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BENGALURU BRANCH OF SIRC OF ICAI

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INTERPRETATION OF THE INCOME - TAX LAW IN THE CONTEXT OF RETROSPECTIVE AND PROSPECTIVE AMENDMENTS – WITH SPECIAL REFERENCE TO THE ROLE OF PROVISO AND EXPLANATION

The budget displays unconcealed scorn for the judicial process. On several points, it proposes to annul with retrospective effect the law which had become, well settled for years as a result of the rulings of the Supreme Court and the High Courts.

Such retrospective provisions can only serve to bring the law into contempt. They imply that the citizen's right of appeal is illusory, that the executive is omnipotent, and that the hapless citizen should never hope to win in his fight against the State, however illegal the State's action might be. Even the very cases in which the judgments were rendered by the Supreme Court and the High Courts have not been spared from the retrospective operation. Never in the history of India has any budget shown such total contempt for the rule of law.

Nani Palkhivala; We, the People; pp. 150-151

1. Introduction

1.1. Taxation, particularly income-tax, is one of the few areas of law where the Legislature and Judiciary are in a constant dialogue. Amendments to income-tax law are frequent, reflecting fiscal needs, policy shifts and judicial interpretation. While some amendments bring relief to the taxpayers at large, most amendments of late, have sought to reverse judicial pronouncements. The situation is further aggravated when:

- Prospective amendments which seek to apply only to future transactions are sought to be given retrospective amendment by the Revenue.
- Retrospective amendments cause prejudice by altering rights and liabilities for earlier periods.

1.2. The use of Provisos and Explanations within tax statutes further complicates this field, especially when the officers of the law enforce these provisions to the Revenue's benefit and this comes up before judicial fora. Though these appear as mere drafting devices, they often carry the interpretative burden of deciding whether an amendment is clarificatory or substantive, retrospective or prospective. For taxpayers and more so, practitioners, understanding this distinction is crucial – for it determines not only additional tax liability but also the stability of settled assessments.

1.3. This article examines the principles governing retrospective and prospective operation of tax statutes, with special reference to the role of Provisos and Explanations, and highlights key Supreme Court ('SC') pronouncements that have shaped the doctrine[1].

2. Retrospective laws – an overview

2.1. Generally, amendments to law should operate prospectively, with retrospective legislation being exception. There may be situations where it may be necessary to give retrospective effect to laws. Article 20(1) of the Constitution of India prohibits retroactive penal statutes[2]. Though this Article is towards penal law, this should also apply with equal force to tax law and laws which impose a burden on the taxpayer.

2.2. The SC in Kanta Kathuria[3] had upheld the power of the Legislature to pass retrospective law. Though this was ruling was in the context of a retrospective amendment by the Rajasthan State Legislature on a disqualification condition for a Member of Rajasthan's Legislative Assembly passed during the pendency of the appeal before the SC, this ruling has been followed by various courts in tax matters too.

2.3. In the context of the income-tax law, the SC's ruling in Govinddas[4] is instructive. This ruling was on whether assessments on a HUF under provisions of the Income-tax Act, 1922 ('ITA 1922') could have resort to special provisions for similar assessments under Income-tax Act, 1961 ('ITA 1961'). The SC replied in the negative but held as below:

"Now, it is a well-settled rule of interpretation hallowed by time and sanctified by judicial decisions that, unless the terms of a statute expressly so provide or necessarily require it, retrospective operation should not be given to a statute so as to take away or impair an existing right or create a new obligation or impose a new liability otherwise than as regards matters of procedure. The general rule as stated by Halsbury in volume 36 of the Laws of England (third edition) and reiterated in several decisions of this court as well as English courts is that "all statutes other than those which are merely declaratory or which relate only to matters of procedure or of evidence are prima facie prospective" and retrospective operation should not be given to a statute so as to affect, alter or destroy an existing right or create a new liability or obligation unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only."

2.4. It is important to note the following observation that was affirmed by the SC in Hindustan Electro Graphites Ltd.[5]:

"An assessee cannot be imputed with clairvoyance. When the return was filed, the assessee could not possibly have known that the decision on the basis of which cash compensatory support had been claimed as not amounting to the assessee's income ceased to be operative by reason of retrospective legislation".

1. Considering numerous rulings of the SC itself, (see for instance State of Orissa v. Sudhansu Sekhar Misra and Others (AIR 1968 SC 647)), all rulings cited have to be construed in the facts and concerned provisions relating to which they were pronounced. Considering judicial observations de hors this matrix precludes an appropriate appreciation of the principles. Hence, when extracting from case law, fairly long extracts have been provided.
2. Administrative Law by SP Sathe; 7th Edition; pp.111.
3. (1969) 3 SCC 268
4. 103 ITR 123
5 243 ITR 48

2.5. In this backdrop, the use of Provisos and Explanations aggravate the understanding of the law.

2.6. Maxwell on the Interpretation of Statutes states on a Proviso that:

"The general rule that the words of a Proviso are not to be taken 'absolutely in their strict literal sense', but that a Proviso is of necessity... limited in its operation to the ambit of the section which it qualifies'. And so far as that section itself is concerned, the Proviso again receives a restricted construction: where the section confers powers, 'it would be contrary to the ordinary operation of a Proviso to give it an effect which would cut down those powers beyond what compliance with the Proviso renders necessary[6]".

2.7. Ramanathan Aiyar's Law Lexicon notes as below on what is a 'Proviso' and what is an 'Explanation':

"Proviso.

The word "'Proviso" is used frequently to denote the clause the first words of which are "Provided that' inserted in deeds and instruments generally, and containing a condition or stipulation on the performance or non-performance of which, as the case may be, the effect of a proceeding clause or of the deed depends.

A clause inserted in a legal or formal document, making some condition, stipulation, exception or limitation or upon the observance of which the operation or validity."

"Explain.

Make known in detail ; make intelligible ; account for.

To make plain or intelligible ; 2. to account for ; 3. to make oneself understood [S. 164(2), Cr PC].

To explain is simply to render intelligible ; to illustrate and elucidate are to give additional clarity : everything requires to be explained to one who is ignorant of it ; but the best informed will require to have abstruse subjects illustrated, and obscure subjects elucidated."

2.8. Explanations are regarded as declaratory enactments and are noted to be retrospective in nature[7].

2.9. Thus, while a Proviso carves out an exception to a section / law, an Explanation clarifies the law. Hence, it is obvious that an 'Explanation' has been typically adopted to call out an amendment as being retrospective.

2.10. Considering this meaning of the words 'Proviso' and 'Explanation', a few landmark rulings have articulated this aspect eloquently.

2.11. In Gold Coin Health Food (P) Ltd.[8], the SC was ruling on whether penalty under section 271(1)(c) could be levied if the returned income was a loss. This question was considered

6 Page 189-190

7 Declaratory statutes which declare the meaning of an existing statute are to be construed as intended to lay down a rule for future cases, and to act for retrospectively. A declaratory Act or enactment declares what the law is on a particular point, often for the avoidance of doubt. See Bennion on Statutory Interpretation; Indian Reprint 2019 (pages 56-57). Kindly also refer the same authority on an excellent compendium on the general principles of retrospectivity in pages 181-191, paras 5.12 to 5.17.

8 304 ITR 308

in light of the amendment made by the Finance Act, 2002 with effect from 1-4-2003 in the Explanation 4 to section 271(1)(c)(iii). The SC held that what the Finance Act intended was to make the position explicit which otherwise was implied. Noting that the recommendations of the Wanchoo Committee pursuant to which Explanation 4(a) was inserted with effect from 1-4-1976 and the Department Circular No. 204 dated 24-7-1976 had substantial relevance to provide for levy of penalty, the SC held that:

"When the word 'income' is read to include losses as held in Harprasad & Co. (P.) Ltd.'s case (supra), it becomes crystal clear that even in a case where on account of addition of concealed income the returned loss stands reduced and even if the final assessed income is a loss, still penalty was leviable thereon even during the period 1-4-1976 to 1-4-2003. Even in the circular dated 24-7-1976, the position was clarified by the CBDT by stating that in a case where on setting off of the concealed income against any loss incurred by the assessee under any other head of income or brought forward from earlier years, the total income is reduced to a figure lower than the concealed income or even to a minus figure, the penalty would be imposable because in such a case 'the tax sought to be evaded' would be tax chargeable on concealed income as if it is 'total income'".

2.12. The memorable ruling of the SC on this issue was in Allied Motors[9]. Here, the SC was adjudicating whether the first Proviso to section 43B was to be regarded as being retrospective in nature. The Proviso was not on the statute book when the assessments were made. The taxpayers contended before the SC that the Proviso should be given effect to retrospectively from the date when section 43B became a part of the Income-tax Act, 1961, as it was intended to obviate unexpected hardships in the application of Section 43B. The SC held as follows:

"While interpreting Section 43B without the first Proviso some of the High Courts, in order to prevent undue hardship to the assessee, had taken the view that Section 43B would not be attracted unless the sum payable by the assessee by way of tax, duty, cess or fee was payable in the same accounting year. If the tax was payable in the next accounting year, Section 43B would not be attracted. This was done in order to prevent any undue hardship to assessees such as the ones before us. The memorandum of reasons takes note of the combined effect of Section 43B and the first Proviso inserted by the Finance Act, 1987. After referring to the fact that the first Proviso now removes the hardship caused to such tax payers it explains the insertion of Explanation 2 as being for the purpose of removing any ambiguity about the term 'any sum payable' under clause (a) of Section 43B. This Explanation is made retrospective. The Memorandum seems to proceed on the basis that Section 43B read with the Proviso takes care of the hardship situation and hence Explanation 2 can be inserted with retrospective effect to make clear the ambit of Section 43B(a). Therefore, Section 43B(a), the first Proviso of Section 43B and Explanation 2 have to be read together as giving effect to the true intention of Section 43B. If Explanation 2 is retrospective, the first Proviso will have to be so construed. Read in this light also, the Proviso has to be read into Section 43B from its inception along with Explanation 2……."

9 224 ITR 677

"The departmental understanding also appears to be that Section 43B, the Proviso and Explanation 2 have to be read together as expressing the true intention of Section 43B. Explanation 2 has been expressly made retrospective. The first Proviso, however, cannot be isolated from Explanation 2 and the main body of Section 43B. without the first Proviso, Explanation 2 would not obviate the hardship or the unintended consequences of Section 43B. The Proviso supplies an obvious omission. But for this Proviso the ambit of Section 43B becomes unduly wide bringing within the scope those payments which were not intended to be prohibited from the category of permissible deductions……."

"As observed by G.P. Singh in his Principles of statutory Interpretation, 4th Edn. Page 291, "It is well settled that if a statute curative or merely declaratory of the previous law retrospective operation is generally intended." In fact, the amendment would not serve its object in such a situation unless it is construed as retrospective".

2.13. The SC analysed Allied Motors (supra) again in Alom Extrusions[10]. Here, the law was that one Proviso to section 43B (the second) was omitted and another (the first) was amended. The Revenue contended that the omission of the second Proviso operated only with effect from 1-4-2004, whereas according to the taxpayers, omission operated with effect from 1-4-1988 [retrospectively]. Considering this, the SC held that:

"The Court, in Allied Motors (P.) Ltd.'s case (supra), held that when a Proviso is inserted to remedy unintended consequences and to make the section workable, a Proviso which supplies an obvious omission in the section and which Proviso is required to be read into the section to give it a reasonable interpretation, it could be read to be retrospective in operation, particularly to give effect to the section as a whole. Accordingly, the Court, in Allied Motors (P.) Ltd.'s case (supra), held that the first Proviso to section 43B was curative in nature and, hence, retrospective in operation with effect from 1-4-1988. It is important to note once again that by the Finance Act, 2003, not only the second Proviso is deleted but even the first Proviso is sought to be amended by bringing about an uniformity in tax, duty, cess and fee on the one hand vis-á-vis contributions to welfare funds of employee(s) on the other. This is one more reason to hold that the Finance Act, 2003, is retrospective in operation. Moreover, the judgment in Allied Motors (P.) Ltd.'s case (supra) is delivered by a Bench of three Judges, which is binding on the Court".

