, can be claimed in the pre-GST period. Similarly, the issue of free goods in respect of supplies effected during the pre-GST period be issued in the pre -GST period.

Data generation and its back up together with audit trail is very important for strict compliances under the GST laws. Hence, pro-active data capturing and software enabled data/report extraction is a must for smooth filings of monthly returns, annual return and generating reconciliation statements required as per Audit Form GSTR-9C.

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CA Tejas Parikh

Auditing Framework for GST Audit

Government has introduced GST Audit provisions under the GST Act(s)/Rules to ensure effective compliance with the various GST provisions and to ensure performance of audits in a systematic, transparent and fair manner. GST audit is comprehensive audit introduced under indirect tax laws similar to tax audit under direct tax provisions. GST audit can be conducted by Chartered Accountant or Cost Accountant if the taxable turnover of registered person exceeds ₹ 2 crore. This article attempts to cover auditing standards/guidance notes issued by the Institute of Chartered Accountants of India (ICAI), which GST auditor can refer to in order to discharge this onerous responsibility effectively and efficiently.

GST Audit – Definition under GST

*Audit has been defined in section 2(13) of the CGST Act, 2017 and it means the **examination** of records, returns and **other documents** maintained or furnished by the registered person under the GST Acts or the rules made thereunder or under any other law for the time being in force to verify **the correctness** of turnover declared, taxes paid, refund claimed and input tax credit availed, and to assess his compliance with the provisions of the GST Acts or the rules made thereunder.*

From above definition it is clear there is need for examination of records and GST auditor is required to verify its correctness. The word examination is not defined in the Act; however, it seems to suggest that reasonable assurance (discussed later in this article) is expected from GST auditor for work performed by him. Form GSTR–9C which prescribes audit format starts with reconciliation statement in PART A followed by certification in PART B. Part B prescribes two types of certification format as follows:

Format I: Certification in cases where the reconciliation statement (FORM GSTR-9C) is drawn up by the person who had conducted the audit of the accounts.

Format II: Certification in cases where the reconciliation statement (FORM GSTR-9C) is drawn up by a person other than the person who had conducted the audit of the accounts.

Auditing approach will have to be modified suitably depending whether GST auditor had conducted audit of accounts. In case GST auditor is different from statutory auditor, Format II will have to be considered for certification. In case of Format II, point Nos. 3a) and 3b) present in Format I (which deals with availability of all information and explanations, maintenance of proper books of account, profit and loss account is in agreement with books of account) is not provided for in Format II. This seems to suggest that in case GST auditor is issuing certification under Format II, can place reliance on statutory auditor to the extent of maintenance of books of account and that financials are drawn correctly from books of account. However, GST auditor is required to exercise necessary caution because in opinion para there is mention of examination of books of account including other relevant documents and explanations provided by client. The document mentioned in the above definition can also be interpreted to include electronic record as defined in clause (t) of sub-section (1) of section 2 of the Information Technology Act, 2000 (21 of 2000). "Electronic record" means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer-generated micro fiche.

True and Correct vs. True and Fair View

True and Correct assertion in GST audit report lay emphasis on factual accuracy of the information and amounts presented. True and Fair view is expression of opinion on the financial statements. Both the terms are not clearly defined anywhere. True and Correct view is generally required in certification work. GST auditor is required to issue certification as per format prescribed. True and correct view is also mentioned in Tax Audit Report. We can refer to Guidance Note on Tax Audit issued by ICAI to correctly interpret audit procedures to be performed to express True and Correct view.

Extracts from Guidance Note on Tax Audit issued by ICAI (in italics)

"…. where an audit has already been conducted and the opinion of the auditor has been expressed on the accounts, it would not be necessary to repeat the entire exercise to express similar opinion all over again. The tax auditor has only to annex a copy of the audited accounts and the auditor's report and other documents forming part of these accounts to his report and verify the particulars in the prescribed form for expressing his opinion as to whether these are true and correct" (refer para 11.5 Page No. 54).

The above guidance will be particularly useful for GST auditor issuing certification under Format B (i.e., where person other than GST auditor has conducted audit of books of account).

"…………. As regards the statement of particulars to be annexed to the audit report, he is required to give his opinion as to whether the particulars are true and correct. In giving his report the tax auditor will have to use his professional skill and expertise and apply such audit tests as the circumstances of the case may require, considering the contents of the audit report. He will have to conduct the audit by applying the generally accepted auditing procedures which are applicable for any other audit". (Refer para 11.1 page no 52-53).

Referring above, GST auditor can also consider procedures prescribed under auditing standards issued by ICAI.

"It should be noted that the responsibility for maintenance of books and records and that for preparation of financial statements is that of the assessee. It is, therefore, desirable that guidance is given to a person who carries on business or profession but who is not required by or under any other law to get his accounts audited about the maintenance of books of account and records as well as about the requirements of auditing. Similarly, guidance is also required to be given about the preparation of financial statements and the information to be provided in such statements. (See "Monograph on Compulsory Maintenance of Accounts" published by ICAI)" (Refer para 71.2 Page No. 210).

From above, it is clear that maintenance of books and preparation of financial statements is responsibility of entity and GST auditor is required only to examine records produced before him to give true and correct certification.

Reasonable Assurance – Framework of Assurance Engagements

Any assurance engagement is classified into two dimensions i.e., limited assurance and reasonable assurance. Extent of procedures performed in limited assurance is limited compared to reasonable assurance. Limited assurance generally gives assertion such as *"……. nothing has come to the practitioner's attention to cause the practitioner to believe that the subject matter information is materially misstated"*. Limited assurance is given by auditor in case of quarterly limited reviews of listed companies. GST auditor is required to give reasonable assurance considering that certification requires true and correct view. Let us understand what reasonable assurance is.

Reasonable assurance engagement in which the practitioner (can be referred to as auditor) reduces engagement risk to an acceptably low level in the circumstances of the engagement, as the basis for the practitioner's opinion. The practitioner's opinion is expressed in a form that conveys the practitioner's opinion on the outcome of the measurement or evaluation of the underlying subject matter against the criteria (Source: Glossary of Terms Used in Guidance Note on Reports or Certificates for Special Purposes).

Reasonable Assurance does not mean that auditor is required to give complete or absolute assurance. Generally, there is perception among regulators that "true and correct view" is absolute assurance and there is no scope for inadvertent error. Reference can be drawn to Para 51 of *"Framework for Assurance Engagements"* of ICAI.

Para 51:

"Reasonable assurance" is less than absolute assurance. Reducing assurance engagement risk to zero is very rarely attainable or cost beneficial as a result of factors such as the following:

- *The use of selective testing.*
- *The inherent limitations of internal control.*
- *The fact that much of the evidence available to the practitioner is persuasive rather than conclusive.*
- *The use of judgment in gathering and evaluating evidence and forming conclusions based on that evidence.*
- *In some cases, the characteristics of the subject matter when evaluated or measured against the identified criteria."*

Considering above, GST auditors should undertake reasonable assurance of records produced before him and assess factual correctness related to reconciliation statement given under PART A of GSTR 9C.

Guidance note on Report and Certificates for Special Purposes

Form GSTR-9C requires auditor to issue certification in PART B. Since certificate is required to be issued, we can refer to Guidance Note on Report and Certificates for Special Purposes issued by ICAI. This Guidance note has defined meaning of certificate and report. The same is given below

A "certificate" is a written confirmation of the accuracy of the facts stated therein and does not involve any estimate or opinion.

A "report", on the other hand, is a formal statement usually made after an enquiry, examination or review of specified matters under report and includes the reporting auditor's opinion thereon.

Certification under GST audit is combination of report and certificate having regard to use of following words in the certificate.

Extract from Certification from Format I

2. ***Based on our audit I/we report that the said registered person***—

*has maintained the books of account, records and documents as required by the IGST/CGST/<<>>GST Act, 2017 and the rules/notifications made/issued thereunder.

*has not maintained the following accounts/records/documents as required by the IGST/CGST/<<>>GST Act, 2017 and the rules/notifications made/issued thereunder:

3. (b) ****I/we further report that***, -

(A) *I/we have obtained all the information and explanations which, to the best of *my/our knowledge and belief, were necessary for the purpose of the audit/ information and explanations which, to the best of *my/our knowledge and belief, were necessary for the purpose of the audit were not provided/partially provided to us.

(B) In *my/our opinion, proper books of account *have/have not been kept by the registered person so far as appears from*my/ our examination of the books.

(C) I/we certify that the balance sheet, the *profit and loss/income and expenditure account and the cash flow Statement are *in agreement/not in agreement with the books of account maintained at the principal place of business at ……………………and ** …………………… additional place of business within the State.

5. In *my/our opinion and to the best of *my/our information and according to explanations given to *me/us, the particulars given in the said Form No.GSTR-9C ***are true and correct*** subject to following observations/qualifications, if any:

Considering above, GST auditor issuing certificate is responsible for the factual accuracy of what is stated therein and gives his opinion in due accordance with facts that it is arrived at by the application of due care and skill. Though above certificate seems to suggest that he is required to provide absolute level of assurance (i.e., procedures performed as considered appropriate to reduce the engagement risk to zero), GST auditor is required to undertake reasonable assurance (as explained above). Para 4 of this Guidance Note also mentions that a practitioner is not expected to reduce the engagement risk to zero. This is because there are inherent limitations attached to the procedures which a practitioner may perform in relation to issuance of a report or certificate, as the case may be.

Key points under this Guidance Note which may be useful for GST Auditors:

- The GST auditor can enter into detail engagement letter with client which lists down responsibilities of GST auditor and client, unrestricted access to records, and documents, that engagement cannot be relied upon to disclose errors, illegal acts or other irregularities, etc. Similar guidance is also available in *SA 210, Agreeing the Terms of Audit Engagements.*

- GST auditor can also consider enclosing a statement containing essential elements of an assurance report as prescribed in this Guidance Note in addition to the format prescribed under the law or regulation.

- GST auditor can obtain written representations as mentioned in this Guidance Note. GST auditor should obtain written representation for the following:

a) That it has provided GST auditor with all information of which the appropriate party(ies) is aware that is relevant to the engagement.

b) Confirming the measurement or evaluation of the underlying subject matter against the applicable criteria, including that all relevant matters are reflected in the subject matter information.

In case of material matters, the GST auditor should evaluate their reasonableness and consistency with other evidence obtained, including other representations (oral or written); and consider whether those making the representations can be expected to be well-informed on the particular matters (Paras 62-64 of Guidance Note).

Materiality in Planning and Performing an Audit – SA 320

Since GST auditor is required to undertake audit of various records, documents, he is required to consider materiality standard to determine nature, timing and extent of audit procedures. Following guidance given under this standard can be considered for GST audits.

- GST auditor can determine materiality level or levels to be applied to those particular classes of transactions, account balances or disclosures. GST auditor can consider applying suitable benchmark (in terms of percentage) as a starting point in determining materiality (for e.g., sale invoice above 5% of total sales may be examined by GST auditor or materiality level can also be set GST rate wise in case entity is selling products which are sold at different GST rate slabs).
- Materiality level may change considering applicable law, regulations or financial reporting framework (for e.g., GST auditor will have to consider whether entity is following which accounting framework i.e., Indian GAAP or Ind AS). Certain financial impact under IND AS may be notional will have to be appropriately dealt with by GST auditor in its reconciliation statement.
- GST auditor should document materiality level considered for particular classes of transactions, account balances or disclosures and financial statements as a whole (for e.g., materiality level for examining inward supplies may be different than outward supplies).

Audit Sampling – SA 530

This auditing standard provides guidance on the means available to the auditor for selecting items for testing, of which audit sampling is one means. The GST auditor shall select items for the sample in such a way that each sampling unit in the population has a chance of selection. Audit sampling enables the auditor to obtain and evaluate audit evidence about some characteristic of the items selected in order to form or assist in forming a conclusion concerning the population from which the sample is drawn. Audit sampling can be applied using either non-statistical or statistical sampling approaches (Refer Para A4 of SA 530).

GST auditor may consider use of test of controls (i.e., checking and verifying internal control framework of entity) if GST auditor concludes that expected error based on his understanding of business and relevant controls is reasonably low. GST auditor may consider this approach in case of smaller entities with less complex operations or centralised decision controls. If auditor observes or expects high material misstatements, he will have to perform test of details (i.e., verifying and examining at document level in detail) on a larger sample size. GST auditor should consider combination of test of controls and test of details in his audit approach.

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

GST auditor shall determine whether the work of the internal audit function can be used for purposes of the audit by evaluating the following (refer Para 15 of SA 610 Revised):

- The extent to which the internal audit function's organisational status and relevant policies and procedures support the objectivity of the internal auditors.
- The level of competence of the internal audit function.
- Whether the internal audit function applies a systematic and disciplined approach, including quality control.

GST auditor planning to use internal auditors report to plan his audit programme should obtain understanding of the nature and extent of audit procedures performed by internal auditor, including evaluating whether:

- The work of the function had been properly planned, performed, supervised, reviewed and documented.
- Sufficient appropriate evidence had been obtained to enable the function to draw reasonable conclusions.
- Conclusions reached are appropriate in the circumstances and the reports prepared by the function are consistent with the results of the work performed (Para 23 of SA 610 Revised).

Conclusion

Auditing Standards will enable GST auditor to undertake audit in a systematic manner. GST auditor is expected to plan and perform engagement with professional skepticism, recognising that circumstances may exist that may cause the subject matter information to be materiality misstated. Considering GST auditor is required to verify that *"I hereby solemnly affirm and declare that the information given herein above is true and correct to the best of my knowledge and belief and nothing has been concealed therefrom"* in PART A of his certification, he is required to make critical assessment, with a questioning mind, of the validity of evidence obtained and is alert to evidence that contradicts or brings into question the reliability of documents or representations by the entity. GST auditor can use format of acceptance letter to be issued to entity as given under Technical Guide on Annual Return & GST audit issued by ICAI on 17th October 2018 (Refer Appendix 9 Part B) which clearly stipulates management's responsibility & GST auditor's responsibility and audit strategy that will be adopted by the GST Auditor.

[Source: Extracts from Framework for Assurance Engagements, Auditing Standards and various Guidance Notes issued by ICAI]

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Anything that brings spiritual, mental, or physical weakness, touch it not with the toes of your feet.

— *Swami Vivekananda*

CA Bimal Jain

Key Action Points for filing GST Annual Return by 31st December

In terms of Section 44(1) of the CGST Act, 2017 (**"the CGST Act"**), every registered person, other than an Input Service Distributor, a person paying tax under Section 51 (TDS deductor) or Section 52 (TCS collector), a casual taxable person and a non-resident taxable person, shall furnish an **Annual Return for every financial year** on or before the 31st day of December following the end of such financial year, electronically, in the form and manner prescribed. Hence, Annual Return for Financial Year 2017-18 is to be filed on or before December 31, 2018.

Considering the time period of only 2 months left for due date of Annual Return i.e., 31st December, this article deciphers on the key aspects of filing Annual Return in GST along with highlighting certain issues that needs immediate attention of the taxpayers and necessary actions on their part.

Form for filing Annual Return

Rule 80 of the CGST Rules, 2017 (**"the CGST Rules"**) prescribes that annual return as per Section 44(1) of the CGST Act shall be furnished electronically in **FORM GSTR-9 (for normal taxpayers)** and **Form GSTR-9A (for composition taxpayers)** through the common portal either directly or through a Facilitation Centre notified by the Commissioner.

In this regard, the Government *vide* Notification No. 39/2018 – Central Tax dated September 4, 2018 has notified the format of Annual Return Form GSTR-9 and Form GSTR-9A.

It may also be noted here that in addition to the annual return, every registered person whose aggregate turnover during a financial year exceeds INR 2 crore shall also get his accounts audited and furnish a copy of audited annual accounts and a reconciliation statement, duly certified, in FORM GSTR-9C as notified *vide* Notification No. 49/2018 – Central Tax dated September 13, 2018.

Broad contours of Form GSTR-9 and GSTR-9A

Broader framework of Form GSTR-9 and GSTR-9A and the information required therein is given as under for easy glance:

GSTR-9 (Annual Return for normal taxpayers)	
Parts	**Information required**
Pt. I	Basis Details
Pt. II	Details of Outward and Inward Supplies declared during the financial year
Pt. III	Details of ITC as declared in returns filed during the financial year
Pt. IV	Details of tax paid as declared in returns filed during the financial year
Pt. V	Particulars of transactions for the previous FY declared in returns of April to September of current FY or up to date of filing of annual return of previous FY whichever is earlier
Pt. VI	Other Information
	• Particulars of Demand and Refund
	• Information on supplies received from composition taxpayers, all deemed supplies from the principal to the job-worker under Section 143 [i.e., inputs and capital goods sent for job work, but not received back within prescribed time] and goods sent on approval basis
	• HSN wise summary of Outward and Inward supplies
	• Late fees payable and paid

GSTR-9A (Annual Return for composition taxpayers)	
Parts	**Information required**
Pt. I	Basis Details
Pt. II	Details of Outward and Inward Supplies declared during the financial year
Pt. III	Details of tax paid as declared in returns filed during the financial year
Pt. IV	Particulars of transactions for the previous FY declared in returns of April to September of current FY or up to date of filing of annual return of previous FY whichever is earlier
Pt. V	Other Information
	• Particulars of Demand and Refund
	• Details of credit reversed or availed.
	• Late fees payable and paid

Collating information of Form GSTR-9 from monthly returns filed earlier

Table 4A: Supplies made to unregistered person (B2C)
In Table 4A, taxpayer has to report supplies made to unregistered person and consumers, either inter-state or intra-state. The value of supply to be declared here shall be net of debit notes or credit notes issued in this regard. Transactions to be reported here can be picked up from Tables 5, 7, 9 and 10 of Form GSTR-1.

Table 4B: Supplies made to registered person (B2B)
In Table 4B, taxpayer has to report supply made to registered person. In B2B supply, details of debit and credit notes shall be mentioned separately. The data can be derived from Tables 4A and 4C of Form GSTR-1.

Table 4C: Zero rated supplies (export) on payment of tax (except supplies made to SEZ)
In Table 4C, taxpayer has to report details of exports on which IGST is paid. The same can be extracted from Table 6A of Form GSTR-1.

Table 4D: Supplies to SEZ on payment of tax
In Table 4D, taxpayer has to report supplies made to SEZ unit or SEZ developer on payment of IGST. This data can be derived from Table 6B of Form GSTR-1.

Table 4E: Deemed Exports
Deemed exports viz. supplies against EPCG, Advance Authorisation, supply of goods to EOU, supply of gold by a specified bank or PSU against Advance Authorisation, are notified in GST *vide* Notification No. 48/2017 – Central Tax dated October 18, 2017. In Table 4E, all the supplies treated as deemed exports are required to be reported separately. This data can be derived from Table 6C of Form GSTR-1.

Table 4F: Advances on which tax has been paid but invoice has not been issued
In Table 4F, taxpayer has to report all the advances received on which tax has been paid but not billed up to March 31, 2018. The data can be derived from Table 11A of Form GSTR-1 after considering adjustment of advances from Table 11B for which invoices have been issued during the financial year.

Table 4G: Inward Supplies on which tax is to be paid on reverse charge basis
In Table 4G, taxpayer has to report details of inward supplies on which tax under reverse charge has been paid under Section 9(3) and 9(4) of the CGST Act. While Section 9(4) of the CGST Act is exempted from October 13, 2017 till September 30, 2019, liability to pay tax under reverse charge is there under Section 9(3) of the CGST Act. Table 3.1(d) of Form GSTR-3B can be used for filling up these details.

Table 4I: Credit note issued in respect of transactions specified in (B) to (E) (-)
In Table 4I, all credit notes issued as per Section 34 of the CGST Act, in respect of supply made to registered person, export on payment of taxes, SEZ supplies on payment of taxes and deemed export are required to be reported here. The data can be extracted from Table 9B of Form GSTR-1.

Table 4J: Debit note issued in respect of transactions specified in (B) to (E) (+)
Table 4J, all debit notes issued as per Section 34 of the CGST Act, in respect of supply made to registered person, export on payment of taxes, SEZ supplies on payment of taxes and deemed export are required to be reported here. The data can be extracted from Table 9B of Form GSTR-1.

Tables 4K and 4L: Supplies/tax declared through Amendments
In Tables 4K and 4L, details of amendments made in B2B supplies, exports, supplies to SEZ and deemed exports are required to be reported here. The data can be pricked up from Tables 9A and 9C of Form GSTR-1.

Table 5A: Zero rated supply (export) without payment of tax
In Table 5A, aggregate value of exports (except supplies to SEZs) on which IGST has not been paid i.e., same is made under Bond or Letter of Undertaking, shall be declared here. The data can be picked up from Table 6A of GSTR-1.

Table 5B: Supply to SEZs without payment of tax
In Table 5B, aggregate value of supplies to SEZs on which tax has not been paid i.e., same is made under Bond or Letter of Undertaking shall be declared here. The data can be pricked up from Table 6B of Form GSTR-1.

Table 5C: Supplies on which tax is to be paid by the recipient on reverse charge basis

In Table 5C, outward supplies of taxpayer on which GST is required to be paid by the recipient of goods or services has to be reported. This data can be extracted from Table 4B of Form GSTR-1.

Table 6A: Total amount of ITC availed through FORM GSTR-3B (sum total of Table 4A of FORM GSTR-3B)

In Table 6A, the amount of ITC claimed in Table 4A of GSTR-3B will be auto populated. The data contained in Table 4A of GSTR-3B, deals with ITC availed in respect of the following:

1. Import of Goods
2. Import of Services
3. Inward Supplies liable to reverse charge
4. Inward Supplies from ISD
5. All other ITC

Table 6B: Inward supplies (other than imports and inward supplies liable to reverse charge but includes services received from SEZs)

In Table 6B, inward supplies of goods or services within India on which ITC has been availed during the period July 2017 to March 2018 need to be reported. This data can be picked up from Table 4(A)(5) of GSTR-3B. This shall not include ITC which was availed, reversed and then reclaimed in the ITC ledger. This is to be declared separately under Table 6H below.

Table 6C: Inward supplies received from unregistered persons liable to reverse charge (other than B above) on which tax is paid & ITC availed

In Table 6C, aggregate value of ITC availed on all inward supplies received from unregistered persons (other than import of services) on which tax is payable on reverse charge basis shall be declared here. Table 4(A)(3) of FORM GSTR-3B may be used for filling up these details.

Table 6D: Inward supplies received from registered persons liable to reverse charge (other than B above) on which tax is paid and ITC availed

Table 4(A)(3) of GSTR-3B may be used for filling up these details.

There may be situation where taxpayer has not maintained separate accounts for inward supplies from registered and unregistered person. Hence, proper segregation may be required.

Table 6E: Import of goods (including supplies from SEZs)

The data filed up in Table 4(A)(1) of GSTR-3B may be used for filing up these details.

Only IGST paid on import of goods can be availed as ITC. BCD and Social Welfare Surcharge cannot be availed as ITC.

Table 6F: Import of services (excluding inward supplies from SEZs)

The data filled up in Table 4(A)(2) of GSTR-3B may be used for filling up these details.

Table 6G: ISD received from Input Service Distributor ("ISD")

The data from Table 4(A)(4) of FORM GSTR-3B may be used for filling up these details.

The taxpayer must be in possession of invoice issued by ISD under Rule 54(1) of the CGST Rules. The amount of ineligible portion of ITC distributed by ISD should not be availed as ITC.

Table 6K, 6L: Transition Credits through TRAN-I (including revisions if any) and TRAN-II

In Tables 6K, 6L, the aggregate value of ITC availed by registered person through TRAN-I and TRAN-II. The credits availed through Form TRAN-1 and TRAN-2 would have been credited directly into the Electronic credit ledger of the registered person.

Table 7: Details of reversed and ineligible ITC as declared in returns filed during the financial year

Table 7A: As per Rule 37 – Section 16(2) – payment to supplier not made within 180 days.

Table 7B: As per Rule 39 – ISD apportioned is in negative because of credit note issued by ISD.

Table 7C: As per Rule 42 – Proportionate reversal of credit on common ITC and other than business purpose ITC.

Table 7D: As per Rule 43 – Proportionate reversal of credit on common capital goods.

Table 7E: As per Section 17(5) – Blocked Credits.

Table 7F: Reversal of TRAN-I – Ineligible credits reversed.

Table 7G: Reversal of TRAN-II – Ineligible credits reversed.

This data can be extracted from Table 4(B) of GSTR-3B.

Table 7H: Any ITC reversed through Form ITC-03 shall be declared here.

Table 10 – Supplies / tax declared through Amendments (+) (net of debit notes)

The debit notes issued from April, 2018 to September, 2018 which are issued for the transactions related to previous financial year and reported in the Tables 9A, 9B & 9C of GSTR-1 of April – September of current financial year has to be reported in this Table of the Annual Return.

Table 11 – Supplies / tax reduced through Amendments (-) (net of credit notes)

The credit notes issued from April, 2018 to September, 2018 which are issued for the transactions related to previous financial year and reported in Tables 9A, 9B & 9C of GSTR-1 of April – September of current financial year in the monthly returns has to be reported in this Table of the Annual Return.

Table 12 – Reversal of ITC availed during previous financial year

There can be cases where the inputs or services or capital goods on which the ITC has been availed in the previous financial year has to be reversed in returns filed for April – September of current financial year. Such details have to be reported in this Table of the Annual Return which can be filed from Table 4(B) of GSTR-3B.

Table 13 – ITC availed for the previous financial year

There can be cases where the ITC related to the previous financial year is claimed in the current financial year, all such amounts have to be reported in this Table of the Annual Return. For example final instalment of the goods are being received after the closure of the financial year but some of them have been already consumed in the previous financial years. Table 4(A) of Form GSTR-3B can be used.

Table 17 – HSN wise summary of Outward Supplies

The information for reporting can be derived from Table 12 of the GSTR-1 monthly return.

Immediate steps required by taxpayers in collating additional details/information for filing Form GSTR-9

One need to appreciate that Annual Return in GST is not just the compilation of details furnished in monthly returns. Rather, Form GSTR-9 is a comprehensive format of Annual Return which seeks many layers of additional information and details which, by far, the taxpayers are not collating in their monthly return Forms GSTR-3B and GSTR-1 and it is most likely that they might not be capturing such details in their records, otherwise also. Few of such key tables which requires working by the taxpayers on immediate basis are discussed as under:

Tables 5H, 5I: Credit Note and Debit Note issued in respect of transactions specified in A to F above

In Tables 5H and 5I, all the credit notes and debit notes issued in respect of supplies on which tax is not payable (like exempted, nil-rated, non-GST supply, zero-rated supply without payment of tax) as declared in returns need to be reported. This data can be extracted from Table 9B of GSTR-1. However, bifurcation of all these supplies will be a complex and time-consuming process.

Table 5J, 5K: Supplies declared or reduced through amendments

In Tables 5J, 5K, supplies declared or reduced through amendments need to be reported. The data related to amendments in zero rated supply without payment of tax or supply to SEZ without payment of tax can be picked up from Table 9A of GSTR-1. However, there is no Table in GSTR-1, where amendments to Nil-rated, exempted or Non-GST supply can be made.

Table 6: Bifurcation of ITC into inputs, input services and capital goods

Table 6 of Form GSTR-9 while capturing details of ITC availed as declared in returns filed during the financial year, also asks for details of such ITC on inward supplies bifurcated between credits availed on inputs, input services and capital goods which is not required in the present monthly return Form GSTR-3B. The assessees might not have maintained and/or recorded such data due to non-requirement in Form GSTR-3B. Further, since there is no difference in treatment of ITC on goods and services, such bifurcation of total ITC on inward supplies between credits availed on inputs, input services and capital goods, it is not likely to be maintained separately by the assessees.

Table 6H: Amount of ITC reclaimed (other than B above) under the provisions of the Act

In Table 6H, amount of ITC claimed, reversed and reclaimed by the taxpayer for the period July 2017 to March 2018 should be reported.

For example: As per Rule 37 of the CGST Rules, ITC claimed need to be reversed on account of non-payment to supplier within 180 days. Subsequently, the ITC can be availed at the time when payment is made.

Table 8: Other ITC related information

Table 8 of Form GSTR-9 ('Other ITC related information') requires reconciliation of ITC details filed by the tax payer in Form GSTR-3B with system generated Form GSTR-2A. But, it may happen that many taxpayers have availed credit in Form GSTR-3B based on invoices of suppliers which may or may not match with Form GSTR-2A which was not even available in initial period of GST introduction.

In Table 8A, the value of supplies along with amount of tax will be auto populated from Table 3 and Table 5 of Form GSTR-2A. While Table 3 relates to 'Inward supplies received from a registered person other than the supplies attracting reverse charge', Table 5 relates to 'Debit/Credit notes received during the current period'.

It may be noted that the ITC availed by the assessee as per Form GSTR-3B is already reflected in Table 6 of GSTR-9. Hence, difference between ITC availed in Form GSTR-3B *vis-à-vis* invoices uploaded by supplier and thus reflected in Form GSTR-2A, will be automatically calculated and reflected in Annual Return. Hence, proper reconciliation of ITC is required.

Table 8F: ITC available but ineligible (out of D)

In Table 8F, the taxpayer has to report that portion of ITC availed, which is ineligible to be taken as credit due to provisions of Section 17 of CGST Act read with Rule 39 and 42 of CGST Rules.

Section 17(5) of the CGST Act provides a list of goods or services on which ITC is not available. The taxpayer might have expense off such credit in his books of accounts. If this information is not available, collection of such data will be a tiresome task.

Table 9: Details of taxes paid as declared in returns filed during the financial year

Information required in this clause is of 'tax payable' and 'tax paid' (by cash or credit). Reference is given to Table 6.1 of GSTR 3B to collect information and include it here. Table 6.1 of GSTR 3B also contains 'tax payable' and 'tax paid'.

Accordingly, where taxable turnover reported in GSTR-1 and GSTR-3B are in agreement with each other, there would be no 'new' tax liability being identified for the first time in GSTR-9. However, where they are not in agreement, which is often the case, taxable turnover reported in GSTR-1 and that on which tax is actually discharged through GSTR 3B may not be in agreement.

The instructions given against Sl. No. 9Q provides that tax payable must flow from Table 9 along with taxes admitted against Table 10 and 11.

The amount of interest, late fees, penalty and others need to be filed up in Table 9 also.

Table 16 – Information on supplies received from composition taxpayers, deemed supply under Section 143 and goods sent on approval basis

In this table, the taxpayer has to disclose the information related to the input received from composition taxpayers, all deemed supplies from the principal to the job-worker under Section 143 [i.e. inputs and capital goods sent for job work, but not received back within prescribed time] along with the details of value of the goods sent on sale or approval basis during the previous financial year:

Inward Supplies from composition taxpayers: Data pertaining to same can be extracted from Table 5 of GSTR-3B. However, it will be complicated and tedious task, if data under Table 5 of GSTR-3B has not been filled up.

Deemed Supply under Section 143: These details can be obtained from Form GSTR ITC-04 and delivery challan.

Goods sent on approval basis but not returned: These details can be verified from stock register maintained by the company capturing details of date of receipt and date of return.

Table 18: HSN wise summary of inward supplies

Table 18 of Form GSTR-9 requires the details of HSN wise summary of inward supplies received by the taxpayer. It may be noted that neither of the present return forms viz. Form GSTR-3B and GSTR-1 capture such details. Only Form GSTR-1 requires supplier to provide HSN wise summary of outward supplies. It is most unlikely that the system of taxpayers maintains records of HSN wise of inward supply data. The taxpayer might not have maintained such data due to non-requirement in Form GSTR-3B. Further, small suppliers having aggregate turnover upto INR 1.5 crore are not even required to mention HSN on their invoices. In such cases, it will be herculean task for the recipients of such suppliers to determine HSN of their inward supplies for furnishing in Form GSTR-9.

Points for immediate attention and/or clarification from the Government:

Table 5: Clarity on meaning of terms 'Exempted', 'NIL Rated', 'Non-GST supply'

Parts D, E and F of Table 5 i.e. 'Details of outward supplies on which tax is not payable as declared in returns filed during the FY' requires separate disclosure as to the following:

Part of Table 5 of Form GSTR-9	Particulars
Part D	Exempted outward supply
Part E	Nil-Rated outward supply
Part F	Non-GST outward supply

Following are the points of clarification required for contents of Table 5:

- Exempt supplies already include Nil-rated supplies – Definition of 'exempt supply' under Section 2(47) of the CGST Act, is given as under:

  > *"exempt supply" means supply of any goods or services or both which attracts nil rate of tax or which may be wholly exempt from tax under section 11, or under section 6 of the Integrated Goods and Services Tax Act, and includes non-taxable supply"*

  Thus, when definition of exempt supply itself includes Nil rated supplies, separate mention of the same under Part E above will add to confusions.

- Clarity on meaning of non-GST supply – As seen supra that definition of exempt supply includes non-taxable supply i.e. a supply of goods or services or both which is not leviable to tax under this Act [Section 2(78) of the CGST Act], hence, scope of non-GST supplies is not understood. This confusion persists in current format of GSTR-3B as well which requires separate reporting of non-GST outward supplies apart from exempted outward supply, which includes non-taxable supplies, Nil rated supplies and exempted supply. Thus, clarity on items included in non-GST supplies is required.

Late fee/ notice on failure to furnish Annual Return

As per Section 47(2) of the CGST Act, any registered person who fails to furnish the return required under Section 44 (i.e., Annual Return) by the due date, shall be liable to pay a late fee of ₹ 200 per day of delay (₹ 100 for CGST & ₹ 100 under SGST/UTGST), subject to a maximum amount of (0.25% CGST + 0.25% SGST/UTGST) of the turnover in the State or Union Territory.

Further, Section 46 of the CGST Act read with Rule 68 of the CGST Rules states that a notice in Form GSTR-3A shall be issued, electronically, to a registered person who fails to furnish return under Section 44, requiring him to furnish such return within fifteen days.

DISCLAIMER: The views expressed are strictly of the author and A2Z Taxcorp LLP. The contents of this article are solely for informational purpose. It does not constitute professional advice or recommendation of firm. Neither the author nor firm and its affiliates accepts any liabilities for any loss or damage of any kind arising out of any information in this article nor for any actions taken in reliance thereon.

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> Desire, ignorance, and inequality — this is the trinity of bondage.
>
> — *Swami Vivekananda*

CA Chirag B. Mehta

Reconciliation Statement Form 9C
[Parts I to III of Form 9C]

GST Landmark Tax Reform

The Goods and Services Tax ('GST') is a landmark indirect tax reform in the history of our nation. It is a comprehensive destination based consumption tax that is levied on all supplies of taxable goods or services consumed domestically within the country. The anchor point or the taxable event for the charge of GST to trigger is "Supply". GST is a form of VAT where tax that is levied at each stage of supply is to be paid by the tax payer and the taxes paid on eligible inputs are available as credit. Simply put the GST payable by a tax payer is to be determined by deducting the eligible input tax credits from the gross tax payable.

Necessity of an External Audit

GST is based on the principles of self-assessment under which the tax payer himself determines his tax liability on periodic basis and furnishes details in his periodic returns. In other words whatever the tax payer submits in his periodic returns is accepted as correct without asking him to substantiate his submissions.

However, in order to protect the exchequer from revenue leakage due to various tax frauds and evasion it is essential to have an appropriate mechanism in place to verify the correctness of tax determined and paid by the tax payer in his periodic returns and whether the same is in conformity with the provisions of the Act and the Rules framed thereunder. This objective is achieved through the process of audit. One of the audits that the law envisages is an external audit to be conducted by a Chartered Accountant or Cost Accountant.

Statutory Provisions

The statutory provisions relating to external audit and certification under the GST law are contained in section 35(5) of the CGST Act, 2017 read with Rule 80(3) which casts a liability on every registered person whose turnover exceeds the prescribed threshold of ₹ 2 crore during the financial year to get his accounts audited by a Chartered Accountant or a Cost Accountant and also submit a reconciliation statement reconciling the turnover appearing in the Financial Statements with the turnover declared in the returns. The relevant statutory provisions are discussed in detail in another article comprised in this issue.

Form and Manner

The Government recently notified the most awaited forms, the form for filing the annual return and the reconciliation statement (also referred to as the GST Audit report). This article intends to examine each clause the reconciliation statement in Form GSTR-9C and the interplay between this form and the annual return in Form GSTR-9. While annual return consolidates details furnished by the tax payer, the reconciliation statement involves reconciliation of the financial turnover with the GST turnover as stated in Form GSTR-9, that is the annual return

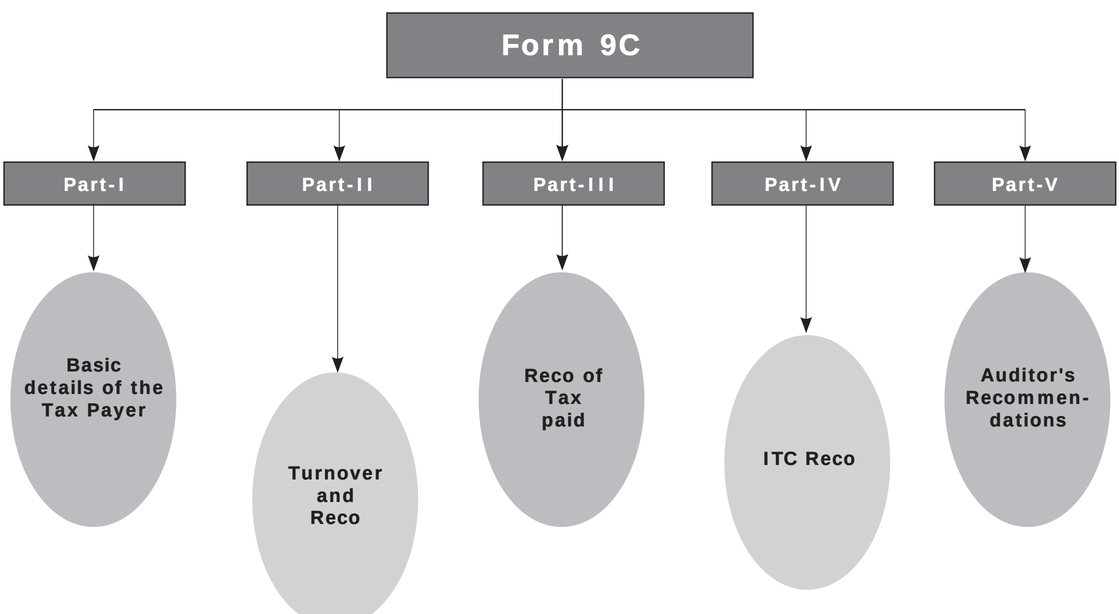
Form GSTR-9C comprises of two parts:

1. The statement of reconciliation that aims at reconciling the turnover, Input Tax Credits and the tax payments as reported in the Annual return (Form GSTR-9) with the financial turnover/ books of account **[Part-A]**;

2. Formal certification by the auditor along with audit observations in respect of non-reconciliation **[Part-B]**.

Broad Structure of Form GSTR-9C [Part-A]

To begin with Form GSTR-9C is divided into 5 parts. Although it runs into mere 5 pages the level of details that is required to be furnished would mean enormous data collation and efforts to summarise what is required in these five pages of the form. The broad design of the form is as under:



This article deals with Parts I to III that relate to outward supplies and tax payable thereon. The next article in the same issue of the journal shall provide a clause by clause analysis of the remaining parts of the form.

Reconciliation Tables in Form-9C

Before examining each clause of Part-I thru Part-III let us understand the broad parts and tables of the form:

Part	Table	Details to be furnished
I	1-4	Basic details of the tax payer
II	5	Reconciliation of Gross Turnover
	6	Analysis of non-reconciliation of gross turnover
	7	Reconciliation of Taxable Turnover
	8	Analysis of non-reconciliation of taxable turnover
III	9	Rate-wise reconciliation of taxable value and tax payable with the taxes paid and reported in the annual return
	10	Analysis of the unreconciled payment amounts
	11	Additional amount payable on account of unreconciled differences in tax paid
IV	12-13	Reconciliation of Net Input Tax Credit
	14-16	Expense wise reconciliation of Input Tax Credit
V		Auditor's recommendation of additional liability due to non-reconciliation

Parts II & III: Reconciliation of turnover and taxes

Part II of the form aims at a two-level turnover reconciliation. In Table 5 the gross turnover level reconciliation is to be drawn and in Table 6 reconciliation of taxable turnover is to be drawn. Part III involves reconciliation of taxes payable with the taxes paid by the tax payer.

Before we move forward it is interesting to note the head note of Part 2. The same is reproduced here under:

*"Reconciliation of turnover **declared** in audited annual financial statements with turnover **declared** in Annual return"*

On reading the above heading of Part II it is not rocket science to understand that these are two end points and what is expected of the auditor (who certifies the reconciliations) is to just travel the journey between these two points. It is also obvious that the auditor who is certifying the reconciliation cannot change anything which is already declared in the audited financial statements and the annual return. Hence, the focus of the auditor should be to concentrate only on correctness of the contents between the start point and the end point

Analysis of each clause of reconciliation tables comprised in Part II & Part III are provided in a tabular form hereunder:

<table>
<tr><td>5</td><td colspan="2">Reconciliation of turnover declared in audited Financial Statements with turnover declared in Annual Return [GSTR-9]</td></tr>
<tr><td>5A</td><td>Turnover as per audited financial statements</td><td>
"Turnover as per audited financial statements" is the starting point of the journey of reconciliation. In view of the author the start point of the reconciliation should ideally be an amount that is easily available in financial statements or State level trial balance, as the case may be
The instructions to the form make it clear that in case of persons operating from multiple States/ UT's (holding multiple GSTIN's) the turnover of each such State/ UT shall have to be derived by the tax payer. In such a case the start point (at 5A) may be derived from:
1. State/ UT level trial balance
2. State/ UT level Profit and Loss account in cases where separate Profit and Loss account is drawn
3. Tax Invoice register for the State/ UT (outward supplies)
4. Sales Ledger of the State/ UT
Pointers to be considered
1. <u>Incomes other than Revenue from operations</u>:
There may be income streams (other than revenue from sales) which do not form part of the top line. It is suggested that other income streams that may or may not be taxable on outward supplies but not reported at the top line should be made a part of reconciliation items in subsequent rows. In view of the author such items may be reported as other adjustments (at clause 5O) instead of reporting it at clause 5A. Such items may broadly include the following:
a. Sale of Assets (where only profit or loss on sale is routed through Profit and Loss Account)
b. Sale of securities
c. Expense recoveries from employees which may have been credited to expense ledger
d. Reimbursements claims from customers/ clients which have been credited to expense ledgers
e. Notice pay recovery
2. <u>Industry specific challenges</u>
There may be cases where the GST turnover and the financial turnover may have no connection. Builders following project completion method for accounting of revenue and professionals who maintain books on cash basis are a few examples that can be cited. In such cases it is the author's view that turnover reported at 5A may be picked up from the Tax Invoice/ Sale Register. However, suitable disclosures/ observations may be made for the same.
</td></tr>
</table>

		3. <u>**Case where multiple auditors are appointed for different States/ UT's**</u> It is quite possible that the tax payer may have separate auditors for each State who shall be certifying Form GSTR-9C. In such cases it would be prudent for the auditor of a State to obtain a certificate from the statutory auditor and in cases where this is not possible suitable Management Representation reconciling State wise financial turnover with the turnover reported in Financial Statements may be obtained. **4.** <u>**Effect of Credit notes**</u> It is possible that the revenue reported in annual audited accounts is after considering the effect of credit notes. In view of the author where revenue reported in financial statements is net of credit notes the value to be furnished in clause 5A should also be net of credit notes. To the extent of credit notes that are not allowable under the GST law the same would be added back at clause 5J of the same table. It may be noted that turnover declared in the annual return (Form GSTR-9) is net of credit notes. However, this would not affect the manner of reporting in Form GSTR-9C. **5.** <u>**Taxes collected and included in the turnover**</u> Taxes collected on outward supplies are recorded in the balance sheet as a liability and hence should not affect the reconciliation. However in cases where the turnover reported in financial statements is inclusive of taxes on outward supplies the same should be included in clause 5A and the taxes should be reduced at clause 5O (Other adjustments).
5 B / 5H	Opening and closing unbilled revenue **[+/ -]**	Recognition of revenue is based on the prescribed accounting standards. Accordingly, there is a possibility that an item of revenue may be recognised in the books of account by way of an accrual but for which an invoice is not issued at the time when such accrual is done. Accordingly, there may be situations where revenue has been accrued based on accounting principles but the time of supply in terms of sections 12 & 13 of the CGST Act has not arisen. Such items of revenue are described as "Unbilled Revenue". Accordingly we may come across two situations: 1. **Opening Unbilled Revenue:** The unbilled revenue as at the beginning of the financial year shall be added at clause 5B; 2. **Closing Unbilled Revenue:** The unbilled revenue at the end of the financial year shall be reduced at clause 5H.

SS-II-44

<table>
<tr><td></td><td></td><td>
Pointers to be considered:
1. Unbilled revenue as at what date
Due to the mid-year introduction of GST the question that arises is whether unbilled revenue as at 1-4-2017 or as at 1-7-2017 should be furnished at clause 5B. In view of the author ideally unbilled revenue as at 1-4-2017 should be furnished at clause 5B since it would be reflected in audited financial statements for the year ended 31-3-2017.
The instructions to Form GSTR-9C unbilled revenue recorded in the books of account in previous financial year and carried forward in current financial year shall be recorded here. It is possible that such unbilled revenue may be partially or fully not liable for payment of GST. The difference between closing and opening unbilled revenue accordingly could result in following scenarios:

To the extent the difference represents exempted outward supply the same shall be considered at clause 7A of the form;
To the extent the difference represents turnover achieved during April-June 2017 the same shall get reduced at clause 5G;
To the extent the difference represents a reversal in the amount accrued the amount may be considered as a reduction at clause 5O;
To the extent the difference represents a taxable supply between July-March 2018 the same would have either be included in turnover in Form GSTR-9 (annual return) or would remain an unreconciled item for which reasons would have to be given in Table 6.

2. <u>Challenges in certain cases</u>
There may be challenges in identifying State-wise unbilled revenue specially in cases of tax payers who were under centralised registration under the Service Tax law.
</td></tr>
<tr><td>5 C / 5I</td><td>Opening and Closing unadjusted advances

[-/ +]</td><td>
The point of taxation under GST law is guided by provisions relating to time of supply contained in section 12 and 13 of the CGST Act.
Adjustments on account of advances are exactly the reverse of the adjustments relating to unbilled revenue (as discussed above).
<u>Important dates in this regards</u>
Under the GST law the liability to pay tax would arise on earlier of receipt of consideration or raising of the invoice. In this regard the following dates need to be noted:
</td></tr>
</table>

Period	**Taxability of Advances**		
	Goods [Aggregate T/o </= ₹ 1.5 crore]	**Goods** [other cases]	**Services**
1-7-2017 to 12-10-2017	√	√	√
13-10-2017[1] to 14-11-2017	NA	√	√
15-11-2017[2] onwards	NA	NA	√

Accordingly, we may come across two situations:

1. **Opening Unadjusted Advances:** The unadjusted advances as at the beginning of the financial year shall be reduced from the financial turnover to the extent taxes have been discharged on receipt of advance.
2. **Closing Unadjusted Advances:** The unadjusted advances as at the end of the financial year shall be added here.

Pointers to be considered

1. **<u>Table 11 of GSTR-1:</u>** Arithmetically the closing unadjusted advances can be arrived at by adding up all advances on which GST was paid as per Table 11 of GSTR-1 and reducing the adjustments made thereto in the same table during the financial year.
2. **Opening Advances as at what date to be considered**
   Due to the mid-year introduction of GST the question that arises is whether unbilled revenue as at 1-4-2017 should be considered at clause 5I. In the author's view such advances would get reported as turnover during April-June 2017 and hence for the year 2017-18 one may not report opening advances at all.

5D Deemed Supply under Schedule I **[+]**

Aggregate value of deemed supplies enumerated in Schedule I of the Act need to be furnished here. The instructions state that if the turnover in annual financial statements already include the turnover of deemed supplies then it need not be included here.

<u>Deemed supplies under Schedule-I include the following:</u>

1. Permanent transfer of disposal of business assets where ITC has been availed;
2. Supplies between related parties/ distinct persons without consideration,
3. Supply of goods between principle to/ from agent
4. Import of services by a taxable person from a related person or from any of his other establishment outside India

1 Notification No. 40/2017-Central Tax, dated 13-10-2017

2 Notification No. 66/2017-Central Tax, dated 15-11-2017

<table>
<tr><td></td><td></td><td>Pointers to be considered
1. In respect of permanent transfer/ disposal of assets information may be obtained from working papers for GSTR-1 and GSTR-3B. This information can also be extracted from Fixed Asset schedule and notes to accounts;
2. Supplies like stock transfers would get covered under this clause. State level accounts or trial balance generally would include these stock transfers and hence shall not be furnished at 5D;
3. Details of stock transfer of services that need to be furnished at 5D may be obtained from monthly tax workings and policies adopted by the auditee For example while auditing the central location of a tax payer it would have charged for various support services provided to units located in other States.
4. In case of supplies between principal and agent details can be obtained from monthly working papers and tax invoice registers.
5. Details import of services from establishment or associated enterprise located outside India can be obtained from monthly tax workings and policies adopted by the auditee.
6. List of related parties can be available from notes to accounts in case of corporate tax payers and tax audit report in Form 3CD. A management representation in this regards may be obtained.</td></tr>
<tr><td>5E</td><td>Credit Notes issued after end of the financial year but reflected in annual return
[+]</td><td>In terms of provisions of section 34 of the CGST Act credit notes can be issued only by a supplier subject to certain conditions prescribed in this section.
Let us first examine what information that clause 5E contemplates.
1. It requires reporting of credit notes;
2. In respect of any supply accounted in the current financial year;
3. Such credit note is issued after 31-3-2018, that is, it is dated on or after 1-4-2018 but before prescribed date, and;
4. Such a post year-end credit note has been considered in the Annual return.
The clause requires such credit notes to be added to the amount reported at clause 5A. Needless to state that where the credit note is issued after end of the year such amount is already included in the turnover reported at clause 5A. In such a case there is no need to add such value at clause 5E. In view of the author it is difficult to comprehend a situation where a credit note dated post 31-3-2018 has been considered in GSTR-9.</td></tr>
</table>

		Another possible view is that the tax payer has made provision for credit notes pertaining to invoices issued during 2017-18. Effect of the provision would be by way of debit to the turnover in the financial statements. Only in such cases such provision for credit note would be added back to the 5A turnover since the underlying credit note has been issued in subsequent financial year. For example an invoice for supply of goods is issued during March 2018 for ₹ 1,00,000 and GST ₹ 18,000. A part of the total quantity is returned by the customer in April 2018. In the instant case the transaction requiring the issue of credit note has occurred in 2018-19. The turnover as per financial statements would include ₹ 1,00,000. Accordingly, there is no requirement to report this as an addition at clause 5E.
5J	Credit Notes accounted for in audited financial statements but not permissible under GST **[-]**	Only credit notes that are issued in line with the conditions provided in section 34 are admissible for claiming reduction in output tax. It is possible that due to commercial reasons the tax payer would have issued credit notes which do not comply with the conditions stated in section 34 as referred above. In other words such credit notes would not be allowed as a reduction from outward supply and the tax attributable thereto. The above would lead to a difference between the financial turnover and the turnover reported in returns. Clause 5J contemplates reporting of such credit notes that are recorded in the financial turnover for 2017-18. Ideally the value of such credit notes should be added to the financial turnover as the same is not permissible in 5F. However, Form GSTR-9C contemplates a reduction at this clause. In such a situation the auditor may not reduce it at clause 5J but instead add it at clause 5O with proper reasoning.
5F	Trade discounts accounted for in audited Annual Financial Statements but not permissible under GST [+]	In terms of section 15(3) of the CGST Act post supply trade discounts are allowed as a reduction from output tax only if the conditions provided in the said section are fulfilled. It is quite possible that a tax payer would have offered such trade discounts but may not be in a position to comply with the conditions laid down in the above provision. For example annual target incentives (in the nature of discounts). In such cases such amount would have been debited to sales ledger in the books of accounts (and thereby reducing the financial turnover) and hence need to be added to the turnover reported in the annual financial statements so as to arrive at the GST turnover. It may be noted that the value of any pre-supply trade discounts that are stated on the face of the Tax Invoice need not be furnished at clause 5F. Similarly, any permissible discounts given post supply are also not be furnished here.

<table>
<tr><td>5G</td><td>Turnover during the period April-Jun 2017

[-]</td><td>This adjustment is required due to the midyear roll out of GST. Accordingly, turnover for April-June 2017 as per financial statements need to be reduced at this clause. In view of the author only revenue that is billed during this period shall be reported here and cannot include any revenue accruals/ provisions made during this period.</td></tr>
<tr><td>5K</td><td>Adjustments on account of supply of goods by SEZ units to DTA units

[-]</td><td>As per section 30 of the SEZ Act, 2005 supplies from units in SEZ to DTA shall be liable to duties of Customs. Further, Section 53 of the Act provides that the SEZ shall be deemed to be a territory outside India. Consequently a unit in the DTA is required to file a Bill of Entry to clear goods from the SEZ area. Such procurements are considered as import of goods from outside India. On the other hand the SEZ unit shall not record such transactions in Table 4A of GSTR-1. It may be pertinent to note that this clause covers only cases of supply of "goods" by SEZ units and not supply of "services" by such units.

Typically details at clause 5K shall be furnished by a unit in the SEZ.</td></tr>
<tr><td>5L</td><td>Turnover for the period under composition

[-]</td><td>The composition scheme under section 10 is subject to a threshold. Once the threshold is crossed the person ceases to be a composition taxable person. There may be cases where a person who has initially opted for composition has switched over to regular tax payer under section 9 of the Act.

This clause requires reporting of the turnover under composition. The composition turnover would be a part of annual return in Form 9A and hence excluded from the reconciliation.

No disclosure is asked in Form 9C for composition turnover reported in Form 9A and payment of tax thereof. The Form 9C is a reconciliation of turnover as per financial statements and turnover as per annual return in Form GSTR-9 only.</td></tr>
<tr><td>5M</td><td>Adjustments in turnover under section 15 and rules made there under

[+/-]</td><td>Value of supply means the value on which tax is payable under the GST Law. As a general rule the transaction value is the value on which tax becomes payable in terms of section 15 of the CGST Act. The transaction value further requires certain inclusions.

However, in certain cases the value recorded in the books of accounts and the value adopted and reported in the GST returns may differ for following reasons:

1. Price is not the sole consideration for the supply and hence valuation is done as per the applicable valuation rules,

2. The supplier and recipient are related parties and hence valuation is done as per the applicable valuation rules,

3. The valuation is prescribed in case of notified supplies under section 15(5) of the CGST Act [for e.g. land deduction in case of builders],</td></tr>
</table>

		4. Optional valuation provided in certain cases [For e.g. money changers, air travel agents, sale of vehicles by second hand car dealers]. In such cases the financial turnover may defer and hence a suitable adjustment needs to be furnished at clause 5M.
5N	Adjustments on account of foreign exchange fluctuation **[+/-]**	Difference in the financial turnover due to foreign exchange fluctuation shall be reported here. Value of taxable goods exported is determined under section 14 of the Customs Act at CBIC notified rates of exchange. It is quite possible that the financial turnover reported by adopting a different rate of exchange. This clause requires a suitable adjustment so as to get the financial turnover in line with the turnover reported in the GST returns. Needless to state that the amount of foreign exchange gain or loss as per financial statements is not required to be shown here. Only difference between value as per financial statement and as per GST invoice is to be furnished here.
5O	Adjustments in turnover due to other reasons **[+/-]**	The above listed elements of reconciliation are not exhaustive. This clause seems to be a residuary clause and in view of the author one should report only technical reasons for reconciliation at this clause. For example sale of assets would get reported in this clause since the same shall not form part of revenue from sales reported in financial statements. However, if the tax payer has through oversight missed reporting value of an outward supply the same should not be reported here but the same should represent an un-reconciled transaction which should be reported at Table 6 and liability shall be quantified at Table 11 of the form.
5P	Annual turnover after adjustments	The amount at 5P shall be auto populated figure which is arrived at by adjusting the financial turnover by giving effect to adjustments reported at clauses 5B to 5O.
5Q	Turnover as declared in Annual Return in Form GSTR-9	This clause requires the disclosure of turnover reported in the annual return (Form GSTR-9). The turnover to be specified at 5Q shall be the sum total of value reported in following clauses of GSTR-9.

Table of GSTR-9	Particulars
5N	Total turnover including advances but excluding inward supplies on which tax is payable under RCM reported at Clause 4G of GSTR-9
10	Amendments/ Debit notes pertaining to FY 2017-18 reported in 2018-19 (Apr-Sep)
11	Amendments/ Credit notes pertaining to FY 2017-18 reported in 2018-19 (Apr-Sep)

<table>
<tr><td>5R</td><td>Unreconciled turnover</td><td>This shall be denoted as AT1 and shall be the difference between turnover at 5P and the turnover as per GSTR-9 as reported in 5Q</td></tr>
<tr><td>6</td><td colspan="2">Reasons for unreconciled difference in annual gross turnover</td></tr>
<tr><td></td><td colspan="2">On comparison of values at clauses 5P and 5Q we arrive at the unreconciled difference between adjusted gross turnover and the turnover that has been reported by the tax payer in his annual return (5R). On a comparison two situations may arise
• Turnover at 5P (as a result of reconciliation) is higher than the turnover at 5Q (i.e. Annual return];
• Turnover at 5P is lower than the turnover at 5Q
The shortfall/ excess reported at 5R may be a combination of various factors including under/ over reporting of taxable as well non-taxable transactions. Table 6 requires furnishing of reasons for the non-reconciliation.
On perusal of the form it appears that at table 6 the auditor needs to furnish only reasons for the non-reconciliation. For example it is possible that through oversight the tax payer has not reported commission income in GSTR-1 & 3B and hence the same is not reported in the annual return. However, the same shall get furnished at clause 5O of Form GSTR-9C and result in non-reconciliation when compared to the turnover reported in GSTR-9. Suggestive reason that can be provided in Table 6 may read as “Commission income not considered in annual return”.</td></tr>
<tr><td>7</td><td colspan="2">Reconciliation of taxable turnover</td></tr>
<tr><td>7A</td><td>Annual Turnover after adjustments</td><td>The annual turnover as per clause 5P shall auto populate at clause 7A which becomes the start point of reconciliation of taxable turnover with the taxable turnover reported in the annual return [Form GSTR-9].</td></tr>
<tr><td>7B</td><td>Value of exempted, NIL rated, Non-GST supplies and No supply
[-]</td><td>Value (Net of Credit/ Debit notes) of certain outward supplies (not having tax implication) has to be furnished at this clause. This would include the following:
1. Supplies that are exempted [For e.g., healthcare services, education, etc.];
2. NIL rated supplies;
3. Non-GST supplies [For e.g., alcoholic liquor]
4. No-Supply which would typically include items specified in Schedule III [For e.g., sale of land]</td></tr>
<tr><td>7C</td><td>Zero Rated supply without payment of tax
[-]</td><td>This clause requires furnishing of values of zero rated supplies without payment of tax as included in the financial statements. In other words zero rated supplies under a letter of undertaking [“LUT”] shall be furnished here. This would include exports and supplies made to SEZ units as provided in section 16 of the IGST Act.</td></tr>
<tr><td>7D</td><td>Supplies on which tax is to be paid under Reverse Charge
[-]</td><td>Details of Outward Supplies by the tax payer (whose Form 9C is being filled) on which recipient (his customer) is liable to pay RCM have to be furnished here. For example in case the Form 9C is being filed for a registered GTA his turnover from GTA operations (where his customer is liable to pay GST under RCM) shall be furnished at this clause.</td></tr>
</table>

<table>
<tr><td>7E</td><td>Net Taxable Turnover</td><td>This would be auto calculated by reducing the amounts furnished at 7B, 7C and 7D from the annual turnover appearing at 7A.</td></tr>
<tr><td>7F</td><td>Taxable Turnover as per GSTR-9</td><td>This clause requires the disclosure of taxable turnover reported in the annual return (Form GSTR-9). As per the instructions appearing in Form 9C the amount to be specified at clause 7F shall be the amount reported at 4N of GSTR-9. The amount at 4N of GSTR-9 includes inward supplies liable for payment of GST under RCM. Further, the instructions do not consider the period adjustments that are reported in Table 10 and 11 of the annual return (Form GSTR-9). In view of the author the amount at 7F should be derived as under:
<table>
<tr><td>7F</td><td>=</td><td>4N of GSTR-9</td><td>(-)</td><td>4G of GSTR-9</td><td>+</td><td>10 of GSTR-9</td><td>(-)</td><td>10 of GSTR-9</td></tr>
</table>
</td></tr>
<tr><td>7G</td><td>Unreconciled Taxable Turnover</td><td>On comparison of taxable turnover at clause 7E with the taxable turnover reported in the Annual return (GSTR-9) we arrive at the un-reconciled difference in the taxable turnover [7E – 7F].</td></tr>
<tr><td>8</td><td colspan="2">Reasons for unreconciled difference in annual gross turnover</td></tr>
<tr><td colspan="3">This table of Form 9C requires providing reasons for the non-reconciliation in the taxable turnover as appearing at 7G above.</td></tr>
<tr><td>9</td><td colspan="2">Reconciliation of rate wise liability and amount payable thereon</td></tr>
<tr><td>9 A - 9K</td><td>Rate wise taxable value and tax payable</td><td>These clauses require furnishing of taxable value and tax payable (rate-wise) for:
1. <u>Outward Supplies</u>
The values to be furnished in this clause are with respect to taxable outward supplies that can be derived by computing month wise of taxable value (rate wise) as per books of accounts. The exercise for details to be furnished in this table should run parrallely with computing details to be furnished at Table 5 of Form GSTR-9C.
2. <u>Inward Supplies where tax is payable under RCM</u>
The values do be furnished in this clause are with respect to RCM Inward supplies that can be derived by a month wise analysis of ledgers in books of account. This exercise can be done simultaneously with the analysis of ITC to be furnished at Table 14 of Form GSTR-9C.
The rate wise details appearing in these clauses should be as per books of account after giving effect to credit notes, debit notes and amendments. Needless to state that the items of non-reconciliation of taxable turnover also would get included here while calculating the tax payable. In other words the sum total of taxable value reported in Table 9 (clauses 9A to 9K) should agree with the value of taxable turnover reported in clause 7E.</td></tr>
<tr><td>9 L - 9O</td><td>Interest, late fees, penalty</td><td>Interest payable under section 50 of the CGST Act, late fees and penalty needs to be furnished here.</td></tr>
</table>

9Q	Total amount paid and declared as per GSTR-9	The amount at clause 9Q shall be auto populated from Table 9 (paid column) and Table 14 of the Annual Return (GSTR-9). In other words it shall include the following 1. Amount paid in cash as per GSTR-3B (for 2017-18) and reported at column 3 of clause 9 of GSTR-9 2. Amount paid by utilisation of ITC as per Form GSTR-3B (for 2017-18) and reported at column Nos. 4-7 of Table 9 of GSTR-9 3. Amount paid in cash or by utilisation of ITC as per Form GSTR-3B and reported as paid in Table 14 of GSTR-9 (i.e. period adjustment of transactions reported in Apr-Sept. of subsequent year)
9R	Unreconciled payment amount	The unreconciled payment amount shall appear at clause 9R which shall be the difference between amount payable (clause 9P) and amount paid (clause 9Q)
10	Reasons for unreconciled payment amount	In this table the reasons for the unreconciled liabilities needs to be furnished. Continuing with our example of commission income at Table 6 above the reason would have to be repeated again at this clause.
11	Additional amount payable due to non-reconciliation	The rate wise analysis of tax payable and the amount paid would finally be concluded with the auditor furnishing rate-wise details of additional amounts payable. Few issues in this area are as under: 1. The heading above column 3-6 of Table 11 states that the additional amounts are to be paid in cash. As per the recent update from GSTN these amounts shall be paid through DRC-03; 2. The tax payable at Table 9 above is classified rate wise while the amount paid in GSTR-3B is not classified rate wise. Hence, it may be ideal for quantifying the items of non-reconciliation reported at clause 8 and the unpaid RCM liabilities; 3. It is possible that the tax payer would choose to declare the tax payable through DRC-03 and pay the tax through cash ledger. In such cases no additional amount shall be reported as payable at Table 11.

Approach for preparation of the reconciliation

On perusing the details required to be furnished in Table 5 to Table 11 it is evident that the exercise is bound to involve a systematic and a mammoth exercise of collation of data as per books of account. Data for each of the clauses in various Tables cannot be derived individually but should be worked out in a manner so that values to be furnished in each clause can be arrived at from a consolidated exercise. A suggestive approach could be to compare data as under:

1. Comparison of data furnished in Form GSTR-1 with details as per books of accounts,
2. Comparison of data furnished in Form GSTR-3B with the details as per books of account,

3. Reconciliation of reasons for the difference arrived after above comparisons,

4. Examining the action that the tax payer has taken for the month wise differences in the above comparisons during the year 2017-18 and during 2018-19 (up to Sept-2018).

Recent update from GSTN on filing process

On 24-10-2018 the GSTN has issued a guidance note on the filing process of annual return and reconciliation statement. Following features are highlighted in the above document issued by the GSTN:

1. Based on GSTR-1 and GSTR-3B filed during the year, facility to download system computed GSTR-9 as PDF format shall be made available;

2. Values in various tables of GSTR-9 shall be auto-populated to the extent possible;

3. Form GSTR-9 could be filed either online or using the offline utility;

4. The reconciliation statement in Form GSTR-9C shall be prepared using offline excel tool;

5. Using the offline utility the auditor shall generate json file attaching his/ her DSC which shall be handed over to the auditee for uploading on the common portal;

6. The reconciliation statement in Form GSTR-9C can be filed only after furnishing the annual return in Form GSTR-9;

7. Other documents like Profit and Loss Account, Balance Sheet shall be uploaded by the tax payer on the common portal.

The balance parts of Form GSTR-9C are analysed in a separate article of this issue of the journal

Note: The above compilation of Part I to Part III of the article intends to educate the reader with the details that need to be furnished in each clause of these parts. Due to space constraints the author has not elaborated on the technical aspect of the reconciliation.

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Our duty is to encourage everyone in his struggle to live up to his own highest idea, and strive at the same time to make the ideal as near as possible to the Truth.

— *Swami Vivekananda*

CA Vasant Bhat

Reconciliation Statement Form 9C

[Parts IV & V of Form 9C]

Part IV.: Sl. No. 12 – Reconciliation of Net Input Tax Credit (ITC)

In this part of the reconciliation statement, reconciliation of ITC after considering the reversals and other adjustments shall be made. ITC availed as per the audited annual financial statement/books of account shall be reconciled with ITC as declared in the annual return. In case of entities having GST registration in different States, ITC need to be segregated in the books of account for each such registration.

A	ITC availed as per audited Annual Financial Statement for the State/ UT (For multi-GSTIN units under same PAN this should be derived from books of account)	The net ITC as per the audited financial statement pertaining to the concerned registration is to be mentioned in this Table. The GST laws necessitates the maintenance of relevant records registration-wise though it is said to be one nation, one tax. The financial statement shall be one for all the registrations under same PAN. Through internal records, the relevant information for each registration should be derived. Net ITC means ITC after considering the effect for: a. Reversal due to ineligible credits b. Lapse of time limit, c. Non-payment to supplier within 180 days d. Common credit used for taxable and exempt supplies e. Debit notes f. Credit notes, etc. The net ITC shall include ITC on input, input services, capital goods, GST paid under RCM, ITC received through ISD. ITC of the financial

		year 2017-18 availed during April 2018 to September 2018 would also have to be considered in this Table. In case where, the entity is liable to pay the compensation cess, such entity may entitle for ITC of compensation cess. In such cases, ITC figure in this Table shall include compensation cess also.
B	ITC booked in earlier Financial Years claimed in current Financial Year [+]	There may be instances where ITC has been accounted in a particular financial year in books of account, however, such credits are not availed in the GST returns of the said financial year. The ITC accounted in the books of account in the previous financial year which has been availed in the GST return of the current financial year is to be included in this Table. For the financial year 2017-18, transitional credit availed is to be reported here.
C	ITC booked in current Financial Year to be claimed in subsequent Financial Years [-]	In case the ITC was accounted in the books of account of the current financial year but the same has been availed in the GST returns of the subsequent financial year, such figure shall be mentioned in this Table. For e.g., goods in transit at the end of the financial year.
D	ITC availed as per audited financial statements or books of account	The auto populated figure in this Table shall be A+B-C
E	ITC claimed in Annual Return (GSTR 9)	The figure of Table 7J of the Annual Return shall be mentioned in this Table.
F	Unreconciled ITC	The difference between D & E above. This shall be the difference of ITC as per books of account and ITC claimed in the Annual Return, which is termed as "ITC-1".

Sl. No. 13 – Reasons for unreconciled difference in ITC

The auditor should explain the reasons for difference between ITC as per books of account and the ITC availed as per GST returns. If the ITC as per books of account exceeds the ITC availed in the GST returns, then the excess credit needs to be reversed in the books of account.

Sl. No. 14 – Reconciliation of ITC declared in Annual Return (GSTR-9) with ITC availed on expenses as per audited Annual Financial Statement or books of account

Cash basis vs. Accrual basis

Some registered person may maintain the financial records on cash basis. However, the GST law requires the compliances on accrual basis. GST liability arises based on the provisions of time of supply. Receipt of the payment is immaterial. Similarly, for availing the ITC also, payment to the vendor is immaterial. In case the payment is not done within 180 days, the provision requires reversal of the credit. However, in case the records are maintained on cash basis, the registered person may take the ITC also on the basis of payments made. In case where the payment is done after the specified period for availing the ITC, then the registered person cannot take the ITC on such invoices.

When the books of account are maintained on cash basis, the question is whether the registered person can take ITC without including in the annual financial statement? In the opinion of the author, even if a particular transaction is not forming part of the annual financial statement but included in the records specified under section 35 read with Rule 56, the registered person may be eligible to take the ITC. For example, inward supply bill was received in March and payment was made in April. ITC could be taken in March itself on provisional basis as provided under section 41 of the GST Act. In such cases, the reconciliation of ITC is still possible because, the reconciliation statement refers to the annual financial statement or books of account. If the transaction is recorded in the books of account, then the reconciliation shall not result into differences in ITC availed. However, the volume of work would be more for the auditor, more records need to be verified.

Ind AS vs. GST compliance

Even with regard to ITC, the Indian Accounting Standards have become very relevant. In case of certain transactions if capitalised with building, ITC is not eligible. If the said transaction is debited as expenses, ITC is eligible. In such cases, for the purpose of availing the ITC, the expenses of capital nature cannot be debited as expenses. The accounting of expenses needs to be done based on the provisions of applicable accounting standards. However, GST law does not refer to any accounting standards and therefore, the scope of the GST audit may not cover the compliance of the accounting standard.

If any transactions are accounted in the books or account without compliance of the relevant accounting standards with the intention to avail the ITC, then the department may dispute such credits. As far as reconciliation is concerned, the auditor has to be concerned with the transactions recorded in the books of account. The provisions of accounting standards are generally applicable for preparation of annual financial statements and disclosure. If any transactions are recorded in the books of account referred in section 35 read with Rule 56, ITC becomes eligible and the reconciliation of ITC as per annual return shall be done with the books of account.

Reconciliation with heads of expenses

In this section, the ITC availed shall be reconciled with each head of expenses in the books of account. The internal records of the registered person should provide the ITC availed under each head of expenses for each GST registration of the entity. This list of expenses given in the Table are indicative. The registered person may edit the heads of expenses mentioned in this Table. Due care may be taken to disclose the expenses like pre-paid expenses, items capitalised, provisions etc.

The registered person may not show the blocked credit separately in the books of account. Such credit could have been added to the cost without bifurcation of taxes. Even in GST returns also blocked credit would not have been reported. However, in the reconciliation statement and annual return the blocked credits need to be separately disclosed.

Further, in case where proportionate credit has been taken on common ITC, identifying such working with each head of expenses in the books of account may pose a great challenge.

This Table requires reconciliation ITC declared in the annual return (GSTR-9) with ITC on accounting head-wise expenses as per books of account. The value of supply and tax thereon shall be separately disclosed. However, amount of total ITC declared in this Table need not be matched with the ITC availed as per GSTR-9. The amount of eligible ITC availed need to be compared with the ITC availed as per GSTR-9. Where the credit is eligible partially in case of common credits, the portion of eligible credit shall be mentioned in this Table.

A	Purchases	The purchase head generally includes the raw materials, packing materials and other consumables. The details regarding imported goods shall not be included here.
B	Freight/Carriage	This includes inward as well as outward freights.
C	Power and Fuel	The electricity is exempt and petroleum products are non-GST supply. Coal and other fuels may be covered here.
D	Imported goods (including received from SEZs)	The details of goods imported and received from SEZ shall be reported here.
E	Rent and Insurance	Credit taken on expenses under the head rent and insurance shall be disclosed here.
F	Goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples	Based on the internal records of the registered person, the information required here is to be compiled. Such transactions generally do not appear in the annual financial statement.
G	Royalties	Royalties paid within India or outside India, both required to be reported here.
H	Employees' Cost (Salaries, wages, bonus etc.)	ITC taken on staff welfare expenses or other expenses grouped under Employee's cost is to be reported here.
I	Conveyance charges	ITC taken on conveyance charges, if any, may be reported here.
J	Bank Charges	ITC taken on bank charges is to be reported here.
K	Entertainment charges	ITC taken on entertainment expenses is to be reported here.
L	Stationery expenses (including postage etc.)	ITC taken on printing and stationery, postage expenses should be reported here.
M	Repair and Maintenance	ITC on repair and maintenance expenses including that on building repair (not being capitalised) is to be disclosed here.
N	Other Miscellaneous	Credit on miscellaneous expenses are to be reported here.
O	Capital goods	ITC on expenses capitalised need to be reported here.
P	Any other expense 1	ITC on head of expenses other than A to O above, are to be reported here.
Q	Any other expense 2	ITC on head of expenses other than A to P above, are to be reported here.
R	Total amount of eligible ITC availed	The amount of ITC availed as per books of account under all the heads of expenses (A to Q) would be auto populated here.
S	ITC claimed in Annual Return (GSTR-9)	The total amount of ITC available for utilisation as per Table 7J of GSTR-9 would be compared with the ITC availed on various heads of expense as listed above.
T	Unreconciled ITC	The difference of amount of ITC as per GSTR-9 and as per books of account shall be termed as "ITC-2".

Sl.No. 15. Reasons for unreconciled difference in ITC

The auditor is required to explain the reasons for difference between ITC claimed in the GSTR-9 and ITC availed as per books of accounts under various heads of expenses.

Sl.No. 16. Tax payable on un-reconciled difference in ITC (due to reasons specified in 13 and 15 above)

The amount of ITC payable (if the ITC availed in GSTR-9 is more than the ITC available as per books of account) on account of difference in

Table 13 and Table 15 shall be reported in this Table.

PART V: Auditor's recommendation on additional liability due to non-reconciliation

The heading of this part of the reconciliation indicates the additional liability payable due to non-reconciliation. It is important to note that the terms used are 'recommendation' and 'due to non-reconciliation". The auditor's recommendation on the additional liability to be discharged by the taxpayer due to non-reconciliation of turnover or non-reconciliation of input tax credit. The auditor shall also recommend:

a. if there is any other amount to be paid for supplies not included in the Annual Return

b. any refund which has been erroneously taken and shall be paid back to the Government

c. any other outstanding demands to be settled

In the instructions to Form GSTR-9C it is mentioned that towards the end of the reconciliation statement taxpayers shall be given an option to pay their taxes as recommended by the auditor. It appears that the registered person may pay the additional liability as per the recommendation of the auditor or opt not to pay. In case the registered person opts not to pay the additional liability reported by the auditor, then the department may initiate the recovery proceedings.

There may be a question whether the liability due to reconciliation difference alone is to be reported and recommended for payment or any other liability which the auditor has come across during the course of audit should also be reported. In the opinion of the author the primary responsibility is to report additional liability arising due to reconciliation difference. However, the scope of the auditor is not restricted only to the unreconciled amounts but in addition he has to provide his comments on other liabilities also, if he comes to know during the course of audit.

The additional liability recommended by the auditor is to be paid by the registered person in cash only. There is no option in the GSTR-9C to pay such liabilities by utilising the ITC. This may cause some undue hardship to the registered person who have sufficient ITC balance in their credit ledger. Hope Government may reconsider to allow to pay the additional liability through ITC also.

Part B – Certification

Section 35(5) of the CGST Act read with rule 80(3) of the CGST Rules, provides that the auditor is not only required to conduct an audit of the annual accounts of the assessee, but also he is required to certify the reconciliation statement. There are two formats given for certification which are as follows:

Format I – This format is to be used when the audit of the annual accounts and the reconciliation statement is drawn up by the same auditor.

Format II – This format is to be used when the audit and the reconciliation statement is signed by the different auditors.

There would be a major challenge in case the registered person is having multiple registrations under the same PAN. The books of account may be centralised and no separate records are maintained registration-wise. The views of the author are that in such cases, there is no need to draw up the registration-wise separate Balance Sheet and Profit & Loss Account for the purpose of audit. In the instructions to GSTR-9C, it is mentioned that reference to the audited annual financial statements include reference to books of account in case of persons /entities having presence across multiple State. The Explanation further states that the turnover of each GST registration may be derived from internal records maintained by the registered person in such cases. The Government may issue clarification on the same.

Section 35 read with Rule 56 provides for various records to be maintained by the registered person. The auditor is expected to verify these records for the purpose of the audit. The annual financial statements audited under the other Acts may be relied upon. However, if the books of account are not audited under any other Acts or audited by the same auditor, the auditor shall certify the annual financial statement.