2.14. Another landmark ruling was in Vatika Township[11], where the SC was deciding whether a Proviso introducing a surcharge rate in 2002 applied to block assessments for the tax years between 1989 and 2000. Holding in the negative, the SC held as follows:

Of the various rules guiding how a legislation has to be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. One principle of law is known as lex prospicit non respicit: law looks forward not backward. As was observed in Philips v. Eyre [1870] LR 6 QB 1 a retrospective legislation is contrary to the general principle that legislation by which the conduct of

10 319 ITR 306
11 367 ITR 466

mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law.

Thus, legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect; unless the legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation....

For the sake of completeness, that where a benefit is conferred by a legislation, the rule against a retrospective construction is different. If a legislation confers a benefit on some persons but without inflicting a corresponding detriment on some other person or on the public generally, and where to confer such benefit appears to have been the legislators object, then the presumption would be that such a legislation, giving it a purposive construction, would warrant it to be given a retrospective effect. This exactly is the justification to treat procedural provisions as retrospective...

In such cases, retrospectively is attached to benefit the persons in contradistinction to the provision imposing some burden or liability where the presumption attaches towards prospectivity. In the instant case, the Proviso added to section 113 is not beneficial to the assessee. On the contrary, it is a provision which is onerous to the assessee. Therefore, in a case like this, one has to proceed with the normal rule of presumption against retrospective operation....Dogmatically framed, the rule is no more than a presumption, and thus could be displaced by out weighing factors....

When one examines the insertion of Proviso in section 113, keeping in view the aforesaid principles, the irresistible conclusion is that the intention of the legislature was to make it prospective in nature. This Proviso cannot be treated as declaratory/statutory or curative in nature......

At the same time, this very principle is based on "fairness" doctrine as it lays down that if it is not very clear from the provisions of the Act as to whether the particular tax is to be levied to a particular class of persons or not, the subject should not be fastened with any liability to pay tax......

Tax laws are clearly in derogation of personal rights and property interests and are, therefore, subject to strict construction, and any ambiguity must be resolved against imposition of the tax....

There are some other circumstances which reflect the legislative intent. The problem which was highlighted in the Conference of Chief Commissioners on the rate of surcharge applicable is noted above. In view of the aforesaid difficulties pointed out by the Chief Commissioners in their Conference, it becomes clear that as per the provisions then enforced, levy of surcharge in the block assessment on the undisclosed income was a difficult proposition. It is for this reason retrospective amendment to section 113 was suggested. Notwithstanding the same, the legislature chose not to do so, as is clear from the discussion hereinafter....

"Notes on Clauses" appended to Finance Bill, 2002 while proposing insertion of Proviso categorically states that "this amendment will take effect from 1-6-2002". These

become epigraphic words, when seen in contradistinction to other amendments specifically stating those to be clarificatory or retrospectively depicting clear intention of the legislature. It can be seen from the same notes that few other amendments in the Income-tax Act were made by the same Finance Act specifically making those amendments retrospectively. The Notes on Clauses show that the legislature is fully aware of 3 concepts:

- *prospective amendment with effect from a fixed date;*
- *retrospective amendment with effect from a fixed anterior date; and*
- *clarificatory amendments which are retrospective in nature.*

Thus, it was a conscious decision of the legislature, even when the legislature knew the implication thereof and took note of the reasons which led to the insertion of the Proviso, that the amendment is to operate prospectively......

There is yet another very interesting piece of evidence that clarifies the provision beyond any pale of doubt, viz. understanding of CBDT itself regarding this provision. It is contained in CBDT circular No.8 of 2002 dated 27th August, 2002, with the subject "Finance Act, 2002 - Explanatory Notes on provision relating to Direct Taxes". This circular has been issued after the passing of the Finance Act, 2002, by which amendment to section 113 was made. In this circular, various amendments to the Income tax Act are discussed amply demonstrating as to which amendments are clarificatory/retrospective in operation and which amendments are prospective. For example, Explanation to section 158BB is stated to be clarificatory in nature. Likewise, it is mentioned that amendments in section 145 whereby provisions of that section are made applicable to block assessments is made clarificatory and would take effect retrospectively from 1-7-1995. When it comes to amendment to section 113, this very circular provides that the said amendment along with amendments in section 158BE, would be prospective i.e. it will take effect from 1-6-2002....

2.15. More recently, in MM Aqua Technologies Ltd.[12], the SC had an occasion to rule on the retrospectivity or otherwise of Explanation 3C to section 43B of the ITA 1961. Here, the facts were that pursuant to a rehabilitation scheme, taxpayer issued debentures in lieu of interest accrued and payable to financial institutions. This was claimed as a deduction which was challenged by the Revenue. Subsequently, Explanation 3C was introduced which 'declared that' 'for the removal of doubts', a deduction of any sum, being interest payable, shall be allowed if such interest has been actually paid and any interest referred to which has been converted into a loan or borrowing shall not be deemed to have been actually paid. The Revenue relied on this amendment to deny the taxpayer's claim.

2.16. In these facts, the SC held interestingly that:

Explanation 3C, which was introduced for the "removal of doubts", only made it clear that interest that remained unpaid and has been converted into a loan or borrowing shall not be deemed to have been actually paid. As has been seen by us hereinabove, particularly with regard to the Circular explaining Explanation 3C, at the heart of the introduction of Explanation 3C is misuse of the provisions of section 43B by not actually

12 436 ITR 582

paying interest, but converting such interest into a fresh loan. On the facts found in the present case, the issue of debentures by the assessee was, under a rehabilitation plan, to extinguish the liability of interest altogether. No misuse of the provision of section 43B was found as a matter of fact by either the CIT or the ITAT. Explanation 3C, which was meant to plug a loophole, cannot therefore be brought to the aid of Revenue on the facts of this case. Indeed, if there be any ambiguity in the retrospectively added Explanation 3C, at least three well established canons of interpretation come to the rescue of the assessee in this case. First, since Explanation 3C was added in 2006 with the object of plugging a loophole - i.e. misusing section 43B by not actually paying interest but converting interest into a fresh loan, bona fide transactions of actual payments are not meant to be affected....

Second, a retrospective provision in a tax Act which is "for the removal of doubts" cannot be presumed to be retrospective, even where such language is used, if it alters or changes the law as it earlier stood....

This being the case, Explanation 3C is clarificatory – it explains section 43B(d) as it originally stood and does not purport to add a new condition retrospectively, as has wrongly been held by the High Court.

Third, any ambiguity in the language of Explanation 3C shall be resolved in favour of the assessee as per Cape Brandy Syndicate (supra) as followed by judgments of this Court - See Vodafone International Holdings BV v. Union of India [2012] 17 taxmann.com 202/204 Taxman 408/341 ITR 1 (SC) at paras 60 to 70 per Kapadia, C.J. and para 333, 334 per Radhakrishnan, J.

2.17. The SC also took note of the retrospective application of Explanation 3C in another case namely Gujarat Cypromet Ltd[13]. It held that this ruling is distinguishable,

30. On the facts of that case, this Court found that Explanation 3C was squarely attracted in that outstanding interest had not actually been paid, but instead a new credit entry of loan now appeared, bringing the case within the express language of Explanation 3C. This is far removed from the facts of the present case, which were not adverted to at all in this judgment. Consequently, this judgment is also distinguishable and would not apply to govern the facts of the present case.

2.18. The above rulings expound the nature and scope of prospective and retrospective amendments and briefly, the role of provisions and Explanations in construing their time effect.

2.19. Here, it would also be worthwhile to note that Circulars which are binding on the Revenue whether or not favourable to the Revenue, becomes particularly binding if the same is in favour of the taxpayer.

3. Some guiding principles

3.1. Considering the above, the following can be distilled:

a. Scrutinise legislative language – expressions like "for removal of doubts" or "shall be deemed always to have been" prima facie indicate retrospective intent. On the other hand, the words 'Provided that' are prima facie prospective.

13 CIT v. Gujarat Cypromet Ltd. 2006 SCC OnLine Guj 560

b. Classify the amendment – determine whether it is clarificatory or substantive or procedural and whether it expands or constricts the charge:

i. If the amendment is substantive, seeks to expand the charge de hors the original language, then the same ought to be prospective.

ii. If the amendment is procedural and seeks to benefit the taxpayer, then the same ought to be retrospective.

iii. If the amendment is clarificatory and supports an existing (although not explicit) charge or substantive understanding, then the same ought to be retrospective.

iv. If the amendment is clarificatory and beneficial and supports an existing (although not explicit) charge or substantive understanding, then the same ought to be retrospective.

c. Did the original legislative language create an injustice and the subsequent amendment remedy / alleviate the same – if the answer is yes, the amendment can be positioned as being retrospective.

d. Did the original legislative language and surrounding declarations address the issue and the subsequent amendment only explicitly provides the same, the amendment can be positioned as being retrospective.

e. Where retrospectivity causes manifest hardship[14], constitutional restraint can be pleaded to call out the amendment as being prospective.

4. **Conclusion**

The courtroom exchanges on retrospectivity reflects the lack of clarity in the Executive and Legislature in being judicious and appropriate when bringing in amendments. The two quotes from Nani Palkhivala date to the 1970s. They continue to be relevant to this day.

It is desirable that legislative amendments and the use of devices such as Provisos and Explanations are guided by:

a. A sense of moderation rather than vindictiveness, pettiness and greed, if not doing away with them altogether. To quote Nani Palkhivala again '*A law does not become any the less tyrannical because it has been passed by the elected representatives of the people. Montesquieu said two centuries ago that ministers often levied taxes to satisfy their own crankiness. This is true as much of democracies as of dictatorships*[15].'

b. Avoiding the tendency to spend time catching the financial sprat, while the mackerel swims free in the ocean.

c. The law today leaves decisions of the most far-reaching effect from the viewpoint of the individual to the government, which often in practice means a not-very-highly-placed administrative officer. The wide room for harassment and corruption which such a legal system provides, needs no underlining. Any law, including amendments, should be such that it leaves very little of this discretion[16] and bring the taxpayer in confidence when such amendments are amend.

14 A new charge does not stand judicial scrutiny of 'manifest hardship'.
15 For this and subsequent lines, We the People (supra); pp. 124
16 One always wonders when an Explanation is introduced with the words, 'for the removal of doubts', as to 'whose doubts' are sought to be removed, as taxpayers would not have doubts when they take a position of taxation or non-taxation in their income-tax return.

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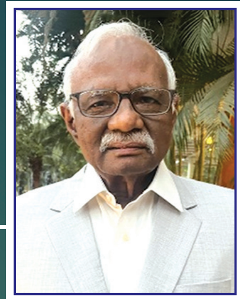

LAW OF EVIDENCE VIS-A-VIS THE CGST ACT, 2017

सतां हि सन्देहपदेषु वस्तुषु प्रमाणमन्तकरणप्रवृत्तयः॥

--from 'Abhijnaana Saakuntalam' of Mahaakavi Kaalidas

'For the virtuous, in matters where doubt arises, the actions of one's inner conscience are the true evidence.'

1. Ascertaining truth of the fact is evidence, which may be either documentary or oral. One of the most prominent Smritis dealing with Dharmasastra dates back to the 1st century BC. It dealt with 'pramaana' (evidence) and 'sakshi' (witness). We had complete code of Evidence in the year 1872, drafted by Sir James Flitzjames. The Indian Evidence Act, 1872 is based on the English Evidence law. Latin Words 'evidens' and 'evidere' gave birth to the word 'evidence', which means to 'prove' or to 'discover clearly'. According to Sir Taylor 'Law of Evidence means through argument to prove or disprove any matter of fact, the truth of which is submitted to judicial investigation.' The Indian Evidence Act, 1872 has been repealed and in its place Parliament has enacted The Bharatiya Sakshya Adhiniyam, 2023 (Act No.47 of 2023), which received the assent of the President of India on 25.12.2023. However, the GST Acts need to be amended wherever reference has been made to the Indian Evidence Act, 1872, like in Section 111 (2) (d) of the CGST Act, 2017. Primary evidence is the best form of evidence. Anything short of this is secondary evidence. Original tax invoice is the best evidence and a photocopy of the same is the secondary evidence. Supplementary evidence, which fortifies the initial evidence is the corroborating evidence.