Format I – Certification in cases where the reconciliation statement (FORM GSTR-9C) is drawn up by the person who had conducted the audit

This format of the certification is to be used where the reconciliation statement is drawn up by the same auditor who conducted the audit of the books of account of the registered person. In this case, the auditor shall examine the

– Balance Sheet
– Profit & Loss Account
– Cashflow Statement;
– Books of account maintained by the registered person.

Based on the verification of the above documents and records, the auditor is required comment and report:

– whether the books of account, records and the documents have been maintained by the registered person as required under the GST Act and Rules made thereunder or not maintained;
– the observations/comments / discrepancies / inconsistencies; if any;
– whether all the information and explanations which, to the best of his knowledge and belief, were necessary for the purpose of the audit have been obtained or not;
– whether proper books of account have been maintained by the registered person or not.

Further the auditor has to certify whether the balance sheet, the profit and loss/income and expenditure account and the cash flow Statement are in agreement with the books of account maintained or not.

The auditor shall also report, as per the information and according to the explanations given, the particulars given in the GSTR-9C are 'true and correct' subject to the observations/ qualifications, if any.

In this format the observations to be reported by the auditor are repeated in para 3(a) and para 5. The contents of para 3(a) appears to be redundant considering the contents of para 5. Hope the Government may make suitable amendment to the form.

Format II – Certification in cases where the reconciliation statement (FORM GSTR-9C) is drawn up by a person other than the person who had conducted the audit of the accounts

This format of the certification is to be used where the reconciliation statement is drawn up by an auditor other than an auditor who conducted the audit of the books of account of the registered person.

The auditor shall report the details of the auditor who audited the books of account and the financial statement of the registered person. A copy of the audit report, balance sheet, profit and loss account / income and expenses statement, cashflow statement and other documents being part of or annexed to the profit and loss account / income and expenses statement and balance sheet shall be attached to the reconciliation statement.

The auditor shall report, whether the books of account, records and the documents have been maintained by the registered person as required under the GST Act and Rules made thereunder or not maintained.

The auditor shall state that the documents required to be furnished under section 35(5) of the CGST Act and Reconciliation Statement required to be furnished under section 44(2) of the CGST Act is annexed to Form No. GSTR-9C.

The auditor shall also report, as per the information and according to the explanations given and according to examination of books of account including other relevant documents, the particulars given in the GSTR-9C are 'true and correct' subject to the observations/ qualifications, if any.

Audit of Accounts:

Section 44(2) provides that the copy of the audited annual financial statement shall be furnished with along with the reconciliation statement. It is presumed that audited annual financial statements means the annual financial statements audited under the provisions of the Companies Act or under the section 44AB of the Income Tax Act, as the case may be. There may be situation where for some reasons the books of accounts are not audited both under the provisions of the Companies Act or Income Tax Act. Further, there may also be a situation where the registered person is neither required to get his accounts audited under the provisions of the Companies Act nor required to get his accounts under the provisions of the Income Tax Act but liable for audit under the provisions of GST law [e.g. registered person (other than a company) having taxable rental income in excess of Rs. 2 crore or a registered person (other than a company) having business/professional income less than the specified limit under section 44AB of the Income tax Act, bust still liable for GST audit due to his other income].

In such cases how to proceed with the GST Audit? Which of the above certificate formats is to be used for certification? In the views of the author, the auditor who does the GST audit shall sign the annual financial statement also (PAN based not GST registration-wise) and he shall use format 1 for certification.

Meaning of 'true and correct'

In both the above formats, the auditor shall state that the particulars given in the GSTR-9C are true and correct. If this statement is subject to any observations / qualifications, the same may be specified. Therefore, it is important to understand the meaning of 'true and correct'. The title of Part B itself is certification. Further, in the Format I, the auditor is required to certify whether the balance sheet, the profit and loss/income and expenditure account and the cash flow Statement are in agreement with the books of account maintained or not.

In case of Statutory Audit under the Companies Act, the auditor is required to state whether the balance sheet and the profit and loss account shows the true and fair view of affairs of the company. In case of Tax Audit under the Income Tax Act, the auditor is required to state the particulars given in Form 3CD are true and correct. In case of VAT audit under the MVAT Act also the auditor is required to certify the various compliance under the MVAT Act and Rules made there under.

The difference between the meaning of phrase 'true and correct' and 'true and fair' is explained as under:

S. No.	True and Correct	True and Fair
1	It indicates highest level of assurance about the status/compliance	It indicates the reasonably high level of assurance of the status/compliance
2	Responsibility is very high	Responsibility is subject to certain facts and circumstances
3	Accurat	May not be accurate
4	Test basis may not give the desired result.	Test basis may give the desired result

In view of the above, the auditor shall take the due care while certifying the particulars given in GSTR-9C.

This is the first year of GST audit. The law is nascent and yet to be settled. The registered persons may not be familiar with the records and documents to be maintained. Even for the auditors, it is a new process. Therefore, for the registered persons and the auditors, the first year audit is going to be more challenging. Audit this year, shall require more dedication of time and efforts. Systematic planning and execution of audit is required. Therefore, it is important for an auditor to know what is expected out of the audit and the responsibility of the auditor.

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CA Manindar Karkala

Importance of Other Reconciliations in GST Audit

Introduction

With the requirement to get the records audited annually under GST Laws the auditor is required to certify the reconciliation of gross turnover, input tax credit availed, taxes paid between Financial Statements and GST Records maintained. The said reconciliation statement is required to be prepared in the format as prescribed under Part A of Form GSTR-9C as notified under Notification 49/2018-Central Tax dated 13.09.2018.

Upon careful consideration of this reconciliation statement, the information sought therein for reconciliation cannot be readily extracted from books of account or from GST records. It is required to draw certain other reconciliation statements before we proceed to work on the reconciliation required under GSTR-9C. This article focuses on such other reconciliation statements to be prepared for smooth preparation of the reconciliation statement as prescribed in GSTR-9C. These statements are indicative and are not exhaustive and would vary from one tax payer to another depending on their business structure, manner of record maintenance etc.

Reconciliation of turnover between GSTR-3B And GSTR-1

In order to compare the turnover and tax payment with that of books of account, it is very important to understand actual turnover as disclosed in GST returns filed for the Financial Year and the tax paid. This information is required to be obtained from the monthly filings of GSTR-1 and GSTR-3B returns.

The GSTR-3B return is a summary return assessing the tax liability for a month. It captures information about taxable, exempted, exported turnover and the corresponding tax payable thereon. Further, it also captures the ITC availed, reversals made and the details of GST payment by using ITC as well as cash.

On the other hand, GSTR-1 return is a declaration about details of supplies made during a month. This return can be amended by making necessary changes in subsequent returns. In this return, the invoice wise details for B2B supplies are to be declared. This also includes the invoices for exports or for deemed exports or for supplies to SEZ.. The invoices issued for exempted supplies, B2C supplies are to be declared on consolidated basis except in cases where the individual invoice value is more than Rs 2,50,000 (each invoice is required to be declared separately in such cases). The adjustments, if any, made to invoices by way of debit notes or credit notes are required to be declared individually for B2B supplies and on consolidated basis in case of B2C supplies. The adjustment on account of credit/debit notes could also be one of the reasons of difference between GSTR-3B and GSTR-1.

The turnover declared in these two returns could be different as GSTR-3B cannot be amended while the turnover declared in GSTR-1 return of a particular month can be amended in GSTR-1 return to be filed for subsequent months by way of debit notes/credit notes or amendment to invoices. Further, while filing annual return in GSTR-9, it is required to aggregate the value of supplies declared in GSTR-1 returns filed for the months of July 2017 to March 2018. Sometimes, invoices issued for FY 2017-18 may not be declared in GSTR-1 returns filed during the period July 2017 to March 2018 and there could be missed out adjustments by way of debit notes or credit notes or amendments or cancellation of invoices declared in GSTR-1 returns for the above period, which may be disclosed in GSTR-1 returns filed for the months of April 2018 to September 2018.

The turnover declared in GSTR-3B returns is not considered for filing annual return while tax payment would be made only when the turnover is declared in GSTR-3B returns. The impact of the adjustments/amendments to GSTR-1 returns filed during July, 2017 to March 2018 and during the period April 2018 to September 2018 are required to be appropriately considered in GSTR-3B returns and accordingly the tax adjustments or additional payments are required to be undertaken.

In view of the above reasons, it is required to prepare a reconciliation statement of turnover declared in GSTR-1 returns and GSTR-3B returns. This reconciliation will help us in understanding the following;

a) The exact amount of taxable turnover considered for GST compliance for the period July 2017 to March 2018

b) Whether the applicable tax for taxable turnover has been appropriately paid along with interest if any by making necessary disclosures in GSTR-3B returns filed up to the month of September 2018.

c) The amount received towards if any, during the period July 2017 to March 2018 and the extent of these advances that remained unadjusted by way of invoices issued during the said period. This information is required for filing column 5B of GSTR-9C. This amount will not be part of the turnover recorded in books of account.

d) The amount of taxable turnover on account of deemed supplies under schedule I will also be identified. This information is required for filing Sl. No. 5D of GSTR-9C. This amount will not be part of the turnover recorded in books of account.

e) The aggregate value of adjustments made by way of debit notes and credit notes and their corresponding impact on the amount of GST paid and their treatment in GSTR-3B returns.

Upon reconciling the difference between GSTR-3B and GSTR-1 returns filed, the resultant turnover details can be compared with that of books of account maintained under the GST law and further to reconcile the turnover between financial records and GST books of accounts for the purpose of GSTR-9C.

Computation and verification of registration wise turnover

In case of a business entity having multiple units located in different states, then registration under GST is required to be taken separately for each state. The audit under GST is required to be carried out independently for each of the registration. In such cases, the auditor is required to determine the state wise turnover as such amount may not be readily available in financial statements. Therefore, a statement is required to be prepared drawing up registration wise turnover as per financial records and the aggregate of the same should match with the turnover shown in financial statements.

Reconciliation of ITC availed between GSTR-2A and GSTR-3B

It is important to note that GSTR-2A is a facilitation measure given to recipient of supply to ensure that the corresponding supplier is depositing the taxes collected from him with Government. This fact of non-reflection of supply in GSTR-2A does not impact the ability of recipient tax payer to avail ITC on self-assessment basis. The apprehension that no ITC can be availed in the event of non-reflection of supply details in GSTR-2A is without legal basis. This position has been clarified by CBIC *vide* their press release dated 18-10-2018.

However, Sl.No 8 of GSTR-9 (Annual Return) requires the tax payer to compare ITC availed with that of GSTR-2A statement and is expected to reconcile the difference. The ITC availed as per GSTR-9 return shall be the aggregate of GSTR-3B returns filed for the period July 2017 to March 2018. The corresponding suppliers might have declared some of these supplies in their GSTR-1 returns filed for the period April 2018 to September 2018 also. Therefore, it is required to prepare a reconciliation statement of ITC availed as per GSTR-3B returns filed up to March 2018 with GSTR-2A statements updated up to September 2018. Out of the differential input tax credit between GSTR-2A statements and ITC availed through GSTR-3B up to March 2018, it is required to ascertain the following for reporting in GSTR-9:

a) ITC available as per GSTR-2A statements but not availed (Sl. No. 9E)

b) ITC available as per GSTR-2A statements but not eligible (Sl. No. 9F)

Upon reconciliation of credit availed between GSTR-2A returns and GSTR-3B returns filed, the following can be identified.

a) The list of suppliers whose invoices are not at all reflected in GSTR-2A return but ITC availed in GSTR-3B. In such cases, the auditor is required to verify the invoices and other documents owned by the recipient tax payer (auditee) in this regard to ensure that such documents are in line with the requirements of GST law and conditions to avail ITC as laid down under section 16 of CGST Act, 2017 have been satisfied.

b) The list of suppliers whose invoices are reflected in GSTR-2A return but no ITC availed in GSTR-3B. In such cases, the auditor is required to verify the invoices and other documents with the auditee to ensure whether proper ITC is claimed. If it is decided that ITC can be claimed in these cases, then ITC can be availed while filing the GSTR-3B return for the month of September 2018 in view of the time restriction under section16(4) of CGST Act, 2017. In case the deadline is missed out, these cases are required to be reported as lapsed credit under Sl. No 9(E) of Annual Return (GSTR-9) as mentioned above.

c) There could be instances where supplies are reflected in GSTR-2A but no ITC has been availed in GSTR-3B for the reason that such supplies are ineligible for ITC in terms of section 17(5) of CGST Act, 2017. These amounts are also required to be reported under Sl. No. 9(F) of Annual Return (GSTR-9) as discussed above.

d) The other reasons for mismatch could be because of failure to account for invoices, debit notes or credit notes. In such cases, the auditor is expected to examine these transactions and appropriate action may be taken.

The reconciliation of ITC availed between GSTR-2A and GSTR-3B could be considered as an appropriate audit procedure to ensure compliance of the ITC availment by the tax payer (auditee).

Reconciliation of INPUT TAX CREDIT AS PER BOOKS OF ACCOUNT AND AS PER GSTR-3B:

Sl. No. 12A to 12F of Part IV of GSTR-9C provides for reconciliation of input tax credit availed between financial statements and the annual return under GSTR-9. ITC availed and disclosed in GSTR-3B returns filed for the months of July 2017 to March 2018 are aggregated and disclosed in GSTR-9 return. Effectively, GSTR-9C requires reconciliation of ITC availed as per books of account and the ITC availed in GSTR-3B returns filed up to March 2018.

The said reconciliation as prescribed under Sl. No 12A to 12F of GSTR-9C requires to disclose the amount of input tax credit booked in earlier Financial Years but claimed in current Financial Year and the amount of input tax credit booked in current Financial Years but claimed in subsequent Financial Years. This could be because of the reason that invoices are received from vendors between the period April 2018 to September 2018 but the expenditure pertains to Financial Year 2017-18.

In order to quantify these amounts for the purpose of GSTR-9C, it would be appropriate to prepare a reconciliation statement of ITC availed as per input ledgers maintained in finalised books of account for FY 2017-18 and the ITC availed as per GSTR-3B returns filed upto September 2018. This reconciliation will help us in understanding the following;

a) The amount of ITC availed in books of account but not reflected in GSTR-3B returns. The tax payer is required to ensure that this amount should be availed in GSTR-3B return to be filed for September 2018. In case failure to disclose in September 2018 return, then the auditor is required to ensure that the amounts shall be expensed out in books of account.

b) The amount of ITC not availed in books of account but reflected in GSTR-3B returns. The auditor is required to examine these transactions and ensure appropriate changes are to be made in ITC ledgers of the books of account. In case the auditor finds that ITC is ineligible but the same is wrongly carried in electronic credit ledger through GSTR-3B returns, ensure that the same is reversed in the GSTR-3B returns to be filed for subsequent months.

c) The amount of ITC availed in books of account and reflected in GSTR-3B returns filed for the period April 2018 to September 2018. This amount is to be considered as ITC booked in current Financial Year but claimed in subsequent Financial Years for disclosure in Sl.No 12C of GSTR-9C.

d) Any other differences between ITC ledgers as per books of account and GSTR-3B will have to be examined and appropriate action shall be taken. These differences could be on account of reasons like ineligible credit availed in books but not considered for GSTR-3B or on account of reversal of common credits attributable to exempted turnover in terms of section 17.

Conclusion

With the requirement to certify that the reconciliation statement in GSTR-9C as true and correct, there is a great responsibility on the auditor to critically examine all the business transactions of the tax payer (auditee) and the resultant GST compliance. The other reconciliation statements would be necessary for auditor to ensure the accuracy of compliance and thereby discharge his responsibility as GST auditor.

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CA C. N. Vaze

Certifications / Audits under GST Act and Professional Ethics

Introduction to Ethics

Ethics means moral values. Ethics are all pervasive and actually are applicable in all walks of life. It is easier to be principled but difficult to be ethical. One can be transparent; but one needs to be accountable. I feel, 'ethics' is nothing but accountability to one's conscience. In the field of ethics, one is either ethical or not ethical. There is no 'in between' stage.

I believe, the entire foundation of our code of ethics can be traced back to a few scriptures from *Taittireeya* Upanishad. The Gurus (sages) used to send off their pupils with the following well-known preaching –

– Satyam Vada – Speak the truth

– Dharmam Chara – Follow the rules of the religion (perform duty); and

– Swãdhyãyãn-Mã-Pramadah – Do not commit default in self-study (This is our CPE).

In the present article, I have been asked to cover the ethical issues relating to GST audit and certification. GST has now completed its one year of existence. The first year being an infancy stage, was a near roller-coaster. With *vide* coverage of GST across the nation, it has become more important to know, not only the technical issues but also the ethical part relating to GST. Certain parts of the code of ethics will be applicable to members in industry as well.

In this article, I have focused mainly on compliances under code of ethics of the ICAI. The disciplinary mechanism is not covered over here.

Code of Ethics – its broad contents and scope

The provisions regarding `misconduct' are contained in Chapter V of the Chartered Accountants Act, 1949 ('the Act'). Section 21 prescribes the procedure in enquiries relating to misconduct of the members while section 22 defines the professional misconduct. Basically 'professional misconduct' shall be deemed to include any act or omission specified in either of the schedules to the Act. However, the section further confers powers on the Institute to enquire into any **`other misconduct'** of a member. Thus, the scope is very wide and can cover any misconduct, which may not be committed in the course of professional work. **It refers to the conduct unbecoming of a professional.** The Amendment Act has inserted Section 21 (Disciplinary Directorate), 21A (Board of Discipline), Sec. 21B (Disciplinary Committee), Sec. 21C (Authority of BOD, DC and Director Discipline), Sec. 22A (Appellate Authority).

There are two Schedules to the Act.

The distinction between First Schedule *vis-à-vis* Second Schedule is that the items in First Schedule affect the members within the profession i.e., an outsider is not adversely affected or aggrieved. On the other hand, in Second Schedule there are those items of misconduct that affect the outsiders – i.e., clients, regulators, banks, etc.

There are four parts in the First Schedule

Part I contains professional misconduct in relation to CAs **in practice**. There are twelve clauses.

Part II covers misconduct in relation to **members in service** and has two clauses.

Part III specifies three clauses of misconduct in relation to **members in general**.

Part IV contains two clauses of 'Other Misconduct' in relation to all members generally.

There are three parts in the Second Schedule

Part I contains ten clauses in relation to CAs in practice.

Part II has four clauses relating to members generally.

Part III covers residuary cases of 'Other Misconduct'.

Apart from the above two schedules, there are various other pronouncements of the ICAI like advertisement guidelines, website guidelines, council general guidelines and other recommended self-regulatory measures which also need to be adhered to by the members. Violation of these pronouncements, doubtless, is a professional misconduct.

The Council in its 281st meeting held in October 2008 considered an issue arising from the Guidance Note on Tax audit under section 44AB of the Income-tax Act, 1961 as to "Whether the internal auditor of an assessee, being an individual chartered accountant or a firm of chartered accountants can be appointed as his tax auditor".

> *The Council decided that an internal auditor of an assessee, whether working with the organisation or independently practicing chartered accountant or a firm of chartered accountants, cannot be appointed as his tax auditor.*

The Council in its 378th Meeting held on 26th and 27th September 2018, noted its earlier decision mentioned above, and clarified that, based on the conflict in roles as statutory and internal auditor simultaneously, the bar on internal auditor of an entity to accept tax audit (under Income-tax Act) will also be applicable to GST Audit (under the Central Goods and Services Tax Act). Accordingly, it has been clarified that, an internal auditor of an entity cannot undertake GST audit of the same entity.

Further, Ethics Plus (brochure) issued by the ESB has dealt with certain issues in question-answer format. The extract of important question-answer has been reproduced herewith:

> ***"53. Whether a statutory auditor can accept the system audit of same entity?***
>
> *Yes, the statutory auditor can accept the assignment of a system audit of the same entity, provided it did not involve any scrutiny/review of financial data and information."*

Many organisations had engaged various chartered accountants to set up system for implementation of GST. A question therefore arises as to whether the same chartered accountant who had helped in setting up the system can also be a GST auditor. If the chartered accountants have helped the organisations in ***"creation of system"*** itself, then the answer would be in negative. However, if the role of chartered accountant is limited to the ***"audit"*** of the said system, then the aforesaid clarification would be equally applicable.

Ethical issues

Audit under GST is nothing but an attest function and hence all the ethical compliances which are applicable to a statutory audit or for that matter to a tax audit under Income-tax Act, 1961 will also be applicable to audits under GST Act. These ethical compliances will equally apply to certifications by a chartered accountant.

The Institute of Chartered Accountants of India ('ICAI') has come out with the FAQs on ethical issues relating to GST (FAQs on GST) in this regard. These FAQs are discussed at relevant places in my article below.

The relevant clauses of Schedules to the CA Act, 1949 have been discussed in the subsequent paragraphs.

Advertisement and solicitation (Clause 6 of Part I of the First Schedule) –

The bare text of this Clause is reproduced as below:

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

(6) solicits clients or professional work either directly or indirectly by circular, advertisement, personal communication or interview or by any other means:

Provided *that nothing herein contained shall be construed as preventing or prohibiting–*

(i) Any chartered accountant from applying or requesting for or inviting or securing professional work from another chartered accountant in practice; or

(ii) A member from responding to tenders or enquiries issued by various users of professional services or organisations from time-to-time and securing professional work as a consequence.

The logic and spirit behind this clause is indeed very laudable. Advertisement, if permitted, often degenerates into cheaper forms of publicity. The point that some of the ethical norms should change with the time is well taken. Nevertheless, there is abundant wisdom in the belief that the work of a professional is his best advertisement.

Just as a member in practice is not allowed to do advertisement for the purpose of securing any kind of audit work, he cannot advertise so as to secure any GST audit as well.

The FAQs Nos. 6, 8 and 11 of FAQs issued by the ICAI in this regard are published below:

"Q.6. Whether a member can send presentation/ write-up on GST, and include services provided in the same?

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

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

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

Q.9. Whether a member can publish testimonials /appreciation letters received by him with regard to GST training assignments?

Ans. Such testimonials are allowed to be mentioned on CA firm website, but not on social media like Facebook, LinkedIn etc.

Q.11.Whether it is permissible for a member to put a Notice for GST Registration/Return preparation along with mention of his name/ name of CA firm? Whether he can mention fees/ charges for providing such services?

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

Communication with outgoing auditor (Clause 8 of Part I of the First Schedule)

The bare text of this Clause is reproduced as below:

(8) Accepts a position as auditor previously held by another chartered accountant or a certified auditor who has been issued certificate under the Restricted Certificate Rules, 1932 without first communicating with him in writing;

The requirement of communicating with the outgoing auditor is equally applicable in case of GST audits also just like all other kinds of audits like internal audit, stock audit, concurrent audit etc. It is necessary **even when the appointment is made by Government agencies** like C&AG, RBI, etc.

In fact, it is meant for our protection from unscrupulous clients. These clients give various reasons to create an **artificial urgency** and pressurise the other auditor to take and expedite the audit.

It is important that the communication in writing should be made **before accepting the audit itself and not before signing the report.** There has to be a fool-proof evidence of communication reaching the previous auditor. Therefore, **an RPAD** letter is advisable though not expressly prescribed. The certificate of posting or courier or speed-post may not satisfy the test. Even **if it is hand-delivered, the proof of delivery to outgoing member is a must.**

The audit can be accepted only after a reasonable period has elapsed after the delivery of the letter. **Actual NOC letter is not a pre-condition.**

It is also pertinent to note that *vide* notification dt. 13-11-1999 (page 83 of CA Journal, January 2000) **non-payment of undisputed audit fee** is a ground for professional objection. Outstanding fees appearing in the balance sheet signed by the auditee are regarded as undisputed. Accepting an audit assignment if any undisputed audit fees of another auditor are unpaid is itself a misconduct.

It is always essential and desirable to obtain **a fresh letter of appointment every year** even for continuance of audit.

It is desirable that the previous auditor should reply to such communication promptly. He may mention the reason why the change took place; but should **not disclose any information about the client**.

A general 'NOC' by previous auditor is not sufficient. Writing to him is a must.

Sharing of fees or profits with a non-member or partnership with non-member (Clause Nos. 2, 3 and 4 of Part I of First Schedule)

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

Clause (2): *Pays or allows or agrees to pay or allow, directly or indirectly, any share, commission or brokerage in the fees or profits of his professional business, to any person other than a member of the Institute or a partner or a retired partner or the legal representative of a deceased partner, or a member of any other professional body or with such other persons having such qualifications as may be prescribed, for the purpose of rendering such professional services from time to time in or outside India.................."*

Clause (3): *Accepts or agrees to accept any part of the profits of the professional work of a person who is not a member of the Institute.*

Clause (4): *Enters into partnership, in or outside India, with any person other than a chartered* *accountant in practice or such other person who is a member of any other professional body having such qualifications as may be prescribed, including a resident who but for his residence abroad would be entitled to be registered as a member under clause (v) of sub-section (1) of Section 4 or whose qualifications are recognised by the Central Government or the Council for the purpose of permitting such partnerships.*

The purpose is to prevent unscrupulous practice of securing professional work through brokers, commission agents or unhealthy associations with non-professionals.

"Q.12 Whether a member in practice can give GST consultation to clients of another professional?

Ans. The member is not allowed to share fees with another professional; however, he can engage separately with the clients of such other professional to provide GST consultation."

The other clauses of First Schedule which may be relevant from the perspective of GST audits are:

Clause (5) of Part I of First Schedule

"Secures, either through the services of a person who is not an employee of such chartered accountant or who is not his partner or by means which are not open to a chartered accountant, any professional business:

***Provided** that nothing herein contained shall be construed as prohibiting any arrangement permitted in terms of items (2), (3) and (4) of this Part."*

Clause (7) of Part I of First Schedule

"Advertises his professional attainments or services, or uses any designation or expressions other than chartered accountant on professional documents, visiting cards, letterheads or sign boards, unless it be a degree of a University established by law in India or recognised by the Central Government or a title indicating membership of the Institute of Chartered Accountants of India or of any other institution that has been recognised by the Central Government or may be recognised by the Council:

***Provided** that a member in practice may advertise through a write up setting out the services provided by him or his firm and particulars of his firm subject to such guidelines as may be issued by the Council."*

In terms of section 7, a member in practice cannot use any designation other than that of a Chartered Accountant.

The FAQs Nos. 5, 6, 7 and 9 of FAQs issued by the ICAI in this regard have been reproduced below:

"Q.5 Can a member/firm conduct training through seminars etc. on GST?

Ans. Yes, a member/firm can conduct training through seminars etc. on GST. However, the member/firm may only invite its existing clients to such training programmes. Inviting individuals or entities other than existing clients may amount to solicitation, which is prohibited under Clause (6) of Part-I of First Schedule to The Chartered Accountants Act, 1949.

Q.7 Whether it is permissible for a member to mention himself as "GST Consultant"?

Ans. No, in terms of provisions of Clause (7) of Part–I of First Schedule to the Chartered Accountants Act, 1949, it is not permissible for a member to mention himself as GST Consultant".

Clauses (10) and (12) of Part I of First Schedule

(10) Charges or offers to charge, accepts or offers to accept in respect of any professional employment, fees which are based on a percentage of profits or which are contingent upon the findings, or results of such employment, except as permitted under any regulation made under this Act.

(12) Allows a person not being a member of the Institute in practice, or a member not being his partner to sign on his behalf or on behalf of his firm,

any balance-sheet, profit and loss account, report or financial statements."

Clause (3) of Part III of First Schedule

(3) While inviting professional work from another chartered accountant or while responding to tenders or enquiries or while advertising through a write up, or anything as provided for in items (6) and (7) of Part I of this Schedule, gives information knowing it to be false."

Second Schedule

Attest function where the member is personally interested (Clause 4 of Part I of the Second Schedule)

The clause reads as follows

"Expresses his opinion on financial statements of any enterprise in which he, his firm or a partner in his firm has a substantial interest, unless he discloses the interest also in his report. **The expression 'unless he discloses the interest also in his report' has been omitted by the Amendment. Hence, the restriction becomes absolute; and the mere disclosure will not help.**

Performing such attest function in itself was not previously a breach of ethics. At the same time, the statutory restrictions, if any, were always applicable. **For example Section 226(3) and (4) of the Companies Act, 1956 (now section 141 of the Companies Act, 2013).**

A person who does the accounts writing of the same auditee; or an internal auditor cannot be the statutory auditor. Similarly, the fees for consultancy assignment from the said auditee cannot exceed certain limit with reference to the audit fees.

Code of ethics and technical lapses (Clause Nos. 5, 6, 7 and 8 of Part I of the Second Schedule

Clause Nos. 5, 6, 7 and 8 of Part I of the Second Schedule talk of technical lapses on the part of the auditor which are viewed as negligence or failing in the professional duty. The auditor is expected to report and disclose all material facts so as not to make the financial statements misleading. This is the very essence of the attest function. **Clause (7) talks of gross negligence whereas clause (8) deals with failure to obtain information.** Clause (10) requires that **a separate bank account** be maintained **for clients' moneys**. The Council has clarified that no separate bank account is necessary for fees received in advance and for moneys which are intended to be spent within a reasonably short time. (e.g., prescribed statutory fees, purchase of stamp paper, etc.) it is relevant to note that every small lapse or minor negligence or deficiency does not amount to "gross negligence". There should be an "ill-motive", or utter disregard to the technical standards.

In Clause (7) of Part 1 of Second Schedule – the scope is enlarged by Amendment. It not only mentions 'gross negligence'; but also now covers 'lack of due diligence'.

Most of the time, the disciplinary proceedings are initiated mainly on the ground that the auditor was grossly negligent or had not exercised due diligence while conducting audit. This being the first year of GST audit, auditors will have to exercise extra caution though it may be cumbersome where the volume of transactions is huge.

For instance, the recipient cannot come to know that the supplier has paid the tax and filed the return. Without tax being paid by the supplier, Input Tax Credit would not be available to the recipient as per Sec 16(2). It will prove very difficult for the auditor to give his opinion on correctness of ITC claim. Secondly, the reliability of the audit software will also be required to be tested.

There can be a host of issues like chargeability to GST, rate of GST, inclusion or grouping of various goods or services etc. A proper documentation in this regard will be required so as to prove that the auditor was not grossly negligent and had exercised due diligence while conducting audit. Maintenance of proper working papers and obtaining of proper and clear Management Representation Letter (MRL) are extremely important.

The other clauses of Part I and Part II of Second Schedule which may be relevant from the perspective of GST audit are

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

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

(9) Fails to invite attention to any material departure from the generally accepted procedure of audit applicable to the circumstances.

Part II of Second Schedule

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

(2) Being an employee of any company, firm or person, discloses confidential information acquired in the course of his employment except as and when required by any law for the time being in force or except as permitted by the employer".

Council General Guidelines

The Council General Guidelines are applicable to GST audit as much as they are applicable to any other audit. One of the relevant clauses is the one related to appointment of auditor where he is indebted to a concern. It states that a member of the Institute in practice or a partner of a firm in practice or a firm shall not accept appointment as auditor of a concern while indebted to the concern or given any guarantee or provided any security in connection with the indebtedness of any third person to the concern, for limits fixed in the statute and in other cases for amount exceeding **₹ 10,000/-**.

Readers are advised to go through the text of Council General Guidelines for further information.

Other misconduct

As stated earlier, Section 22 talks of not only the items of misconduct specified in the Schedules but also covers "other misconduct". The Council is empowered to take action in such cases with a view to upholding the overall image of the members in the society. Thus, **a person's conduct may be unbecoming of a professional, even as a human being.**

Without prejudice to the generality of the coverage of 'Other Misconduct', now, both the Schedules contain separate parts specifying 'Other Misconduct'. These parts cover mostly offence of civil or criminal nature or any act that would bring disrepute to the Institute.

Conclusion

As stated in the initial paragraphs, ethics are applicable to all facets of our professional practice. There is nothing additional that is separately applicable to GST. Nevertheless, while studying the ethics in the context of GST, it is worthwhile to recapitulate all the principles of ethics. I thank the Chamber for giving me this opportunity.

CA Dinesh Tejwani

TECHnovation

GST Compliance: Global Trends

The current Journal issue has a special story on GST Annual Returns and Audit. The audit is intended to assist tax officers in expediting the GST data validation process. It is also considered as a measure towards achieving stronger and better tax compliance.

While selective audit is a well-established tool to ensure the accuracy of tax data, the world over, tax authorities are experimenting with newer ideas to achieve this objective.

With the greater adoption of "digital-only" mode of tax compliance, the emphasis is now more on establishing real-time accessibility and reliability of this data, rather than relying on periodical returns and audits. In this article, we will see some interesting developments in this area in various countries. We will also examine the scenario unfolding in India.

SAF-T: Standard Audit File for Tax

SAF-T is an electronic XML format for efficient transfer of accounting data from businesses to tax authorities or auditors. It has been originally created by the Organisation for Economic Co-operation and Development (OECD). Although it is intended to be a standard, each country can, however, have its own implementation policy and can also introduce additional reporting elements.

Several European countries have adopted SAF-T. It was first adopted by Portugal. Later Austria, Luxembourg, France, Poland, Portugal and Lithuania followed. In some countries the filing is only on request, in others it is periodical.

These countries have seen significant benefits as tax inspections have become more efficient and effective.

UK's Making Tax Digital (MTD)

United Kingdom has planned a comprehensive tax compliance reform called MTD. For VAT compliance MTD kicks in from 1st April 2019. Government believes that this system will be more efficient and more effective.

For this initiative, all VAT-registered businesses above the £85k turnover threshold will have to keep digital records and submit VAT returns using compatible software.

Currently, 87% of online returns are filed by manually typing figures in tax portal. With MTD, VAT return will be directly transmitted from the digital records using APIs. There will be no data entry option.

The Government has already started publishing names of compatible softwares. These software typically allow submission of VAT Return and view VAT liabilities and payments. A pilot is already underway where businesses can voluntarily keep digital tax records and submit VAT returns using compatible software.

Poland: VAT Split Payment

Effective 1st July 2018, Poland has in place a new system of VAT Split for B2B transactions. This is how it works

- Each business opens a separate VAT Account with the bank
- A purchaser can make a single payment for an invoice, but it will be split into two parts. For this purpose, the payer will provide the relevant details to the bank: invoice number, suppliers VAT number, net amount and VAT amount.
- VAT Amount will get credited to the VAT Account
- Net Amount will get credited to the normal business account

The special VAT Account with the bank will come with some riders. It can be used only to pay VAT liability to the tax authorities, pay VAT amount to seller or request tax authority to transfer the funds to the regular bank account.

Currently, the system is not obligatory and business can opt-in on a voluntary basis.

Ghana: Real-Time VAT Collection Monitoring

Ghana has passed a law that makes it mandatory for certain taxpayers to install a Fiscal Electronic Device (FED). The FED is to be used for issuing a fiscal receipt.

A certain number of FEDs will be given free to all taxpayers. A minimum of 2 FED is mandatory, so that if one malfunctions, the other can be used.

What is interesting is that the revenue authority will be able to monitor the sales via FEDs by entering into contracts with communication service providers.

The FED will communicate with the back-end server of the Ghana Revenue Authority.

Government hopes to record an increase in revenue, improvement in relations with the taxpayer and reduction in the need for frequent audits. Taxpayers, on the other hand, will have a quick, accurate and easy way of recording and issuing receipts, easy compliance to tax and accurate returns.

Hungary: Real-Time Invoice Reporting

Effective July 1, 2018, Hungary has implemented a system of real-time direct transmission of invoice data to tax authorities. This is how it works

- It is applicable only to invoices of value exceeding 1,00,000 HUF (Hungarian forint).
- Where the invoice is prepared using a billing software, the data will be transmitted to tax authorities immediately using the internet. Submission of an Invoice can be "live" i.e., when the invoice is blocked or in batches of 100 invoices at a time. The process of submissions must be fully automated over the internet from accounting or billing systems, without manual intervention.
- Where the invoice is prepared manually, the data must be uploaded on the web interface within 5 days.
- Errors must be re-submitted within three days of the original submission. Credit notes will also need to be reported.

Govrnment believes these measures will discourage tax frauds and VAT revenues can be increased.

Spain: Immediate Supply of Information (SII)

Spain already has an immediate supply of information system in place effective July 1, 2017. The system mandates certain categories of taxpayers to upload sales invoices within 4 working days on Government Portal. Hence the information submitted is "almost" real-time

India: Still Evolving

India started with the intention of Invoice-level matching for giving input credit. However, because of technology glitches and perceived complexity, the matching has been kept in abeyance.

In the first six months of 2018-19, monthly GST collections averaged ₹ 96,283 crore. The budgeted GST collection is ₹ 1 lakh crore every month. This means there is a monthly shortfall of around ₹ 3,700 crore so far.

A new GST fraud is reported almost every day in newspapers. Most common being issuing bogus invoices and claiming input credit.

To improve tax collection and prevent such frauds, Government is constantly working on new measures. Tax Deduction at Source and Tax Collection at Source on prescribed transactions have been implemented from October 1, 2018.

Concept Paper on DIN

In September newspapers reported this interesting story on a concept paper which suggested doing away with filing of returns altogether.

A committee on invoice was formed by GST Council in January . The committee has released a concept paper. The paper acknowledges that the current system of GSTR-3B, GSTR-1 and matching concept is inadequate.

The concept paper talks about a new concept of DIN: Distinct Invoice Number for B2B transactions, which is generated from the GSTN Portal. Each invoice generated by the supplier must contain a DIN. The buyer will quote this DIN to claim input credit. The Debit Note and Credit Note will also need to contain the DIN of the invoice.

The system is visualised to work as follows

– At the beginning of the month, a supplier downloads DIN in bulk say 1000

– The supplier issues invoices with the serially numbered DIN.
– There will be a facility to surrender unused DIN and cancellation of DIN

For B2C transactions, the concept paper suggests a way to involve end consumers by incentivising them, as tax evasion is much higher in this segment. Each consumer registers and gets a consumer number. After paying for a bill, the consumer logins into the GSTN portal and matches the DIN mentioned in the invoice against his consumer number. This signals that the consumer has paid GST against DIN. If the supplier fails to make payment of GST, suitable penal action can be taken against him. The consumer can be rewarded for the effort in some monetary way.

Simplified Return Filing: Upload-Lock-Pay

In May 2018, GST Council unveiled a new simplified return filing process wherein

- One single monthly return to be filed by the regular taxpayer. Composition dealer to file quarterly return. Return details will be much simplified.
- Only seller to upload sales invoice. A buyer would be able to see details of uploaded return on daily basis. No need to upload purchase return. Hence, there will be a unidirectional flow of invoices.
- Seller to upload invoice details. The system will auto calculate tax liability.
- Buyer to get automatic input credit based on invoices filed by the seller.

From the Financial Year, 2019-20 onwards simplification of filing GST returns will commence in phases. In the first six months of FY 2019-20, Input Tax Credit (ITC) available to a business will be auto-generated on the basis of GSTR-1 filed by the counterparty. If the business claiming ITC observes that there is a shortfall i.e., some suppliers have not uploaded their invoices it can *suo motu* add such missing invoices and claim ITC on a provisional basis.

The luxury to "add" missing invoices will be available only till September 2019. In the next phase, which is scheduled to be implemented from October 2019 businesses will be able to claim ITC only if the counterparty has uploaded the same in GSTR-1.

It appears that India is moving towards real-time reporting of invoices. The continuous upload of invoice of data will enable a buyer to view and "lock" the same to claim credit.

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B. V. Jhaveri, *Advocate*

DIRECT TAXES

Supreme Court

Without there being any new circumstances, the Commissioner was not justified in denying renewal of certificate u/s. 80G which is being renewed since its registration u/s. 12A in the year 1995.

[2018] 98 taxmann.com 266 (SC) Supreme Court of India, Commissioner of Income-tax vs. Khairabad Eye Hospital.

M/s. Khairabad Eye Hospital was granted registration as a charitable organization in the year 1995 and since then every year a certificate of exemption u/s. 80G was granted and renewed. The Commissioner of Income-tax while scrutinising the application for renewal of certificate u/s. 80G of the Act observed that the assessee trust is paying salaries to doctors who were running the assessee's organisation and therefore, renewal application for certification u/s. 80G was rejected.

In the appeal against the order of the Commissioner of Income-tax denying the certificate u/s. 80G of the Act, the Tribunal held that no new circumstances have been referred to by the Commissioner of Income-tax while rejecting the application for renewal of the certificate u/s. 80G of the Act. Therefore, the Tribunal directed the Commissioner of Income-tax to issue the certificate u/s. 80G of the Act. The said order of the Tribunal was upheld by the High Court. The Supreme Court dismissed the SLP of the Department.

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> Books are infinite in number and time is short. The secret of knowledge is to take what is essential. Take that and try to live up to it.
>
> — *Swami Vivekananda*

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

DIRECT TAXES
High Court

1. Transfer Pricing u/s. 92C – Tribunal held that the basic intention behind introducing the transfer pricing provisions in the Act is to prevent shifting of profits outside India, and the assessee is claiming benefit under section 10A of the Act, the transfer pricing provisions ought not to be applied to the assessee – No question of law in spite of incorrect finding of the Tribunal being against proviso to sub-section (4) of section 92C. (AY 2003-04)

CIT vs. Phillips Software Centre P. Ltd. – (2018) 257 Taxman 449 (Kar.)

The assessee was claiming deduction u/s. 10A of the Act. While framing the assessment certain Transfer Pricing (TP) adjustments were made in the hands of the assessee. However, the same were deleted by the Hon'ble Tribunal. While coming to its conclusion in allowing the appeal of the assessee, the Tribunal held that since the basic intention behind introducing the transfer pricing provisions in the Act is to prevent shifting of profits outside India, and the assessee claiming benefit under section 10A of the Act, the transfer pricing provisions ought not to be applied to the assessee. The Tribunal further held that, before the ALP is determined by the Assessing Officer has to prove that at least one of the four conditions laid down in sub-section (3) above have been satisfied. Further, section 92CA(3) provides that even a TPO should determine the ALP in accordance with the provisions of section 92C(3). Accordingly, the conditions of section 92C(3) would also be relevant to the TPO. Referring to circular No. 2/2001, dated 23-8-2001, issued by the CBDT, Tribunal held that the intention of section 92C(3) has always been that scrutiny of the international transactions of an assessee can only be done if the Assessing Officer/TPO can prove that the circumstances enumerated in clauses (a) to (d) are satisfied. Even where any infirmity is identified by the Assessing Officer/TPO, the action of the Assessing Officer/TPO would be restricted to taking remedial action commensurate with the infirmity identified and not beyond. For instance, if there is a finding, based on evidence, for satisfaction of the condition of section 92C(3)(d), the Assessing Officer/TPO could, at best, use their judgment as regards any information/document, unreasonably withheld by the taxpayer, for the purpose of making the assessment, on the other hand, for a case where condition of section 92C(3) (a) is triggering, and not triggering any of the other conditions of section 92C(3), the Assessing Officer/TPO has to use the data used by the taxpayer and modify the analysis of the taxpayer only to the extent that the computation of the ALP deviates from sub-sections (1) and (2) of section 92C. On this aspect, the Tribunal ultimately concluded that the TPO or the AO need to satisfy and communicate to the taxpayer the relevant clause under section 92C(3) which has been triggered by the assessee, which had necessitated the application of provisions of the transfer pricing provisions. Since this was not demonstrated to the assessee, the Tribunal held that the transfer pricing order was void. Thereafter the Tribunal further went on to decide the appeal giving its finding on facts.

Against the said order of the Tribunal, the Revenue filed an appeal raising multiple questions. The High Court, so far as the observations of the Tribunal regarding violation of conditions u/s. 92C(3) were concerned, did not admit the questions though specifically raised by the Revenue at the time of final hearing. As regards the other questions which were earlier admitted, the primary argument of the Revenue was that the aforesaid observations by the Tribunal, that TP provisions would not apply since the assessee's income is exempt u/s. 10A, are erroneous since these observations are contrary to the second Proviso to Section 92C(4) of the Act which provides that no deduction u/s. 10A shall be allowed to an assessee in respect of enhancement of income due to TP adjustments. The assessee rebutted stating that these observations did not have an effect in the computation of income of the assessee, since the Assessing Officer had denied deduction u/s. 10A on the TP Adjustments made by the TPO and hence the Revenue could not be aggrieved by such an observation. The Hon'ble High Court dismissed the appeal of the Department holding that the submission made by the Revenue is misplaced and bereft of factual foundation in the assessment of the present assessee. The aforementioned observation of the Tribunal cannot be even described as a finding of fact, but it is merely an obiter. Though such an obiter or observation had been made by the learned Tribunal in ignorance of the aforesaid Proviso to Sub-section (4) of Section 92C of the Income-tax Act, it does not have any binding character because as far as the computation of income of the assessee is concerned, the Assessing Authority has not given any benefit of Section 10-A of the Act to the assessee with respect to Transfer Pricing Adjustments made in the Assessment Order. There is no reversal of such findings of the Assessing Authority by the Tribunal in the present case. Therefore, the observation regarding section 10A, cannot be said to be causing any prejudice to the Revenue in the present case. Thus the appeal was dismissed.

Note : High Court followed the Judgment of the Hon'ble Karnataka High Court in the case of *PCIT vs. Softbrands I. Pvt. Ltd. ITA Nos.536 and 537 of 2015.*

2. Business expenditure u/s. 37– Capital or revenue – Assessee taken over project from the State Government – subsequently the project was cancelled – expenditure incurred on the project allowed as revenue in nature [A.Y. 1998-99 & 1999-2000]

Tamil Nadu Magnesite Ltd. vs. ACIT [2018] 407 ITR 543 (Mad.)

A chemical beneficiation plant was established by Tamil Nadu Industrial Development Corporation (TIDCO). Since TIDCO was not being able to achieve the desired result, the assessee company was invited to take over the project, as the assessee possessed expertise in the field. Thus assessee stepped into the project. The assessee had entered into an arrangement with TIDCO as well as with IDBI and fixed the project cost with a debt equity ratio, which was approved by the Government of Tamil Nadu, and thereafter, steps were taken to acquire land, import machinery etc. IDBI withdrew from the project, as it was found to be unviable and another co-promoter, viz., M/s. Khaltan Supermag Limited was brought in and a joint sector company was formed with the assessee subject to certain conditions. Thereafter, the said co-promoter, M/s. Khaltan Supermag Limited expressed inability to be a part of the project and after 12 years in 1998, the Government took a decision to sell the project and consequently, cancelled the allotment of 47 acres of land in favour of the assessee. The assessee filed return for the year under consideration declaring loss of ₹ 11,95,25,000/- as project expenses. The AO while finalising the assessment disallowed the project expenses treating the same as capital expenditure. On appeal CIT(A) allowed the appeal, which was subsequently reversed by the Tribunal and decided against he assessee. The assessee being aggrieved by the above order of the Appellate Tribunal preferred an appeal before the Hon'ble Madras High Court under section 260A of the Act. The High Court observed that a proper test need to be applied, which would distinguish capital and revenue expenditure. However, no test is paramount or conclusive. There is no all-embracing formula, which can provide a ready solution to the problem; no touchstone has been devised. It would be misleading to suppose that, in all cases, securing a benefit for the business would be *prima facie* capital expenditure "so long as the benefit is not so transitory as to have no endurance at all". The High Court observed that the assessee though had entered into arrangement with the banks and co-promoters and took action for acquisition of land, import of machinery, etc., no new venture was established by the assessee. The venture, which was to be taken over by the assessee and operated, did not fructify, not on account of the conduct of the assessee, but on account of the decision of the Government of Tamil Nadu. The decision of the Government of Tamil Nadu to sell the project is a very important fact, which had to be borne in mind to decide as to whether the expenditure incurred by the assessee was capital or revenue in nature. The Court further held that the AO fell in error in going by the fact that the expenditure was incurred from the capital account forgetting that the test to be applied to ascertain as to whether the expenditure is revenue or capital is not based on where the funds were drawn from. The broad parameters and tests, which have been laid down by various decisions are that there should be an enduring benefit, which should accrue to the assessee and there should be a creation of a new asset. In the instant case, both these parameters remain unfulfilled. The High Court thus held that the expenditure was revenue in nature and the same is deductible.

3. Penalty – section 271(1)(c) of the Income-tax Act, 1961 – claim of deduction made on the basis of decisions of Tribunal – all particulars furnished – levy of concealment penalty unjustified [A.Ys. 2003-04, 2004-05 & 2005-06]

PCIT vs. Dhariwal Industries Ltd. [2018] 408 ITR 102 (Bom.)

The AO while finalising the assessment disallowed the claim of deduction under section 80IA, disallowance of claim of sales tax incentive as a capital receipt not liable to be taxed and addition on account of items not considered to be eligible for 100 per cent depreciation. The AO also passed order under section 271(1)(c) of the Act and levied penalty on the above additions and disallowances. On appeal the Ld. CIT(A) deleted the penalty levied by the AO on the first two additions. However, the Ld. CIT(A) upheld the levy of penalty on addition on account of disallowance of 100 per cent depreciation. The assessee as well as department being aggrieved by the order passed by Ld. CIT(A) preferred cross appeals before the Appellate Tribunal. The Appellate Tribunal concurred with the view of the Ld. CIT(A) in deleting penalty levied on first two disallowances. The Appellate Tribunal further deleted the penalty levied on addition made on account of items not considered to be eligible for 100 per cent depreciation.

The department being aggrieved by the above order of the Appellate Tribunal preferred an appeal before the Bombay High Court. Hon'ble High Court dismissed the appeal of the department by observing that on facts the Tribunal was fully justified in confirming the order of the Commissioner in all the three assessment years for deleting the penalty as far as the first two additions were concerned. With reference to first two issues the High Court observed that in the quantum proceedings the appeals had already been admitted in which a substantial question of law was raised which indicated that they were debatable and arguable. The High Court further upheld the order of the Appellate Tribunal on deleting the penalty on third point by observing that as far as depreciation is concerned, the assessee had admitted that a mistake was made in adopting 100 per cent depreciation and on accepting the assessee's explanation the Appellate Tribunal had held that it was a *bona fide* mistake and that penalty ought not to have been levied.

4. Collection and recovery of taxes u/s. 220 – Stay of demand while the appeal is pending before the CIT(A) – Department asked to pay 20% – Stay granted and no coercive action be taken till the disposal of appeals (AY 2015-16)

Bhupendra Murji Shah vs. DCIT [2018] 98 taxmann.com 233 (Bom.)

The assessee had challenged the assessment order before the CIT(A) and the matter was part heard. In the meanwhile, the assesee approached the AO and prayed that the demand be kept in abeyance till the disposal of the appeal before CIT(A). The AO dismissed the stay application and after referring to the Circular dt. 29-2-2016 asked the assessee to pay 20% of the outstanding amount. He directed the assessee to produce the challan and seek stay of demand again, failing which collection and recovery would continue. Being aggrieved, the assessee approached the High Court. The High Court held that if the demand is under dispute and is subject to the appellate proceedings, then the right of appeal vested in the assessee by virtue of the statute should not be rendered illusory and nugatory. That would mean that if the amount as directed by the communication of the AO being not brought in, the assessee may not have an opportunity to even argue his appeal on merits or that the appeal may become infructuous, if the demand is enforced and executed during its pendency. In that event, the right to seek protection against collection and recovery pending appeal by making an application of stay would also be defeated and frustrated. Such could never have been the mandate of law. The High Court thus directed the CIT(A) to conclude the appeals as expeditiously as possible and during pendency of the appeals, the assessee shall not be called upon to make payment of any sum, much less to the extent of 20% either of the demand or as claimed as outstanding by the revenue. The High Court further directed that during the pendency of appeals, the attachment if any levied on assessee' s bank account may be raised. The High Court further recorded that during the pendency of appeal, the assessee shall not dispose of or create third party rights in respect of movable assets and properties. However assessee can utilise the assets and properties in ordinary and normal course of business.

5. Transfer Pricing u/s. 92 – location savings – addition deleted (AY 2009-10)

PCIT vs. Watson Pharma P. Ltd. – (2018) 95 taxmann.com 281

Assessee Company was engaged in providing contract manufacturing and contract research & development services to its AE(s). In consideration of the said services, the AE(s) compensated the assessee on a total operating cost plus arm's-length mark-up basis. In the Transfer Pricing Study Report prepared by the assessee, search was performed to identify comparable companies engaged in providing similar pharmaceutical contract manufacturing and contract research and development services in India. During the course of proceeding before the TPO accepted the TNMM method and also the comparables selected by assessee for benchmarking contract manufacturing services provided by the assessee to its AEs. However, the TPO contended that the assessee ought to have received extra compensation on account of location savings over and above the margins earned by the comparables. The TPO observed that the main aim of Watson Group is to reduce cost by transferring several solid dosage products from its facilities in US to Watson India's facilities in Goa, India. TPO called for the details of cost of manufacturing in USA and ultimate selling price to the distributors in respect of products manufactured in assessee's facility in India. These details were not filed by assessee, as the assessee was not privy to such details of its AE, and hence, the TPO assumed that the location savings does arise and therefore results into increased profits or location rents. The TPO concluded that in case of contract manufacturing, cost in India is around 40% of cost in USA (excluding raw material cost) and in case of contract R&D, the cost of R&D in India (excluding raw material cost) is around 50% of cost in USA. The TPO, allocated the location savings on *ad hoc* basis by dividing the savings equally between assessee and its AE. Based on this approach TPO made an adjustment of ₹ 34,23,57,263/- on account of location savings in respect to the contract manufacturing segment and contract research and development segment. The DRP confirmed the same. On further appeal, the Tribunal deleted the addition. On further appeal, by the Department the Hon'ble High Court affirmed the order of the Tribunal. The High Court observed that comparables selected to determine the ALP were entities operating in India just as the respondent-assessee. As the comparables as well as the assessee are both situated in India there was no locational difference and consequently no locational advantage.

Note:

Locational advantages are benefits which the corporates / multinationals are able to receive from locating / relocating part of their businesses to certain jurisdictions. The benefits are generally cost savings on account of reduction in various costs like wage costs, raw material costs, transportation costs, rent, training costs, subsidies, tax incentives, infrastructure costs, etc. Locational advantage can also be in locations with highly specialised skilled manpower and knowledge or relatively easier availability of certain specialised technology. This judgment of the Hon'ble High Court on locational saving is a welcome observation for all multi-national corporates operating in India.

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

DIRECT TAXES

Tribunal

Unreported Decisions

1. Income from business and Profession – Section 28(va) of the Act – damages received for relinquishment of the "right to sue" is a capital receipt not chargeable to tax and the same cannot be added under the head business income

Bhojison Infrastructure Pvt. Ltd. vs. ITO (ITA No.: 2449/Ahd/2016) [Assessment Year: 2008-09], order dated 17-9-2018

Facts

The assessee is a private limited company and the assessment year under consideration is 2008-09. During the year under consideration, the assessee entered into a development agreement dated 30-3-2007 with the owner of land, Shri Sureshbhai M. Patel by which a right in the property was created in favour of the assessee. However, despite the said development agreement in existence, the said owner sold the said property to the third party. In light of the same, the only right available with the assessee was to file a suit for specific performance against the said land owner which the assessee did not exercise and received the compensation amount for relinquishing its 'right to sue' the land owner in the court of law. While filing its return of income for the year, the assessee did not consider the said compensation as taxable income. However, during the course of assessment proceedings, the learned AO treated the said compensation as a revenue receipt and taxed the same u/s. 28(va) of the Act as business income. Aggrieved by the same, the assessee preferred an appeal before the learned CIT(A) but did not find any success. Thereafter, the assessee preferred an appeal before Hon'ble ITAT. After considering the arguments of both the parties, Hon'ble ITAT observed as under:

Held

Hon'ble ITAT held that the only question arises for consideration is whether the damages received by the assessee for breach of the development right is a capital receipt or otherwise chargeable to tax. It was observed that by way of a development agreement, the assessee was enabled to utilise property/land for consideration and for share of profit. The said right accrued to the assessee was taken away by selling the said property to the third party. The prospective purchaser as well as defaulting parties perceived threat of filing suit by the assessee and consequently, paid the compensation/damages to the assessee to avoid prospective litigation. Hon'ble ITAT held that on breach of the said development agreement, the assessee was left with no option other that filing a suit against the defaulting party and the purchaser. The said compensation was paid to the assessee for not filing a suit in the court of law against any of the two parties. Further, it was held that a 'right to sue' is neither a capital asset within the meaning of Section 2(14) of the Act nor is capable of being transferred under section 6(e) of the Transfer of Properties Act. Hon'ble ITAT, further referred to the provisions of section 6(e) of the Transfer of Property Act and held that the expression 'property of any kind' in the context of transferability makes an exception in the case of a mere 'right to sue'. Thus, a 'right to sue' is a non-transferable right and the same doesn't fall under the definition of a 'capital asset'. In order to attract capital gains, the transfer of a capital asset is a *sine qua non* and in absence of any transfer of a capital asset, the said compensation cannot be brought to tax. While arriving at this conclusion, Hon'ble ITAT relied upon the decision of Hon'ble Gujrat High Court in the case of *"Baroda Cement & Chemicals Ltd. vs. CIT" reported at 158 ITR 636 (Guj)*. Finally, the issue was decided in favour of the assessee and against the Department.

2. Penalty – Section 272A r.w.s. 276BB – Penalty need not be levied for late filing of TDS/TCS returns/ statements when there is no loss to the Revenue and late filing of TDS/TCS returns/statements is due to reasonable cause

Haryana Distillery Ltd vs. JCIT (ITA 1642 & 1643/ Del/2015) [Assessment Years: 2010-11 and 2011-12] order dated 4-9-2018, [2018] 97 taxmann.com 571 (Delhi – Trib.)

Facts

The assessee was engaged in the business of production of potable country liquor/alcohol. For the years under consideration, the assessee deposited the amount of TDS/TCS to the treasury of the Government on time but failed to file TDS/TCS statements/returns within the time prescribed under the Act. Considering the delay in filing the said statements, the learned AO levied the penalty u/s. 272A(2)(k) of the Act on the assessee. Being aggrieved, the assessee preferred an appeal before the learned CIT(A). Before the learned CIT(A), the assessee submitted that there was reasonable cause for non-filing the said returns on time since the assessee was not in receipt of PAN of all the parties and the manager who was looking after the same was on leave due to serious illness. It was further submitted before the said authority that there is no loss to the department since the amount of TDS/TCS was deposited on time. However, the said contentions did not impress the learned CIT(A) and the appeal filed by the assessee was dismissed. Thereafter, the assessee had to prefer an appeal before Hon'ble ITAT. During the course of hearing, the assessee reiterated its submissions made before the learned CIT(A) and relied upon some judicial pronouncements. After hearing both the parties, Hon'ble ITAT held as under:

Held

Hon'ble ITAT observed that it is an admitted fact that the assessee deducted tax on time and deposited the same with the Department on time. Further there was reasonable cause since the parties did not furnish their PAN on time to the assessee and the manager of the assessee who was looking after the said compliance was on leave due to illness. Hon'ble ITAT concluded that there was only a technical or venial breach to the provisions of the Act requiring the assessee to submit the quarterly statements of tax deducted at source within the time provided under the Law and it is not a case of the department that the assessee did not file the required statements at all. On the said facts, Hon'ble ITAT concluded that there was no financial loss to the Government since the amount of TDS/TCS was deposited on time and in such a case, the penalty should not be levied u/s. 272A of the Act on the assessee. In light of the abovementioned observations, Hon'ble ITAT deleted the penalty levied by the learned AO and held in favour of the assessee.

3. Reassessment proceedings – Section 147 of the Act – an assessing officer is not empowered to carry out fishing/roving inquiries in absence of fresh material/information regarding the item which is not initially subject matter of reassessment proceedings

Juliet Industries Limited vs. ITO (ITA 5452/Mum/2016) and ITO vs. Juliet Industries Limited (ITA 5975/Mum/2016) [Assessment Year: 2009-10] order dated 4-4-2018

Facts

The assessee is a resident corporate and the assessment year under consideration is 2009-10. For the year under consideration, the assessee filed a return of income at ₹ Nil which was processed u/s. 143(1) of the Act. Thereafter the case was reopened u/s.147 r.w.s 148 of the Act and accordingly the notice was issued to the assessee. The said case was reopened on the basis of information received from the investigation wing regarding the entries of bogus purchase bills obtained by the assessee for the year under consideration. The assessee to avoid litigation and to buy peace of mind accepted the said contention and agreed to pay the tax on the same. However, during the course of the said reassessment proceedings, the learned AO observed that the assessee received an amount of ₹ 765 lakh as share application money (towards share capital and share premium) from 26 parties. To gather details of the same, the learned AO issued notices u/s. 133(6) of the Act to the said parties. However, no satisfactory reply was found. Ultimately, the learned AO made the addition of ₹ 765 lakhs as unexplained cash credit in the assessment proceedings. Aggrieved by the same, the assessee preferred an appeal before the learned CIT(A) who gave the partial relief to the assessee. Against the order passed by the learned CIT(A), the assessee as well as the department filed the respective appeals before Hon'ble ITAT. During the course of hearing, the learned AR of the assessee objected to the initiation of reassessment proceedings. Further, it was argued that the learned AO made the addition of ₹ 765 lakh on account of unexplained cash credit u/s. 68 of the Act by conducting roving/fishing inquires without having any tangible material/information regarding the same which is not permissible in the law. The learned AR of the assessee drew attention of Hon'ble ITAT to the *explanation 3* to section 147 and the memorandum explaining the said provision. On the contrary, the learned DR vehemently opposed the contention of the assessee. After hearing both the parties Hon'ble ITAT held as under.

Held

In the first place, Hon'ble ITAT rejected the contention of the assessee and upheld the initiation of the reassessment proceedings. However, with regard to the addition made on account of unexplained cash credit u/s. 68 of the Act, Hon'ble ITAT noticed that the learned AO added the same in absence of any new tangible material/information by making roving/fishing inquires. Hon'ble ITAT observed that in absence of any tangible material/information, it is not permissible to an assessing officer to disturb the accepted original return of income. Hon'ble ITAT perused the *explanation 3* to section 147 and referred to various judicial pronouncement on the subject matter and thereafter concluded that an Assessing Officer is not empowered to do fishing/roving inquires in the garb of *explanation 3* to section 147 of the Act. Hon'ble ITAT held that there must be minimum material to trigger further action on the part of an assessing officer so as to assume valid jurisdiction and finality of issues cannot be agitated or revisited by the respective parties except within the framework of the law. Finally, Hon'ble ITAT concluded that the learned AO in the facts under consideration exceeded the jurisdiction by taxing the income of ₹ 765 lakh u/s. 68 of the Act in absence of any fresh material/information available on record. In light of the abovementioned observations, the addition of ₹ 765 lakh made by the learned AO u/s. 68 of the Act was deleted by Hon'ble ITAT and the issue was allowed in favour of the assessee and against the Department.

4. Reassessment – Section 143(3) r.w.s 147 of the Act – Reassessment proceedings are bad in law and without jurisdiction if no fresh notice u/s. 143(2) of the Act is issued after the assessee files a return of income pursuant to the notice issued u/s. 148 of the Act

Shri Sudhir Menon vs. ACIT (ITA No.: 1744/ Mum/2015) [Assessment Year: 2010-11], order dated 3-10-2018

Facts

The assessee is an individual and the assessment year under consideration is AY 2010-11. The assessee filed his return of income for the impugned assessment year on 31-7-2010 declaring the total income at ₹ 46,76,95,780/-. The return was processed u/s. 143(1) of the Act *vide* intimation dated 21-3-2012. Subsequently, the assessment was reopened by issuing a notice dated 1-4-2013 u/s. 148 of the Act which was served on the assessee on 8-4-2013. Despite the fact that the assessee did not file his return of income pursuant to the said notice issued u/s. 148 of the Act, the learned A.O. issued another notice dated 3-5-2013 u/s. 143(2) of the Act asking the assessee to attend the office on 13-5-2013. Thereafter, the assessee filed a reply dated 23-5-2013 requesting the learned AO to treat the original return filed on 31-7-2010 as a return filed pursuant to the notice u/s. 148 of the Act. Subsequently, the hearings took place and the assessment order dated 19-3-2015 was passed u/s. 143(3) r.w.s 147 of the Act. Aggrieved by the said assessment order, the assessee preferred an appeal before learned CIT(A). However, the learned CIT(A) confirmed the action of the learned AO. Being aggrieved by the same, the assessee preferred an appeal before Hon'ble ITAT. The Appellant filed an addition ground of appeal challenging the validity of the assessment order and pleaded that the reassessment proceedings are bad in law since no notice u/s. 143(2) of the Act was issued after filing the return of income on 23-5-2013 pursuant to the notice issued u/s. 148 of the Act. Hon'ble ITAT after hearing both the sides admitted the additional ground and held as under:

Held

Hon'ble ITAT held that the notice u/s. 148 of the Act was issued on 1-4-2013 and served on the assessee on 8-4-2013. The assessee replied to the said notice *vide* letter dated 23-5-2013. It means that the assessee filed the return of income on 23-5-2013 in response to the notice issued u/s. 148 of the Act. The learned AO issued the notice dated 3-5-2013 u/s. 143(2) of the Act requiring the assessee to attend the office on 13-5-2013. As per the provisions of section 143(2) of the Act, the learned AO is empowered to issue a notice under section 143(2) of the Act within six months from the end of the financial year in which the return is filed. The said condition is not fulfilled in the present case since the notice u/s. 143(2) of the Act was issued prior to filing the return of income and no notice u/s. 143(2) of the Act was issued by the learned AO on or after 23-5-2013. i.e the date on which the return in response to the notice under section 148 was filed. Thereafter Hon'ble ITAT concluded that the learned AO failed to fulfil the condition provided u/s. 143(2) of the Act and did not assume valid jurisdiction. In light of the same, it was held that the reassessment framed u/s 143(3) r.w.s 147 of the Act is bad in law. While arriving at the said conclusion, Hon'ble ITAT relied upon the decisions of *ACIT vs. Geno Pharmaceuticals Ltd. [2013] 214 Taxman 83 (Bom.), Ms. Malvika Arun Somaiya [2010] 2 taxmann.*

com 144 (Bom.) and *DIT vs. Society for Worldwide Inter Bank Financial, Telecommunications [2010] 323 ITR 249 (Delhi)* and held in favour of the assessee.

5. Taxability of receipts – Section 2(24) of the Act – Compensation received by the assessee for withdrawing a criminal complaint filed by him against an accused is a capital receipt not chargeable to tax

ACIT vs. Jackie Shroff (ITA 2792/Mum/2016) [Assessment Year: 2011-12] order dated 23-5-2018, [2018] 97 taxmann.com 277 (Mumbai – Trib.)

Facts

The assessee is a film actor and the Assessment Year under consideration is 2011-12. For the year under consideration, the assessee had received US $1.5 million, equivalent to ₹ 6,97,94,580/- from one person but the same was not offered to tax by the assessee in his return of income. During the course of assessment proceedings, the learned AO asked the explanation of the same. In response thereto, the assessee submitted that in one of the transactions, his signature was forged by the opposite party for which the assessee filed a criminal complaint with the office of the Economic Offences Wing at Mumbai requesting it to look into the matter. Thereafter, the opposite party came forward for settlement of the case and paid the said amount to the assessee for withdrawing the criminal complaint filed against him by the assessee. During the course of assessment proceedings, the assessee submitted that the said amount being a capital receipt was not at all chargeable to tax since the same did not partake characteristics of income as per section 2(24) of the Act. However, the learned AO after rejecting the submission of the assessee added the same to the returned income of the assessee. The assessee preferred an appeal against the same before the learned CIT(A) who reversed the order of the learned A.O. Aggrieved by the same, the Department filed an appeal before Hon'ble ITAT. Both the parties put forth their respective contentions. After hearing them, Hon'ble ITAT held as under:

Held

Hon'ble ITAT observed that to settle the dispute, the person against whom the assessee filed a complaint came forward for amicable settlement of the dispute and a settlement deed was executed between the parties. The assessee received the said compensation as per the terms of the settlement deed. Hon'ble ITAT further observed that the compensation received by the assessee was not for his professional activities. Thereafter, Hon'ble ITAT came to the conclusion that the said compensation is a capital receipt and cannot come within the definition of income as enunciated u/s. 2(24) of the Act. Further Hon'ble ITAT recorded a finding that the present case under consideration is covered by the decision of Hon'ble Bombay High Court in the case of *CIT vs. Amar Dye Chem Ltd. [1994] 74 Taxman 25 (Bombay)*. In light of the aforesaid observation, the appeal filed by the department was dismissed by Hon'ble ITAT and the issue was decided in favour of the assessee.

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Be Grateful to the Man you help, think of Him as God. Is it not a great privilege to be allowed to worship God by helping our fellow men?

— *Swami Vivekananda*

 

CA Tarunkumar Singhal & Sunil Moti Lala, *Advocate*

INTERNATIONAL TAXATION
Case Law Update

A. HIGH COURT

1. Advertisement and sales promotion expenses incurred by the assessee, engaged in rendering marketing and sales activities to its AEs, are not separate and independent international transactions and are allowable under section 37(1)

Pr.CIT vs. Mary Kay Cosmetic Pvt. Ltd. - TS-1063-HC-2018(DEL) - ITA 1010/ 2018 & CM APPL. 37728/ 2018

Facts

(i) Assessee, a wholly owned Indian subsidiary of USA Company, was appointed and had acted as an exclusive distributor of products manufactured by and procured from the holding company / AEs. As a distributor, the assessee had undertaken marketing and sales activities of the said products.

(ii) The AO treated advertisement and sales promotion expenses as a separate international transaction, and held that the ratio of the said expenses over the turnover (i.e. 25.2%) was exceptionally high. He thus applied 'Bright Line Method' and made a TP addition.

(iii) Alternatively, the AO held that the said expenses was not allowable under section 37(1) since they were incurred for promoting the brand belonging to AE and not the assessee.

(iv) The CIT(A) deleted the addition made by the AO by applying "Bright Line Method" and held that expenditure incurred on advertisement and sales promotion was allowable under section 37(1). The Tribunal affirmed the CIT(A)'s order.

Held

(i) The Court held that the issue whether the assesssee was entitled to deduction of advertisement and sales promotion expenses under section 37(1) is covered against the Revenue by the decisions in *Sony Ericsson Mobile Communications India Pvt. Ltd. vs. CIT (2015) 374 ITR 118 (Delhi)* and *CIT vs. Whirlpool of India Ltd. (2016) 381 ITR 154 (Delhi)*. It also observed that in Sony Ericsson Mobile Communications India Pvt. Ltd. (supra), the "Bright Line Method" was also disapproved.

(ii) The Court held that the AO had not given any good ground/ reason to treat advertisement and sales promotion expenses as a separate and independent international transaction, rather it was a function performed by the assessee engaged in marketing and distribution.

(iii) Accordingly, it dismissed the Revenue's appeal.

2. It was not proper on part of the DRP to pass an order on the application filed by one party alone (i.e. DRP itself) leaving the other application (filed by the assessee) either unheard or not disposed of

Regen Powertech Private Limited vs. DRP & Anr. - TS-1076-HC-2018(MAD) - W.P.No.27334 of 2017; W.M.P.No.29226 of 2017

Facts

(i) The assessee-company, engaged in the business of manufacturing and supply of wind turbine generators, made a payment of royalty to its AE in Cyprus during the previous year relevant to assessment year 2013-14. The TPO made an adjustment with respect to the said international transaction.

(ii) The assessee filed objections before the DRP against the draft assessment order inter alia contending that the TPO/ AO's action was not in accordance with the principle of res-judicata in view of the Tribunal's order for the assessment year 2011-12. With regard to assessment year 2011-12, the Tribunal had remanded the issue of royalty payment to the TPO for recalculation of ALP and the TPO had accepted the assessee's claim for downward adjustment of royalty payment.

(iii) The DRP, however, rejected the assessee's objection following its own order for assessment years 2011-12 and 2012-13 decided against the assessee. Subsequently, the DRP filed a suo moto application for rectification of its own order/ direction for assessment year 2013-14 to state that the facts for the earlier years were different.

(iv) The assessee also filed an application for rectification of the said order contending that the same had to be rectified considering the Tribunal's order for assessment year 2011-12.

(v) The DRP, without disposing the application filed by the assessee, passed a rectification order merely by adjudicating upon its own suo motu rectification application.

(vi) Aggrieved, the assessee filed the writ petition against the rectification order of the DRP.

Held

(i) The Court held that in, all fairness, the DRP ought to have considered the assesssee's application alongwith its suo motu application for rectification and it was not proper to pass an order on the application filed by one party alone leaving the other application either unheard or not disposed of

(ii) Accordingly, it set aside the rectification order passed by the DRP and directed the DRP to pass a fresh order considering both the applications on merits and in accordance with law.

3. Exclusion and inclusion of comparables does not necessarily give rise to substantial question of law

Pr CIT vs TIBCO Software (India) Pvt Ltd. - TS-1077-HC-2018 (Bom) - ITA No.522 of 2016

Facts

(i) The assessee-company rendered support services to a USA based AE which was into business of software development. The TPO did not accept assessee's benchmarking of the said transaction and accordingly made a TP adjustment by selecting fresh comparables.

(ii) Assessee filed an appeal before the Tribunal against the final assessment order passed to pursuant the DRP's direction. The Tribunal relied on its earlier year decision in the assessee's own case involving identical grounds and held that the comparables selected by the TPO were not comparable at all with the assessee since the said comparables were engaged in ITeS as against software design and development services rendered by the assessee.

(iii) Aggrieved, the Revenue filed an appeal to the High Court against the order of the Tribunal.

Held

(i) The Court relied on the division decision in the case of Pr.CIT v. Barclays Technology Centre India Private Ltd, [ITA No. 1384 of 2015 (Bom)] and held that the Revenue routinely brings such factual matters before the Court knowing fully well that TP particularly with regard to exclusion and inclusion of certain comparables to determine ALP would not necessarily give rise to purely legal question or substantial question of law.

(ii) Accordingly, observing that the Tribunal's findings and conclusions could not be termed as perverse or vitiated by error of law apparent on the face of the record and that the issue involved was factual, the Court dismissed the Revenue's appeal.

4. Cryptic order passed/ directions issued by the DRP without application of mind, simply accepting the TPO's order, without independent reasoning and findings, is liable to be set aside

Renault Nissan Automotive India Private Ltd. and Nissan Motor India Pvt. Ltd. vs DRP & Othrs - TS-1087-HC-2018(MAD) – W.P.Nos.26814 & 26815 of 2017; W.M.P.Nos.28531 to 28533 of 2017 & 16197 of 2018

Facts

(i) The TPO rejected a) the overseas tested party approach adopted by the assessee b) the economic adjustments claimed by the assessee and proposed TP adjustment.

(ii) The assessee-filed objection before the DRP against the draft assessment order incorporating the adjustment made by the TPO. The DRP issued directions to the AO, which in effect, accepted the conclusion arrived by the TPO in toto.

(iii) The assessee filed the writ petition before the High Court against the said directions of the DRP primarily contending that the DRP had passed the order in total non-application of mind to the objections raised by the assessee. It contended that the DRP was not justified in rejecting the objections and confirming the TPO's order simply by stating that it was in agreement with the findings rendered by the TPO without any detailed discussions and independent findings on each issue.

Held

(i) The Court held that perusal of the DRP's order clearly indicated that apart from extracting objections raised by the Petitioner and the relevant portion of the TPO's order dealing with such objection, the DRP had not further discussed anything on the said objection in detail as to how the objections raised by the assessee could not be sustained or as to how the findings rendered by the TPO on such issue had to be accepted.

(ii) Noting that section 144C(5) r.w. 144C(6) contemplates that DRP shall issue directions only after inter alia considering objections raised by the assessee, evidences filed by assessee etc., the Court held that issuance of such directions could not be made mechanically or as an empty formality. It held that, on the other hand, the DRP had to issue directions only after considering the above stated materials and such consideration must be apparent on the face of the order.

(iii) It thus held that, in absence of independent reasoning and finding, the DRP had passed a cryptic order without application of mind.

(iv) Accordingly, it set aside the DRP's order and directed it to pass a fresh order after considering the objections raised by the assessee in detail and giving independent reasons and findings.

Tribunal Decisions

5. India-South Africa DTAA- Income from providing Line Functions in production of a T. V. Serial is not taxable as "Royalty" or "Fees for Technical Services" (FTS) under the provisions of the Income-tax Act or the DTAA

M/s. Endemol South Africa (Proprietary) Ltd. vs. DCIT-(International Taxation), circle 2(2)(1), [TS-583-ITAT-2018(Mum)] Assessment Year: 2012-13

Facts

(i) Endemol India Private Limited **("Endemol India")** was commissioned to produce a television series called "Fear Factor" (based on the popular US show of the same name) and was required to shoot episodes in South Africa for which it needed local support. Endemol India entered into an agreement dated April 19, 2011 with Endemol South Africa (Proprietary) Ltd. (the "assessee") to carry out line production services which involved providing various administrative services such as making logistic arrangements and (acting as a facilitator and coordinator for filming of the television series in South Africa on a work-for-hire basis.

(ii) In terms of the Agreement, the assessee received an amount of INR 96 million (approx.) from Endemol India for providing the aforementioned services in South Africa. These payments received by the assessee outside India were subjected to withholding taxes by Endemol India. Since it was an accepted position that the assessee did not have a Permanent Establishment **("PE")** in India, the assessee declared no taxable income in its Indian tax returns.

(iii) However, the Assessing Officer **("AO")** took a view that the role of the assessee was not that of a mere facilitator and that it had assigned copyright to, and provided managerial and technical services to Endemol India. The AO pointed to the fact that Endemol India had withheld tax on these payments to the assessee to evidence tacit acceptance of the AO's position by the parties to the Agreement. Accordingly, the AO concluded that the income earned by the assessee from Endemol India was taxable in India as Royalty and FTS at the rate of 10% as per Article 12 of the Treaty which was contested by the assessee before the Dispute Resolution Panel **("DRP")**.