2. The Central Goods and Services Tax Act, 2017 (hereinafter referred to as the 'GST Act') came into effect from 1.7.2017. It provided for levy of tax on the supply of goods or services or both. It is but natural that in an indirect tax statute, evidence has to be placed on record, concerning existence of business premises, identification of persons doing business, actual conduct of business, supply and receipt of goods or services or both, issue of invoices, credit and debit notes, etc., transport of goods, provision of services, filing of returns, payment of taxes, physical receipt of goods and services, proof of export / import, maintenance of books of account, proof

of service of notices /orders, proof of categories of supplies like composite and mixed, proof of threshold limits, claim of input tax credit, proof of making TCS and TDS, refund claims, etc. Statute itself makes it mandatory to furnish certain evidence in some situations and there is no exception from it. Any evidence produced must be valid, convincing and beyond reasonable doubt.

3. Section 145 of the GST Act specifically deals with admissibility of micro films, facsimile copies of documents and computer printouts as documents and as evidence. This Provision reads as follows:-

"145. (1) Notwithstanding anything contained in any other law for the time being in force,-

(a) a micro film of a document or the reproduction of the image or images embodied in such micro film (whether enlarged or not); or

(b) a facsimile copy of a document; or

(c) a statement contained in a document and included in a printed material produced by a computer, subject to such conditions as may be prescribed; or

(d) any information stored electronically in any device or media, including any hard copies made of such information,

shall be deemed to be a document for the purposes of this Act and the rules made thereunder and shall be admissible in any proceedings thereunder, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

(2) In any proceedings under this Act or the rules made thereunder, where it is desired to give a statement in evidence by virtue of this section, a certificate,-

(a) identifying the document containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer,

shall be evidence of any matter stated in the certificate and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

3.1 Section 2 (41) of the GST Act provides an inclusive definition of 'document' thus "document" includes written or printed record of any sort and electronic record as defined in clause (t) of section 2 of the Information Technology Act, 2000 (21 of 2000);"

4. Section 2 (e) of the Bharatiya Sakshya Adhiniyam, 2023 (hereinafter referred to as BSA, 2023) defines 'evidence' as follows:-

"2 (e) "evidence" means and includes-

(i) all statements including statements given electronically which the Court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry and such statements are called oral evidence;

(ii) all documents including electronic or digital records produced for the inspection of the Court and such documents are called documentary evidence;'

Section 2 (d) of the BSA, 2023 defines 'document' as follows:-

"(d) "document" means any matter expressed or described or otherwise recorded upon any substance by means of letters, figures or marks or any other means or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter and includes electronic and digital records.

Illustrations.

(i) A writing is a document.

(ii) Words printed, lithographed or photographed are documents.

(iii) A map or plan is a document.

(iv) An inscription on a metal plate or stone is a document.

(v) A caricature is a document.

(vi) An electronic record on emails, server logs, documents on computers, laptop or smartphone, messages, websites, locational evidence and voice mail messages stored on digital devices are documents;'

Section 61 of the BSA, 2023 is an important new provision:-

"61. Nothing in this Adhiniyam shall apply to deny the admissibility of an electronic or digital record in the evidence on the ground that it is an electronic or digital record and such record shall, subject to section 63, have the same legal effect, validity and enforceability as other document."

Section 63 of the BSA, 2023 deals with 'admissibility of electronic records'. Sub section (4) thereunder reads as follows:-

'(4) In any proceeding where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things shall be submitted along with the electronic record at each instance where it is being submitted for admission, namely:-

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer or a communication device referred to in clauses (a) to (e) of sub-section (3);

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed by a person in charge of the computer or communication device or the management of the relevant activities (whichever is appropriate) and an expert shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it in the certificate **specified in the Schedule**.'

Schedule to the Adhiniyam shows the format of the certificate.

5. A taxable person comes into contact for the first time with the authorities under the GST Act while applying for registration. Rule 8 (4) of the CGST Rules, 2017 (hereinafter referred to as the GST Rules) prescribes that the documents specified in FORM GST REG-01 shall accompany the application. 'List of documents to be uploaded' is available on this form like photographs, partnership deed etc., relating to constitution of business, proof of principal place of business, etc.

6. In SRG Plastic Company v Commissioner, Delhi GST T & T Department (2023-150 taxmann.com 261), honourable Delhi High court ruled that prescription of documents in circular No.125/44/2019 does not preclude the concerned officer from calling upon the refund-claimant to furnish any other relevant documents that he considers necessary for processing the application for refund. Annexure A in Circular No. 125/44/2019 dated 18.11.2019 contains list of all documents to be provided along with the refund application.

   6.1. Proper officer is empowered to summon any person either to give evidence or to produce a document or any other thing in any enquiry as provided in the case of a civil court under the Provisions of the Code of Civil Procedure, 1908, vide section 70 (1) of the GST Act. Appellate Tribunal has been given similar powers under section 111 (2) of the GST Act. Section 113 (1) empowers the Appellate Tribunal to direct to take additional evidence, while remanding back the case to the lower authority. Appellant has an opportunity to produce any evidence for the first time before the appellate authority or the Appellate Tribunal subject to the circumstances mentioned in Rule 112 (1) of the GST Rules with a rider that such admission is subject to providing reasonable opportunity to the lower authority to examine such evidence vide sub Rule (3) of Rule 112.

7. Section 122 (1) (vii) of the GST Act mandates that if the taxable person fails to furnish information or documents called for by an officer in accordance with the provisions in the Act or the Rules made thereunder, he shall be liable to pay penalty of Rs.10,000 or an amount equivalent to the tax evaded, etc., whichever is higher. Persons receiving summons should also note that section 122 (2) of the GST Act provides for imposition of penalty, which may extend to Rs.25,000, if they fail to appear before the officer.

8. Input Tax Credit confers the benefit of output tax liability reduction. Being the benefit made available, it carries with it some conditions. According to section 155 of the GST Act, where any person claims that he is eligible for ITC, the burden of proving such claim shall lie on such person. For this purpose, he must produce

required evidence. Evidence furnished will be verified to examine its veracity. Sub section (2) of section 16 lists the conditions to discharge the said burden from clause (a) to (d). Readers may also see Rule 36 of the GST Rules.

9. Generally in any business, evidence would be in the form of Books of account, Bank accounts, credit and debit notes, vouchers, document evidencing, receipt voucher for the advance received, e-waybills, invoices, consignment notes, etc. Entries in the books of account maintained in the regular course of business are primary evidence. However the authorities may refuse to accept the books of account, if other reliable evidence has been brought on record. Under Section 35 (3) of the GST Act, the Commissioner is empowered to notify a class of taxable persons to maintain additional accounts or documents for such purpose as may be specified therein.

10. Section 144 deals with presumption as to documents in certain cases. It reads as follows:-

    " Where a person produces any document, or where a document has been seized from a person, or a document has been received from outside India in the course of any proceedings and the prosecution tenders such document as evidence against any person, unless contrary is proved by such person, the court shall presume

    (i) the truth of the contents of such document;

    (ii) that the signature and every other part of such document which purports to be in the handwriting of any particular person or which the court may reasonably assume to have been signed by, or to be in the handwriting of, any particular person, is in that person's handwriting, and in the case of a document executed or attested, that it was executed or attested by the person by whom it purports to have been so executed or attested;

    (b) admit the document in evidence notwithstanding that it is not duly stamped, if such document is otherwise admissible in evidence.

11. Section 54 (4) of the GST Act requires that the evidence as prescribed, shall be filed, where the amount claimed as refund, exceeds Rupees two lakhs. Rule 89 (1) of the Rules prescribes filing of an application electronically in form GST RFD-01 through the common portal by the supplier or the recipient as the case may be, duly accompanied by the documents mentioned in Rule 89 (2) (a) to (m) of the GST Rules.

12. Maintenance of correct and complete accounts is of paramount importance to any business. For the successful completion of audit under the GST Act, evidence in the form of such maintained books would be of great help. Evidence in the form of all these books of account and documents also help in claiming ITC and refunds. Rule 56 of the GST Rules specifies maintenance of true and correct accounts for various categories of taxable persons.

13. Another debatable issue is evidence in the form of affidavits. Section 3 (3) of the General Clauses Act, 1897 defines 'affidavit' as follows:-

"-'affidavit' shall include affirmation and declaration in the case of persons by law allowed to affirm or declare instead of swearing".

According to section 111 (2) (c) of the GST Act:-

"The Appellate Tribunal shall, for the purposes of discharging its functions under this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908.) while trying a suit in respect of the following matters, namely:-

(c) receiving evidence on affidavits;"

Honourable Supreme Court in Sudha Devi (Smt) V M.P. Narayanan (1988) AIR SC 1381 held that an affidavit is not an evidence as defined in Section 3 of the Indian Evidence Act, 1872. Hence conclusion based on affidavit, cannot be said to be based on evidence, unless contents of an affidavit are duly supported by admissible evidence.

In the case of Ayaaubkhan Noorkhan Pathan V State of Maharashtra (2013) 4 SCC 465, honourable Supreme Court held as follows:-

'36 Therefore, affidavits, in the light of the aforesaid discussion are not considered to be evidence, within the meaning of Section 3 of the Evidence Act. However, in a case where the deponent is available for cross-examination, and opportunity is given to the other side to cross-examine him the same can be relied upon.

A statement by a deponent can be held to be unreliable by the Tribunal either on the basis of cross-examination of the deponent or by reference to other material on record leading to the inference that the statement made in the affidavit, cannot be held to be true.'

14. Generally authorities do not consider the evidence produced without putting the same to the opposite party. In Special Circle, Pali V P.G. Foils Limited (2008)11 VST 942 (Raj) (HC), honourable Rajasthan High Court held as follows:-

'In these facts and circumstances, it appears that the very foundation of the order dated February 8, 1999 is the additional evidence produced by the assessee and the pleas taken by the assessee on the basis of those documents and the Tax Board relied upon those documents without affording an opportunity of hearing to the Revenue nor gave any opportunity to the revenue to produce evidence to rebut the documentary evidence by the assessee and the Tax Board's order dated February 8, 1999 is based on the evidence produced by the assessee, therefore, only on this ground alone, the order of the Tax Board dated February 8, 1999 deserves to be set aside.'

15. Evidence in the form of Expert's opinion can be taken. Section 153 of the GST Act specifies that the concerned officer may take the assistance of any expert at any stage of scrutiny, inquiry, investigation or any other proceedings before him. In the case of Parle Agro P Limited v Commissioner of Commercial Taxes, Trivendrum (2017) 106 VST 1 (SC)), Honourable Supreme Court held as follows:-

"The expert authority and its opinion which were relied by the appellant were required to be adverted to both by the clarification authority as well as by the High Court and we are of the opinion that expert opinion and materials have been erroneously discarded."

16. There has been an unending debate on whether the evidence seized during the course of illegal search can be used by the authorities. In the case of Poran Mal v Director of Inspection (1974) 93 ITR 505 (SC) honourable Supreme Court held that the evidence found in illegal search can be used against the person, from whose custody, it was seized.