(iv) The DRP also held these payments to be taxable as Royalty and FTS on the basis that the Agreement provided that the copyright in the format, recorded footage, scripts, visuals etc., produced by the assessee for Endemol India would vest exclusively with Endemol India. Further, the DRP observed that as per the Agreement, the assessee was obliged to assign all its copyrights (if any) conferred by the South Africa Copyright Act No. 98 of 1978, as well as all other intellectual rights that may be vested with it in future as a result of producing materials for Endemol India to the latter.

Decision

The Tribunal held in favour of the assessee as under

1. Re: Royalty

(i) The Tribunal went through various clauses of the Agreement to conclude that the same was a contract for providing services, and not for granting a right in any copyright. The Tribunal also observed that the entire consideration that was paid to the assessee under the Agreement was in respect of the provision of the line production services and not towards any licensing rights in any work.

(ii) It was pointed out by the assessee that under Section 17 of the Copyright Act, 1957 as well as the provisions of South Africa Copyright Act No. 98 of 1978, where a work is specifically commissioned under a contract of service by a person, then such person is the first owner of the copyright in that work. Thus, the Tribunal after perusing these legal provisions, held that when Endemol India was anyway the first owner of the copyright in the cinematograph work as per the operation of law, there could be no question of the assessee assigning the same in favour of Endemol India.

(iii) The Tribunal considered the definition of the term "royalty" under Article 12(3) of the Treaty, to find that it only includes consideration received for the use of or right to use, any copyright, and thus, even if the observations of the AO and the DRP that the consideration received by the assessee was for transfer of the copyright to Endemol India were accepted, this would also fall outside the scope of the term "Royalty" for the purposes of the Treaty.

(iv) On this basis, the Tribunal held that the consideration received by the assessee under the Agreement for line production services was not in the nature of "Royalty" under Article 12 of the Treaty read with the ITA.

2. Re: Fees for Technical Services (FTS):

(i) The Tribunal considered whether the line production services being provided by the assessee could fall under any of the kinds of services which are covered under the definition of FTS under the ITA and the Treaty, namely (i) managerial services; (ii) technical services; or (iii) consultancy services.

(ii) ***Managerial Services:*** The Tribunal found that the assessee was in no way involved in controlling, directing, managing or administering the business or part of the business of Endemol India, and hence, concluded that the assessee's services did not fall within the scope of the term "managerial services". In this regard, the Tribunal placed reliance on its own ruling in the case of *Yash Raj Films v. ITO (IT) (2013) 140 ITD 625 (Mum)* which involved a similar set of facts. The assessee in that case had made payments to certain overseas service providers for services availed in connection with the shooting of different films where various activities involved included arranging for shooting locations, obtaining necessary permits, arranging shipping & custom clearances, shooting equipment, meals, transport etc., arranging for makeup of casts, and coordinating necessary licences. In this ruling, the Tribunal had clarified that *"merely because some managerial skill is required to render the services, it would not make the services to be managerial services as envisaged in Explanation 2 to section 9(1)(vii). Similarly, the requirement of knowledge of local laws on the part of the service providers to render the services such as obtaining the permissions for shooting from the local authorities or for arranging insurance of the crew members and shooting equipment would not change the basic nature of the services".*

(iii) ***Technical Services:*** The Tribunal then proceeded to hold that the administrative services being provided by the assessee (such as arranging for logistics, etc.) did not involve use of any technical skill or technical knowledge, nor any application of technical expertise on its part and hence, the same cannot be characterised being in the nature of as "technical services". Again, the ruling of Tribunal in the case of Yash Raj Films (*supra*) becomes relevant as in this case, in the context of logistics support for film shooting, it had also been clarified, that such activities do not constitute "technical" services.

(iv) ***Consultancy Services:*** The Tribunal held that since consultancy services typically require specialised qualification, knowledge, expertise of a professional person and is a function of the skill, intellect and individual characteristics of the person rendering it, the line production services rendered by the assessee under the Agreement could not fall under this category as well.

Based on the above, the Tribunal rejected the argument of the revenue department and held that the consideration received by the assessee under the Agreement could not be characterised as being FTS.

3. Applicability of AAR Rulings:

(i) The Tribunal referred to the two rulings of the Authority for Advance Ruling ("AAR") delivered in the case of *Endemol Argentina, In Re (AAR No. 1082 of 2011 dated December 13, 2013)* and *Utopia Films, In Re (AAR Nos. 1081 and 1082 of 2011; dated February 19, 2014)* where the issue of taxability of consideration received in lieu of providing line production services had been considered and decided upon. Through these two rulings, the AAR had clearly laid down the position that such services did not fall within the scope of FTS under the ITA.

(ii) However, the AO and the DRP had disregarded these rulings on the grounds that (i) AAR rulings are only binding in respect of the applicant only in respect of the transactions in relation to which advance ruling was sought; and (ii) the AAR rulings were in the context of tax treaties other than the South Africa Treaty.

(iii) While the Tribunal agreed with (i) above, it held that AAR Rulings still carry a persuasive value and accordingly, may be relied upon by the AAR itself or by other assessees or the revenue department itself. The Tribunal referred to the judgment of the Supreme Court of India in the case of *Columbia Sportswear Company vs. DIT, Bangalore (2012) 346 ITR 161 (SC)* in support of this view.

(iv) On point (ii), the Tribunal observed that no material was placed before it to differentiate between the definitions of "FTS" which were included in the DTAAs involved in the aforementioned AAR Rulings and the definition of "FTS" as included in the Treaty which was the subject matter of discussion in the instant matter. Accordingly, the Tribunal ruled that the AO and the DRP had erred in not considering the rulings of the AAR while considering the case of the assessee as these rulings had persuasive value.

6. A valid Tax Residence Certificate ("TRC") held by a Mauritius assessee would constitute sufficient evidence of the assessee being the beneficial owner of the income being earned by it for the purposes of the India – Mauritius DTAA

HSBC Bank (Mauritius) Ltd. vs. DCIT (IT)-2(2)(2), Mumbai [TS-460-ITAT-2018(Mum)] / [2018] 96 taxmann.com 544 (Mumbai - Trib.) – Assessment Year: 2011-12

Facts

(i) HSBC Bank (Mauritius) Ltd. is a limited liability company which is incorporated, registered and a tax resident of Mauritius (the **"**assessee**"**). The assessee had earned interest income of INR 950 million (approximately) from investments in Indian debt securities. Relying upon Article 11(3)(c) of the Treaty,

(ii) The assessee claimed an exemption from Indian taxes in respect of this income. However, the said exemption was denied by the tax authorities on the ground that the requisite conditions prescribed in Article 11(3)(c) of the Treaty were not fulfilled by the assessee as:

- the interest was not "derived" by the assessee;
- that interest was not "beneficially owned" by the assessee; and
- that the assessee ought to be carrying on bona fide banking business, which it did not.

(iii) On an appeal by the assessee to the Tribunal, the Tribunal passed an order dated December 16, 2016, by way of which it agreed with the assessee's contentions with respect to points (i) and (iii) above. However, with respect to the condition of beneficial ownership, the Tribunal remanded the issue to the file of the Assessing Officer. This was contested by the assessee by way of a Miscellaneous Application under Section 254(2) of the Income-tax Act (**"ITA"**) and the Tribunal recalled its decision so far as it pertained to the issue of "beneficial ownership" through its order dated January 10, 2018.

Decision

The Tribunal observed and held as under:

(i) Article 11(3)(c) of the Treaty prescribes that interest income arising in India shall be exempt from tax in India provided it is derived and beneficially owned by any bank carrying on a bona fide banking business which is resident of Mauritius.

(ii) The assessee relied on the **Circular No. 789/2000 dated April 13, 2000** (the "**Circular**") issued by the Central Board of Direct Taxes ("CBDT") which, prescribed that wherever a TRC is issued by the Mauritian authorities, such a TRC will constitute sufficient evidence for not only accepting the status of residence, but also the beneficial ownership in order to apply the provisions of the Treaty.

(iii) The assessee drew the attention of the Tribunal to the judgment of the Hon'ble Supreme Court of India in the case of *Union of India vs. Azadi Bachao Andolan, [2003] 263 ITR 706*. It was also pointed out that the Ministry of Finance through its **Press Clarification dated March 1, 2013** has clarified that the Circular continues to be in force.

(iv) The Tribunal had to consider whether the Circular could be relied upon by the assessee considering the fact that it had been issued specifically in the context of income by way of dividend and capital gains arising from the sale of shares. In this regard, the Tribunal referred to the judgment of the Hon'ble Bombay High Court in the case of *DIT vs. Universal International Music B.V, [2013] 214 Taxman 19 (Bom.)* where a company incorporated under the laws of Netherlands and holding a valid TRC issued by the Netherlands authorities was considered to be the beneficial owner of the royalty income received from the Indian company on the basis of the Circular, even though the income in this case was in the nature of royalty income (and not dividends or capital gains). Accordingly, the assessee in this case was held to be entitled to the benefits of Article 12 of the DTAA between India and Netherlands.

(v) Relying upon the above mentioned judgment of the Bombay High Court, the Tribunal held that the Circular would equally apply even in the instant case where the issue concerned the assessee's eligibility to avail benefits of the Treaty in respect of the interest income derived by it.

(vi) The Tribunal also referred to a decision of its Chennai Bench in the case of *Hyundai Motor India Ltd. vs. Dy. CIT [2017] 81 taxmann.com 5* where the Chennai Tribunal held a Mauritius bank to be the beneficial owner of interest income.

7. India-Mauritius DTAA – Article 7(3) – Computation of Business Income – Domestic law restrictions on allowability of expenses not applicable to PE absent specific provision in treaty

DDIT Intl. Taxation, Circle-2(2) New Delhi vs Unocol Bharat Ltd., [TS-582-ITAT-2018(DEL)] – Assessment Year 1998-99

Facts

(i) The assessee a Mauritius tax resident was engaged in business development and promotion in the energy sector in India for its parent company.

(ii) The assessee constituted a PE in terms of Article 5 of the India-Mauritius tax treaty, and accordingly, offered its income to tax on net basis.

(iii) During assessment year (AY) 1998-99, the assessee had incurred certain expenses relating to operating contract, employee salaries and travel and entertainment.

(iv) The Assessing Officer noted that appropriate documentary evidences (i.e., vouchers and bills of expenditure for travel cost, details of tax withheld on salaries paid to employees, etc.) were not produced for the said expenses. Further, the assessee did not withhold any taxes under section 195 of the Act. Accordingly, the TO disallowed the aforesaid expenditure.

(v) Before the CIT(A), the assessee contended that employee salaries were not taxable in India on account of the short stay exemption available to them under Article 15 of the India-US tax treaty.

(vi) It was further submitted that Article 7(3) of the India-Mauritius tax treaty, is differently worded as compared to tax treaties with other countries, which implement additional restriction on deduction of expenses and are subject to the limitation of tax law of that State (i.e., domestic law of India). Under the India-Mauritius Tax Treaty, there was no such restriction for the claim of expenses under Article 7(3). To support its contention the assessee relied on the case of *JCIT v. State Bank of Mauritius Limited 2009 TIOL 712.*

(vii) It was also contended that sufficient details (such as ledger copies, names of employees, details of Indian project, etc.) were submitted to the TO in support of the expenses. Once these details were submitted, the onus was on the TO to prove that the details were insufficient/ erroneous, without which, a disallowance could not be made. The first appellate authority upheld the assessee's contentions.

(viii) The Revenue contended that since the assessee did not conduct any business of its own, the question of allowing any expenditure while computing the income of the PE did not arise.

Decision:

The Tribunal held in favour of the assessee as follows

Relying on the decision of Mumbai Bench of the Tribunal in the case of *State Bank of Mauritius ITA No. 2254/ MUM /2005 order dated 3-10-2012*, the Tribunal held that :

(i) Para 3 of Article 7 of India-Mauritius tax treaty provides for the determination of profits of a PE by allowing the deduction of expenses incurred for the business of the PE, including executive and general administrative expenses so incurred in which the PE was situated.

(ii) Accordingly, all the expenses incurred for the purpose of the business of the PE were to be allowed. There was no restriction on the allowability of such expenses subject to any limitation of the tax laws of the contracting state (India).

(iii) The phraseology used in Article 7 (3) is different from other treaties, for instance, Article 7(3) of the India-US tax treaty provides that the deduction of expenses incurred for the purpose of business of the PE would be in accordance with provisions subject to the limitation of the tax laws of that State. A similar phraseology has been used in the India-UAE Tax Treaty after the protocol.

(iv) Once no such restriction has been provided in a tax treaty for applying the limitation of the domestic tax laws, such limitation under the Indian Income-tax Act cannot be imported in such an Article.

(v) If the expenditure was incurred, it had to be allowed while computing the profit and loss of the PE in full and without any restriction of deductibility, as per the provision of the Act.

Comment

In this decision, the Tribunal has confirmed that in the absence of any restrictions on the allowability of expenses in Article 7(3) of the India-Mauritius tax treaty, the provisions of section 40(a)(i) of the Act cannot be invoked. In other words, the tax treaty should contain a specific requirement to comply with the local laws of the source state for its invocation.

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CA Rishabh Singhvi & CA Avni Asher

INDIRECT TAXES

GST Gyan

Place of Supply under GST

Introduction

India being a federation of 29 States and 7 Union Territories has introduced the Goods and Services Tax Law (GST) overcoming multiple Constitutional challenges. The law was publicised as a "One Nation, One Tax" law which integrates the entire geography. The primary objective of the law was to eliminate multiplicity of taxes and bring uniformity throughout the country. A "Dual GST" model has been adopted in view of the federal structure wherein Centre and States will simultaneously levy GST on every supply of goods or services or both which, takes place within a State or Union Territory.

In a legal and economic system where an attempt has been made to integrate multiple stake holders (Union and States), it is essential that areas of disputes among stakeholders are also reduced to the minimum. We all have memories of the pre-CST era where multiple States scrambled for their share of revenue from a sale transaction, which was subsequently addressed by the CST law wherein the Union was assigned the role of an Ombudsman to decide when transaction took place within a State or outside a State or in the course of inter-State trade or commerce.

Article 246A was inserted by the 101st Constitutional (One Hundred and First Amendment) Amendment Act, 2016 empowering the Union and the State to make laws with respect to goods and services tax imposed by them. This was subject to the exception that the Union would have exclusive powers to make laws with respect to GST on supplies of goods or services which takes place in course of inter-state trade or commerce. Article 269A was introduced empowering the Union to levy and collect taxes on inter-state trade or commerce. Article 286 was also amended empowering the Union to formulate principles on when the supply took place (a) outside a State; and (b) in the course of import/ export into/ from the territory of India.

The IGST Act has been promulgated on the strength of these Articles by the Union Government. The objective of the Act has been stated thus[1]:

1 *Interestingly, the Act has not reproduced the objective of formulation of principles for inter-state characterisation in its opening statement. It is only from the provisions of the chapter IV and V does one understand this objective.*

> *"An Act to make a provision for levy and collection of tax on inter-state supply of goods or services or both by the Central Government and for matters connected therewith or incidental thereto".*

The entire IGST law has been designed to follow basic principle of any value-added indirect tax i.e., tax the supplies at its destination/ consumption. This has been implemented by introduction of the European Union concept i.e., Place of Supply provisions. IGST is a mechanism to monitor the inter-State trade of goods and services and ensure that the SGST component of the dual structure model accrues to the end-consumer State. It maintains the integrity of ITC chain in inter-State supplies.

Characterisation of Supply: Inter-State vs. Intra-State

The IGST law has classified the supply of goods and services in two broad baskets i.e., inter-State or intra-State based on two primary parameters i.e., location of supplier and the place of supply. This has been tabulated below

Characterisation	**Circumstances**
Intra-State supply	Supply of goods / services where the location of the supplier and the place of supply is within the same State or Union territory
Inter-State supply	**General Cases** • Supply of goods / services where the location of the supplier and the place of supply are in different States or Union territory **Special Cases** • Import of goods till they cross the customs frontier • Import of services • Location of supplier is in India and place of supply is outside India (such as export of goods/ services) • Supply of goods/services to/by SEZ Unit or Developer • Supplies to international tourists • Any other supply in the taxable territory which is not intra-State supply

Except for special cases, the nature of the supply depends on the location of the supplier and the place of supply which have been elaborated in the IGST. The analysis of these two variables has been provided below:

A) Location of Supplier

Supply of Goods	Not defined/elaborated in the IGST Act		
Supply of Services	**Sl. No.**	**Particulars**	**Location**
	i.	Where a supply is made *from* a place for which the registration has been obtained	the location of such registered premises
	ii.	Where a supply is made *from* a place other than the place of business for which registration has been obtained	the location of such place of business

	iii.	Where a supply is made from *more than one* establishment	the location of the establishment most directly concerned with the provisions of the supply
	iv.	In absence of such places	the location of the usual place of residence of the supplier

The above definition places certain challenges. In the context of supply of goods, location of the supplier has been kept open-ended and it is unclear whether such location should be understood with reference to the location of the goods or the premises of the supplier. However, the tendency for goods is to follow the movement of goods and decide the supplier based on the origin of such movement rather than the location of the premises. For e.g. Supplier A having an office in KA has moved goods to a fulfilment center / logistics hub of Amazon/ Flipkart, etc. in TN for a limited period of time for packing, etc. On receipt of the online order from a customer in KA, Amazon/ Flipkart would move the goods across states and in such cases the actual movement of goods commences from TN but the location of the supplier is in KA. This controversy over location of supplier is generally resolved by resorting to the fundamental principle of identifying the origin of goods.

In context of supply of services, the provisions provide various scenarios for which the 'from' location of a supplier is to be ascertained. The challenges compound in case of multi-location services for a particular service where multiple offices participate in the service delivery. Sl. iii above provides that the office most directly concerned with the supply of service would be considered as the location of supplier of services. The law does not provide any guidelines for deciding this 'from' location. Services arise from a contractual arrangement and the only available starting point for deciding the location of the supplier is the office which contractually binds itself. Therefore as a practical viewpoint, the office entering into the contract/ raising the service invoice could be considered as the location of supplier for the purpose of characterisation.

B) Place of Supply Provisions

Places of supply provisions have been framed for goods and services, keeping in mind the destination/consumption principle. In other words, the place of supply is based on the place of consumption of goods or services. As goods are tangible, the determination of their place of supply, based on the consumption principle, is not very difficult. Generally, the place of delivery of goods becomes the place of supply. Services being intangible in nature, pose challenges w.r.t. the location where the services are acquired, enjoyed and consumed. Therefore, the most suitable proxy for this dilemma is to ascertain the premises which are most directly concerned with the receipt of the service and treat it as the place of supply. The IGST Act has adopted this approach except for certain clearly identifiable cases such as immovable property services, event organisation services, etc. The place of supply provisions can be sub-divided into four segments:

I. Place of Supply for Goods that have been imported into or exported from India

Supply	Place of Supply
Where the goods have been imported into India	The location of the importer
Where the goods have been exported from India	The location outside India

II. Place of Supply for Goods that have NOT been imported into or exported from India

	Supply	Place of Supply
a)	Where supply involves movement of goods either by supplier or recipient	The location of the goods where the movement of goods terminates for delivery
b)	Where the goods are delivered by the supplier to a recipient or any other person on the *direction of a third person,* before or during movement of goods **(Bill to – Ship to case)**	The principal place of business of the third person
c)	Where the supply does not involve movement of goods, whether by the supplier or the recipient	The location of such goods at the time of the delivery to the recipient
d)	Where the goods are assembled or installed at site	The location of such installation or assembly
e)	Where the goods are supplied on board a conveyance i.e., In • a vessel, • an aircraft, • a train or • a motor vehicle	The location at which such goods are taken on board

III. Place of Supply for Domestic Services

To identify the correct place of supply for services, we need to determine the location of the supplier of services and the location of recipient of services. Where both are located within India (domestic services), section 12 of the IGST Act will be applicable and if either of them is located outside India (international services), Section 13 of the IGST Act will apply. The law provides different set of rules for domestic and international services.

a. In case of immovable property

<table>
<tr><th>Supply</th><th>Place of Supply</th></tr>
<tr><td>Supply directly in relation to an immovable property, including services provided by:
• architects,
• interior decorators,
• surveyors, engineers and other related experts</td><td rowspan="4">a. The location of the immovable property (if the property is located in India)
b. The location of the recipient (if the property is located outside India)</td></tr>
<tr><td>Lodging and accommodation services</td></tr>
<tr><td>Accommodation in any immovable property for organising any official, social, cultural, religious or business function</td></tr>
<tr><td>Any service ancillary to the above services</td></tr>
</table>

b. Personalised Services

Supply	Place of Supply
Restaurant and Catering Services	The location where such services are actually performed
Personal Grooming, Fitness Studio and Beauty treatment services	

c. Training Services

Supply	Registration of Recipient	Place of Supply
Training Services	Registered Recipient	The location of recipient
	Unregistered Recipient	Location where the services are actually performed

d. Event related Services

Supply	Registration of Recipient	Place of Supply
Admission to an event or amusement park or any other place and ancillary services	Irrelevant	The location where the event is held or the where the park or any such place is actually located
Organisation of an event including supply of services in relation to a conference, fair, exhibition, celebration or similar events and ancillary services	Registered Person	Location of the registered person
	Unregistered person	The location where the event is held or where the park or any such place is actually located

e. Transportation Services

Supply	Registration of Recipient	Place of Supply
Transportation of Goods	Registered Person	Location of the registered person
	Unregistered person	The location where the goods are handed over for transportation
Transportation of Passengers	Registered Person	Location of the registered person
	Unregistered person	The Place where the passenger embarks on the conveyance for the journey
Service provided on board a conveyance	Irrelevant	Location of first scheduled point of departure

f. Other Specific Services

Supply	Particulars	Place of Supply
a. Telecommunication services (Fixed line, Post-paid connection, Pre-paid connections) b. Banking and Financial Services	Where the address on record exists	The location as per the records
	Other cases	The location of the supplier of Services
Insurance Services	Registered Recipient	Location of recipient
	Unregistered Recipient	Location of recipient on records of the supplier

g. Place of Supply of Services in all other cases

Particulars	Place of Supply
Registered Recipient	Location of recipient of service
Unregistered Recipient	a. Location of recipient on records of the supplier b. Location of Supplier where Address on Records does not exist

IV. Place of Supply for International Services

a. Performance based services

Supply	Place of Supply
Services supplied in respect of goods which are required to be made physically available by the recipient of services to the supplier of services, or to a person acting on behalf of the supplier of services in order to provide the services	The location where such services are actually performed
Services which require the physical presence of the recipient or the person acting on his behalf, with the supplier for the supply of services.	

b. Services in relation to Immovable Property

Supply	Place of Supply
Any services directly in relation to immovable property	The location where the immovable property is located

c. Event related Services

Supply	Place of Supply
admission to a cultural, artistic, sporting, scientific, educational, entertainment event or amusement park or any other place	The location where the event is held or the where the park or any such place is actually located
Organisation of the above event	
Services ancillary to the above	

d. Transportation related services

Supply	Place of Supply
Transportation of goods (other than by mail or courier)	The location of destination of goods
Transportation of Passengers	The place where the passenger embarks on the conveyance for the journey
Service provided on board a conveyance	Location of first scheduled point of departure.

e. Miscellaneous Services

Supply	Place of Supply
Services by a Banking Company or Financial Institution	Location of Supplier of Services
Intermediary Services	

f. Services not covered above

Supply	Place of Supply
Any Service not covered above	Location of Recipient of Services

Conclusion

The IGST Act has been framed to break the *State vs. State* or *Centre vs. State conundrum*. The author believes that in a value-added tax system, every transaction should be considered as a component in a chain emerging from the manufacturer/ provider and terminating at the end consumer. Unless one allows a free flow of commercial transactions from location A to B through a set of intermediate stops, the principle of value-addition would utterly fail. Therefore the definitions of location of supplier, recipient and place of supply should be interpreted in such a manner that the economic supply chain is not illogically disturbed.

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A tremendous stream is flowing toward the ocean, carrying us all along with it; and though like straws and scraps of paper we may at times float aimlessly about, in the long run we are sure to join the Ocean of Life and Bliss.

— *Swami Vivekananda*

CA Ashit Shah and CA Kush Vora

INDIRECT TAXES
GST – Legal Update

A. CGST Notifications

1. Amendment in the CGST Rules 2017 (*vide* Eleventh Amendment, 2018) *(Notification No. 53/2018 – Central Tax – dated 9-10-2018)*
This notification once again amends Rule 96(10) with effect from 23rd October 2017 which is applicable to persons exporting goods on payment of IGST.

2. Amendment in the CGST Rules 2017 (*vide* Twelfth Amendment, 2018) *(Notification No. 54/2018 – Central Tax – dated 9-10-2018)*
The notification makes amendment in the Rule 89 (4B) pertaining to refund claim in case of persons availing benefit under Notification 40/2017 – Central Tax (Rate) or Notification No. 41/2017-Integrated Tax (Rate) or Notification No. 78/2017 – Customs.

The notification also amends Rule 96(10) wherein refund restriction is carved out to certain category of persons who are in receipt of capital goods in connection to EPCG scheme.

3. Extension of due date for filing of FORM GSTR-3B *(Notification No. 55/2018 – Central Tax – dated 21-10-2018)*
The due date for filing of GSTR-3B for the month of September 2018 has been extended to 25th October, 2018.

4. Seeks to supersede Notification No. 32/2017 – Central Tax, dated 15-9-2017 *(Notification No. 56/2018 – Central Tax – dated 23-10-2018)*
Notification No. 32/2017 dealt with granting exemption to a casual taxable person making taxable supplies of handicraft goods from the requirement to obtain registration. The Notification No. 56/2018 has been issued to supercede Notification No. 32/2017 wherein condition of aggregate turnover has been imposed and also procedure relating to generation of e-Way Bill is prescribed.

5. Seeks to supercede Notification No. 32/2017 – Central Tax, dated 15-9-2017 *(Notification No. 57/2018 – Central Tax – dated 23-10-2018)*
Amendment has been made in Notification No. 50/2018 pertaining to persons liable to

deduct TDS. This notification provides for exception to authorities under the Ministry of Defence and states that said amendment will be with effect from 1-10-2018.

6. Time to furnish final return in FORM GSTR-10 extended till 31st December, 2018 *(Notification No. 58/2018 – Central Tax – dated 26-10-2018)*

The Government notifies the filing of GSTR-10 by 31st December 2018 for persons whose registration under the GST Act has been cancelled by the proper officer on or before the 30th September, 2018.

7. Extension of due date for filing of Form ITC-04 *(Notification No. 59/2018 – Central Tax – dated 26-10-2018)*

The due date for filing of GST ITC-04 for the quarter ending July to September 2018 has been extended to 31st December, 2018.

B. CIRCULARS

1. Clarification regarding refund of Compensation Cess to specified persons *(Circular No. 68/2018 – GST – dated 5-10-2018)*

It is clarified that UN and specified international organisations, foreign diplomatic missions or consular posts in India, or diplomatic agents or career consular officers posted therein, having being specified under section 55 of the CGST Act, 2017, are entitled to refund of Compensation Cess payable on intra-State and inter-State supply of goods or services or both received by them subject to the certain conditions and restrictions.

2. Clarification regarding procedure for Processing of Applications for Cancellation of Registration (Circular No. 69/2018 – GST – dated 26-10-2018)

The detailed procedure and clarification regarding application for cancellation, procedure to be adopted by taxpayer, departmental officers, clarification on relevant forms to be filled up has been laid down *vide* the said circular.

3. Clarification on certain issues related to refund *(Circular No. 70/2018 – GST – dated 26-10-2018)*

The Board has clarified two matters pertaining to refund i.e., clarification on fresh application and recredit in electronic credit ledger when deficiency memo is issued. Also certain clarifications have been provided with respect to exporters who have received capital goods under EPCG to claim refund of IGST paid on exports.

4. Clarification of issues under GST related to casual taxable person and recovery of excess Input Tax Credit distributed by an Input Service distributor *(Circular No. 71/2018 – GST – dated 26-10-2018)*

The board has clarified certain matters relating to calculation of tax liability in case of casual taxable person registration, recovery of excess credit distributed by ISD.

5. Clarification on procedure in respect of return of time expired drugs or medicines *(Circular No. 72/2018 – GST – dated 26-10-2018)*

The Board has clarified various aspects in case of return of expired medicines i.e., the way of treatment i.e., either by treating return of goods as 'supply' or issuance of credit notes subject to time limits prescribed under the law. Further, reversal of ITC is also clarified in cases where expired medicines are destroyed by the manufacturer.

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CA Naresh Sheth & CA Jinesh Shah

INDIRECT TAXES

GST – Recent Judgments and Advance Rulings

A. Rulings by National Anti-Profiteering Authority

1. Shri Ankur Jain & Director General Anti-Profiteering, CBIC vs. M/s. Kunj Lub Marketing Pvt. Ltd. (2018-TIOL-09-NAPA-GST)

Facts, issue involved and contention of the Applicant

Ankur Jain (applicant) is a retailer, doing business in name of M/s. Anil Kumar Jain & Sons to whom Kunj Lub Marketing Pvt. Ltd. (respondent) had been selling Nestle's products. Applicant had purchased Maggi Noodle packs (hereinafter referred as "product") each weighing 35 gms, having MRP of ₹ 5/- from the respondent on 6-11-2017 and 28-11-2017.

GST rate on product was reduced from 18% to 12% w.e.f. 15-11-2017. Prior to 15-11-2017, the respondent charged 18% GST on base price of ₹ 3.96 per pack. After the rate reduction w.e.f. 15-11-2017 the respondent increased the base price to ₹ 4.17 per pack and charged 12% GST.

Applicant claimed that by increasing base price of the product from ₹ 3.96 per pack to ₹ 4.17 per pack even though when the GST rate on product reduced from 18% to 12%, the respondent has not passed on the benefit to the customer.

Applicant filed an application before the Standing Committee stating that the respondent has not passed on the benefit of reduction in the tax rate. The application was studied by Standing Committee of Anti-Profiteering and was referred to DGPA (Director General of Anti-Profiteering) for further investigation.

Contention of the respondent

Respondent submitted that in case of the product (35 gms. pack), price reduction would have been around 21 paise to the retailer and around 25 paise to the ultimate consumer. This price reduction would be inconvenient to both retailer as well as the ultimate consumer due to legal tender issues.

In case of Maggi Noodles Pack of 70 gms. bearing MRP of ₹ 12/- per pack, GST benefit of rate reduction for the retailer was around 56 paise. Respondent stated that they had reduced the price of 70 gms. pack by nearly 92 paise and reduced the MRP to nearly ₹ 11/-. Hence the benefit in respect of the product (30 gms. pack) had been passed by reducing the price of other packs of Maggi Noodles (70 gms. pack) by more than what it was required.

Observations of DGAP

The DGPA in its report confirmed that the GST rates were reduced from 18% to 12% with effect from **15-11-2017 *vide* notification No. 41/2017 dated 14-11-2017.** The DGPA further confirmed in its report that the respondent has not contested the allegation of not passing on the benefit of GST rate reduction in respect of the product (30 gms. pack).

Provisions of section 171 of CGST Act require that any reduction in rate of tax on any supply of goods or services or the benefit of ITC shall be passed on to the recipient by way of commensurate reduction in prices. Since the respondent has not passed on the benefit of GST rate reduction, it amounts to profiteering.

Maggi Noodle pack of 35 gms. and 70 gms. carrying MRP of ₹ 5/- and ₹ 12/- respectively are two different products and the benefit available to the buyer on one item could not be denied by offering more than the required benefit to the buyer of the other item. Such a proposition would work against the recipients of the product and the law did not provide for such adjustments.

Observations of NAPA

It is apparent from the facts of the case that the respondent has increased the base price of the product from ₹ 3.96/- per pack to ₹ 4.17/- per pack after the GST rate was reduced from 18% to 12%.

Respondent had no legal sanction to increase the base price of the product on his own and what was required of him was that he should have only reduced the MRP of the product by taking in to account the effect of the reduction in the rate of tax.

Respondent had no mandate to deny the benefit of reduction of the tax rate due to the problem of legal tender as he had no legal authority to fix MRP arbitrarily. It was for the customers to furnish the required legal tenders and therefore, the Respondent cannot be allowed to resort to profiteering.

Respondent has no liberty to arbitrarily decide in respect of which products he would pass on the benefit and in respect of which products he would not pass such benefit. As per the provisions of Section 171 of the Act the benefit has to be passed on to each recipient and the same cannot be selectively granted or denied.

Maggi Noodles pack of 35 gms. is distinct from a pack of 70 gms. pack and both the packs may be bought by the different recipients/customers. Hence the benefit accruing to one customer cannot be given or denied to another nor can the benefit given to one set of customers arbitrarily enhanced and set off against the other. No such adjustments are permissible under the Act.

Ruling of NAPA

On the basis of calculations made by DGAP, the quantum of profiteering is determined as ₹ 90,778/-. Respondent is directed to reduce the price of the product commensurate to the reduction in the rate of tax. He is further directed to refund an amount of ₹ 2,253/- to the applicant along with interest @ 18% p.a. Since the other customers of the product are not identifiable, respondent is hereby directed to deposit the balance amount of ₹ 88,525/- along with the interest at 18% p.a. in the respective Central or State Consumer Welfare Fund within a period of 3 months from the date of receipt of the order.

B. Rulings by Authority of Appellate Authority for Advance Ruling

2. M/s. Tathaghat Heart Care Centre LLP – AAAR Karnataka (2018-TIOL-15-AAAR-GST)

Facts, issue involved and query of applicant

Applicant is a Cardiology Specialise Hospital running on a premise taken on lease. The premises are used for treatment of heart patients as a lifesaving activity. Critical care patients are admitted into special rooms/general wards with lifesaving support system, beds, oxygen supply, ICU with 24*7 attendance for timely monitoring of patients. They have taken premises on rental basis for heart care services.

Applicant had filed an advance ruling application on the question whether *GST is leviable on rent payable by hospital supplying lifesaving services (cardiology and emergency services).*

Discussions by and Observations of AAR

Impugned services 'rental or leasing services involving own or leased non-residential property' is classified as a taxable service under the SAC 997212 and is taxable under GST. [Notification 11/2017 – CGST (rate) dated 28-6-2017].

Further no specific exemption is available under any notification for the time being in force.

Also there is no provision available in the Act which allows exemption on an input service if the output services provided by the taxable person is exempt.

Ruling of AAR

GST is leviable on the rent paid/payable for premises taken on lease by the applicant.

Appeal to AAAR

Aggrieved by the ruling, applicant preferred an appeal on the following grounds:

- AAR has not considered grounds of appeal / statement of Applicant's interpretation of law or facts in right earnest thus violating the principle of natural justice.
- Applicant is not required to pay GST on room rent collected from the patients and also on supply of medical services to the ailing patients undergoing critical heart care treatment.
- Applicant does not have any taxable value of supply of medical services by virtue of exemption granted in GST law. As a result payment of GST on rent of the premises remains non set-off against output tax i.e., ITC cannot be availed due to nil tax payable under GST law on supply of medical services to the patients.
- There is no provision to get refund of ITC to the extent of GST paid / payable on the rent of the premises. This has resulted in financial hardship to the applicant.

Discussions by and Observations of AAAR

In terms of Notification 11/2017 – CGST (rate) dated 28-6-2017, GST is leviable at 18% on rent paid/payable for the premises taken on lease by the applicant for running the hospital.

The plea made by applicant before us is that the ITC of GST paid on rent cannot be availed as credit by them since their output supply is not taxable and hence should be allowed refund of ITC to the extent of GST paid/payable on the rent.

Scope of AAAR is limited to passing such order as it thinks fit, confirming or modifying the ruling appealed against or referred to. There was no question raised before the AAR seeking a ruling on the aspect of ITC used for providing exempted supplies and refund of ITC. This issue has been raised for first time before the AAAR. There can be no appeal on issues on which no ruling was sought before the AAR and which was not examined by AAR.

As such the plea of the applicant is dismissed as non-sustainable.

Ruling of AAAR

AAAR upheld the order of AAR and dismissed the appeal filed by the applicant.

C. Rulings by Authority of Advance Ruling

3. M/s. Elambrachari Khaldoon – AAR Kerala (2018-TIOL-187-AAR-GST)

Facts, issue involved and query of applicant

There are 13 co-owners holding equal share in 86.78 cents of land and building. Applicant is one of the co-owners. They have rented out these properties to different parties. Total rent from all these properties exceeds twenty lakh rupees in a financial year. But, the individual share does not exceed the said threshold. The owners are now planning to engage one of the co-owners to collect rent and then distribute the rent amongst them for administrative convenience.

Applicant has sought advance ruling on the following:

1. *Whether small business exemption under Section 22 of the CGST Act 2017 is available to all owners separately in case of jointly owned property?*
2. *Engaging a co-owner to collect and distribute rent among all the owners for administrative convenience will have any implication on the business exemption under Section 22 of the CGST Act 2017 for individual co-owners?*

Authorised representative of the applicant stated that renting of immovable property is a supply of service taxable under GST at 18%. Supplier is exempted from registration under GST if his aggregate turnover does not exceed ₹ 20 lakh in a financial year. Co-ownership of the property is for financial, administrative and family reasons. As per the provisions of the Income-tax Act 1961, in the case of jointly owned properties, each joint owner is assessed separately for his share and he is also eligible for any relief as an individual owner of his respective share. Each individual will be entitled to basic exemption up to threshold limit. Here the co-owner is engaged to collect rent from the tenants and distribute among others just for administrative convenience. Share of each co-owner is definite and ascertainable.

Discussions by and observations of AAR

Each co-owner received rental income of below ₹ 20 lakh, which is below the threshold limit under GST. By mere joining of hands of two or more persons, a different and distinct legal entity or legal personality does not come into existence. It is settled law under Section 26 of the IT Act 1961, that where the property, consisting of buildings and land appurtenant is owned by two or more persons and their respective shares are definite and ascertainable, such person shall not, in respect of such property, be assessed as an association of persons, but the share of each person in the income from the property is included in his total income.

There is judicial pronouncement under service tax that clubbing of rent amount received by each co-owner, as per their share in jointly owned rented property, is not permissible. [2017(51)STR 38 (Tri.-Chan).

Co-ownership of the property is for financial, administrative and family reasons. The rent is collected from all the parties together and divided equally and transferred to the bank account of each co-owner.

Ruling of AAR

In respect of question (1), small business exemption, provided under Section 22 of the CGST Act 2017, is eligible to the co-owners separately in the case of jointly owned property, where the rent is collected together, but divided equally and transferred to respective co-owner.

In respect of question (2), where a co-owner is engaged to collect and distribute rent amongst all the owners for administrative convenience, it has no implications on the business exemption under Section 22 of the CGST Act 2017 for the individual co-owners.

4. M/s. PPD Living Spaces Pvt. Ltd. – AAR Kerala (2018-TIOL-192-AAR-GST)

Facts, issue involved and query of applicant

The Applicant is executing a layout development project 'Emerald Hills'. They have converted eleven acres of property into residential plots with common facilities like paved up roads, water and electricity supply, etc. Total cost of plot is divided as cost of land and cost of development. Land component consists of cost of actual area of each plot and cost of undivided share of land in common area. Undivided share in common areas is transferred to an association through a sale deed. Applicant has collected 18% GST on the development charge. Completion certificate dated 31-5-2018 in respect of layout development has been issued.