17. It is settled law that on mere assumptions, guess work and suspicion, no tax can be imposed. Even the authorities are obliged to place on record sufficient valid evidence in support of any proposal made in the show cause notice. 'Suspicion, how strong it may be is no evidence.' In Dhakeshwari Cotton Mills Ltd v CIT (1954) 26 ITR 775 (SC), honourable Supreme Court held 'there must be something more than bare suspicion to support the assessment' In yet another case of Umacharan Shaw and Brothers v CIT (1959) 37 ITR 271 (SC), honourable Supreme Court held 'there was no material on which the ITO could come to the conclusion that the firm was not genuine. There were many surmises and conjectures and if the conclusion is the result of suspicion, which cannot take place of proof in this matter.'

18. Authorities are also obliged to supply copies of all the documents relied upon by them along with the show cause notice. In the case of State of A.P. v Vogireddy Venkatareddy and Company (1989) 74 STC 179, where the CTO completed the assessment without supplying the documents relating to the enquiry conducted, honourable Andhra Pradesh High Court held thus 'the whole procedure was contrary to the principles of natural justice. The procedure adopted was, to say the least, unfair and was calculated to undermine the confidence of the public in the impartial and fair administration of the Sales Tax department concerned.'

19. Cross examination and reliance on the third party evidence play an important role in determination proceedings. In Machilipatnam Consumer Co-operative Society Limited v State of A.P (1988) 7 APSTJ 218 (AP) (HC), honourable Andhra Pradesh High Court held that if any statements are recorded from the persons on whom reliance was placed, the assessing authority should afford an opportunity to the assesse to cross-examine such persons. In the case of Vijayalakshmi & Co. Aravalli v State of A.P. (1989) 8 APSTJ 110 (AP) (HC), honourable High Court of Andhra Pradesh held that any document filed by a third party can be relied upon as long as there is nexus between such document and the accounts of the assesse.

20. Honourable Supreme court had an occasion to observe on how to judge evidence in CIT v. Durga Prasad More (1971) 82 ITR 540 (SC) as follows:-

"**Science has not yet invented any instrument to test the reliability of the evidence placed before a Court or a Tribunal.** Therefore the Courts and the Tribunals have to judge the evidence before them by applying the test of human probabilities. Human minds may differ as to reliability of a piece of evidence, but that sphere decision of the final fact finding authority is made conclusive by law."

Christopher Hitchens' saying 'what can be asserted without evidence can be dismissed without evidence' would be equally applicable to the tax payers and the tax officers.

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A COMPREHENSIVE ANALYSIS OF SECTION 70 OF THE CGST ACT, 2017 WITH PROVISIONS OF THE BNS ACT, 2023

A. *INTRODUCTION*

1. Intelligence Action is asymmetrically structured under the broad framework of the Central Goods and Services Tax Act, 2017 ('CGST Act, 2017' in short)[1]. Inspection, Search, Seizure and Arrest are the modes of action provided to the Intelligence Authorities under Chapter XIV of the CGST Act, 2017 with a sole objective – 'to investigate' any supply of goods or services or both, which the Tax-Payers have intentionally (fraudulently) or erroneously failed to report (which also includes tax – not paid or short paid or erroneously refunded as well as Input Tax Credit, wrongly availed or utilized)[2].

2. The present article is concerned with the said objective i.e to 'to investigate'. More particularly, the present article dives into one of the tools provided to achieve the said objective i.e to the power to summon any person or document which is provided under Section 70 of the CGST Act, 2017, the limitations placed on the said power, the co-relation of the power to summon with the provisions of Bhartiya Nyaya Sanhita, 2023 as well as the Bhartiya Nagarik Suraksha Sanhitha, 2023, the comparison of the provisions of Section 70 of the CGST Act, 2017 as it stood under the Indian Penal Code, 1860 and now i.e under Bhartiya Nyaya Sanhita, 2023 as well as the non-availability of right to not self-incriminate, as provided under, Article 20(3) of the Constitution of India, 1950.

B. Summons under the CGST Act, 2017 – A Broad Framework

3. In these four modes of action under Chapter XIV of the CGST Act, 2017, one such tool provided to the Intelligence Authorities is under Section 70 of the CGST Act, 2017 which provides the power to a 'Proper Officer' to summon any person, who is necessary for the purpose of investigation[3]. The first part of Section 70(1) of the CGST Act, 2017 begins with the use of the phrase "Proper Officer". Circular bearing No. 03/03/2017 dated 05.07.2017 was issued by the

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1 The Author states that as the provisions of CGST Act, 2017 are largely Para-Materia to that of the respective State Goods and Services Tax Act, 2017 ('SGST Act' in short), any mention/reference to the provisions of the CGST Act, 2017, unless specified contrary to the same, shall also include the provisions of SGST Act, 2017.

2 Aishwarya Sharma, *Eight Years of GST in India: A Legal Retrospective and Road Ahead*, [2025] 175 taxmann.com 879 (Article) [2025]

3 Central Goods and Services Tax Act, 2017, § 70, No. 12, Acts of Parliament, 2017 (India).

Government of India (Ministry of Finance) vide which the 'Superintendent of Central Tax' is appointed as the 'Proper Officer' to issue summons under Section 70(1) of the CGST Act, 2017[4].

4. The second part of Section 70(1) of the CGST Act, 2017 provides that the proper officer can issue summons to "any person" that "he considers necessary" to "either give evidence" or "to give any document" in any "inquiry". Two specifics can be dissected herein. The use of the phrase "any person" means any person as defined under Section 2(84) of the CGST Act, 2017 which would commonly mean an individual, HUF, LLP, Company and etc can be summoned by the proper officer. Further, the use of the phrase "he considers necessary" places the ultimate discretion on the hands of the proper officer to summon any person or any document 5.

5. The full nature of the said discretionary powers can be understood after elaborating on the consequence of not responding to the summons or not being present before the proper officer in response to the summons. The latter part of Section 70 of the CGST Act, 2017 specifies that the entire procedure of issuance of summons shall be in the same manner as that of a 'civil court' as provided in the Code of Civil Procedure, 1908. Order XVI of the Code of Civil Procedure, 1908, Rules 1 to 9 provide for the format, manner and mode of service of summons. The said rules detail on the content of the summons and manner and mode of service of summons. Though not specified under the CGST Act, 2017 and the rules thereof, the summons by the proper officer, generally follows the same procedure.

6. Under the Code of Civil Procedure, 1908, the consequence of not responding to a summon or not attending in response to a summon, is provided in Order XVI Rule 10 wherein, after the Court comes to a finding that sufficient service of summons is made and that the person summoned does not respond or attend, then the Court can direct issuance of a warrant to arrest the person and also to attach the property of the said person in order to ensure the attendance of that person6. There is a presumption that the Proper Officer has the power to invoke the said measures as well.

7. In order to curtail and control the powers granted to the Proper Officer to issue summons, the Investigation Wing of the Central Goods and Services Department in the Ministry of Finance has issued an Instruction bearing No. 03/2022-23 (GST – Investigation) dated 17.08.2022 which provide for guidelines for issuance of summons. One of the key guidelines is that three opportunities are to be given to the person summoned to appear. In the event that the person does not appear, then complaint should be filed with the Jurisdictional Magistrate under the provisions of the Indian Penal Code, 1860 (Now Bhartiya Nyaya Sanhitha, 2023)7.

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4 Circular No. 03/03/2017 dated 5th July, 2017, Government of India, Ministry of Finance, (Oct. 10, 2025, 8:28 P.M) available at https://cbic-gst.gov.in/pdf/circularno-3-gst.pdf

5 Rajendra Arora and Yugal Goyal, *Summons under GST,* [2020] 122 taxmann.com 193 (Article) [2020]

6 Code of Civil Procedure, 1908, Order XVI Rule 10, Acts of Parliament, 1908 (India)

7 Instruction No. 03/2022-23 (GST-Investigation) dated 17th August,2022, GST-Investigation Wing, (Oct. 12, 2025, 7:20 P.M)

C. *Quasi-Judicial Inquiry – Inter-play of Summons under CGST Act, 2017 with Bhartiya Nyaya Sanhitha, 2023.*

8. Section 70(1) of the CGST Act, 2017 provides that the Proper Officer can issue summons in any 'inquiry'. Section 70(2) of the CGST Act, 2017 states that the enquiry referred to in sub-section (1) is to be regarded as a 'judicial proceedings' under the provisions of Section 229 and Section 267 of the Bhartiya Nyaya Sanhitha, 2023. Judicial Proceedings is defined under 2(k) of the Bhartiya Nagarik Suraksha Sanhita, 2023 (Previously being Code of Criminal Procedure, 1973) wherein Judicial Proceedings is defined as proceedings in which evidence is or may be legally taken on oath8. Hence, reading the provisions of Section 70 of the CGST Act, 2017 along with it, summons is to be issued by the proper officer in any 'Inquiry' in which evidence is or may be taken by the Proper Officer on oath.

9. Before the Indian Penal Code, 1860 was repealed, Section 70(2) of the CGST Act, 2017 provided that the Inquiry referred to in sub-section (1) is to be regarded as 'judicial proceedings' under Sections 193 and 228 of the Indian Penal Code, 1860. After the Indian Penal Code, 1860 was repealed and the Bhartiya Nyaya Sanhitha, 2023 was brought into force, the Ministry of Law and Justice issued a Notification bearing S.O. 2790(E) dated 16th July, 20249 following which, the reference made to the provisions of the Indian Penal Code, 1860 were replaced by the provisions of the Bhartiya Nyaya Sanhitha, 2023.

10. Reading provisions of Section 229 and 267 of the Bhartiya Nyaya Sanhitha, 2023 with Section 70 of the CGST Act, 2017, Section 229(1) punishes persons who, in response to the summons, provide false evidence or false documents in the inquiry conducted in relation to the said summons. Further, Section 267 punishes persons who, in response to the summons, attend and disrupt and/or insult the Proper Officer conducting the inquiry in relation to the said summons. While Section 267 of the Bhartiya Nyaya Sanhitha, 2023 ensures that the persons attending the enquiry in response to the summons, conduct themselves properly, Section 229(1), on the other hand, ensures that the persons attending the enquiry in response to the summons, do not make intentionally make false statements or provide false documents10.

11. The aforesaid penal provisions provide un-checked powers in the hands of the proper officers and an atmosphere of apprehension/fear is created for the person being summoned. As no particular format for summons has been notified and only a sample pro-forma is provided to the GST Authorities11, more often than not, the summons issued by the proper officers also state that the summons proceedings is a judicial enquiry as provided under Section 229 and Section 267

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available at https://cbic-gst.gov.in/pdf/Instructuon-No-03-2022-23-INV.pdf

8 Bhartiya Nagarik Suraksha Sanhita, 2023, § 2(k), No. 46, Acts of Parliament, 2023 [2023]

9 Notification No. S.O. 2790(E) dated 16th July, 2024, Ministry of Law and Justice, (Oct. 15, 2025, 10:45 A.M), available at https://egazette.gov.in/

10 Bhartiya Nyaya Sanhita, 2023, § 229 and 267, No. 45, Acts of Parliament, 2023 [2023]

11 Department of Taxes, Nagaland, Enforcement Module – GST List Formats, (Oct. 16, 2025, 7:19 P.M), available at https://nagalandtax.nic.in/docs/Enforcement/Formats_Enforcement.pdf

of the Bhartiya Nyaya Sanhitha, 2023, thereby indicating that the persons who are summoned would be subject to criminal prosecution if they fail to answer adequately and hence, it gives rise to an apprehension that the persons who are summoned, may be coerced, put under duress or threatened with criminal prosecution to secure a false answer.

12. With a view to enable the summoned person to provide evidence correctly or to provide the correct documents, section 70 of the CGST Act, 2017 was amended and Sub-section 1A was introduced by the Finance Act, 2024 with effect from 01.11.2024 so as to permit the persons who are summoned to appoint an Authorized Representative who can provide the correct details and documents as necessary12. However, despite the same, the said sub-section does not provide any other individual to be present either with the summoned person or with the authorized representative.

13. The Hon'ble Supreme Court in its judgement dated 14.08.1992 in Poolpandi v. Superintendent, has held that the no individual (Lawyer, Chartered Accountant or Auditor) is to be present in the room wherein the inquiry is being conducted, apart from the Officer who has issued the summons/conducting the inquiry and the person who has been summoned to give evidence13. The said decision of the Hon'ble Supreme Court has been followed by the Hon'ble High Court of Delhi in Sudhir Kumar Aggarwal v. Directorate General of GST Intelligence14 as well as the Hon'ble High Court of Allahabad in Ankit Bhutani v. Union of India15. Therefore, presently, only the summoned person or the authorized representative has to appear in the inquiry following the summons. There is a need to amend the law so as to permit another individual to be present in the room wherein the inquiry is taking place so as to mitigate the apprehension of coercion or duress.

D. *Obligation to not falsify evidence and a Right to not Self-Incriminate: A need for system of checks and balances.*

14. Section 70 of the CGST Act, 2017, makes it clear that the summoned person or his authorized representative ought not to falsify evidence and in the event that they do, they will be subject to harsh criminal prosecution. This puts the onus on the summoned person and the authorized representative, to answer the questions and produce the required documents in a truthful manner. This raises an interesting dilemma, as the CGST Act, 2017 lists out offences which are punishable by imprisonment, thereby adding an element of criminal/penal measure in a tax legislation16.

15. The dilemma arises in instances wherein, in an on-going investigation of a tax-payer, accused of committing such offences, the summoned individual/

12 Memo explaining the provisions in the Finance Bill, 2024, Government of India, (Oct. 16, 2025, 7:58 P.M), available at https://www.indiabudget.gov.in/doc/memo.pdf
13 Poolpandi v. Superintendent, 1992 taxmann.com 30 (SC), Para 11
14 Sudhir Kumar Aggarwal v. Directorate General of GST Intelligence, [2019] 112 taxmann.com 360 (Delhi)
15 Ankit Bhutani v. Union of India [2020] 116 taxmann.com 330 (Allahabad)
16 Central Goods and Services Tax Act, 2017, § 132, No. 12, Acts of Parliament, 2017 (India).

representative of the tax-payer is bound to state the truth and produce correct documents, thereby effectively incriminating the tax-payer which gives rise to a case of 'Compelled Self-Incrimination'17. Article 20(3) of the Constitution of India, 1950 states that 'No person who is accused of any offence shall be compelled to be a witness against himself'18. This protection to 'Not Self-Incriminate' is provided to any person being accused of an offence under the criminal law. The question then arises as to whether this protection ought to be extended to the tax-payers who are accused of offences under the CGST Act, 2017 and are directed to participate in the inquiry through summons which could lead to self-incrimination.

16. Interestingly, the Hon'ble High Court of Telangana, in P.V. Ramana Reddy v. Union of India, has held that the enquiry as specified in Section 70 of the CGST Act, 2017 is a judicial proceeding and not a criminal proceeding and hence, the person summoned has to be present before the Officer and should provide all the evidence which is inquired by the Officer and in the event that the person fails to do so, he will be subject to criminal prosecution19. Further, the Hon'ble High Court of Delhi in Azad Malik v. DGGI, Meerut Zonal Unit20 as well as the Hon'ble High Court of Orissa in Suchishmita Mohanty v. State of Odisha21, have held that issuance of summons does not amount to initiation of a criminal proceedings and therefore, declined to grant anticipatory bail.

17. The Hon'ble Supreme Court, in the case of Poolpandi (supra) has held that, as summons proceedings are not criminal in nature and further, as, at the time of issuance of summons, the tax-payer is not accused of any offence, the protection under Article 20(3) of the Constitution of India, 1950 is not available to the tax-payers22. The said view of the Hon'ble Supreme Court is upheld in a later decision of the Hon'ble Supreme Court in Radhika Agarwal v. Union of India and Ors wherein the Hon'ble Supreme Court, while upholding the constitutional validity of Section 69 and 70 of the CGST Act, 2017 has also held that the protection to 'not self-incriminate' is not available at the stage of interrogation as at that stage, no tax-payer is accused of committing any offence23.

18. An argument can be made herein that, under the procedures followed in traditional criminal law, a complaint is filed before the jurisdictional police station against an individual following which an FIR is immediately registered against the said individual accusing him of committing an offence, following which, an investigation is conducted. On the other hand, in the case of an offence under the GST Act, Inquiry/Investigation is conducted during the course of which, evidence is gathered following which, the tax-payer is accused of an offence and is immediately punished.

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17 Harshdeep Khurana, Rachit Jain and et.al., *Tax Investigations and Right Against Self-Incrimination: Balancing Legal Safeguards*, 2025 SCC OnLine Blog Exp 63, [2025]
18 INDIA CONST, art. 20, §3
19 P.V. Ramana Reddy v. Union of India, [2019] 104 taxmann.com 407 (Telangana)
20 Azad Malik v. DGGI, Meerut Zonal Unit, [2025] 177 taxmann.com 785 (Delhi)
21 Suchishmita Mohanty v. State of Odisha, [2023] 157 taxmann.com 684 (Orissa)
22 Poolpandi, supra note 13 at Para 6
23 Radhika Agarwal v. Union of India and Ors, 92025) 6 SCC 545

19. It cannot be so, that, in the first instance, the individual is already accused of an offence and hence, the protection to 'not self-incriminate' is available, whereas in the second instance, as the tax-payer is subsequently accused of committing an offence and not at the stage of interrogation, the protection to 'not self-incriminate' is not available. Hence, a mechanism ought to be inbuilt within the provisions of the CGST Act, 2017 as to duly protect the right to not self-incriminate while also ensuring that the tax-payers do not falsify the evidence.

E. CONCLUSION

20. While a uniform pan-Indian indirect tax mechanism is beneficial for the growing economy, it is necessary that the GST Law undergoes evolution so as to ensure that there is a correct system for collection of indirect tax. As discussed in the Article, a system of checks and balances ought to be introduced so as to curtail the wide range of powers accorded to the intelligence authorities and most importantly, a mechanism to ensure that protection available under the Constitution of India ought to be made available. A progress towards the same can only be effected if due representations raising these issues are made to the concerned authorities and the said authorities are sensitized to understand and proactive to bring about such changes for the benefit of the tax-payers.

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LIABILITY TO PAY IN CERTAIN SPECIAL CIRCUMSTANCES UNDER GST (S. 85 TO S. 94 OF THE CGST ACT)

The Goods and Services Tax (GST) rests on the principle that the taxable person supplying goods or services is primarily responsible for paying tax – could be the supplier under forward charge; recipient under reverse charge or the e-commerce operators under S. 9(5). Having said that, while the person liable to pay tax may be so said, the recovery of the tax could be even from person other than the one who was required to discharge that. These situations are contained in Chapter XVI of the CGST Act, 2017 between S. 85 to S. 94 – typically due to circumstances such as liquidation, transfer of business, restructuring or even death of the tax payer. To safeguard revenue, the legislature has enacted these provisions, which impose liability on connected persons such as successors, directors, partners, legal heirs, guardians or trustees, embodying the doctrine of vicarious liability – viz., tax dues, for the right reasons don't get extinguished merely because the original taxpayer ceases to exist or carry on business.

Relevance of this topic

1. With the increase in corporate restructuring and M&A activity, there are more business transfers, amalgamations and insolvency-driven acquisitions, especially post-COVID. The successor liability under S. 85, S. 86 and S. 87 has therefore become a practical risk in transactions, not just for the Government to be able to administer, monitor and recover the taxes, but even for the parties in the transaction to be able to absorb the liabilities.

2. The interplay between S. 88 (company in liquidation) and the Insolvency and Bankruptcy Code, 2016 (IBC) has led to litigation on priority of Government dues over the secured creditors.

3. With the increased focus of the tax office on identifying fake invoicing, there is increased scrutiny of directors and partners too. Tax authorities are increasingly invoking S. 89 and S. 90 to hold partners and directors personally liable when companies / firms are in default, consequently raising concerns about the balance between revenue protection and the corporate limited liability principle on one side and on the expectations or responsibilities between the companies / firms and the directors / partners *inter-se*, on the other.

4. Many family-owned businesses are undergoing generational change, making the provisions relating to legal heirs (S. 93 and S. 94) and guardians / trustees (S. 91) practically significant.

   Thus, this topic is not merely academic but certainly lies at the heart of corporate governance and transactional structuring and litigation, in today's environment.

Overview of the Provisions

A. S. 85 – Liability in case of transfer of business

This section provides that when a business is transferred in any manner (sale, gift, lease, lease and license or hire or in any other manner), both the transferor and transferee will be jointly and severally liable for any tax, interest, or penalty due, up to the date of transfer.

- Purpose: Prevents taxpayers from avoiding dues by transferring business to another entity and forces such a transfer to be a more diligent and informed one, from a transferee's point of view.
- Safeguard: The liability applies only for the period up to the date of transfer. Post-transfer, the transferee / successor will be solely liable for his own compliance and payment of taxes.
- Compliance: The compliance under the GST provisions will be the responsibility of the transferee, for filing of returns upto the date of transfer, continuation of pending proceedings and initiation of new proceedings by tax office and cancellation of registration (if relevant). Procedurally, whilst any proceedings that have already been initiated or any new proceedings are being initiated, it would be under the same (transferor) GSTIN, the liability to discharge the taxes or any other amounts thereto would be the joint and several liability of both, the transferor and the transferee.

B. S. 86 – Liability of agent or principal

Similar to how the law applies in case of transfer of business, for any supplies by the agent on behalf of the principal, the liability would be joint and several, between both, the agent as well as the principal. In this context, it is important to note that it is only the agent's liability for supplies made on behalf of the principal, that is joint and several and not vice-versa (liability of principal, if any does not become a liability of the agent).

C. S. 87 – Liability in case of amalgamation or merger

If two or more companies amalgamate / merge, the transferee company automatically inherits the GST dues of the amalgamating companies - all the dues of the amalgamating company can be recovered from the amalgamated company. In this breath, it is relevant to take note of the ruling of Karnataka HC in the case of Trelleborg Sealing Solutions India Private Limited (KHC 24866 dt. 02.07.2024) - Citing the Supreme Court verdict in Maruti Suzuki (India) Ltd, the HC stated, "once an amalgamating entity ceases to exist upon an approved Scheme of Amalgamation, the question of continuing the proceedings as regards the non-existent company cannot be permitted." Accordingly, the HC quashed the SCNs and set aside the demand of tax including interest and penalty. This ruling establishes that the proceedings (new and already initiated ones) should be continued or pursued only against the amalgamated company and nothing can continue against the amalgamating company.

On a different note, the law also provides that if there were any transactions between the two or more companies that are amalgamating or merging and where the effective date of merger is an earlier date, S. 87 specifically provides that all such transactions during the interregnum would remain as such and continue to be included in the supplies made/received (as the case may be) by the respective entity. Whilst from a financial statement perspective (Balance Sheet and Profit and Loss Account), these transactions would get eliminated in the process of consolidation, the same would not impact or have any consequence for GST – it would remain a supply made by the entity which initially supplied and receipt by the entity which received. The liability for payment of output taxes, claim of input credits and all other consequential compliances would remain status-quo. It also provides that, such entities would be reckoned as 'distinct entities' for the limited purposes of GST provisions during this interregnum (from the effective date of amalgamation upto the date of cancellation of registrations of such amalgamating entities).

Broadly, it would be safe to infer that the route of amalgamations and mergers or demergers should not, and more particularly, cannot be used as a tax evasion mechanism.

Practically, whether of the amalgamated company liability applies from the appointed date or effective date of amalgamation is often litigated – in line with the above, the liability of the amalgamated company would ideally be from the effective date of amalgamation. Thus, all compliances upto the effective date would vest with the amalgamated companies, though it would be a joint and several liability of both the entity from a tax administration and recovery point of view.