Applicant now intends to structure future agreements by fixing land costs which will fully absorb the development charges.

In light of above, the applicant sought for advance ruling on the following:

1. *Is it correct to structure agreement by fixing land cost by absorbing the development charges?*
2. *Whether the ITC availed has to be paid back on pro rata basis, on plots sold after completion?*

Discussions by and Observations of AAR
As per Paragraph 5 of Schedule III of the CGST Act 2017, sale of land and, subject to clause (b) of Paragraph 5 of Schedule II, sale of building shall be treated neither as supply of goods nor as a supply of service.

As per Paragraph 5(b) of Schedule II of the CGST Act 2017, construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupant, whichever is earlier, shall be treated as supply of services.

In the instant case, since the transaction is in respect of sale of developed plots/land with civil structures after the issuance of completion certificate, it is covered by Paragraph 5 of Schedule III of the CGST Act 2017. Hence the sale deed executed for plot as well as undivided share in common area attracts only stamp duty and registration charges. The ITC availed in respect of the GST paid on goods or services used/consumed for the development of the land is liable to be reversed on *pro rata* basis in respect of plots sold after the issuance of completion certificate.

Ruling of AAR
In respect of question (1), it is lawful to structure agreement by fixing the land cost after absorbing the development charges.

In respect of question (2), the Input Tax Credit availed in respect of the GST paid on goods and/or services used /consumed for the development of the land, in respect of the plots sold after the issuance of completion certificate is liable to be reversed on *pro rata* basis.

5. M/s. Sapthagiri Hospitality Pvt. Ltd – AAR Gujarat (2018-TIOL-174-AAR-GST)

Facts, issue involved and query of applicant
Applicant is a co-developer who is providing infrastructure facilities to establish a Hospitality Project in non-processing zone of Dahej SEZ. Accordingly the applicant constructed a hotel in the non-processing zone of Dahej SEZ on the land allotted to it and started hospitality services therein. The hospitality services so provided by them *inter alia* includes providing rooms on tariff, supplying food/beverages

On the basis of above facts, the applicant has sought ruling on following questions:

1. *Whether the applicant (hotel being located in non-processing zone of Dahej SEZ) is liable to pay GST on all the services provided by it to the clients located in SEZ which inter alia included supply of services by way of providing accommodation services, supplying food and beverages and supplying services ancillary to providing accommodation services?*
2. *Under extreme circumstances, if the hotel is required to provide accommodation services to a visitor other than a visitor located in SEZ, whether GST is required to be paid?*

The applicant submitted that considering the provisions of Section 16(1)(b) of the IGST Act 2017, the company running a hotel in SEZ should not be made liable to pay GST as the services provided by them are 'zero rated supply'.

Applicant further submitted that as **place of supply** in terms of Section 12 of IGST Act shall be the location of the hotel itself i.e., SEZ and there shall not be any requirement to pay GST either on the services provided to clients located in SEZ or a visitor coming from a territory outside SEZ.

Discussions by and observations of AAR

Section 2(20) of the IGST Act, 2017 states that 'Special Economic Zone Developer' shall have the same meaning as assigned to it in clause (g) of Section 2 of the SEZ Act, 2005 and includes an Authority as defined in clause (d) and a Co-Developer as defined in clause (f) of Section 2 of the said Act.

As per Section 7(5) (b) of IGST Act 2017, supply of goods and services or both to or by a SEZ developer or SEZ unit would be treated to be a supply in the course of interstate trade or commerce. Also as per Section 8 of the IGST Act, supply of goods and services to or by SEZ developer or unit would not be considered as intrastate supply.

Hence the provisions of Sections 7 and 8 of IGST Act read with the definition of SEZ developer given at Section 2(20) of IGST Act, mandate that all the supply of goods or services made by or to SEZ co-developer would be considered as interstate supply and the levy of IGST is attracted at the applicable rate.

IGST law allows the benefit of zero rating supplies made to an SEZ unit. A combined reading of Section 16(1) of IGST Act and Section 2(m)(iii) of SEZ Act indicate that supply of services made by the applicant to other units or developers of SEZ would be zero rated supply.

Rendering of services from SEZ to DTA does not qualify as zero rated supply in terms of Section 16 of IGST Act. Therefore, supply of services by the SEZ unit or developer from SEZ to DTA would be covered under the normal course of supply. Accordingly the applicant will be liable to pay GST for the supplies made to clients located outside the territory of SEZ.

Ruling of AAR

In respect of question (1), supplies made by applicant to the clients located in SEZ for authorised operations will be treated as zero rated supplies under the provisions of Section 16(1) of IGST Act, 2017 read with Section 2(m) of SEZ Act, 2005.

In respect of question (2), applicant is liable to pay GST on the services provided from their hotel located in non-processing zone of Dahej SEZ to the clients located outside the territory of SEZ under the provisions of Section 5(1) of IGST Act, 2017.

6. M/s. Mary Matha Construction Company – AAR Kerala (2018-TIOL-190-AAR-GST)

Facts, issue involved and query of applicant

Applicant is a contractor for various Government projects. Many of the works are undertaken by way of sub-contracts. The sub-contractors have raised doubts regarding the applicable tax rate.

Accordingly the applicant has sought advance ruling on applicable GST rates for the following contracts:-

Sr. No.	*Name of the Project*	*Employer*
1.	*Construction of Hospital Block buildings in Government Medical College with civil structural, internal and external finishing, plumbing and sanitary arrangements, electrical, HVAC, lifts and fire-fighting installations, including testing, commissioning and handover as turnkey works*	*SE, PWD, SC-ST District Officer, Special Officer Govt. Medical College, Palakkad.*

Sr. No.	Name of the Project	Employer
2.	*Construction of Non-science building for various departments at Central University of Kerala, Kasaragod.*	*Central University of Kerala represented by RITES Ltd.*
3.	*Construction of Biotech lab and administrative block at Life Science Park, Trivandrum.*	*HLL Infra Tech Services Ltd.*

Discussions by and Observations of AAR

Notification No. 8/2017 – IGST (rate) dated 28-6-2017 as amended *vide* Notification No. 39/2017 – IGST (rate) dated 13-10-2017 provides that a composite supply of works contract as defined in clause (119) of section 2 of the CGST Act, supplied to the Central Government, State Government, Union Territory, a Local Authority, a Government Authority or a Government entity by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation or alteration is taxable at the rate of 12% and other works attract tax at the rate of 18%.

Principal contractor sub-contracts the work awarded by Government. The composite supply of works contract provided by sub-contractor is also taxable at the rate of 12%.

Supply of works awarded by Public Works Department/SC-ST District officer/Special officer, Government Medical College, being line departments of State Government, the civil structure, internal and external finishing, plumbing and sanitary arrangements, electrical HVAC, lifts and fire-fighting installations, including testing and commissioning attracts GST at the rate of 12%.

Government Authority means any authority or a board or any other body set up by an Act of Parliament or State Legislature or established by any Government with 90% or more participation by way of equity control. Central University of Kerala is established under the Central University Act. Hence, the supply work relating to the construction of non-science building for various departments at Central University of Kerala, is also taxable at 12% GST. Even if the works is executed through RITES Ltd., the applicable tax rate is 12%.

Life Sciences Park, Trivandrum is an initiative of Kerala State Industrial Development Corporation ("KSIDC") Ltd., for providing basic infrastructural facilities to research institutions, science and technology academia and companies working in the field of Bio-Technology, Nano Technology and Life Sciences. Hence, it is clearly evident that the Life Sciences Park, Trivandrum is a commercial venture of KSIDC Ltd, a state Public Sector Undertaking and accordingly works contract services in respect of construction of Biotech lab and administrative block at Life Sciences Park is covered under Sr. No. 3(xii) – Heading 9954 of Notification No. 11/2017 – Central Tax (Rate) dated 28-6-2017 attracting tax at the rate of 18%.

Ruling of AAR

Supply of works contracts awarded by Government attracts GST at the rate of 12%.

Supply of works contracts awarded by the Central University of Kerala attracts GST at the rate of 12%.

Supply of work awarded by M/s. HLL Infra Tech Services Ltd. for the construction of Biotech lab and administrative block at Life Science Park, Trivandrum attracts GST at the rate of 12%.

7. M/s. K.P.H. Dream Cricket Pvt. Ltd. – AAR Punjab (2018-TIOL-206-AAR-GST)

Facts, issue involved and query of applicant

Applicant is a franchisee of Board of Control for Cricket in India (BCCI) for the purpose of establishing and operating a cricket team to participate in the Indian Premier League T20 Cricket Tournament (IPL) under the title of 'Kings XI Punjab'. The applicant along with the other franchisee were to participate in the IPL wherein some matches were to be played on the franchisee home ground.

The applicant provides 'Complimentary Tickets' on account of courtesy/public relationship/ promotion of business' wherein no flow of consideration is from the recipient/ holder.

Applicant has sought advance ruling on the following questions:

- *Whether free tickets given as "Complimentary tickets" falls within the definition of supply under the CGST Act 2017 and thus whether the applicant is required to pay GST on such free tickets?*
- *Whether the applicant is eligible to claim Input Tax Credit (for short ITC) in respect of complimentary tickets?*

Concerned jurisdictional officer *vide* his letter dated 24-5-2018 stated that free tickets given as "complimentary tickets" fall within the definition of supply under CGST Act, 2017 and thus applicant is required to pay GST on such free tickets. Applicant will then be entitled to claim ITC in respect of such complimentary tickets.

Applicant in his submissions stated that supply is defined to include all forms of sale, transfers, exchange, barters, etc., made or agreed to be made for a consideration in course or furtherance of business. However supplies between related persons or distinct persons in the course or furtherance of business even if not for a consideration are supplies in term of Schedule I of CGST Act. As a result free supplies between unrelated persons cannot be said to be supplies. Ticket holders (recipient) do not fall under any entry of definition of related persons. Hence complimentary tickets given without any consideration would not fall under the definition of supply under Section 7 of the CGST Act.

Section 17(5) of the Act specifically restricts credit of input tax on 'goods disposed of by way of free samples'. As regards free supply of services, the CGST Act does not prescribe any credit restriction. Therefore in view of applicant even though the output (free supplies of) services are not taxed, there is no need for reversal of ITC.

Act of giving free supplies is similar to the promotional and advertising activities undertaken by every business which are the basic ingredients and inevitable. Moreover when business makes a free supply, cost of provision of such supply is always taken into account in fixing the price of rest of the supplies. Similar observation was made by Honourable Gujarat High Court in Para 17 in case of *Ruby Laboratories vs. Commissioner of Sales Tax (1971 27 STC 326 Guj).*

Applicant also relied on Circular No. 47/21/2018 – GST dated 8-6-2018 *vide* which the Government clarified that supply on FOC basis does not constitute a supply as there is no consideration involved. It also clarified that where FOC supply is made in course or furtherance of business, there is no requirement for reversal of ITC.

Based on the above circular, the applicant *vide* their e-mail dated 14-8-2018, has requested for withdrawal of advance ruling application.

Discussions by and observations of AAR

The authority found it interesting that the applicant withdrew the application citing the Circular No. 47/21/2018 – GST dated 8-6-2018. They observed that no specific provision was present in the CGST Act or Punjab GST Act dealing with withdrawal of Advance Ruling application. Concerned officer is recognized as equal stakeholder to the advance ruling application. Applicant has indicated that his case is similar to OEM which has been discussed in circular as not constituting supply where concerned officer has given a diametrically opposite view that supplying complimentary tickets amounts to supply. Therefore, allowing for withdrawal of the present application in terms of the applicant, without discussing the case on merits would not be in public interest. Hence, circumstances call for discussion on merits rather than allowing withdrawal when both the parties hold contrary views.

Case of an OEM where he is providing dies and moulds owned by him free of cost to a component manufacturer cannot be compared to a situation of handing out complimentary tickets for viewing cricket matches. In this case, there is no owned property of the applicant being given to the receiver for the purpose of value addition and in making of any inputs. Therefore, the case of applicant is differentiated from that of the OEM.

Section 7 of the CGST Act deals with scope of supply which *inter alia* states that supply is made or agreed to be made for a consideration. Consideration as defined under section 2(31) of the Act includes monetary value of any act of forbearance in respect of inducement of supply whether by recipient or any other person.

In present case when the applicant issues a complimentary ticket, the applicant is certainly displaying an act of forbearance by tolerating persons who are receiving the services provided by the applicant without paying any money, which other persons not receiving such complimentary tickets have to pay for. Monetary value of act of forbearance would naturally be pegged to the amount charged from other persons not receiving the complimentary tickets for availing the same services.

Contention of applicant that since he does not receive any consideration for complimentary tickets and is not covered under section 7 of the Act does not stand the legal test of section 7 of the CGST Act. Applicant has clearly missed out the clause (b) in the consideration definition under section 2(31) of the Act.

As per Section 7(1)(d) of the Act, activities listed down in Schedule II are to be treated as supply of goods or services and are to be included in the expression 'supply' for the purpose of CGST Act. Para 5 of Schedule II in clause (e) provides that agreeing to the obligation to refrain from an act or to tolerate an act or situation or to do an act would be treated as supply of services.

Consideration is a factor to determine supply u/s. 7(1)(a). However the same word is absent from provisions under section 7(1)(d) which is an independent clause under section 7. Hence the question whether or not there has been any consideration would not be relevant in interpretation of scope of supply u/s. 7(1)(d).

Applicant is agreeing to tolerate the act of the recipient to enjoy services provided by the applicant free of charge and applicant is also agreeing to obligation of doing an act by allowing entry to such complimentary ticket holder to enjoy the services provided by the applicant.

In view of the above, it is clear that the applicant is providing complimentary tickets free of charge to the recipient and the same would be considered as supply of service as per the provisions of section 7(1)(a) and 7(1)(d) of the CGST Act. Thus, the sale of complimentary tickets will be leviable to tax as per the provision of Section 9 of the Act.

Since the activity of providing complimentary tickets is leviable to tax under section 9 of the Act, ITC would be available to the applicant on inputs going into such complimentary tickets.

Ruling of AAR

Applicant's activity of providing complimentary tickets free of charge would be considered Supply under section 7(1)(a) and 7(1)(d) and therefore would be liable to tax.

Since all tickets supplied by the applicant including complimentary tickets would be taxable, the applicant would be eligible for claim of Input Tax Credit as per Section 16 of the CGST Act, 2017.

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CA Rajiv Luthia & CA Keval Shah

INDIRECT TAXES
Service Tax – Case Law Update

Citation: 2018-VIL-691-CESTAT-CHE-ST

Case: MAS Logistics vs. The Principal Commissioner of CT & C. Ex, GST North Commissionerate, Chennai

Background facts of the case

Appellants have registered with the service tax department under the category of "Clearing & Forwarding Agent" and "GTA services". They rendered Logistic Support service to the shipper namely M/s. Jinneng Energy Technologies Ltd., China (JETL, for short) and received consideration in convertible foreign exchange. While rendering such service, they availed various input services for export of logistics services and hence filed a refund claim. SCN was issued to the appellants proposing to reject the refund claim on the ground that activities of the appellant is not export of services. The original authority rejected the refund claim.

Arguments put forth

The appellants submitted as under:

a) The appellants are licensed customs broker and had carried out logistics services in connection with the return of imported solar modules on the instructions of the Chinese shipper viz., M/s. JETL. The export consideration was received by them in foreign exchange. Though appellants submitted the refund claim for refund of service tax paid on input services availed for export of logistics services, the claim was rejected by the refund sanctioning authority who split the said services into two categories. One category relating to import and the other relating to export of service. Thus, the department denied the refund claim stating that the amount claimed as refund is incurred for import of goods. He submitted that the appellants had rendered specific logistics service in connection with the goods returned to the shipper. M/s. JETL (shipper) *vide* letter dt. 11-5-2016 informed the Commissioner of Customs, Tuticorin that they were in the process of executing purchase order of 21 containers of solar modules from M/s. Solar Edison Products, Singapore to the end consumer Sun Edison Solar Power India Pvt. Ltd., Chennai. The said containers arrived at Tuticorin port on 29-3-2016 but due to unforeseen business circumstances, the importer could not take delivery of the containers and therefore after negotiations, the shipper agreed to recall the goods and carry them back to China.

b) They availed various input services for which they paid service tax and availed CENVAT credit. The input services were indispensable for getting the goods reshipped to the shipper as permitted by the latter. Therefore logistics services rendered being an export of service, the appellant is eligible for credit of service tax paid on input services. He submitted that the authorities below confused with the interpretation of Rule 9 of Place of Provisions of Rules (POPR), 2012 and have concluded wrongly that the appellant has acted as an intermediary for providing freight forwarding activity.

The respondents submitted as under:

a) The input services availed by the appellants prior to grant of re-export permission by the Customs officers cannot be treated as input service relating to export of the goods but they should be treated in respect of import of goods.

b) The appellants were an intermediary for export of the goods and therefore the credit availed on input services is not eligible for refund since the place of provision of service is within India.

Decision

a) The main contention put forward by the department is that the appellant is an intermediary and therefore the place of provision of service is within India. The department has relied on Rule 9 of Place of Provision of Rules 2012, and held that since, the appellant who is an intermediary is within India, the place of providing service is within India. From the facts it is seen that appellant was engaged by M/s. H & H, China. So also, it is admitted that appellants have provided services to H & H, China. The invoices were raised on H & H, China by the appellant. The only conclusion therefore possible is that H & H, China is the intermediary if at all, and not the appellants. The recipient of logistic services being situated outside India, and the consideration having received in convertible foreign currency, the transaction has to be treated as export of service. It is brought out from the statement as well as from perusal of records that appellants have facilitated the re-export of the goods.

b) The contract between shipper (M/s. JETL) and the importer was cancelled and the delivery of goods were not taken by the importer. Thus ownership remained with shipper and he recalled the goods. Thus the goods were to be carried back to China. For this re-export/return of goods, various legal formalities and procedures are required to be complied. The goods had to be kept in CFS, under proper storage facility had to be presented for examination/verification of Customs department etc. The input services availed for doing such return of goods to China are services availed for exports of goods only.

Accordingly the appeal filed by the assessee was allowed and the refund along with consequential relief was granted.

Citation: 2018-VIL-708-CESTAT-AHM-ST

Case: Alembic Limited, Shreno Limited vs. CCE & ST Vadodara – I

Background facts of the case

The appellants are engaged in development of real estate projects. They had availed CENVAT Credit of service tax paid on various input services used to construct residential complex. They were registered with service tax authorities as service provider and had paid service tax under works contract service category for the residential units sold to various customers from time-to-time.

That in case of M/s. Alembic Ltd., their residential project was awarded completion certificate on 24th July, 2014. Similarly, in case of M/s. Shreno Ltd., the completion certificate was obtained for their residential project on 24th February, 2014. As on date of obtaining such completion certificate, approx. 32% and 35% property respectively, remained unsold by the appellant and for which no bookings were made. Therefore no service tax would be payable on sale of such completed flats.

The appellant had given due intimation to jurisdictional service tax authorities after receipt of completion certificate that they shall be availing only proportionate CENVAT Credit on input services received by them after obtaining completion certificate, on basis of square feet area basis, which suffered the levy of service tax as compared to the area which was converted into immovable property and on which no service tax would be paid. The appellant was made to reverse/pay credit towards the proportionate CENVAT credit availed by them during the period 2010-11 till obtaining completion certificate.

Arguments put forth

The assessee as appellants submitted as under:

a) The appellants were regularly paying service tax on entire income for the said projects up to receipt of the completion certificate, however, after obtaining the completion certificate for the project, the same constituted immovable property and as per the provisions of service tax laws, the appellants continued to pay service tax even after receipt of completion of certificate in respect of properties booked/sold prior to obtaining completion certificate. Whereas properties sold after receipt of completion certificate, appellant did not pay any service tax.

b) Appellants had maintained separate accounts, on scientific basis, whereby they had only availed proportionate credit periodically after receipt of completion certificate on basis of the square foot property on which service tax was paid by them whereas they had not availed any CENVAT credit on input services which were exclusively pertaining to sale of immovable property and they had also not availed proportionate credit in respect of input services pertaining to the percentage of property converted into immovable property after receipt of completion certificate, on basis of the square foot area. The appellants has also relied upon two separate CA Certificates dated 3rd July, 2018 as well dated 26th April, 2018 & submitted to the Revenue Authorities, intimating the fact of proportionate availment of CENVAT credit. The said certificates are also supported with detailed certified workings and calculations, along with invoices on sample basis, which shows that while a higher service tax was actually paid on input services, the appellants had availed only proportionate credit based on the percentage of immovable property which had suffered service tax levy in the manner stated hereinabove.

c) In case of sale of immovable property after receipt of completion certificate, the same is neither sale of goods nor services, as per law and hence the same can never be exempted service within the meaning of CENVAT Credit Rules, 2004. By virtue of amendment carried out in the CENVAT Credit Rules while notification No. 13/2016-CE(NT) dated 1-3-2016 whereby Explanation 3 was inserted to Rule 6 of the CENVAT Credit Rules, 2004 which provided, for the first time on prospective basis that the exempted service defined under Rule 2(e) of the CENVAT Credit Rules shall include an activity which is not a service as defined under Section 65B (44) of the Finance Act, 1994

d) The appellants relied on the decision of Hon'ble Tribunal in the case of Foods, Fats and Fertilizers Ltd. 2009 (244) E.L.T. (Tri-Bang) - 2009-VIL-34-CESTAT-BLR-CE, when a scientific basis is adopted to avail only proportionate credit instead of full credit involved in an invoice, the same amounts to maintaining separate accounts.

The respondent submitted as under:

a) The proportionate credit is required to be reversed in respect of non-taxable transaction and the same will necessarily include the whole of credit availed by the appellants right from the inception of the project and cannot be taken to be limited only to the credits availed after receiving the completion certificate.

b) The appellants did not follow the requirements of filing intimation etc., as required under Rule 6(3) of the CENVAT Credit Rules 2004 and hence the demand raised by the lower authorities is justifiable.

Decision

a) That upon receipt of completion certificate for the projects, the output activity of sale of residential units becomes "non-service" as per provisions of Section 65B of the Finance Act, 1994 read with definition of the term "exempt service" under Rule 2(e) of the CCR, 04. This is further supported by specific amendment carried out in Rule 6(1) of the CCR, 04 whereby w.e.f. 1st April, 2016, *Explanation 3* was inserted specifically dealing with a situation as in the present case, where a deeming fiction was created that for the purposes of Rule 6 of CCR, 04, exempted services as defined in clause (e) of Rule 2 shall include an activity, which is not a 'service' as defined in section 65B(44) of the Finance Act, 1994 provided that such activity has used inputs or input services. That there was no such stipulation prior to 1st April, 2016 in law and *prima facie* such situation was not to be treated as exempt service and did not attract the mischief created under Rule 6 of the CCR, 04. In the present case, it is evident that the appellants had started taking only proportionate credit after receipt of completion certificate which was after due intimation to the revenue department and also certified by independent CA. It is the case of the appellants before this Court that Rule 6 of the CCR, 04 in toto cannot apply prior to 1st April, 2016 to their case, since sale of immovable property is not exempt service at all. We are accordingly of the view that having taken only proportionate credit on input services after receipt of completion certificate, duly backed by CA certificate and certified work sheets for the proportionate credits availed after completion certificate and also demonstrated on sample basis during the course of hearing, the appellant has fulfilled its obligation under Rule 3 of the CCR, 04 read with Rule 6 thereof as such.

b) As regards the next issue of whether the appellants was also required to reverse proportionate credit, out of the valid input service credits availed by them during the period 2010 till obtaining completion certificate, i.e., availing during the time when whole of output service of construction of residential complex was taxable. It was argued by the appellants that out of business prudence, no developer wishes to have a situation where the properties are not sold as soon as possible and the property is converted into immovable property after receipt of completion certificate. It was also argued that as per Rule 3 of the CCR, 04, credit eligibility is to be examined as on date of receipt of input service and not governed by later developments such as portion of property getting converted into immovable property after receipt of completion certificate. The Bench agreed with such plea raised by the appellants. While the law does not intend to allow any undue benefit to a service provider in terms of CENVAT Credit of service tax paid on input services used in providing non-taxable output activity, however, as held by the Hon'ble Apex Court in the case of *Dai Ichi Karkaria 1999(112) ELT 516(SC) - 1999-VIL-02SC-CE,* MODVAT / CENVAT Credit is a vested right. Once it is legally and validly availed, the same cannot be denied and/or recovered unless specific provisions exist for the same.

c) This being the case, a harmonious reading of Rule 3 of the CCR, 04 read with Rule 6 and Rule 11 of the said Rules will suggest that eligibility / entitlement to credit has to be examined only at the time of receipt of input service and once it is found to be availed at a time when output service is wholly taxable, and the said credit is availed legitimately, the same cannot be denied and/or recovered unless specific machinery provisions are made in this regard.

d) Since the Bench held that the appellants is not required to reverse any credit availed by them on valid input services availed during the period 2010 till obtaining of Completion certificate, the said amounts reversed by them under protest cannot be retained by the revenue authorities and have to be returned to the Appellants.

Citation: 2018-VIL-681-CESTAT-BLR-ST

Case: Praxair India Limited vs. C.C.E & ST Jaipur

Background facts of the case

The appellants are engaged in the manufacture and supply of liquid oxygen, liquid nitrogen and gaseous nitrogen, etc. The appellants have air separation plants and pump filling stations across the country for the manufacture and supply of the said products. The appellants have registered themselves with Service Tax. The appellants also erect storage tanks at the premises of their customers to facilitate storage of their products. The appellants also construct oxygen nitrogen plants at the customers' premises and lease it out to iron and steel, copper units. They also undertake maintenance and repair of such plants. The appellants have entered into an agreement with Usha Martin Ltd. (UML) and Usha Alloys and Steels Division, a division of Usha Beltron Ltd, over a period of time. The Revenue sought to tax such transaction under the category "Banking and Financial Services", "Management, Maintenance & Repair Service" and "Storage and Warehousing Services"

Arguments put forth

The assessee as appellants submitted as under:

a) The plant was already erected in the premises of the appellants before February 2001. It is pertinent to note that the Department has detained the plant on 1st February, 2001 itself. *Vide* letter dated 13th July, 2001, the Superintendent of Central Excise clearly recorded that the detention of the plant and equipment installed in the premises of M/s. UML has been lifted. The appellants have commissioned the VPSA plant on 13th July, 2011 and have started the operations and have also started charging for the lease, operations and maintenance of the equipment on and from that date. A reference to the agreement dated 11th July, 2001 would clearly indicate that the effective date would be the date on which the agreement was signed. In terms of the agreement, the oxygen plant would at all times remain with the appellants only. The nature of the agreement also would indicate that the appellants have given to the lessee the plant on purely a lease-rent basis.

b) The appellants relied on the Accounting Standards AS-19 to distinguish between a 'finance lease' and 'operating lease'. In this regard, reference was invited to Hon'ble Supreme Court's decision in the case of *Association of Leasing and Financial Service Companies vs. UOI: 2010 (20) STR 417 (SC) - 2010-VIL-17-SC-ST-LB* wherein Hon'ble Supreme Court has clearly defined a difference between financial lease and operational lease. Therefore, in respect of both the plant (1) leased out prior to 16th July, 2001 and plant (2) set up in terms of agreement dated 29th December, 2006, no service tax is leviable in terms of Section 65(105) (zm) of the Finance Act, 1994

c) As far as the demand of service tax on Management, Maintenance and Repair services is concerned, the appellant entered into a separate agreement dated 30th December, 2006 for operation and maintenance of the oxygen plant set up by them and owned by them. As per para 2 of the agreement, the appellants will maintain the oxygen plant themselves and M/s. UML shall pay the appellants the operations and maintenance charges at the rate of ₹ 15,40,000/- per month during the first year, ₹ 10,00,000/- per month during the second year and from third year onwards ₹ 13,40,000/- per month. The appellants being the owners of the oxygen plant set up and they only undertake managing, maintenance and repair services. Thus, they are providing services to themselves and not to any other person.

d) With reference to the demand of warehousing and storage services, the learned counsel for the appellants submitted that the appellants have entered into an agreement dated 1st August, 1999 with M/s. UML to deliver liquid oxygen into appellant's storage installations and would permit M/s. UML to use the storage facility subject to Clause 10 of the agreement, as per which M/s. UML would use the facility exclusively. It was submitted that there is no service involved in allowing the usage of the facility owned by the appellants. The Tribunal in the case of *Indian Oil Corporation Ltd. vs. CCE, Goa: 2014 (35) STR 431 (Tri.-Mum.)* wherein it has held that from the facts mentioned earlier it would be clear that all the operations of the outlets are under the control of the dealers and not of the appellant. It is not as if the dealers bring their goods to the appellant for storing or warehousing and thereafter, clear the goods so stored. Appellants only own and lease facilities to the dealers for their use. Keeping in view the nature of transaction, the service provided cannot be considered as 'storage and warehousing service' provided by the appellants.

The respondent submitted as under:

a) It was submitted that whether the contract being a financial lease or operating lease, the same will be taxable under the category of Banking and Financial Services. Also, since the stamp paper on which agreement was made was after 16-7-2001, the same is liable for payment of service tax. Also as far as demand on Management, Maintenance and Repair Services are concerned, it cannot be said that the services are provided to self since they are recovering the charges from the customer.

Decision

a) In the statement of the director it is stated that the plant was detained by Excise Officers on 1st February, 2001, which was vacated on 13th July, 2001. The complete plant was ready for operation from early July itself but could not be commissioned because the plant was under detention. It was commissioned after the stay was vacated and hence, the agreement effective from 11th July, 2001. However, the actual signature was taken at a later date. Going by the circumstances of the case, it is evident that the plant was in existence in the premises of M/s. UML well before 16th July, 2001. Therefore, in view of the Board Circular cited above, the appellants cannot be charged to pay service tax under the heading 'Banking and Other Financial Services' for leasing of the plant to M/s. UML. The appellants have tried to differentiate between finance lease and operating lease by taking recourse to Accounting Standards AS19 as cited above. We find that the Tribunal in the case of *G.E. India, Industries Ltd.: 2008 (12) STR 609 - 2008-VIL-94-CESTAT-AHM-ST* in a similar situation where extrusion material was given on lease to Jain Irrigation, the Tribunal after looking into the terms and conditions of the agreement which are similar to the present agreement, set aside the demand.

b) Ongoing through the agreement for establishment of VPSA based oxygen plant between M/s. Usha Beltron Ltd.

(M/s. UML) and the appellants, we find at para 1.7 that subject to other provisions of this agreement, title to all oxygen plant equipment will remain vested in the appellants. Going by the above and the differentiation brought in by the decisions of various judgments of the Tribunal, the Bench was inclined to hold that the appellant's case is that of a equipment lease rather than financial lease.

c) As far as demand on Management, Maintenance and Repair Services, the appellants contended that they are providing service to self. However, in terms of the agreement, the Bench observed that the appellants are rendering OM services to the plant which is under lease to M/s. UML. The appellants are also charging M/s. UML for this particular O&M services. If it were the case of the appellant that the service rendered was to themselves, there was no need whatsoever for M/s. UML to pay the appellants for O&M charges in terms of the agreement. Therefore, we do not find any reason to interfere with the impugned orders as far as demand in respect of 'Management, Maintenance or Repair Services'.

d) It is evident that the appellants have not rendered any warehousing services. It is not the case where the appellants hold a storage facility in their own premises and customers will come with their goods to the facility to deposit/store the goods for a period of time. No warehousing activities are involved as the appellants have built an oxygen tank in the premises of their customers and have leased the same to the customers. The appellants are not concerned with the receipt, storage and clearance of the goods stored in the tanks. They do not maintain any accounts for that matter in this regard. They have only leased out the tanks for a certain period of time for a consideration. This in itself will not constitute warehousing and storage operations, therefore, the demands raised against the appellants on this count are not maintainable.

Citation: 2018-TIOL-2132-HC-DEL (WP.(C). No.6215/2018)

Subject : Validity of Rule 10 of PPSR, 2012

Case: South India Krishna Oil and Fats Pvt. Ltd. vs. CST & Ors.

Background facts of the case

The petitioner has challenged that Rule 10 of PPSR, 2012 i.e., place of provision of services of transportation of goods shall be destination of goods is *ultra vires* to Section 66B read with section 64 and section 65B(52) & 66C(1) of the Finance Act, 1994.

It is also pleaded to strike down paragraphs 4 and 4.1 of the TRU Circular No. 206/4/2017-ST dated 13th April, 2017. The prayer is to restrain the respondents from levying service tax by way of transportation of goods by vessel from a place outside India up to the customs station of clearance in India.

Observations of the HC

a) The present writ petition was filed after provisions relating to service tax in the Finance Act, 1994 have ceased to become applicable.

b) It was admitted by the counsel that there are no pending proceedings against the petitioner. Counsel for the petitioner states that if the WP is allowed and relevant provisions are struck down, petitioner could seek refund. No such plea or prayer has been made in the WP.

c) It would not be appropriate and proper to issue notice to examine validity and *vires* of statutory provisions that are no longer in operation and no proceedings are pending against the petitioner. We would not enter into an academic exercise and examine the earlier statutory provisions.

d) The petitioner, if advised and necessary may challenge similar provisions in Central Goods and Services Tax Act, 2017.

e) The writ petition was dismissed.

Citation: 2018-TIOL-3095-CESTAT-CHD

Subject: Business Auxiliary Services

Case: Amrit Pal Singh Sodhi & Ors. vs. CCE, Ludhiana

Background facts of the case

The assessee was working as Gold Diplomat Associate of M/s. eBIZ Pvt. Ltd. and selling products/packages for operation of computer systems and to motivate other associates for awareness of computer educational packages of M/s. eBIZ and prospects thereto. A show cause notice was issued to the appellant to demand service tax under the category of Business Auxiliary Service.

The Ld. CCE (Appeals) confirmed the demand of service tax & the remaining orders of the adjudicating authority, but dropped penalty u/s. 76 of the Act. Against the order of CCE (Appeals), the appellants filed appeal on merits and the Revenue filed appeal against dropping the penalty u/s. 76. In the earlier round of litigation, the appeals were dismissed by this Tribunal. Later on, the matter travelled up the Hon'ble High Court and the Hon'ble High Court *vide* order dated 12th August, 2014 remanded the matter back to this Tribunal to consider the issue on merits again.

Arguments put forth

Appellants

a) The activity carried on by the assessee was not a Business Auxiliary Service and it was exempt being in the nature of Information Technology Service as per explanation added w.e.f. 10th September, 2004 to Section 65(19) of the Finance Act, 1994, wherein the Information Technology Service was excluded from the Business Auxiliary Service and no service tax was leviable thereon.

The respondent reiterated the submissions of the impugned O-I-O.

Decision

c) The services provided by the assessee are not in dispute which are in nature of providing service on behalf of the principal of Information Technology Service.

d) Section 65(19)(vii) defining the term "Business Auxiliary Services", provides that "a service incidental or auxiliary to any activity specified in sub clauses (i) to (vi) such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, evaluation of prospective customer or vendor, public relation services, management or supervisions, and includes services as a commission agent, but does not include any information technology service and any activity that amounts to manufacture within the meaning of clause (f) of Section 2 of the Central Excise Act, 1944.

e) Further, the *explanation* to Section 65(19) provide that "for the removal of doubts, it is hereby declared that for the purpose of this clause, 'information technology service' means any service in relation to designing, developing or maintaining of computer software or computerised data processing of system networking or any other service primarily in relation to operation of computer systems."

f) The activity undertaken by the assessee involved the promotion or marketing of the service of eBIZ and getting commission from the eBIZ of the same as the service provided by the assessee in relation to the operation of computer systems. In that circumstances, the assessee is covered by the *explanation* to Section 65(19) of the Finance Act, 1994, therefore, they are not liable to pay service tax.

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Janak C. Pandya, *Company Secretary*

CORPORATE LAWS

Company Law Update

[2018] 210 Comp Cas 677 (NCLAT)

[Before the National Company Law Appellate Tribunal – New Delhi]

Ramprasad Dalmia vs. Board of Directors, Milkfood Ltd., and Others

When the applicant has not provided the supporting documents and facts on the manner in which the AGM was conducted and the resolutions passed therein, then, *prima facie*, no case can be made under section 97 of the Companies Act, 2013 ("CA13") whereby a member is allowed to make an application to the Tribunal to direct the company to call for an AGM.

Brief

This appeal has been filed against the Order of the National Company Law Tribunal ("NCLT"), Chandigarh Bench, dismissing the application of the Petitioner. The original appeal has the following grounds.

1. The respondent company is a public limited company and the petitioner holds 105 equity shares in dematerialised form.

2. The respondent company had sent the notice and the relevant agenda etc. for the 44th Annual General Meeting ("AGM") to be held on September 26, 2017.

3. The applicant has filed the proxy form to enable his representative to attend the AGM.

4. On the date of AGM, the representative of the petitioner was present and he observed as follows:

   i. That the Board of Directors of the respondent company were not present;

   ii. The procedure to be followed for conducting the AGM including the passing of resolution etc. was not followed;

   iii. Resolutions were simply adopted by the Company Secretary, without going through the procedure of putting before the shareholders for voting etc.;

   iv. Upon objection by the petitioner representative and other shareholders on the procedure of AGM etc., they were threatened with dire consequences;

v. The report filed with BSE was also incorrect. The CEO was not present in the meeting, but in the report, it shows that the CEO was present as a special invitee.

The applicant in his application before the NCLT has prayed for declaring the AGM as *non est* and/or void *ab intio* including resolution thereof. In its observation, the NCLT has referred to the provision of section 96 of the CA13 relating to holding of AGM. It has observed that the section provides for holding of AGM each year, and not the manner in which, such AGM has been conducted, thus said question cannot be raised before the Tribunal. It has also observed that the petitioner has mentioned that certain other shareholders also raised the objection, but could not provide their names. Further, his authorised representative also has not given any affidavit in support of the said allegation. The Tribunal, also looked at the provisions of section 97 and section 107 as to voting by show of hands and report filed with BSE. The Tribunal, also looked at section 241 and 242 of the CA13 as to whether the acts alleged as of non-compliance of provisions may be considered as an act of oppression and mismanagement and noted that no such case has been made out by the applicant.

The applicant submitted that as per section 96 of the CA13, every company is liable to hold, each year a general meeting and if the default is made in holding AGM, then, the tribunal can direct holding of AGM under section 97 of the CA13.

The applicant has also submitted that as per section 97 of the Act, any member can move the NCLT under section 97. It also submitted that when an obligation to hold the AGM in accordance with the mandatory compliances and procedures under section 96 are not followed, then the entire object of holding AGM would be rendered nugatory. The material irregularity / illegality in the manner of holding AGM should be held as "default" within the meaning of section 97 of the CA13.