Additional notes: On amalgamation or merger of entities, the Bombay HC in the case of Umicore Autocat India Private Limited, Goa Bench (WP No. 463/2024) held that S. 18(3) read with R. 41 allows transfer of unutilised ITC across States, and the GSTN portal or any Circular cannot restrict ITC-02 to "same-State" cases. It ordered that the ITC should be allowed to move from the transferor GSTIN (Goa) to the transferee GSTIN (Maharashtra) after an NCLT-approved amalgamation with transfer of liabilities.

D. S. 88 - Liability in case of company in liquidation

When a company is being wound up irrespective of the reasons for the same, the liquidator (or administrator under IBC) must inform the jurisdictional Commissioner within 30 days of appointment that the company is into liquidation.

Thereafter, the Commissioner would be required to notify the liquidator within 3 months, the amount which he deems sufficient to cover the liability of company upto the date of the liquidation. Legally, there would be no assessment and confirmation of demands at this stage. The intimation by the Commissioner is only an estimate which he believes would be sufficient towards the amount of taxes, interest and penalties, after which date and upto such amount, it becomes the duty of the liquidator to ensure that GST dues are settled before distributing assets.

Nonetheless, as an extended liability, if any dues cannot be recovered from the company, the directors of the company (during the period of default) can be held personally liable, unless they prove that non-recovery was not due to their gross neglect, misfeasance or breach of duty. This would include liabilities both, in respect to proceedings that were initiated prior to the liquidation as well as any proceedings that are initiated subsequently during the process of liquidation.

Additional notes: This provision should to be read along with the Insolvency and Bankruptcy Code, 2016, which prescribes its own waterfall of priority for creditors.

E. S. 89 – Liability of directors of a private company

If a private company fails to pay its GST dues for reasons whatsoever, and such dues cannot be recovered from its assets, the 'directors at the time of default' can be made personally liable. Only exception and safeguard for the directors would be if they are able to demonstrate that the non-payment was not due to their gross neglect and if they had taken adequate care within their reach from this misfeasance or breach of duty. The burden of proof completely lies on directors to reverse the usual presumption of *mens-rea*.

One exception being, where a company is converted from a private to a public limited company, if any dues of the private company could not be recovered prior to it becoming a public limited company, such un-recovered liability cannot be subsequently recovered from the directors of the private company.

Another important aspect to note is that 'personal penalty or liability of a director' is different from 'recovery of company's tax dues from a director'. While the former is a penalty on the director in his capacity as a director for mis-conduct or participation in any misfeasance, the latter is recovery of company's liability from the director – where the tax liability is crystallised in the hands of the company but the tax office is unable to recover from the company. The provisions of S. 89 applies only to liability of a company that is recoverable from a director.

On the question of when and what types of dues can be recovered from a director, the Telangana HC in the case of Valluripalli Nagarjun vs. DC, (2022 (11) TMI 1271) held that any recovery of arrears of tax due from a private limited company from the Directors of the company can be initiated and recovered only in line with S. 27 of the Andhra Pradesh Revenue Recovery Act, 1864 read with S. 16-B of the APGST Act, which is only when the company is in liquidation and not otherwise. The stand of the respondent that since the 3rd respondent in the petition has been amalgamated with the 4th respondent, the same is to be deemed to be under winding up, does not appeal this Court for acceptance for the reasons that the amalgamation is undertaken under S. 397 of the Companies Act, 1956, whereunder there would be transfer of assets and liabilities of the company being taken over by the other company with which it is being amalgamated and thus, it cannot be considered as deemed to be wound up. The procedure for winding up of a company is prescribed under Part II of Chapter XX of the Companies Act, and it operates in a different field and cannot be considered same as in the case of amalgamation. Therefore, in the light of the settled position of law as enunciated by this Court in Maddi Swarna vs. CTO, (2001 (6) TMI 795 – AP HC), this Court held that the action of the 1st respondent in issuing the impugned notice of attachment in Form 5 dt.22.08.2007 under section 27 of the Act of 1864, cannot be countenanced.

Additional notes:

a. The GST provisions does not distinguish between whole time directors, non-whole time directors and independent directors. The difference in roles and responsibilities under the corporate laws would not be relevant and cannot be used as a safeguard under the GST laws. The only exception or safeguard being if the director is able to demonstrate that he / she was not involved in the misfeasance.

b. Again, the liability of a managing director and other directors also would not have any differential treatment under the GST laws. Nonetheless, if the contracts and / or roles and responsibilities of each of them are clearly defined, it could help demonstrate the non-involvement in the misfeasance.

c. It will be important to note that this recovery provision applies only to the directors of a private company and does not extend to public companies.

d. Former directors cannot be held responsible for the liabilities of a subsequent period. As a reference, the Madras High Court in the case of DV Rao vs. Deputy DGFT (2024 (6) TMI 204) held that *the penalty imposed on a company cannot be recovered from its former director who had resigned and filed necessary documents with the Registrar of Companies. The court quashed the order imposing penalty on the director and directed implementation against others, excluding the petitioner director (former director).* The important procedure to insulate oneself being intimation to the tax authorities, of the retirement or resignation or any other form of separation of the director from the company.

F. S. 90 – Liability of partners of a firm

Every partner of a partnership firm would be jointly and severally liable for GST dues of the firm, irrespective of profit-sharing ratios. This would be, for the complete period upto the date of intimation of such retirement or resignation or any other form of separation, where the intimation is filed beyond 1 month (it would be upto the date of separation, where the intimation is filed within 1 month).

Here again, the key to insulate oneself would be the intimation to the tax authorities, of the retirement or resignation or any other form of separation of the partner, either by the firm or by self (by the partner).

Apropos, in the case of death of a partner, the legal heirs would continue to be liable, subject to intimations.

G. S. 91 – Liability of guardians, trustees or agents

When a business is run on behalf of another person, such as a minor, incapacitated person or beneficiary, the guardian, trustee, or agent managing the business would be deemed and treated as the taxable person. The underlying principle being that the tax liabilities cannot be avoided merely because the beneficial owner is legally incapacitated or where the proceedings cannot be legally initiated against the beneficial owner. *Eg: A trust runs a school cafeteria. The trustee must discharge GST dues, even though the beneficiaries (students/ guardians) ultimately enjoy the surplus.*

H. S. 92 – Liability of Court of Wards, Administrators, etc.

Where the management of a business is taken over by a Court of Wards, Administrator General, Official Trustee, or other legal authority, such body will be treated as the taxable person and becomes liable for the GST dues. All the provisions, not limited to ensuring compliance and recovery of taxes, but in entirety will apply mutatis mutandis, to the person who, infact manages the business. *Eg: If a court-appointed administrator is running the affairs of an estate business, that administrator must ensure GST compliance.*

I. S. 93 and S. 94 – Liability in case of discontinued business

If a business is discontinued (due to closure, dissolution or otherwise), the persons in charge of the business at the time of discontinuance, viz., the partners, directors, trustees, etc. will continue to remain liable for tax dues incurred during the operation of the business.

However, in case death of the tax payer, the legal representative would be responsible for both, the liabilities upto the date of death as well as the liabilities for the period thereafter, if the business is continued. The safeguard on the amount of recovery for the period upto the date of death is limited to the extent the liabilities can be met out of the estate of the deceased.

Further, where the tax payer is either an HUF or an AOP, where the property is distributed amongst the members upon its dissolution, all such members would be jointly and severally responsible for the dues upto the date of dissolution. Apropos a partnership firm, all the partners would be jointly and severally responsible for all the dues upto the date of dissolution. These would however be subject to any specific provisions in the IBC, 2016.

Practically, where the tax payer is A but the business is run by B (typically between siblings, spouses, parents-children), it is important to note that the liability is and will always be the responsibility of the person registered as tax payer and not the person conducting the business (in the instant case A and not B). God forbid, if B (person managing the business) expires, irrespective of the fact that A was not involved and A is not aware of the business / transactions, the liability will always vest with A.

In the case of Om Prakash Wadhawan vs. State of UP (Writ Tax No. - 1032 of 2025), where a notice was issued against a dead person, the Allahabad High Court held that the same is not sustainable. It found that though the show-cause notice, reminders and the subsequent tax determination were directed to the deceased, since the same were issued after the death, it ought to have been issued to the legal representative and not the deceased. Upholding the provisions of S. 93, the Court held that while a legal representative may be liable for tax arising from a deceased person's business, the statute does not permit making a determination against a dead person; the legal representative must be served and given an opportunity to respond.

Next, in the case of Sunil Thampy Nair vs. State of Maharashtra (TS-679-HC(BOM)-2025-GST), the Bombay High Court set aside the demand order and the consequential notice for attachment of properties on the premise that the order would be a nullity since it is made against a dead person. The proceedings ought to have been initiated and demand raised against the legal representative. Nonetheless, the HC permitted the Revenue to initiate fresh proceedings against the legal representatives, in accordance with law. So also, in the case of Amit Kumar Sethia (Deceased) vs. State of UP (TS-243-HC (ALL)-2025-GST), the Allahabad High Court took a similar view while holding that, once the provision deals with the liability of a legal representative on account of death of the proprietor of the firm, it is sine qua non that the legal representative is issued a show cause notice and after seeking response from the legal representative, the determination should take place.

Thus, in case of a death of the tax payer, it clearly follows that the proceedings should thereafter be initiated only the against legal representative and any steps taken against the deceased would be invalid.

Some issues and summing-up

Collectively, S. 85 to S. 94 ensure that GST dues are "sticky" and they attach to the business, its controllers, and its estate, ensuring tax recovery and continuity of liability across transfers, succession, or discontinuance.

Issue	Explanation
1. Broad and uncertain scope of liability	"Joint & several liability" can implicate innocent partners/directors.
2. Conflict with Companies Act	Companies Act provides limited liability; GST overrides by making directors personally liable.
3. Successor liability in business transfer	Buyers face risk of inheriting hidden GST dues, affecting M&A certainty. Practically, insisting the transferor to provide a "tax clearance certificates" could be a security for the transferee.
4. Liability of legal heirs	Legal heirs are liable only to extent of estate, but law does not provide the procedure to quantify or assess the value of inheritance.

Issue	Explanation
5. Overlap with Insolvency & Bankruptcy Code (IBC)	S. 86 liability conflicts with IBC's waterfall distribution. Note: The hon'ble SC has clearly provided that once the resolution plan is approved, there can be no further liabilities (if any, it would extinguish).
6. Burden of proof on directors/partners	GST shifts burden on directors to prove innocence and filing of intimations.
7. Continuity of liability even after dissolution	Partners/directors remain liable indefinitely even after discontinuance.
8. Transparency in pending dues	Buyers, investors, or heirs cannot easily verify pending GST dues. Utmost, as indicated above, the transferee can insist on 'tax clearance certificates', but anyways, this would not insulate them from any joint and several liabilities.
9. Joint and several liability	While the law elaborately explains the joint and several liabilities in different circumstances, it is important to note that from a tax administration perspective, procedurally, the liability to pay tax and other amounts is essentially on the primary person. The joint and several nature of liability does not empower the tax office to directly recover the said amounts from the other person. It follows that the tax office should demand the taxes and other amounts from the primary person and if unrecoverable, the recovery should be initiated against the other.

To sum up, whilst S. 85 to S. 94 of the CGST Act represents and provide for the legislature's determination to secure government revenue even in the face of liquidation, succession or business transfer, the judiciary has consistently upheld the principle of continuity of liability, but with an important caveat - that the liability should not be imposed mechanically but must always respect principles of fairness and natural justice. Goes without saying that the liability should be imposed only on culpable persons rather than innocent stakeholders, but the responsibility to prove innocence would solely be on such person and could be a matter of litigation, especially where the liability is a natural fallout and this exception is not carved out.

The insights shared in this article reflect the author's personal understanding and interpretation of the subject matter. While feedback and differing perspectives are welcome to enrich the discussion, the contents in this article should not be construed as tax, legal, or financial advice. Professional advice should be sought before taking any action based on the information provided.