Judgment

NCLAT has dismissed the application, It has observed that tribunal has not looked at the legal question on whether under section 97,the words "any default" used is to include the manner in which AGM is to be held. It also observed that the applicant has not provided full details of his authorized representative name, who has attended the AGM, nor has provided the names of other shareholders, who have raised the objection on conducting the meeting. The applicant has not provided the particulars of alleged threats that the company had given to them. There is no document on record, whereby the proxy has lodged his protest as to manner in which the AGM was being held. It has further observed that no *prima facie* case is made for various allegations, where even applicant himself was not attended the AGM.

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CA Mayur Nayak, CA Natwar Thakrar & CA Pankaj Bhuta

OTHER LAWS
FEMA Update and Analysis

In this article, we have discussed recent amendment to FEMA through updation of Master Direction and in addition to it we have discussed few compounding orders recently issued by RBI

1. Updated through Master Direction

A. FED Master Direction No. 5/2015-16- Master Direction – External Commercial Borrowings, Trade Credit, Borrowing and Lending in Foreign Currency by Authorised Dealers and Person other than Authorised Dealers (updated as on 11th October, 2018).

- In Track I & Track III given under Para 2.1 of Para 2 (Framework for Raising Loans through External Commercial Borrowings) following has been inserted and now it reads as:

  Track I: Medium term foreign currency denominated ECB with minimum average maturity of 3/5 years. ***Manufacturing sector companies may raise foreign currency denominated ECBs with minimum average maturity period of 1 year.***

  Track III: Indian Rupee (INR) denominated ECB with minimum average maturity of 3/5 years. ***Manufacturing sector companies may raise INR denominated ECBs with minimum average maturity period of 1 year.***

- Under Track-I of Para 2.4.1 (Minimum Average Maturity Period) following point has been newly inserted:

  (i) 1 year for ECB up to USD 50 million or its equivalent for companies in manufacturing sector only.

- Under Para 2 (Framework for Raising Loans through External Commercial Borrowings) following para has been newly inserted:

  Para 2.24 – **ECB facility for Oil Marketing Companies:** Notwithstanding the provisions contained in paragraphs 2.4.5 (d), 2.4.6 (i)(a) and 2.5 above, Public Sector Oil Marketing Companies (OMCs) can raise ECB for working capital purposes with minimum average maturity period of 3/5 years as per paragraph 2.4.1 (ii)/ (iii) respectively from all recognised lenders under the automatic route without mandatory hedging requirements. The overall ceiling for such ECBs shall be USD 10 billion or equivalent. However, OMCs should have a Board approved forex mark-to-market procedure and prudent risk management policy, for such ECBs. All other provisions under the ECB framework will be applicable to such ECBs.

- Under point (iii) of Para 3.3.3 (Recognised Investors) following has been **inserted** and *deleted*:

  However, related party within the meaning as given in Ind-AS 24 cannot subscribe or invest in or purchase such bonds. Indian banks, subject to applicable prudential norms, can **participate as arrangers/ underwriters/ market makers/ traders in RDBs issued overseas.** *(Deleted the words "In case of an Indian bank underwriting an issue, its holding cannot be more than 5 per cent of the issue size after 6 months of issue")*. However, underwriting by overseas branches/subsidiaries of Indian banks for issuances by Indian banks will not be allowed.

(Comments: The above updates are in line with A.P. (Dir. Series) Circulars 9 & 10 issued on 19th September, 2018 and 3rd October, 2018 respectively.)

We have discussed below few recent compounding orders issued by RBI:-

A. Inbound Investment (FEMA 20)

1. Inability to issue equity shares or refund share application money to foreign investor.

Applicant	M/s. Apollo Cosmetic Surgical Center Private Limited
Compounding Application number	C.A. HYD 308
Compounding Authority Name	Foreign Exchange Department, Hyderabad
Amount imposed under compounding order	₹ 37,289/-
Date of order	30th August, 2018
Facts of the case	The applicant had acquired M/s. Apollo Cosmetic Surgical Center Private Limited (ACSCPL), *vide* High Court of Telangana order dated August 18, 2016. ACSCPL was originally incorporated as M/s. Chicago Cosmetic Surgery Centers Private Limited under the Companies Act, 1956 on 17-7-2007 and later changed its name on 21-12-2009. ACSCPL had received inward remittance of INR 9,85,250/- from Mr. Sanjeev Kaila, non-resident Indian on 11-3-2009 towards advance for subscription to equity shares. However, the company (ACSCPL) could not allot shares or refund the share application money to the foreign investor since he was not traceable. The applicant, since took over ACSPL, transferred the unallotted share application money to Investor Education and Promotion Fund on August 8, 2018 in accordance with Section 125 of Companies Act, 2013.
Contravention	Neither the equity instruments were issued nor amount refunded within 180 days from the date of receipt of the inward remittance: Paragraph 8 of Schedule 1 of

	erstwhile Foreign Exchange Management (Transfer of issue of Security by a Person Resident outside India) Regulations, 2000 notified *vide* Notification No. 20/2000-RB stated as follows: "If the shares are not issued within 180 days from the date of receipt of the inward remittance, the amount of consideration so received shall be refunded to the person concerned, provided the Reserve Bank may on an application made to it and for sufficient reasons permit to refund the amount of consideration received towards issue of security, if such amount is outstanding beyond a period of 180 days from the date of receipt".
Comments	• Though Foreign Exchange Management (Transfer or Issue of Security By a Person Resident Outside India) Regulations, 2000 has been replaced by revised regulations; Para 2(2) of Schedule 1 of extant FEMA 20(R)/2017-RB dated 7-11-2017 corresponds to Para 8 of Schedule 1 of erstwhile FEMA 20/2000- RB dated May 3, 2000. • It may be noted that the applicant was indeed constrained from either refunding the share application money to the foreign investor or allotting shares to him since the foreign investor was not traceable implying impermissibility of performance. Further, the applicant has also complied with the provisions of Companies Act, 2013 by transferred the unallotted share application money to Investor Education and Promotion Fund. It is difficult to reconcile that RBI has proceeded with levy of penalty notwithstanding these facts.
2. Allotment of Shares to Non-Resident under Wrong Category	
Applicant	M/s. Rain Industries Limited
Compounding Application Number	C.A. HYD 304
Compounding Authority Name	Foreign Exchange Department, Hyderabad
Amount imposed under compounding Order	₹ 52,708/-
Date of order	4th July, 2018
Facts of the case	Applicant had taken over M/s. Rain Calcining Limited (RCL) with effect from 25-10-2007. RCL had received a foreign inward remittance of ₹ 3,61,000/- from Mr. Siddiqui Dawood on 20-2-1997 towards allotment of shares. At the time of subscription, Mr. Siddiqui Dawood had *declared his nationality as British* and was allotted 36,100 shares of ₹ 10/- each on 21-3-1997 under NRI category. Consequent upon amalgamation of RCL with the applicant, shares were allotted to the existing shareholders of RCL in the ratio of 2:7 with further division of one equity share of ₹ 10/- each into five equity shares of ₹ 2/- each. Accordingly, 51,570 equity shares were issued to Mr. Siddiqui Dawood.

	The applicant has received an application from Mr. Rafique Dawood, son and legal heir of late Mr. Siddiqui Dawood, for transmission of 51,570 shares held by his father. The applicant later approached FIPB on 15-6-2016 seeking approval for the transmission of above shares to Mr. Rafique Dawood who is a citizen of Pakistan. Ministry of Commerce and Industry, Department of Industrial Policy and promotion (FIF-Section), Govt. of India, *vide* their approval No. 02(2018)/SIA-CoC/4239/2016 dated April 13, 2018 conveyed its approval for the transfer of 51,570 shares held by Late Mr. Siddiqui Dawood to Mr. Rafique Dawood subject to Compounding of Contravention.
Contravention	<u>Allotment of shares to the non-resident investor under wrong category</u>: Sub-Regulation (1) of Regulation 5 of erstwhile Foreign Exchange Management (Transfer of issue of Security by a Person Resident outside India) Regulations, 2000 notified *vide* Notification No.20/2000-RB stated as follows: "A person resident outside India (other than a citizen of Bangladesh or Pakistan or Sri Lanka) or an entity outside India, whether incorporated or not, (other than an entity in Bangladesh or Pakistan), may purchase shares or convertible debentures of an Indian company under Foreign Direct Investment Scheme, subject to the terms and conditions specified in Schedule 1." Further, notwithstanding anything contained in clause above, "A person who is a citizen of Pakistan or an entity incorporated in Pakistan may, with the prior approval of the Foreign Investment Promotion Board of the Government of India, purchase shares or convertible debentures or warrants of an Indian company under Foreign Direct Investment scheme, subject to the terms and condition specified in schedule 1".
Comments	• Though Foreign Exchange Management (Transfer or Issue of Security By a Person Resident Outside India) Regulations, 2000 has been replaced by revised regulations; sub-regulation (1) of Regulation 5 of extant FEMA 20(R)/2017-RB dated 07/11/2017 corresponds to sub-regulation (1) of Regulation 5 of erstwhile FEMA 20/2000- RB dated May 3, 2000. • This order relates to incorrect declaration of nationality by the foreign investor. It becomes important for a company inviting FDI to conduct due diligence of the foreign investor before receiving the share application money. However, the company may come under precarious situation if the foreign investor does not disclose a change in status of his nationality, subsequent to receipt of investment, to that of a notified country which requires prior government approval.

3. Receipt of foreign investment under approval route without obtaining specific and prior approval from Government of India

Applicant	M/s. Alphamed Formulations Private Limited
Compounding Application Number	C.A. HYD 307
Compounding Authority Name	Foreign Exchange Department, Hyderabad

Amount imposed under Compounding Order	₹ 24,91,973/-
Date of order	24th July, 2018
Facts of the case	The applicant is a resident company incorporated as a Private Limited Company under the Companies Act, 1956 on 20-11-2006. Applicant is engaged in the business of manufacturing and dealing with pharmaceuticals, formulations, medicines, chemical preparation and drug formulation and the company had been receiving inward remittances since December 2006, which are permitted up to 100% under automatic route. In terms of Department of Industrial Policy and Promotion's Press Notification No. 1/16/2010-FC-I dated November 8, 2011, the FDI policy has been revised such that the foreign investment up to 100% would be permitted for brownfield investments in the pharmaceutical sector, under the Government approval route. The applicant did not obtain prior approval from Government of India for the remittances received after 8-11-2011 as per the extant rules. Later, Department of Pharmaceuticals, on an application being made to it by the company granted its *post facto* approval *vide* their approval No. 13012/13/2017-FDI-Policy dated February 23, 2018 subject to compounding of the said contravention by Reserve Bank of India.
Selected Contravention	<u>Receipt of foreign investment under approval route without obtaining specific and prior approval from Government of India</u>: Paragraph 3 of Schedule 1 to erstwhile Foreign Exchange Management (Transfer of issue of Security by a Person Resident outside India) Regulations, 2000 notified *vide* Notification No. 20/2000-RB stated as follows: "A company which is engaged or proposes to engage in any activity specified in Annexure 'A' or which proposes to issue shares to a person resident outside India beyond the sectoral limits stipulated in Annexure 'B' or which is otherwise not eligible to issue shares to a person resident outside India, may issue shares to a person resident outside India referred to in paragraph 1, provided it has secured prior approval of Secretariat for Industrial Assistance or, as the case maybe of the Foreign Investment Promotion Board of the Government of India and the terms and conditions of such an approval are complied with".
Comments	Though Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000 has been replaced by revised regulations; Para 1(1) of Schedule 1 of extant FEMA 20(R)/2017-RB dated 7-11-2017 corresponds to para 3 of Schedule 1 of erstwhile FEMA 20/2000- RB dated May 3, 2000. Press Note No. 3/2011 for restricting brownfield investment under pharmaceutical sector was issued by DIPP on 8-11-2011 whereas corresponding Notification No. FEMA/296/2014-RB dated 3-3-2014 took effect from 8-1-2014. Though Notification was issued much later after the issuance of press note by

	DIPP, RBI has still considered the date of issuance of press note as the date of commencement of contravention. This is contrary to its stand as reported in FAQ No. 47 wherein RBI has clarified that foreign investment can be made based on notification issued under FEMA 1999 and cannot be based on press note / FDI Policy.
4. Delay in repatriation to India of excess refund of share application money	
Applicant	M/s. PAR Formulations Pvt. Ltd.
Compounding Application Number	C.A. 789/2016
Compounding Authority Name	Foreign Exchange Department, Chennai
Amount imposed under Compounding Order	₹ 2,40,846/-
Date of order	6th July, 2018.
Facts of the case	The applicant had received foreign inward remittances from i) Mr. Muthusamy Shanmugam, USA, ii) M/s. Kali Capital LLP, USA iii) M/s. Par Pharmaceuticals Inc., USA towards subscription to equity shares and reported the same to the Reserve Bank. Later, out of the total remittance received by the applicant, the applicant failed to allot the shares against the remittance of ₹ 68,76,036/- received on 16-11-2007 and refunded ₹ 84,43,800/- on 19-5-2009 with delay of one year three days approximately without prior approval of Reserve Bank. However, the company instead of refunding foreign currency equivalent to the rupee consideration received, had refunded on 19-5-2009 the INR equivalent of the USD received on 16-11-2007 resulting in excess refund. The company has brought in the excess amount of refund as advised by Reserve Bank by way of inward remittance on 22-12-2017 with delay of eight years seven months three days approximately.
Selected Contravention	<u>Delay in bringing in excess refund:</u> Para 8 of Schedule 1 to erstwhile Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000 notified *vide* Notification No. 20/2000-RB read with AP (Dir Series) Circular No. 20 dated December 14, 2007, which states that: "If the shares are not issued within 180 days from the date of receipt of the inward remittance, the amount of consideration so received shall be refunded to the person concerned, provided the Reserve Bank may on an application made to it and for sufficient reasons permit to refund the amount of consideration received towards issue of security, if such amount is outstanding beyond a period of 180 days from the date of receipt".

Comments	• Though Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000 has been replaced by revised regulations; Para 2(3) of Schedule 1 of extant FEMA 20(R)/2017-RB dated 7-11-2017 corresponds to Para 8 of Schedule 1 of erstwhile FEMA 20/2000- RB dated May 3, 2000. • It is a common occurrence when excess remittance is wired to India due to absence of clarity in the amount of bank charges. It may be even borne in mind that any amount of excess share application money received, however minor, needs to be refunded. • Further, the FDI recipient company needs to be careful to refund foreign currency equivalent of excess rupee consideration received originally and not rupee equivalent of excess foreign currency remitted by foreign investor.

B. Outbound Transactions (FEMA 120)

1. Making outward remittances to the overseas entity when Indian party is under investigation

Applicant	PC Jeweller Limited
Compounding Application Number	C.A 4619/2018
Compounding Authority Name	Foreign Exchange Department, Mumbai
Amount imposed under Compounding Order	₹ 74,13,478/-
Date of order	12th July, 2018
Facts of the case	The applicant set up a wholly-owned subsidiary (WOS) namely, P. C. Jeweller Global DMCC in UAE on June 8, 2016 and made remittances amounting to USD 20,000,500 to the overseas WOS, ***under the automatic route***. The remittances were reported in Form ODI-Part-I within the prescribed time except in one instance wherein the applicant had to remit USD 500 to compensate for the shortfall in the first remittance on account of deduction of the bank charges. Thus, applicant reported the said remittance with delay beyond the prescribed time on December 13, 2017. However, the ***applicant was under investigation*** by Directorate of Revenue Intelligence (DRI) which was concluded in July 2014 and a show cause notice (SCN) dated July 8, 2014 was issued to the applicant. The applicant filed an appeal against the SCN to Commissioner (customs) Imports in January 2015 which is pending till date RBI, *vide* letter No. FE.CO.CEFA/8434/15.20.67/2017-18 dated April 12, 2018 requested Directorate of Enforcement (DoE) to convey within 30 days as to whether the investigation pertained to the contraventions sought to be compounded and whether it had any objection to compounding by RBI under

	the specific provisions. After RBI's reminder dated May 15, 2018, DoE *vide* letter F.No.RBI/SDE/WR/B-140/2018/886 dated June 7, 2018 expressed its inability to quote the applicability of the conditions specified in the proviso to rule 8(2) of the Foreign Exchange (Compounding Proceedings) Rules, 2000. Accordingly, this order is only in respect of the above contraventions and the contraventions are compounded without prejudice to any action initiated or proposed to be initiated by any Authority including the DoE/DRI under any Law including under the FEMA or PMLA against the Applicant or any other person involved in the contravention compounded by the Reserve Bank.
Contravention	<u>Making outward remittances to the overseas entity without submission of Form ODI</u>: In terms of Regulation 6(2) (vi) of Notification No. FEMA 120/2004-RB, Dated 7-7-2004, an Indian Party making direct investment in a joint-venture (JV)/WOS outside India has to submit Form ODI Part-I, duly completed, to the designated branch of an Authorized Dealer, the applicant did not report the investment made in the overseas entity (WOS) within the prescribed time period of 30 days in one instance. <u>Making outward remittances to the overseas entity under the automatic route when the same was permitted only with prior approval</u>: In terms of regulation 6(2) (iii) of Notification No. FEMA 120/2004-RB, dated 7-7-2004, an Indian Party may make direct investment in a JV/WOS outside India subject to the condition that the Indian Party is not on the Reserve Bank's exporters' caution list / list of defaulters to the banking system circulated by the Reserve Bank and/or is not under investigation by any investigation / enforcement agency or regulatory body. Whereas the applicant made ODI in the overseas WOS when the appeal filed by the applicant in connection with a DRI investigation was still pending and thus applicant had contravened the said provisions under FEMA.
Comments	• One needs to bear in mind that remittance of shortfall due to bank charges without filing of Form ODI would also constitute a Contravention under FEMA. • If a Company is under investigation by any investigation/enforcement agency or regulatory body, then the said company needs to take prior approval of Reserve Bank of India for making any outward remittance to overseas entity even though the same would be ordinarily permitted under automatic route. • In terms of the proviso to Rule 8 (2) of Foreign Exchange (Compounding Proceedings) Rules, 2000 inserted *vide* GOI notification dated February 20, 2017, if the Enforcement Directorate is of the view that the compounding proceeding relates to a serious contravention suspected of money laundering, terror financing or affecting sovereignty and integrity of the nation, then RBI is not supposed to proceed with the matter and has to remit the case to the appropriate Adjudicating Authority for adjudicating contravention under section 13. Under the present case, since Directorate of Enforcement (DoE) expressed its inability to convey whether the investigation pertained to the contraventions sought to be compounded and whether it had any objection to compounding by RBI under the specific provisions, RBI has proceeded with compounded the contraventions sought to be compounded.

2. Write-off the entire amount of ODI without filing APR and obtaining fair valuation certificate	
Applicant	Anand Rathi Wealth Services Limited
Compounding Application Number	C.A. 4627/2018
Compounding Authority Name	Foreign Exchange Department, Mumbai
Amount imposed under compounding order	₹ 2,10,510/-
Date of order	17th July, 2018.
Facts of the case	The applicant invested USD 30,000 on October 19, 2005 in an overseas WOS viz., Anand Rathi India Realty Fund in Mauritius. The company was unable to commence operations and as a result the applicant decided to close the company *vide* Board Resolution dated May 17, 2008. The company was removed from the Registrar of Companies in Mauritius w.e.f. August 6, 2009. The applicant did not submit annual performance reports (APRs) for the period 2006 to 2009.Further, the applicant had written off the entire amount of ODI under automatic route without obtaining fair valuation certificate and without submitting APRs.
Selected Contravention	<u>Written off the entire amount of ODI under automatic route without obtaining fair valuation certificate:</u> Regulation 16(1) (iii) of the Notification No. FEMA 120/2004-RB, dated 7-7-2004, states that an Indian Party may transfer, by way of sale to another Indian Party any share or security held by it in a JV or WOS outside India subject to the condition that if the shares are not listed on the stock exchange and the shares are disinvested by a private arrangement, the share price is not less than the value certified by a Chartered Accountant / Certified Public Accountant as the fair value of the shares based on the latest audited financial statements of the JV/WOS. Whereas Regulation 16(1)(v) of the notification ibid, states that an Indian party may transfer, by way of sale to another Indian Party any share or security held by it in a JV or WOS outside India subject to the condition that the overseas concern has been in operation for at least one full year and the Annual Performance Report together with the audited accounts for that year has been submitted to the Reserve Bank.
Comments	• It is very often encountered that Indian corporates swiftly incorporate WOS in tax friendly jurisdictions but later on realise that it may not feasible for WOS to run the operations in those jurisdictions. • In such cases, permission from RBI should be sought before liquidating WOS if the operations of WOS may not have begun yet.

	• If the operations of WOS would have begun and the WOS would have made losses due to which closure would be contemplated, then the company needs to file APR for first year of WOS and subsequently opt for disinvestment of WOS subject to satisfaction of pricing guidelines and other conditions.
3. Delayed return of share application money under ODI	
Applicant	Pyramid Consulting Engineers Private Limited
Compounding Application Number	C.A. 4673/2018
Compounding Authority Name	Foreign Exchange Department, Mumbai
Amount imposed under compounding order	₹ 1,10,000/-
Date of order	9th July, 2018
Facts of the case	The applicant remitted USD 275,000 on August 17, 2007 towards investment in overseas joint venture viz., Pyramid Engineering and Consulting LLC in Oman. Due to business disagreement between the promoters, the plan to open the JV could not materialise. The aforesaid amount of investment was returned to the applicant after deducting bank charges. The applicant received USD 224,956.74 on October 10, 2007 (within 6 months of initial investment) and USD 47,448.13 on September 22, 2008 (beyond 6 months of the initial investment).
Contravention	<u>Delayed return of share application money beyond 180 days from the date of remittance:</u> Regulation 15(i) of FEMA 120/2004, states that an Indian party, shall receive share certificates or any other document as an evidence of investment in the foreign entity to the satisfaction of the Reserve Bank within six months, or such further period as Reserve Bank may permit, from the date of effecting remittance or the date on which the amount to be capitalised became due to the Indian party or the date on which the amount due was allowed to be capitalised.
Comments	This kind of unfortunate circumstance usually occurs in the case of JV disputes. However, in cases where overseas direct investment is refunded amicably, compounding application is generally dealt with under Regulation 15(i) of FEMA 120 (viz., non receipt of share certificate within six months from the date of effecting remittance, or such further period as RBI may permit.) RBI has considered the period of contravention as 10 years and 10 days, being date of remittance to the date of submission of compounding application.

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> Why should a Man be Moral? Because this strengthens his will.
>
> — *Swami Vivekananda*

CA Zubin Billimoria

In Focus – Accounting and Auditing

RECENT AMENDMENTS IN SCHEDULE III TO THE COMPANIES ACT, 2013 INCLUDING AMENDMENTS RELATING TO NBFC IND AS FINANCIAL STATEMENTS

INTRODUCTION

General

India is one of the very few countries where the regulators specify the format of and the disclosures in the financial statements, even though the notified Accounting Standards are applicable. Different regulators specify the format of the Financial Statements and related disclosures, such as the MCA for Companies registered under the Companies Act, except for Banks where the Banking Regulation Act, 1949 and for Insurance Companies wherein the IRDA has laid down the formats of the Financial Statements and related disclosures for their respective companies. Similarly, SEBI has also laid down the format to be followed by Mutual Fund Schemes. Finally, specific and additional disclosure requirements are also specified by the RBI for Banks and NBFCs, by SEBI for Mutual Funds and Asset Management Companies, Broking companies, amongst others.

The purpose of this article is to evaluate the amendments to Schedule III to the Companies Act, 2013 which were notified by the MCA on 11th October, 2018.

History and Structure of Schedule III

Before proceeding to analyse the above amendments it would be pertinent to note the regulatory history and structure of Schedule III. It initially came into force with effect from 1st April, 2014 and was subsequently amended *vide* notifications dated 4th September, 2015 and 6th April, 2016, the last amendment being the insertion of Division II which prescribes the formats of the Financial Statements and related disclosures in respect of companies to which Ind AS was applicable in the first two phases (other than NBFCs and Banks).

Accordingly, before the latest amendment, Schedule III was structured on the following lines:

- The existing Schedule III which was applicable to companies to whom the **Companies (Accounting Standards) Rules, 2006 ('Indian GAAP')** was applicable was included as **Division I**.
- Insertion of **Division II** which is applicable in respect of companies to which **Ind AS was applicable in the first two phases (other than NBFCs and Banks),** as indicated above.

The latest amendments are essentially in three parts as under:

(i) Minor amendments to Division I so as to reflect consistency with the amendments to the Accounting Standards and other related matters

(ii) Amendments to Division II so as to reflect consistency with the requirements as per Ind AS and other related matters.

(iii) Insertion of Division III prescribing the formats of the Financial Statements and related disclosures in respect of Non-Banking Financial Companies to whom Ind AS is applicable.

Let us now proceed to analyse these amendments, especially those under (iii) above. **For the purpose of this article, it is presumed that the readers are familiar with the requirements of the Accounting Standards as applicable to the respective class of companies and hence these would not be discussed in detail unless the same is directly relevant to the requirements prescribed in Schedule III.**

AMENDMENTS TO DIVISION I

As indicated earlier, Division I is applicable to companies who are required to adopt Indian GAAP. The main amendments therein are purely procedural and technical in nature without substantively altering the existing requirements, are briefly analysed hereunder:

(i) The existing General Instructions for Preparation of Balance Sheet and Statement of Profit and Loss provide that each item on the face of the Balance Sheet and Statement of Profit and Loss ***<u>shall</u>*** be *cross referenced to any related information in the notes to the accounts.* The amendment provides that **the *word "shall" be substituted with the word "should".*** Whilst on a plain reading there does not appear to be any perceptible difference between the words "shall" and "should", if we go by the general dictionary meanings, the word ***"shall" indicates a strong intention or assertion*** whereas the word ***"should" indicates an obligation or duty.*** Accordingly, the **purpose** of the amendment is to make it a **mandatory obligation to cross reference all related notes and disclosures (including those required by the Accounting Standards)** which was currently not always done. *It is interesting to note that a similar amendment has not been done in Division II nor inserted in Division III.*

(ii) The words "Fixed Assets" appearing in the main format and the notes shall be substituted by the words "Property, Plant and Equipment". This amendment is purely technical so as to bring it in line with the change in the Accounting Standard.

(iii) In the General Instructions for Preparation of the Balance Sheet, against the term Securities Premium Reserve, the word Reserve has been omitted. *This amendment is to align with the corresponding requirements under the Companies Act, 2013 pertaining to Securities Premium and to be consistent with the terminology used therein.*

AMENDMENTS TO DIVISION II

As indicated earlier, Division II is applicable to companies that are required to adopt Ind AS. Whilst some of the amendments are aimed at bringing in consistency with the requirements in Division I, most of the amendments are aimed at aligning with specific requirements as per some of the Ind AS's.

Let us now proceed to briefly analyse the main amendments.

Disclosures relating to Trade Payables

The existing format of the Balance Sheet under the heading "Equity and Liabilities" required disclosure of Trade Payables" under the heading

Non-Current and Current Financial Liabilities, respectively. The same has now been substituted as under:

"Trade Payables:

(A) total outstanding dues of micro enterprises and small enterprises; and

(B) total outstanding dues of creditors other than micro enterprises and small enterprises.";

Further, a separate note under Clause F – Current Liabilities under General Instructions for Preparation of the Balance Sheet has been inserted as under:

"FA. Trade Payables

The following details relating to micro, small and medium enterprises shall be disclosed in the notes:-

(a) the principal amount and the interest due thereon (to be shown separately) remaining unpaid to any supplier at the end of each accounting year;

(b) the amount of interest paid by the buyer in terms of section 16 of the Micro, Small and Medium Enterprises Development Act, 2006 (27 of 2006), along with the amount of the payment made to the supplier beyond the appointed day during each accounting year;

(c) the amount of interest due and payable for the period of delay in making payment (which has been paid but beyond the appointed day during the year) but without adding the interest specified under the Micro, Small and Medium Enterprises Development Act, 2006;

(d) the amount of interest accrued and remaining unpaid at the end of each accounting year; and

(e) the amount of further interest remaining due and payable even in the succeeding years, until such date when the interest dues above are actually paid to the small enterprise, for the purpose of disallowance of a deductible expenditure under section 23 of the Micro, Small and Medium Enterprises Development Act, 2006. Explanation.- The terms 'appointed day', 'buyer', 'enterprise', 'micro enterprise', 'small enterprise' and 'supplier', shall have the same meaning as assigned to them under clauses (b), (d), (e), (h), (m) and (n) respectively of section 2 of the Micro, Small and Medium Enterprises Development Act, 2006."

Even prior to these amendments, companies were required to make these disclosures under Section 22 of the aforesaid Act and hence these amendments are purely technical and procedural in nature.

Disclosures relating to Trade and Loan Receivables

Under the existing General Instructions for Preparation of the Balance Sheet under Non-Current and Current Assets in respect of Trade Receivables and Loans, disclosure of doubtful items in respect thereof was required apart from the Secured and Unsecured classification. Whilst the amendment retains the classification of Secured and Unsecured for trade receivables and loan receivables considered good, it has added the following further classification requirements for trade receivables and loan receivables:

(i) Those having a ***significant increase in credit risk***; and

(ii) Those which are ***credit impaired***.

These are fairly significant changes which have been brought about primarily arising out of the revised provisioning framework under Ind As-109 for financial assets as per the Expected Credit Loss Method, as against the incurred loss provisioning method applied currently. *Since these amendments are also relevant under Division III, the same are separately analysed later on in this article.*

Amendments Relating to Statement of Changes in Equity

There are two minor amendments as under, which pertain to disclosures relating to Statement of Changes in Equity.

(i) Under the heading "Statement of Changes in Equity" under the sub heading "Other Equity", for the words "Securities Premium Reserve" the word "Securities Premium" shall be substituted. *This amendment is to align with the corresponding requirements under the Companies Act, 2013 pertaining to Securities Premium and to be consistent with the terminology used therein.*

(ii) A description of the nature and purpose of each reserve within equity shall be disclosed in the Notes. *This is in line with the requirement as per para 79(b) of Ind AS-1.*

INSERTION OF DIVISION III

As indicated earlier, the last part of the amendment pertains to the insertion of Division III prescribing the formats of the Financial Statements and related disclosures in respect of Non-Banking Financial Companies to whom Ind AS is applicable in two phases commencing from the financial year 2018-19.

Let us now proceed to briefly analyse the main requirements of Division III.

General Instructions for Preparation of Financial Statements

These lay down the broad framework and principles governing the presentation and disclosure requirements, which can be broadly categorised as follows, for ease of understanding.

Applicability

The requirements apply to every **Non-Banking Financial Company ("NBFI")** as *defined* in the **Companies (Indian Accounting Standards) (Amendment Rules), 2016 ("the Rules").**

As per **Rule 2(g)** of the Rules, an NBFI means a **"Non-Banking Financial Company" ("NBFC")** as defined in **Clause 45-I(f) of the Reserve Bank of India Act, 1934** (discussed later) and **includes** the following classes of companies:

- Housing Finance Companies
- Merchant Banking Companies
- Micro Finance Companies
- Mutual Benefit Companies
- Venture Capital Fund Companies
- Stock or Sub Broking Companies
- Nidhi and Chit Companies
- Pension Fund Companies
- Asset Management Companies
- Core Investment Companies

At this stage it is pertinent to understand the meaning of the term NBFC which includes the following as per **Clause 45-I(f) of the Reserve Bank of India Act, 1934:**

(i) a ***financial institution*** *(which as per Clause 45-I(c) includes the business of lending, acquisition of shares, hire purchase and insurance, amongst others)* which is a company;

(ii) a non-banking institution which is a company and which has as its principal business the receiving of deposits, under any scheme or arrangement or in any other manner, or lending in any manner;

(iii) such other class of companies as may be notified.

It can thus be seen that the term NBFI apart from including the traditional and commonly understood deposit taking, lending and investing companies also includes several other financial intermediaries and special class of companies which are governed and regulated by various regulators like RBI, SEBI, IRDA, NHB etc.

Resolution of Conflicts with Regulations and Accounting Standards:

As has been the case with the earlier versions of Schedule III, this part also contains provisions to the effect that in case of conflicts with the requirements under any regulations, guidelines, circulars etc., or under Ind ASs, the requirements under the Schedule would stand modified to that extent.

However, in the context of compliance with the requirements of the Ind ASs, the notification has made an *exception to the option of presenting assets and liabilities in accordance with the current and non-current classification* as laid down in Ind AS-1, which permits as an alternative a classification in order of liquidity. In this context, **para 63 of Ind AS-1** specifically provides that for ***some entities, such as financial institutions, a presentation of assets and liabilities in increasing or decreasing order of liquidity provides information that is reliable and more relevant than a current/non-current presentation because the entity does not supply goods or services within a clearly identifiable operating cycle.***

Disclosure of Additional Information

Similar to the above, any additional disclosures or requirements under any regulations, guidelines, circulars etc., or in the IndASs should also be complied with. The notification clarifies that any such additional disclosures shall be made in the notes, unless a specific IndAS requires such disclosures on the face of the financial statements. Further, each item on the face of the Balance Sheet, Statement of Profit and Loss and Statement of Changes in Equity shall be cross-referenced to any related information in the notes to the accounts. As discussed earlier the *amendment to insert the word shall with the word should has neither been inserted in Division II nor III, for reasons best known to the regulators!*

Format for the Financial Statements

As is the case with Division I and II notified earlier, Division III also specifies an indicative format for the financial statements, followed by general instructions for each, in three parts as under:

- Part I- Balance Sheet (including Statement of Changes in Equity)
- Part II – Statement of Profit and Loss
- Part III – Dealing with Consolidated Financial Statements

Let us now proceed to analyse the components / constituents of each of these separately together with ***specific disclosure requirements which are different from the earlier Divisions (which it is presumed that readers are familiar and hence not repeated due to space constraints) and which are peculiar and specific to NBFCs.***

Balance Sheet

The minimum items which need to be disclosed on the face of the Balance Sheet for the current and previous reporting period together with the corresponding notes are set out below:

ASSETS

Financial Assets

a) Cash and Cash Equivalents

b) Bank Balance other than above

c) ***Derivative financial instruments***

d) Receivables – Trade Receivables and Other Receivables

e) ***Loans***

f) ***Investments***

g) Other Financial Assets (to be specified)

Non-Financial Assets

a) Inventories

b) Current Tax Assets (net)

c) Deferred Tax Assets (net)

d) Investment Property

e) Biological Assets other than bearer plants

f) Property, Plant and Equipment

g) Capital work in progress

h) Intangible Assets under development

i) Goodwill

j) Other Intangible Assets

k) Other Non-Financial Assets (to be specified)

LIABILITIES AND EQUITY

LIABILIITES

Financial Liabilities

a) ***Derivative Financial Instruments***

b) Payables – Trade Payables and Other Payables **(showing separately dues from micro, small and medium enterprises and others)***

c) ***Debt Securities***

d) ***Borrowings (Other than debt securities)***

e) ***Deposits***

f) ***Subordinated Liabilities***

g) Other Financial Liabilities (to be specified)

Non-Financial Liabilities

a) Current tax liabilities (net)

b) Provisions

c) Deferred tax liabilities (net)

d) Other Non-financial liabilities (to be specified)

EQUITY

a) Equity Share Capital

b) Other Equity

***Disclosures similar to those required for Trade Payables as discussed earlier under amendments to Division II need to be given in the notes to accounts.**

Let us now proceed to analyse the specific disclosure requirements, which are peculiar and specific to NBFCs for certain items as laid down in the general instructions for preparation of the Balance Sheet.

Derivative Financial Instruments

The following disclosures are required to be given in respect of derivative financial instruments for the current and previous periods:

- Notional amounts
- Fair value – assets
- Fair value – liabilities

The above disclosures are required to be given for each of the following types and sub-classifications of derivative instruments

(i) Currency Derivatives

a) Spot and forwards

b) Currency futures

c) Currency swaps

d) Options Purchased

e) Options sold

f) Others

(ii) Interest Rate Derivatives:

a) Forward rate agreements and interest rate swaps

b) Options purchased

c) Options sold

d) Futures

e) Others

(iii) Credit Derivatives

(iv) Equity Linked Derivatives

(v) Others

Further, in respect of each of the above, following further classification needs to be disclosed:

(i) Fair Value hedging

(ii) Cash flow hedging

(iii) Net investment hedging

(iv) ***Undesignated derivatives (presumed to be those undertaken for speculation / trading purposes in accordance with the relevant guidelines by prescribed classes of entities)***

Finally, the notification provides that NBFCs shall explain the use of derivatives and *cross reference* the disclosures to the ***financial risks section for management of risks from derivatives which are required to be disclosed in terms of Ind AS-107.***

Trade and Other Receivables:

These are required to be sub-classified as under *together with the allowance for impairment loss* under each.

(i) Secured Considered good

(ii) Unsecured Considered good

(iii) Those which have a ***significant increase in credit risk***

(iv) Those which are ***credit impaired***

The disclosures under (iii) and (iv) above, are fairly significant changes which have been brought about primarily arising out of the revised provisioning framework under Ind AS-109 for financial assets as per the Expected Credit Loss Method, as against the incurred loss provisioning method applied currently, which have also been made in Division II as discussed earlier.

Before proceeding further, it would be pertinent at this stage to briefly understand the criteria for assessing significant increase in credit risk and identification of receivables which are credit impaired as laid down in Ind AS-109, to comply with the above disclosure requirements.

Assessing Increase in Credit Risk and Identifying Receivables which are Credit Impaired

The main purpose of assessing increase in credit risk and identifying receivables which are credit impaired is to calculate and assess the impairment of financial assets for expected credit losses (ECL) as per the requirements of Ind AS-109. Accordingly it would be relevant at this stage to gain an overall understanding of the approach for measuring impairment as per the ECL method which is tabulated hereunder.

	Stage 1	**Stage 2**	**Stage 3**
Stage	Financial Asset is originated or purchased	**Credit Risk has increased significantly** in respect of the financial asset since initial recognition	The Financial Asset is **credit impaired**
ECL provision required	Twelve months expected credit losses	Life time expected credit losses	Life time expected credit losses

As can be seen from the above, assessment of increase in the credit risk and determining receivables which are credit impaired are the key triggers for assessing impairment on the basis of life time expected credit losses. Let us now proceed to briefly understand the principles laid down in Ind AS-109 for complying with the aforesaid disclosure requirements which would be relevant for all classes of entities to whom Ind AS is applicable since both Divisions II and III have this requirement.

Whilst the assessment of increase in the credit risk is qualitative and judgmental, IndAS-109 has laid down certain principles which are summarised hereunder:

- At each reporting date, an entity shall assess whether the credit risk on a financial instrument has increased significantly since initial recognition. When making the assessment, an entity shall use the change in the risk of a default occurring over the expected life of the financial instrument instead of the change in the amount of expected credit losses. To make such assessment, an entity shall consider *reasonable and supportable information*, that is available without undue cost or effort that is indicative of significant increases in credit risk since initial recognition.