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2015–2025 A DECADAL REVIEW OF THE BLACK MONEY ACT: TEN EVOLVING LEGAL QUESTIONS FROM THE COURTS

INTRODUCTION

The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 ("Black Money Act" or "BMA") was enacted as a dedicated regime to address undeclared foreign income and assets, strengthen cross-border tax transparency, and impose stringent consequences for offshore non-compliance. Yet, a decade after its introduction, the statute continues to generate substantial interpretational controversy—particularly regarding its temporal operation, its relationship with the Income-tax Act, and the contours of its civil and criminal consequences. As the law evolves through litigation, the judiciary has played a pivotal role in defining its true boundaries.

This paper examines **ten evolving legal question from Courts** that have shaped the understanding of the BMA between 2015 and 2025, drawing upon statutory provisions, legislative intent, and emerging jurisprudence.

1. WHETHER THE BLACK MONEY ACT APPLIES TO FOREIGN ASSETS THAT HAD CEASED TO EXIST PRIOR TO 01 JULY 2015?

The scope and applicability of the Black Money (Undisclosed Foreign Income and Assets) Act, 2015 ("BMA") flow primarily from Sections 2(11) and 2(12), which define "undisclosed asset located outside India" and "undisclosed foreign income and asset". The Legislature has consciously used the present-tense expressions "located", "is", and "held", thereby indicating a clear intention to cover only those foreign assets that existed and were held by the assessee **on or after 01 July 2015**, the date on which the Act came into force.

This interpretation is fortified by the judgment of the Hon'ble Supreme Court in ***F.S. Gandhi v. CWT (1990) 184 ITR 34 (SC)***, which held that the term "is" must be construed in the present tense for determining the existence of an asset as on the relevant statutory date. A similar approach to the word "is" was adopted by the Supreme Court in ***International Taxation–2(2)(2), New Delhi v. Nestle SA, Civil Appeal No. 1420 of 2023***. Accordingly, an asset liquidated or ceased to exist prior to 01 July 2015 cannot fall within the scope of Section 2(11).

Despite this statutory and judicial position, Income Tax authorities across India have adopted a contrary view. By relying on Sections 3, 71 and 72 of the BMA, the Revenue has asserted that the Act applies even to foreign assets that were disposed of prior to 01 July 2015, provided they were undisclosed. Based on this interpretation, multiple notices under Section 10 of the BMA have been issued to persons whose assets had ceased to exist long before the Act became operational.

Aggrieved by the apparent retrospective application of the Black Money Act, several assessees approached various High Courts, and the issue presently remains sub- judice. The following matters are currently pending consideration :

a. **Surendra Kumar Jain v. Addl. CIT**, W.P. No. 1530/2021 (interim stay granted);
b. **Madhulika Tiwari v. Joint CIT**, W.P.(C) No. 4225/2022 (Delhi High Court);
c. **Deepak Talwar v. Union of India**, W.P.(C) No. 5294/2021 (Delhi High Court);
d. **Anila Rasiklal Mehta v. Union of India**, W.P.(C) No. 1300/2018 (Bombay High Court);
e. **Gautam Khaitan v. Union of India**, W.P.(Crl.) No. 618/2019;
f. **Mohit Jain v. Dy. Director of Income Tax**, W.P.(C) 217/2022 (Delhi High Court);
g. **Ravi Bharadwaj v. Additional CIT**, W.P.(C) No. 5206/2022 (Delhi High Court).

In addition, several connected writ petitions—W.P.(C) 6562/2022, W.P.(C) 4252/2022, W.P.(C) 443/2024, CM APPL. 2031/2024, W.P.(C) 8927/2022, W.P.(C) 13974/2022, W.P.(C) 14020/2022, along with W.P.(C) 247/2023, W.P.(C) 3732/2023, W.P.(C) 3801/2023, CM APPL. 65399/2024, W.P.(C) 3802/2023, and W.P.(C) 3805/2023-are also pending before the Hon'ble Delhi High Court. .

The Karnataka High Court, in ***Smt. Dhanashree Ravindra Pandit v. Income Tax Department*** [2024] 466 ITR 1, examined the retrospective application of Sections 50 and 51 (penal provisions relating to imprisonment). Applying Article 20(1) of the Constitution, the Court held such retrospective penal consequences to be unconstitutional. However, this decision has been stayed by the Hon'ble Supreme Court *[**2024] 166 taxmann.com 279 (SC)).***

In contrast, the Hon'ble Mumbai ITAT, in ***Rakesh Manohar Bhansali v. ACIT*** (193 ITD 141), upheld the Revenue's stance by holding that even where an undisclosed foreign asset had been disposed of prior to the enforcement of the Act, the BMA could still be invoked in the year in which the Assessing Officer first discovered its existence.

Similarly, the Hon'ble Calcutta High Court in ***Shrivardhan Mohta v. Union of India*** [2019] 102 taxmann.com 273 (Cal.) held that failure to disclose foreign bank accounts-despite having had an opportunity-could validly attract prosecution under the BMA. In that case, the assessee had maintained four undisclosed foreign bank accounts.

Given these divergent judicial views, the question of the BMA's retrospective applicability remains unsettled. Final clarity will emerge only upon authoritative adjudication by the Hon'ble Supreme Court.

From the author's standpoint, a statute such as the BMA which incorporates significant penal and deterrent consequences-cannot be applied retrospectively. Penal provisions require strict construction, and conduct that was not an offence at the time it occurred cannot be subjected to penal consequences later. Retrospective application would offend the principles of fairness, violate legal certainty, and directly contravene **Article 20(1)** of the Constitution. Judicial precedents such as ***T. Barai v. Henry Ah Hoe (1983) 1 SCC 177*** *and* ***K.P. Varghese v. ITO (1981) 131 ITR 597 (SC)*** underscore this principle. Accordingly, any interpretation that confers retrospective effect upon the penal provisions of the BMA is legally untenable.

2. WHETHER THE REVENUE, AFTER HAVING OBTAINED FULL PARTICULARS OF A FOREIGN ASSET AND CONCLUDED INQUIRY/INVESTIGATION UNDER THE INCOME-TAX ACT BEFORE THE COMMENCEMENT OF THE BLACK MONEY ACT, CAN STILL INVOKE THE BMA FOR THE SAME ASSET MERELY BECAUSE IT CARRIES STRICTER CONSEQUENCES?

The Black Money (Undisclosed Foreign Income and Assets) Act, 2015 ("BMA") and the Income-tax Act, 1961 ("ITA") operate as parallel fiscal statutes, each empowered to tax foreign income and assets of a resident. Neither enactment contains a non obstante clause overriding the other. Consequently, where both statutory pathways are concurrently available, the settled doctrine of election and the broader rule against approbation and reprobation squarely constrain the conduct of the Revenue.

Where the Revenue was already in possession of complete information concerning a foreign asset prior to, or immediately following, the commencement of the BMA, and consciously chose to invoke its extensive investigative and assessment powers exclusively under the ITA-including summons, enquiries, reassessment or search-its subsequent attempt to invoke the BMA on the identical set of facts is legally impermissible. A statutory regime cannot be abandoned and replaced merely because the alternative statute is more punitive.

Indian jurisprudence has consistently affirmed that where two parallel statutory remedies exist, the State cannot elect one, induce the subject to proceed on that basis, and thereafter shift to another inconsistent or more onerous remedy for the very same cause of action. In ***Hiralal @ Hiranand v. Commissioner of Customs*, 2004 SCC OnLine Cal 210**, the Calcutta High Court held that a party who has consciously chosen one course of action is precluded from subsequently adopting a contradictory position. Similarly, the Delhi High Court in ***Ramaswamy Palledar v. Government of NCT of Delhi*, 2019 SCC OnLine Del 8253**, reiterated the settled doctrine that what cannot be done directly cannot be achieved indirectly by merely altering the forum while pursuing the same subject matter. The Supreme Court, in ***Bank of India v. Lekhimoni Das*, (2000) 3 SCC 640**, further affirmed that once a statutory remedy has been elected and pursued, a parallel remedy in respect of the same lis cannot thereafter be invoked. These principles apply with equal force in fiscal adjudication, restraining the Revenue from abandoning one statutory route after exercising it and resorting to another parallel regime for the very same asset and the same taxable event.

This position is reinforced by CBDT Circular No. 13/2015 (Q.15 & Q.16), which clarifies that where a foreign asset is already the subject of proceedings under the ITA, action must continue under the ITA and not under the BMA. This administrative interpretation aligns with the doctrine of election and expressly disallows shifting regimes for the same asset.

The Gujarat High Court in ***PCIT (Central) v. Income-tax Settlement Commission*, 420 ITR 149**, has given the clearest judicial articulation of this principle in the very context of the BMA. The Court held that though the two statutes operate in parallel, once the Revenue consciously chooses to proceed under the ITA-whether through search, reassessment, or settlement-it cannot subsequently take a “somersault” and seek to invoke the BMA on the same asset, as this violates the doctrine of election and amounts to impermissible approbation and reprobation.

Given the draconian civil and penal consequences under the BMA, permitting the Revenue to first exhaust the ITA machinery and thereafter shift to the BMA solely to impose harsher consequences would constitute arbitrariness, abuse of statutory power, and a direct infraction of the constitutional guarantee of fairness under Article 14. The law does not permit such tactical oscillation between parallel statutes.

Accordingly, once the Revenue elects to proceed under the Income-tax Act for a foreign asset already within its knowledge, a subsequent invocation of the BMA on the same set of facts is without jurisdiction, contrary to settled legal principles, and liable to be quashed as fundamentally arbitrary.

3. WHETHER THE ADVANCEMENT OF THE COMMENCEMENT DATE UPHELD IN *GAUTAM KHAITAN* ENDORSES RETROSPECTIVE APPLICATION OF THE BLACK MONEY ACT, EVEN THOUGH THE SUPREME COURT’S RULING WAS CONFINED TO FACILITATING SECTION 59 COMPLIANCE AND LEFT THE BROADER ISSUE OF RETROSPECTIVITY OPEN?

That the decision in *Gautam Khaitan* has no bearing on the retrospective application of the Black Money Act. The advancement of the commencement date of the Black Money Act (“BMA”) from 01.04.2016 to 01.07.2015 does not render the statute retrospectively applicable, nor does it authorize the imposition of penal consequences for conduct that occurred prior to its enforcement. The judgment of the Hon’ble Supreme Court in *Union of India v. Gautam Khaitan* [2020] 420 ITR 140 (SC) is frequently misunderstood on this point. The decision does not examine-much less settle-the constitutional question of retrospectivity; it deals exclusively with a narrow technical issue: the validity of the “Removal of Difficulties” Order that preponed the commencement date solely to operationalize the one-time compliance window under Section 59.

The Supreme Court observed that if the Act had come into force only on 01.04.2016, the statutory declaration window (up to 30.09.2015) and payment deadline (31.12.2015) would have become unworkable. The advancement to 01.07.2015 was therefore upheld only to the limited extent necessary to preserve the compliance mechanism. Significantly, the Court expressly directed the Delhi High Court to decide the writ petition uninfluenced by its observations. Thus, *Gautam Khaitan* cannot be construed as affirming retrospective application of the BMA for purposes of tax, penalty, or prosecution.

This interpretation stands affirmed by several High Courts. The Karnataka High Court in *Smt.* ***Dhanashree Ravindra Pandit v. Income Tax Department*** **[2024] 466 ITR 1 (Karn)** held that *Gautam Khaitan* neither considers nor determines whether penal provisions such as Sections 50 and 51 can apply to pre-enactment conduct.

The Bombay High Court in ***Anila Rasiklal Mehta v. Union of India*** **[2020] 115 taxmann.com 321 (Bom)** has provided the most detailed exposition on this point. After examining *Gautam Khaitan*, the Court noted that the Supreme Court had merely clarified that the substitution of the commencement date to 01.07.2015 was effected under the power to remove difficulties to enable assessees to avail Section 59. The Supreme Court had also recorded that the assessing officer can charge tax only from assessment years commencing on or after 01.04.2016, and that the High Court was not correct in treating the penal provisions as retrospectively applied. The Bombay High Court further held that the issue of statutory bar on filing a declaration under Section 59-as raised in that case—was never an issue before the Supreme Court in *Gautam Khaitan*. Consequently, the Bombay High Court concluded that the decision in *Gautam Khaitan* does not govern the question of retrospective application of the BMA.