- If *reasonable and supportable forward-looking information is available without undue cost or effort, an entity cannot rely solely on past due information* when determining whether credit risk has increased significantly since initial recognition.
- However, when *information that is more forward-looking than past due status* (either on an individual or a collective basis) is *not available* without undue cost or effort, an entity may *use past due information* to determine whether there have been significant increases in credit risk since initial recognition.
- Regardless of the way in which an entity assesses significant increases in credit risk, there is a ***rebuttable presumption that the credit risk on a financial asset has increased significantly since initial recognition when contractual payments are more than 30 days past due.***
- **Para B5.5.17 of Ind AS-109** has provided a **list of information** which may be relevant for **assessing changes in credit risk**. An illustrative list of the sane is provided below:
  - a) an actual or expected significant change in the party's external credit rating.
  - b) an actual or expected significant change in the operating results of the party.
  - c) significant changes in the value of the collateral supporting the obligation or in the quality of third-party guarantees or credit enhancements, which are expected to reduce the debtor's economic incentive to make scheduled contractual payments or to otherwise have an effect on the probability of a default occurring.

For identifying receivables which are credit impaired, **Appendix A of Ind AS-109 defines a "credit impaired financial asset" as under:**

"A financial asset is credit-impaired when one or more events that have a detrimental impact on the estimated future cash flows of that financial asset have occurred. Evidence that a financial asset is credit-impaired include observable data about the following events:

(a) significant financial difficulty of the issuer or the borrower;

*(b) a breach of contract, such as a **default or past due event**;*

(c) the lender(s) of the borrower, for economic or contractual reasons relating to the borrower's financial difficulty, having granted to the borrower a concession(s) that thelender(s) would not otherwise consider;

(d) it is becoming probable that the borrower will enter bankruptcy or other financial reorganisation;

(e) the disappearance of an active market for that financial asset because of financial difficulties; or (f)the purchase or origination of a financial asset at a deep discount that reflects the incurred credit losses.

It may not be possible to identify a single discrete event, instead, the combined effect of several events may have caused financial assets to become credit-impaired."

One of the common criteria which is practically applied in assessing credit impairment is to identify whether there is a ***default or a past due event*****. In this context, para B5.5.37 of Ind AS-109** provides that when defining default for the purposes of determining the risk of a default occurring, an entity shall apply a default definition that is consistent with the definition used for internal credit risk management purposes for the relevant financial instrument and consider qualitative indicators (for example, financial covenants) when appropriate. However, there is a ***rebuttable presumption that default does not occur later than when a financial asset is 90 days past due unless an entity has reasonable and supportable information to demonstrate that a more lagging default criterion is more appropriate.*** ***Accordingly, though the Ind AS provides 30 and 90 day thresholds these are not sacrosanct like the existing NPA guidelines and need to be evaluated in the context of other qualitative and judgemental factors which need to be appropriately disclosed.***

Loans:

Loans are required to be classified as under based on the assessment of the business model and other criteria as per Ind AS-109, for the current and previous years, respectively, which would also substantially take care of the disclosure requirements under Ind AS-107 (though these would need to be independently considered) as well as cater to the business requirements in the Indian context.

Particulars	**At Amortised Cost**	**At Fair Value through OCI**	**At Fair value through profit or loss**	**Designated at Fair Value through profit or loss**
(A) LOANS				
Bills Purchased and Discounted				
Loans repayable on Demand				
Term Loans				
Leasing				
Factoring				
Others (to be specified) (Note 1 below)				
Total (A) – Gross				
Less: Impairment Allowance				
Total (A) – Net				
(B)				
Secured by Tangible Assets				
Secured by Intangible Assets				
Covered by Bank / Government Guarantees				
Total (B) – Gross				
Less: Impairment Allowance				

Particulars	At Amortised Cost	At Fair Value through OCI	At Fair value through profit or loss	Designated at Fair Value through profit or loss
Total (B) – Net				
(C)(1)				
Loans in India				
Public Sector				
Others (to be specified) (Note 2 below)				
Total (C)(1) – Gross				
Less: Impairment Allowance				
Total (C)(1) – Net				
(C)(2)				
Loans Outside India				
Less: Impairment Allowance				
Total (C)(2) – Net				
Total (C)(1) and (2)				

Notes:

1. These would include items like securitised / purchased / assigned receivables, discounting of rent receivables etc. It is hoped that the ICAI comes up with some indicative guidance in this regard.
2. These could include classification based on the type of borrowers like corporate, retail individuals, sole proprietors, firms, self-employed borrowers etc. depending upon the nature of the business and other specific criteria. It is hoped that the ICAI comes up with some indicative guidance in this regard.

Investments

Like loans, investments are also required to be classified as under based on the assessment of the business model and other criteria as per Ind AS-109, for the current and previous years, respectively, which would also substantially take care of the disclosure requirements under Ind AS-107 (though these would need to be independently considered) as well as cater to the business requirements in the Indian context.

Particulars	At Amortised Cost	At Fair Value through OCI	At Fair value through profit or loss	Designated at Fair Value through profit or loss
Mutual Funds				
Government Securities				
Other Approved Securities				

Particulars	**At Amortised Cost**	**At Fair Value through OCI**	**At Fair value through profit or loss**	**Designated at Fair Value through profit or loss**
Debt Securities				
Equity Investments:				
Subsidiaries				
Associates				
Joint Ventures				
Others (Specify) (Note 2 below)				
Total (A) – Gross				
(B)				
Investments in India				
Investments outside India				
Total (B)				
Total (A) to tally with (B)				
Less: Impairment Allowance **(C)**				
Total – Net (D) =(A) –(C)				

Notes:

1. Apart from the above classification which is as per the Ind AS-109 requirements, Schedule III has also included a residual category "others" which appears to be primarily to comply with the requirements under Ind AS-27 which provides an option to record investments in equity instruments of subsidiaries, joint ventures and associates at cost.

2. These would include instruments like CPs, CDs, PTCs etc.

Debt Securities:

Debt Securities are required to be classified as under based on the criteria as per Ind ASs-32 and 109, for the current and previous years, respectively, which would also substantially take care of the disclosure requirements under Ind AS-107 (though these would need to be independently considered) as well as cater to the business requirements in the Indian context.

Particulars	**At Amortised Cost**	**At Fair Value through profit or loss**	**Designated At Fair value through profit or loss**	**Total**
(A)				
Liability component of compound financial instruments				
Others (Bonds / Debentures etc.)				
Total (A)				

Particulars	**At Amortised Cost**	**At Fair Value through profit or loss**	**Designated At Fair value through profit or loss**	**Total**
(B)				
Debt Securities in India				
Debt Securities outside India				
Total (B)				
Total (A) to tally with (B)				

Apart from the above, the other disclosures like the terms, interest rate, defaults, reissue terms etc. which are there in the existing Division I and II are also required to be given.

Borrowings (Other than Debt Securities)

Borrowings (other than Debt Securities are required to be classified as under, based on the criteria as per Ind ASs-32 and 109, for the current and previous years, respectively, which would also substantially take care of the disclosure requirements under Ind AS-107 (though these would need to be independently considered) as well as cater to the business requirements in the Indian context.

Particulars	**At Amortised Cost**	**At Fair Value through profit or loss**	**Designated At Fair value through profit or loss**	**Total**
(A)				
Term Loans from Banks				
Term Loans from Others				
Deferred Payment Liabilities				
Loans from Related Parties				
Finance Lease Obligations				
Liability Component of Compound Financial Instruments				
Loans repayable on demand – from Banks				
Loans repayable on demand – from Others				
Other Loans- specify nature				
Total (A)				
(B)				
Borrowings in India				
Borrowings outside India				
Total (B)				
Total (A) to tally with (B)				

Apart from the above, the other disclosures like the terms, interest rate, defaults, security details, terms etc., which are there in the existing Division I and II are also required to be given.

Deposits:

Deposits are required to be classified as under based on the criteria as per Ind ASs-32 and 109, for the current and previous years, respectively, which would also substantially take care of the disclosure requirements under Ind AS-107 (though these would need to be independently considered) as well as cater to the business requirements in the Indian context.

Particulars	**At Amortised Cost**	**At Fair Value through profit or loss**	**Designated At Fair value through profit or loss**	**Total**
(A)				
Deposits				
Public Deposits				
From Banks				
From others				
Total (A)				

Apart from the above, the other disclosures like the terms, interest rate, defaults, security details, terms etc. which are there in the existing Division I and II are also required to be given.

Subordinated Liabilities

Subordinated Liabilities are required to be classified as under based on the criteria as per Ind ASs-32 and 109, for the current and previous years, respectively, which would also substantially take care of the disclosure requirements under Ind AS-107 (though these would need to be independently considered) as well as cater to the business requirements in the Indian context.

Particulars	**At Amortised Cost**	**At Fair Value through profit or loss**	**Designated At Fair value through profit or loss**	**Total**
(A)				
Perpetual Debt Instruments to the extent they do not qualify as equity				
Preference Shares other than those that qualify as equity				
Others (specifying the type and nature of the instrument)				
Total (A)				
(B)				
Subordinated Liabilities in India				
Subordinated Liabilities outside India				
Total (B)				
Total (A) to tally with (B)				

Apart from the above, the other disclosures like the terms, interest rate, defaults, security details, terms etc. which are there in the existing Divisions I and II are also required to be given.

Equity Share Capital and Other Equity

Apart from the normal disclosures which are there in the existing Divisions I and II, the following additional disclosures are also required to be given:

(i) Information that enables the users of the financial statements to evaluate the NBFCs objectives, policies and processes for managing capital. *This is in line with the requirement as per para 79(b) of Ind AS-1.*

(ii) A description of the nature and purpose of each reserve within equity shall be disclosed in the Notes. *This is in line with the requirement as per para 134 of Ind AS-1.*

(iii) Any conditions or restrictions attached to the distribution or utilisation of statutory reserves.

Statement of Changes in Equity

This is required to be presented after the Balance sheet and is in two parts as under:

A. Equity Share Capital

B. Other Equity

Equity Share Capital

Under this a reconciliation of the amount of opening and closing balance needs to be shown together with the reasons for the change.

Other Equity

The disclosures in respect thereof are discussed in ***three parts*** *as under, though in practice all the three tables need to be presented together.*

Other Equity

Disclosures in respect of the components of equity other than share capital are tabulated below:

Particulars	Share application money pending allotment	Equity Component of Compound Financial Instruments
Balance at the beginning of the reporting period		
Changes in the accounting policy / prior period errors		
Restated Balance at the beginning of the reporting period		
Total Comprehensive Income for the year		
Dividends		
Transfer to Retained Earnings		
Any Other Changes (to be specified)		
Balance at the end of the reporting period		

Reserves and Surplus

Disclosures in respect of reserves and surplus are tabulated below

Particulars	Statutory Reserves	Capital Reserve	Securities Premium	Other Reserves (specify nature)	Retained Earnings
Balance at the beginning of the reporting period					

Particulars	Statutory Reserves	Capital Reserve	Securities Premium	Other Reserves (specify nature)	Retained Earnings
Changes in the accounting policy / prior period errors					
Restated Balance at the beginning of the reporting period					
Total Comprehensive Income for the year					
Dividends					
Transfer to Retained Earnings					
Any Other Changes (to be specified)					
Balance at the end of the reporting period					

The following additional information is required to be disclosed:

(i) Remeasurement of defined benefit plans and fair value changes relating to own credit risk of financial liabilities designated at fair value through profit or loss shall be recognised as a part of retained earnings with separate disclosure of such items along with the relevant amounts in the Notes.

(ii) A description of the purpose of each reserve within equity shall be disclosed in the Notes.

Other Comprehensive Income (OCI)

Disclosures in respect of OCI are tabulated below:

Particulars	Debt Instruments through OCI	Equity Instruments through OCI	Effective Portion of Cash Flow Hedges	Revaluation Surplus	Exchange Differences on Translation	Other Items of OCI	Money Received against share warrants
Balance at the beginning of the reporting period							
Changes in the accounting policy / prior period errors							
Restated Balance at the beginning of the reporting period							
Total Comprehensive Income for the year							
Dividends							
Transfer to Retained Earnings							
Any Other Changes (to be specified)							
Balance at the end of the reporting period							

Statement of Profit and Loss

The minimum items which need to be disclosed on the face of the Statement of Profit and Loss for the current and previous reporting period together with the corresponding notes are set out below:

REVENUE FROM OPERATIONS

(i) *Interest Income*

(ii) Dividend Income

(iii) Rental Income

(iv) Fees and Commission Income

(v) *Net gain on Fair Value Changes*

(vi) Net gain on sale of financial instruments under amortised cost category

(vii) Sale of products (including excise duty)

(viii) Sale of services

(ix) Others (to be specified)

(x) **Other Income (to be specified)**

EXPENSES

(i) *Finance Costs*

(ii) Fees and Commission Expenses

(iii) *Net Loss on fair value changes*

(iv) Net Loss on derecognition of financial instruments under amortised cost category

(v) *Impairment of Financial Instruments*

(vi) Cost of materials consumed

(vii) Purchases of Stock-in-Trade

(viii) Changes in Inventories of finished goods, stock in trade and work in progress

(ix) Employee Benefits Expenses

(x) Depreciation, amortisation and impairment

PROFIT OR LOSS BEFORE EXCEPTIONAL ITEMS [I]

EXCEPTIONAL ITEMS [II]

PROFIT OR LOSS BEFORE TAX [III] = [I] – [II]

TAX EXPENSES [IV]

(i) Current Tax

(ii) Deferred Tax

PROFIT OR LOSS FOR THE PERIOD FROM CONTINUING OPERATIONS [V] = [III] – [IV]

PROFIT OR LOSS FROM DISCONTINUED OPERATIONS [VI]

TAX EXPENSES ON DISCONTINUED OPERATIONS [VII]

PROFIT OR LOSS FROM DISCONTINUED OPERATIONS AFTER TAX [VIII] = [VI]-[VII]

PROFIT OR LOSS FOR THE PERIOD [IX] = [V] + [VIII]

OCI

(i) Items that will not be reclassified to profit or loss (specify items and amount)*

(ii) Income tax relating to items that will not be reclassified to profit or loss

(iii) Items that will be reclassified to profit or loss (specify items and amount)@

(iv) Income tax relating to items that will be reclassified to profit or loss

*Schedule III requires these to be classified as under:

a) Changes in revaluation surplus

b) Remeasurement of defined benefit plans

c) Equity Instruments through OCI

d) Fair value changes relating to own credit risk of Financial Liabilities designated at fair value through profit or loss

e) Share of OCI in Associates and Joint Ventures to the extent not classified to profit or loss

f) Other Items (to be specified)

@ Schedule III requires these to be classified as under:

a) Exchange differences on translating the financial statements of foreign operations

b) Debt instruments through OCI

c) Effective portion of gains and losses on hedging instruments in cash flow hedges

d) Share of OCI in Associates and Joint Ventures to the extent classified to profit or loss

e) Other Items (to be specified)

Interest Income

Interest Income is required to be classified as under based on the criteria as per Ind ASs-32 and 109, for the current and previous years, respectively, which would also substantially take care of the disclosure requirements under Ind AS-107 (though these would need to be independently considered) as well as cater to the business requirements in the Indian context.

Particulars	**On Financial Assets *measured* at Fair Value through OCI**	**On Financial Assets *measured* at Amortised Cost**	**On Financial Assets *classified* At Fair value through profit or loss**	**Total**
Interest on Loans				
Interest on Investments				
Interest on Deposits with Banks				
Other Interest Income				
Total				

Net Gain/(Loss) on Fair Value Change

Net Gain/(Loss) on Fair Value Change is required to be disclosed under the following broad heads based on the criteria as per Ind ASs-32 and 109, for the current and previous years, respectively, which would also substantially take care of the disclosure requirements under Ind AS-107 (though these would need to be independently considered) as well as cater to the business requirements in the Indian context.

A. Net gain/(loss) on financial instruments at fair value through profit or loss

(i) On trading portfolio separately for investments, derivatives and others

(ii) On financial instruments designated at fair value through profit or loss

B. Others (to be specified)

C. Total

D. Realised and Unrealised fair value changes to be disclosed as additional information which should tally with the total as per (C).

It has been specifically clarified that fair value changes in this schedule are other than those arising on account of accrued interest income or expense.

Other Income

Other Income is required to be disclosed under the following broad heads based on the criteria as per the respective Ind AS, for the current and previous years, respectively, which would also substantially take care of the disclosure requirements under the respective Ind AS (though these would need to be independently considered) as well as cater to the business requirements in the Indian context.

(i) Net gain / (loss) on ineffective portion of hedges

(ii) Net gain / (loss) on derecognition of property, plant and equipment

(iii) Net gain / (loss) on foreign currency transaction and translation *(other than those considered as finance cost)*

(iv) *Others (to be specified) (any item exceeding one per cent of the total income needs to be specified)*

Finance Costs

Finance Costs are required to be classified as under based on the criteria as per Ind ASs-32 and 109, for the current and previous years, respectively, which would also substantially take care of the disclosure requirements under Ind AS-107 (though these would need to be independently considered) as well as cater to the business requirements in the Indian context.

Particulars	**On Financial Liabilities *measured* at Fair Value through Profit or Loss**	**On Financial Liabilities *measured* at Amortised Cost**
Interest on Deposits		
Interest on Borrowings		
Interest on Debt Securities		
Interest on subordinated liabilities		
Other Interest Expenses		
Total		

Impairment on Financial Instruments

Impairment on Financial Instruments is required to be classified as under based on the criteria as per Ind ASs-32 and 109, for the current and previous years, respectively, which would also substantially take care of the disclosure requirements under Ind AS-107 (though these would need to be independently considered) as well as cater to the business requirements in the Indian context.

Particulars	**On Financial Liabilities *measured* at Fair Value through Profit or Loss**	**On Financial Liabilities *measured* at Amortised Cost**
Loans		
Investments		
Others (to be specified)		
Total		

General Instructions for Preparation of Consolidated Financial Statements

These are summarised hereunder:

- Where an NBFC is required to prepare Consolidated Financial Statements, it shall *mutatis mutandis* follow the requirements of this Schedule as applicable to an NBFC in the preparation of balance sheet, statement of changes in equity and statement of profit and loss. However, *where the consolidated financial statements contains elements pertaining to NBFCs and other than NBFCs, mixed basis of presentation may be followed for consolidated financial statements where both kinds of operations are significant.* Whilst this is not clear it appears that for *non NBFCs, apart from the other disclosures, the classification of assets and liabilities into current and non-current apart from other specific requirements under Division II would need to be adhered to.* ***It is hoped that the MCA and/or the ICAI comes up with appropriate clarifications / guidance on these matters including the thresholds for considering significance for non-financial operations.***
- In addition, the consolidated financial statements shall disclose the information as per the requirements specified in the applicable Indian Accounting Standards notified under the Companies (Indian Accounting Standards) Rules 2015, including the following, namely:-

  (i) Profit or loss attributable to 'non-controlling interest' and to 'owners of the parent' in the statement of profit and loss shall be presented as allocation for the period. Further, 'total comprehensive income' for the period attributable to 'non-controlling interest' and to 'owners of the parent' shall be presented in the statement of profit and loss as allocation for the period. The aforesaid disclosures for 'total comprehensive income' shall also be made in the statement of changes in equity. In addition to the disclosure requirements in the Indian Accounting Standards, the aforesaid disclosures shall also be made in respect of 'other comprehensive income'.

  (ii) 'Non-controlling interests' in the Balance Sheet and in the Statement of Changes in Equity, within equity, shall be presented separately from the equity of the 'owners of the parent'.

  (iii) Investments accounted for using the equity method.

CONCLUSION

The above discussion is only to cover the amendments and disclosures peculiar to NBFCs and needs to be read in conjunction with the requirements of and the disclosures in terms of the various Ind ASs, especially Ind AS-107 dealing with disclosures on Financial Instruments. ***It is however desirable if more specific guidance comes through from ICAI and / or the MCA for the benefit of the various stakeholders who use financial statements.***

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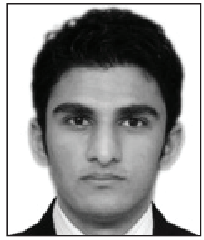
> Education is the manifestation of perfection already existing in man.
>
> — *Swami Vivekananda*



Rahul Sarda, *Advocate*

Best of the Rest

Insolvency and Bankruptcy Code, 2016 – Insertion of Section 238A *vide* Second amendment in the Code on 6-6-2018 – time-barred debts - whether provisions retrospective or prospective?

With effect from 6-6-2018, Section 238A in the Insolvency and Bankruptcy Code, 2016 (Code) was inserted as per which the provisions of the Limitation Act, 1963 were made applicable to the Code. The present appeal was filed seeking clarification whether the provisions of the Limitation Act, 1963 are applicable to the applications filed under section 7 and/or 9 of the Code, on and from its commencement on 1-12-2016 till 6-6-2018. The NCLAT had held that if there was a delay of more than three years from the date of cause of action and no laches on the part of the applicant, the applicant could explain the delay. Where there was a continuing cause of action, the question of rejecting any application on the ground of delay did not arise.

Held, the reason for introduction of Section 238A as stated in the Report of Insolvency Law Committee *inter alia* stated that the intent of the Code could not have been to give a new lease of life to time-barred debts and given that the intent was not to package the Code as a fresh opportunity for creditors who did not exercise their remedy under existing laws within the prescribed limitation period, the Committee thought it fit to insert a specific section applying the Limitation Act to the Code. Further held that the law of limitation was to be applied retrospectively, save and except that the new law of limitation could not revive a dead remedy. It also held that the amendment of Section 238A would not serve its object unless it is construed as being retrospective, as otherwise, applications seeking to resurrect the time-barred claims would have to be allowed, not being governed by the law of limitation.

Therefore, if the default had occurred over three years prior to the date of filing of the application, the same would be barred as per Article 137 of the Limitation Act, save and except in those cases where, in facts of the case, Section 5 of the Limitation Act may be applied to condone delay in filing such application and the provisions of the Limitation Act applied from the inception of the Code i.e. to applications filed under the Code even prior to 6-6-2018.

B. K. Educational Services Private Limited vs. Parag Gupta & Associates – Civil Appeal No. 23988 of 2017 dated 11th October 2018 – Supreme Court of India

Insolvency and Bankruptcy Code, 2016 – Credit card facility – Corporate Card Account Agreement – Debt included card charges – Whether amounts to financial debt?

The Respondent had availed credit facility from the applicant on strength of Corporate Card Account Agreement duly executed between the parties. Credit facility under the Corporate Card Account Agreement was availed by the director of the

Respondent. As the Respondent had failed in repayment of the outstanding dues of the Applicant financial creditor, a prayer had been made to admit the application and to initiate Corporate Insolvency Resolution Process against the Respondent.

The Respondent challenged the application stating that the creditor was neither company nor a body corporate i.e., not a person as defined u/s. 3(23) of the Code.

The Tribunal held that the Respondent had availed credit facility from Applicant on the strength of the Corporate Card Account Agreement and had committed default in repayment of the loan amount. The amount was disbursed by the Applicant against time value of money and for commercial purpose. The debt claimed in the application includes outstanding principal, interest and other card charges as per mutual agreement and therefore comes within the purview of 'financial debt'. The Applicant accordingly comes within the definition of 'financial creditor' in respect of 'financial debt' in question and has a clear right to file an application under section 7. The application was admitted.

American Express Banking Corpn. vs. Jambu Knits (P) Ltd. [2018] 97 taxmann.com 310 (NCLT – New Delhi)

Transfer of Property Act, 1882 – Gift – A Conditional gift – Transfer when effected – Whether revocation of conditional gift permissible?

The short question involved in this appeal was whether a document styled as gift deed but admittedly executed for consideration, part of which had been paid and the balance promised to be paid, could be treated as formal document or instrument of gift. Another related question was whether a gift deed reserving the right of the donor to keep possession and right of enjoyment and enforceable after the death of the executant was a gift or a will.

The Appellant was a childless widow aged 74 years. The Respondent was the nephew of the Appellant. In the expectation that the Respondent would look after the Appellant and her husband and also for some consideration, the Appellant executed a purported gift deed in favour of the Respondent. The gift deed clearly stated that the gift would take effect after the death of the Appellant and her husband. The Appellant executed the deed of cancellation dated 2-6-1999 cancelling the gift deed. The Respondent filed suits for a declaration that the cancellation deed executed by the Appellant was null and void and also for a declaration of his right over the suit property being the subject matter of the purported deed of gift and for a permanent injunction against the Appellant in respect of the property.

The Appellant contended that the document styled as gift deed was to come into effect only after the death of the Appellant and her husband. The question was whether a document in terms whereof the executant of the document retained possession and reserved her right over the property being the subject matter of the document could be a deed of gift or whether such a document was a document in the nature of a will.

Held, a conditional gift with no recital of acceptance and no evidence in proof of acceptance, where possession remains with the donor as long as he is alive, did not become complete during the lifetime of the donor. When a gift was incomplete and title remained with the donor, the deed of gift could be cancelled. There was no provision in the law that ownership in property could not be gifted without transfer of possession of such property. However, the conditions precedent of a gift as defined in Section 122 of the Transfer of Property Act must be satisfied. A gift is a transfer of property without consideration. Moreover, a conditional gift only became complete on the compliance of the conditions in the deed. In the instant case, the deed of transfer was executed for consideration and was, in any case, conditional subject to the condition that the donee would look after the petitioner and her husband and subject to the condition that the gift would take effect after the death of the donor. Therefore, held that there was no completed gift of the property in question by the Appellant to the Respondent and the Appellant was within her right in cancelling the deed.

S. Sarojini Amma vs. Velayudhan Pillai Sreekumar – Civil Appeal No. 10785 of 2018 dated 26th October 2018 – Supreme Court of India

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CA Anish Thacker & CA Parag Ved, *Hon. Jt. Secretaries*

The Chamber News

Important events and happenings that took place between 7th October, 2018 and 7th November, 2018 are being reported as under:

I. ADMISSION OF NEW MEMBERS

1) The following new members were admitted in the Managing Council Meeting held on 16th October, 2018.

LIFE MEMBERSHIP			
1	Mr. Lakshminarayan Bharath	Adv.	Bengaluru
2	Mr. Subbiah Venkatesh	CA	Coimbatore
3	Mr. Modak Sushil Vasant	CA	Sindhudurg
4	Mr. Jamsheed Khushroo	Adv.	Mumbai
5	Mr. S. Hanish Shantilal	CA	Bengaluru
6	Mr. Unwala Huzeifa Ismail	CA	Mumbai
7	Miss Sirsalewala Apoorva Rakesh	CA	Mumbai
8	Mr. Jain Mudit Rakesh	CA	Jaipur
9	Mr. Chordia Vinay	CA	Chennai
10	Mr. Jain Tarachand Geharilal	CA	Mumbai
11	Mr. V. Senthil Kumar	Adv.	New Delhi
12	Mr. Patkar Ishaan Vinayak	CA	Mumbai
ORDINARY MEMBERSHIP			
1	Mr. Modi Vinod	CA	Mumbai
2	Miss Shah Mansi Bhadresh	CA	Mumbai
3	Mr. Guduru Sreenivasa Rao	CA	Hyderabad
4	Mr. Kakarla Eswaraiah	CA	Hyderabad
5	Mr. Gianani Laxmichand Matlaram	B.Com	Mumbai
6	Ms. Thorat Snehal Jalindar	CA	Mumbai
7	Mr. Shah Naisar Satish	CA	Mumbai
8	Mr. Mandavia Himanshu Indravadan	CA	Mumbai
9	Mrs. Dholu Kavita Rajesh	CA	Mumbai
10	Mr. Arora Deepak	CA	Gurgaon
11	Ms. Shah Meena Harsuklal	CA	Mumbai
12	Mr. Kaunen Ali Ahmed	CA	Mumbai
13	Mr. Shah Sanket Mukesh	CA	Mumbai
STUDENT MEMBERSHIP			
1	Ms. Nupur Hitesh Shah	ICAI	Mumbai
ASSOCIATE MEMBERSHIP			
1	Mirae Asset Global Investments (I) Pvt. Ltd.		Mumbai

ML-166

II. PAST PROGRAMMES

1. INTERNATIONAL TAXATION COMMITTEE

Certificate Course on Multilateral Instruments was held on 5th, 6th, 12th and 13th October, 2018 at Hotel West End, Next to Bombay Hospital, Churchgate. The course was addressed by CA Rashmin Sanghvi, CA H. Padamchand Khincha, CA Vispi T. Patel, CA Jigar Saiya, Mr. Vinay Kumar Singh (IRS), Mr. Rahul Navin (IRS), CA Geeta Jani, CA Vishal Gada, Mr. Sanjay Sanghvi (Advocate), CA Yogesh Thar, CA Bhaumik Goda, CA Karishma Phatarphekar and CA Shabbir Motorwala. CA H. Padamchand khincha was the Chairman at the panel discussion and CA Anish Thacker and CA Vishal Shah were panel members for the panel discussion.

2. MEMBERSHIP & P.R. COMMITTEE

Workshop on GST Annual Returns & GST Audit Report was held on 3rd November, 2018 at Shree Vishvaisharayya MSEB Hall, Near Kiran Bungalow, Tarabai Park, Kolhapur. The workshop was addressed by CA Pranav Kapadia and CA Rajiv Luthia.

III. FUTURE PROGRAMMES

1. INDIRECT TAXES COMMITTEE

7th Residential Refresher Course on GST is scheduled to be held from 24th to 27th January, 2019 at Hotel Novotel, Hitec City, Hyderabad.

2. INTERNATIONAL TAXATION COMMITTEE

Intensive Study Course on FEMA is scheduled to be held on 14th, 21st and 22nd December, 2018 at Hotel West End, Next to Bombay Hospital, Churchgate.

3. IT CONNECT COMMITTEE

Seminar on Records Retention: Legal Provisions and Document Management Solutions is scheduled to be held on 7th December, 2018 at Babubhai Chinai Committee Room, IMC, Churchgate.

4. RESIDENTIAL REFRESHER COURSE & SKILL DEVELOPMENT COMMITTEE

42nd Residential Refresher Course is scheduled to be held from 28th February, 2019 to 3rd March, 2019 at Hotel Ramada, Lucknow.

5. MEMBERSHIP & P.R. COMMITTEE

Workshop on GST Annual Returns & GST Audit Report is scheduled to be held on 1st December, 2018 at Solapur.

6. CTC PUNE STUDY GROUP

Workshop on GST Annual Returns & GST Audit Report is scheduled to be held 1st December, 2018 at ELTIS Building, Off. Symbiosis, Pune.

7. INDIRECT TAXES COMMITTEE

Half day Seminar on Penalty & Prosecution is scheduled to be held on 1st December, 2018 at Babubhai Chinai Committee Room, IMC, Churchgate.

(For details of the future programmes, kindly visit www.ctconline.org or refer The CTC News of November, 2018)

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Dussehra Puja

Dussehra Puja was organised at Chamber's office on 17th October, 2018.

CA Hinesh Doshi (President) performing the puja

CA Vipul Choksi (Vice-President) performing the puja

CTC Staff

Meeting with Shri S. E. Dastur, Sr. Advocate and Past President for Dastur Essay Competition 2019. Seen from L to R: S/Shri CA Anish M. Thacker (Hon. Jt. Secretary), CA Hinesh R. Doshi (President), Mr. Ajay R. Singh, Advocate (Past President) and CA Nishtha M. Pandya (Chairperson - Student Committee)

Direct Taxes Committee

Intensive Study Group on "Recent Important Decisions under Direct Taxes" was held on 17th October, 2018 at Chamber Conference Room

CA Fenil Bhatt addressing the delegates

Commercial & Allied Laws Committee

Allied Laws Study Circle on "Recent Developments under the Negotiable Instruments Act & Remedies against arrest under GST Laws" was held on 26th October, 2018 at CTC Conference Room

Mr. Yogesh R. Israni, Advocate addressing the delegates

International Taxation Committee

FEMA Study Circle on "Issues in Single Master Form Reporting" was held on 25th October, 2018 at CTC Conference Room.

CA Paresh P. Shah Chairman

CA Hardik Mehta Group Leader

CTC Bengaluru Study Group

CTC Bengaluru Study Group was held on 26th October, 2018 at FKCCI, K. G. Road, Bengaluru.

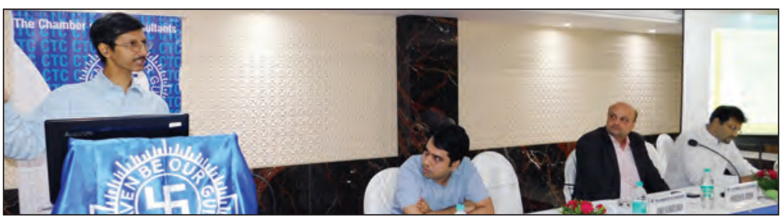
CA K. K. Chythanya addressing the delegates on the topic "Sec 94B Thin Capitalisation"

International Taxation Committee

Certificate Course on MLI was held on 12th and 13th October, 2018 at Hotel West End, Mumbai

CA Hinesh Doshi (President) welcoming the speakers. Seen from L to R: S/ Shri CA Rajesh L. Shah (Co-Chairman), Mr. Rahul Navin, IRS (Speaker) and CA Monika Wadhani (Co-ordinator)

Mr. Rahul Navin, IRS (Speaker) addressing the delegates Seen from L to R: S/ Shri CA Rajesh L. Shah (Co-Chairman), CA Hinesh Doshi (President) and CA Monika Wadhani (Co-ordinator)



Dr. Vinay Kumar Singh, IRS (Speaker) addressing the delegates Seen from L to R: S/ Shri CA Kartik Badiani (Vice-Chairman), CA Hinesh Doshi (President) and CA Shreyas Shah (Convenor)

Faculties

CA Karishma Phatarphekar

CA Yogesh Thar

CA Shabbir Motorwala

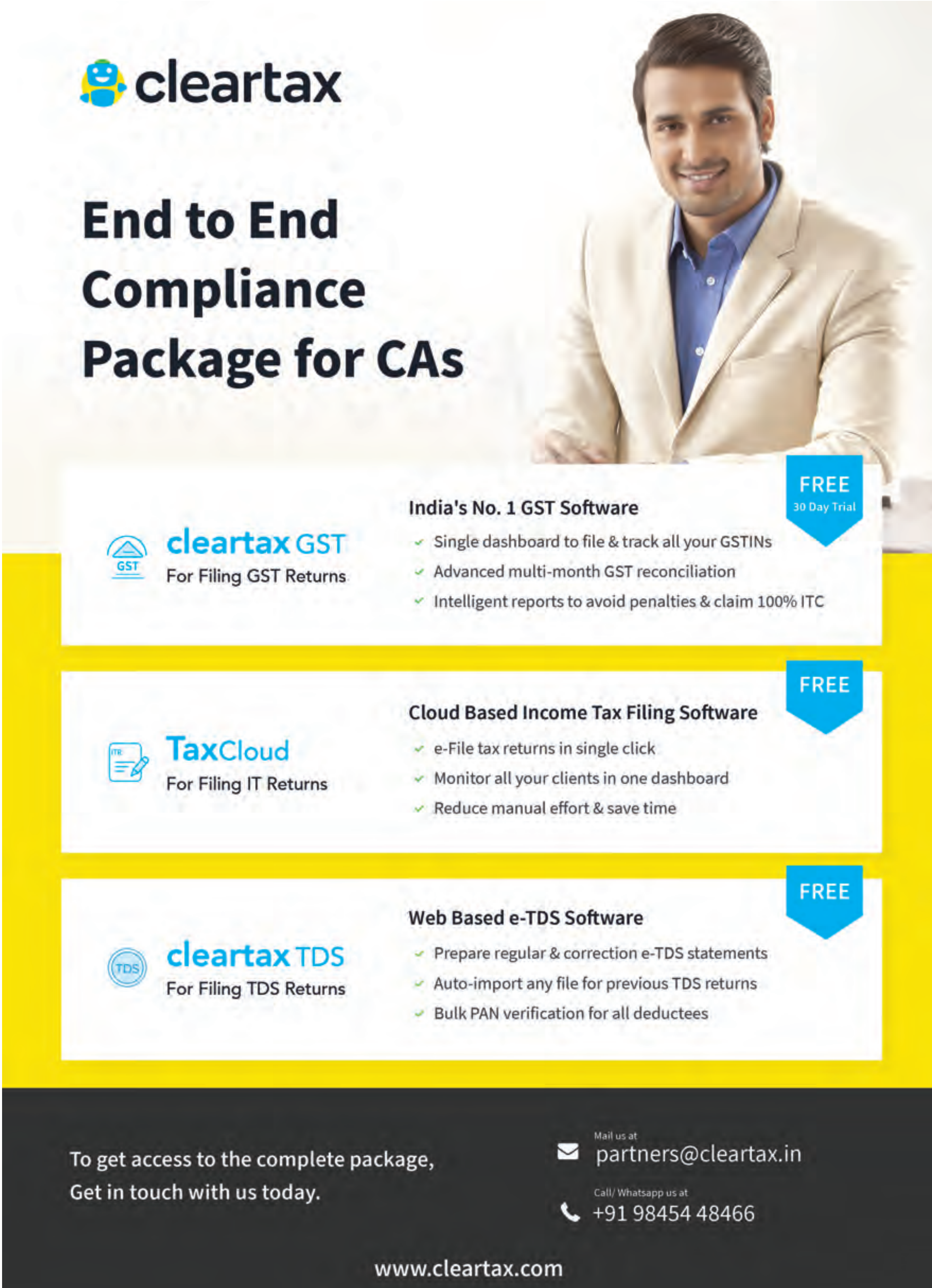
CA Daksha Bakshi

Panel Discussion

Chairman of the Panel CA H. Padamchand Khincha addressing the delegates Seen from L to R: S/ Shri CA Anish Thacker and CA Vishal Shah (Panellists)

CA Anish Thacker (Panellist) replying to the queries

CA Vishal Shah (Panellist) replying to the queries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Similarly, the key to investing is staying invested for as long as possible. While you can start and stop your SIP at any time, you should stay invested for as long as you can to enjoy the benefits of long term investments.

For instance, let us look at Mr. A and Mr. B and analyse their financial choices

Mr. A

Same College

Same Job

Same Salary

Mr. B

Mr. A chooses to invest **₹10,000** per month through SIP

Assuming 12% returns

Total Investment = ₹36 L

Portfolio worth ₹3.52 Cr

Years — 15 Years — 30 Years

Assuming 12% returns

Mr. B chooses to save **₹20,000** per month

He then invests the ₹36 L that he has saved

Total Investment = ₹36 L

Portfolio worth ₹1.97 Cr

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THE CHAMBER'S JOURNAL

Posted at the Mumbai Patrika Channel
Sorting Office, Mumbai 400 001.
Date of Posting: 16th of Every Month

No. MCS/149/2016-18
R.N.I. No. MAHENG/2012/47041
Date of Publishing 12th of Every Month

Printed and Published by Shri Kishor D. Vanjara on behalf of The Chamber of Tax Consultants, 3 Rewa Chambers, Ground Floor, 31, New Marine Lines, Mumbai - 400 020 and Printed at Finesse Graphics & Prints Pvt. Ltd., 309 Parvati Industrial Premises, Sun Mill Compound, Lower Parel (W), Mumbai - 400 013. Tel.: 4036 4600 and published at The Chamber of Tax Consultants, 3, Rewa Chambers, Ground Floor, 31, New Marine Lines, Mumbai - 400 020. Editor : K. Gopal