It is well-settled that unless a contrary intention appears, legislation is presumed not to have retrospective effect. The principle that "a law passed today cannot apply to past events" has been authoritatively affirmed in **CIT v. Vatika Township (P) Ltd.** ***[2014] 49 taxmann.com 249 (SC)***. The mere advancement of the commencement date therefore cannot be conflated with retrospective application of the statute-particularly where stringent penal consequences are involved and Article 20(1) of the Constitution stands as an express bar.

Given the continuing examination of this issue by multiple High Courts, and with the writ petition in *Gautam Khaitan* still pending adjudication before the Delhi High Court, the question of retrospectivity remains a live and unresolved constitutional issue.

4. WHETHER WRIT JURISDICTION CAN BE INVOKED AT THE PRE-ASSESSMENT STAGE UNDER THE BMA WHEN THE CHALLENGE IS TO JURISDICTION, LEGALITY, OR CONSTITUTIONALITY RATHER THAN THE MERITS OF THE PROPOSED ASSESSMENT?

A writ petition under Article 226 is maintainable at the pre-assessment stage under the Black Money (Undisclosed Foreign Income and Assets) Act, 2015 ("BMA") where the challenge strikes at the root of jurisdiction rather than the merits of the proposed assessment. The following grounds clearly fall within this exceptional category:

a) Ultra Vires Application of the BMA to Pre-2016 Assets (Foundational Jurisdictional Error)

Where the impugned notice seeks to tax a foreign asset pertaining to a period **prior to 01.07.2015**, or relates to an assessment year **earlier than AY 2016–17**, the very assumption of jurisdiction under the Black Money Act is fundamentally flawed. This is because:

- Section 3 explicitly makes the charging provision operative only from AY 2016–17 onwards.
- Proviso Cannot extend the main provision
- Scope of the Charging section is not extended by the other Section and rules
- Applying the Act to a period prior to its commencement results in a direct violation of the charging mandate, rendering the proceeding ultra vires and raising a pure question of law, not fact.
- Applicability of Article 20 (1)

Courts have consistently held that challenges involving the **validity of a taxing statute or the legality of its application** are amenable to **writ jurisdiction even at the notice stage**, since the objection goes to the *existence of jurisdiction*, not its exercise. Further, several High Courts-when confronted with notices issued under Section 10(1) seeking to bring pre-2015 assets within the fold of the BMA-have entertained writ petitions challenging the **retrospective application** of the Act. Following is a list of some writ Petition involving identical issues :--

i. **Anila Rasiklal Mehta v. Union of India**, W.P.(C) No. 1300/2018 (Bombay High Court);

ii. **Gautam Khaitan v. Union of India**, W.P.(Crl) No. 618/2019;

iii. **Mohit Jain v. Dy. Director of Income Tax**, W.P.(C) 217/2022 (Delhi High Court);

iv. **Ravi Bharadwaj v. Additional CIT**, W.P.(C) No. 5206/2022 (Delhi High Court).

If a foreign asset ceased to exist before the BMA came into force, proceedings under Section 10(1) are **without jurisdiction**. Writ jurisdiction at the threshold is therefore appropriate, as the challenge strikes at the authority to proceed rather than the merits. High Courts have entertained such petitions, granting interim relief to protect against immediate tax and penalty demands under Sections 41–47 and to shield the assessee from exposure under Sections 50 and 51.

b) Writ as an Option against BMA proceedings When Income Tax Authorities Are Already Seized

Section 4 of the Black Money Act, 2015 expressly bars the initiation of BMA proceedings in respect of a matter already under consideration by the Income Tax authorities. In such situations, any attempt to proceed under the BMA is legally impermissible and constitutes a **jurisdictional error**.

Invoking writ jurisdiction at this stage is therefore both appropriate and effective. The challenge does not engage the merits of the assessment but strikes at the **vires of the notice itself**, asserting that the BMA cannot be applied concurrently where the Income Tax Department has already exercised its statutory powers.

c) Defective or Non-Jurisdictional Notice Under Section 10

If the notice under Section 10 suffers from any of the following jurisdictional defects:

- absence of reasons or reasons not recorded in writing,
- mechanical reproduction of information without "reason to believe,"
- notice issued by an officer lacking authority,
- violation of mandatory procedure (e.g., not furnishing materials relied upon),

the entire proceeding is **void ab initio**. Courts consistently hold that where the defect lies in the *initiation* of proceedings, not in the *final outcome*, writ jurisdiction is maintainable.

d) When the Challenge Involves Constitutional Issues

Any plea involving:

- **legislative competence**,
- **arbitrariness** or violation of **Article 14**,
- **retrospective penal consequences**,

opens the door for writ jurisdiction irrespective of the stage of proceedings. Constitutional concerns enjoy a separate and higher threshold for judicial review.

e) Conclusion

A writ against pre-assessment proceedings under Section 10 of the BMA is maintainable where the assessee raises jurisdictional, temporal, or constitutional objections—for instance, (i) ultra vires retroactive application to pre-2016 assets, (ii) violation of Section 4 owing to simultaneous or prior Income-tax Act proceedings, or (iii) a jurisdictionally defective notice issued under Section 10

5. BMA PROCEEDINGS CAN BE INITIATED WHILE INCOME TAX PROCEEDINGS ARE PENDING?

5.1 Whether Income Tax and Black Money proceedings are Mutual Exclusive ?

Sub-section (2) of Section 4 addresses situations where foreign income has already been disclosed by an assessee in the return of income filed under the Income-tax Act. If, during assessment or reassessment, such income is enhanced under any of the provisions of Sections 29 to 43C, Sections 57 to 59, or Section 92C of the Income-tax Act, such enhancement shall **not** be treated as "undisclosed foreign income" for the purposes of levy of additional tax under the BMA Act.

Sub-section (3) further clarifies the position and **expressly provides for the mutual exclusivity** of proceedings under the Income-tax Act and the BMA Act.

It is also pertinent to note clause (d) of Section 71 of the BMA Act, which stipulates that **Chapter VI**, dealing with voluntary declaration of foreign assets/income, shall **not** be available in cases where proceedings under the Income-tax Act have already been initiated. This reinforces the legislative intent that both Acts operate in **distinct spheres** and should not overlap for the same default.

Further clarity on this aspect was provided by the CBDT through **Circulars No. 13 and 15 of 2015**, particularly in Questions 6, 7, 8, 9, 10, 11, 15, 16, and 27, which elucidate the principles governing the interaction between the two enactments.

5.2 Income Tax v. Black Money –Judicial Precedents

Reference in this regard can be made to the decision of the **Gujarat High Court** in *Principal CIT v. Income Tax Settlement Commission*, Special Civil Application No. 9883 of 2019 [2019] 111 Taxmann.com 176 / [2020] 5268 Taxman 234 (Guj.)]. In this case, income-tax proceedings under **Sections 14, 153A, and 148** were initiated by the tax authorities against the assessee. The assessee approached the **Settlement Commission** to offer and settle income relating to undisclosed foreign assets, which was admitted by the Commission. The Court held that such income, once admitted and settled under the Settlement Commission, could not be subjected to parallel proceedings under the Income Tax Act, thereby emphasizing the principle of **non-duplication of proceedings**.

Reference can also be made to the recent judgment of the Hon'ble **Madras High Court** in the batch of writ petitions (leading W.P. No. 1153/2021 – ***Arun Mammen v. The Deputy Director of Income Tax (Investigation)*), decided on 2 January 2025**. In this case, the Court held that once the disputed foreign income/assets matter has been settled under Chapter XIX-A of the Income Tax Act (i.e., via the Settlement/ Interim Board of Settlement), the continuation of proceedings under Section 10(1) of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (BMA Act) cannot be allowed. The Court emphasized that the very purpose of Chapter XIX-A would be defeated if BMA-Act notices (like the notice dated 27.02.2018 under Section 10(1)) are permitted to run in parallel after such a settlement.

A close watch can also be kept on the case of *Anila Rasiklal Mehta v. Union of India* [2020] 115 Taxmann.com 321 / 425 ITR 545 (Bom.), wherein the **Bombay High Court** admitted the writ petition filed by the assessee. In this case, the department had initially initiated **reassessment proceedings under Section 147** to tax undisclosed foreign assets/income upon receipt of information, but subsequently sought to close those proceedings and initiate proceedings under the **Black Money (Undisclosed Foreign Income and Assets) Act** following its promulgation. The Court observed, at the prima facie stage, that the initiation of proceedings under the Income Tax Act does not automatically preclude action under the Black Money Act, leaving scope for independent consideration under the new legislation.

ITAT Kolkata Bench 'B' in the case of Sri Srinjoy Bose v. A.D.I.T. (Inv.) [2023] 150 taxmann.com 273 (Kolkata - Trib.) wherein it had been held that where the value of the alleged investments received by the assessee in India has already been subjected to Income-tax and taxing the same amount under the Black Money Act, 2015 will tantamount to double taxation.

ITAT, Mumbai in the case of Yashovardhan Birla v. CIT (A)-51, [BMA No. 01 (Mum.) of 2021, dated 3-9-2021] wherein it had been held that :

"The bar in the BM is inbuilt inasmuch as it has been provided that assets out of income assessed to income tax shall be excluded from the purview of undisclosed asset in BM Act. Hence, it is abundantly clear that as per the scheme of the act, there cannot be a simultaneously proceedings on the same asset/income under Income-tax Act, 1961 as well as BM Act. The doctrine of double prejudice does come into play here." [Para 47]

In view of the above, once proceedings have been initiated under the Income Tax Act, there is a strong case that the same default cannot be subjected to parallel proceedings under the **BMA Act**.

However, the **Calcutta High Court** in ***Shrivardhan Mohta v. Union of India*** [2019] 102 Taxmann.com 273 (Cal.) held that imposition of penalty under the Income Tax Act does not bar prosecution under Section 51 of the BMA Act, even in cases of the same default. In that case, the petitioner had already been penalized under Section 28 of the Income Tax Act, which does not prescribe imprisonment. The petitioner was subsequently charged under Section 51 of the BMA Act, which includes penal consequences including imprisonment. The Court observed that since the Income Tax Act does not prescribe imprisonment, there is no bar against the petitioner being prosecuted under the BMA Act, and it cannot be construed as double punishment for the same offence.

6. Jurisdictional Defect in Notice under Section 10(1): Does the Assessment Survive?

A notice under Section 10(1) of the Black Money Act is the *sole* jurisdiction-conferring jurisdiction. The validity of the entire assessment hinges on this notice. Therefore, if the notice suffers from any foundational defect-such as absence of statutory pre-conditions, incorrect assessment year, or subsequent withdrawal—the assessment cannot survive independently. The proceedings under the BMA stand upon the notice; once the notice falls, the assessment collapses with it.

6.1 Absence of Prior Satisfaction: Effect on Validity of Notice under Section 10

Section 10 consolidates the entire assessment framework under the BMA, unlike the Income-tax Act, which disperses assessment powers across several provisions (sections 143, 144, 147, 148, etc.). Under Section 10(1), proceedings can be initiated only when the Assessing Officer (AO) receives credible information from an income-tax authority, another statutory authority, or otherwise comes to possess such information.

Before issuing a notice under Section 10(1), the AO must satisfy three mandatory jurisdictional requirements:

1. **Existence of tangible, credible information** pointing to a possible undisclosed foreign income or asset;

2. **Formation of a reasonable and bona fide belief** that such information is relevant for assessment under the BMA and indicates at least prima facie undisclosed foreign income or asset;
3. **Prior recording of reasons/satisfaction**, demonstrating that the AO applied his mind to the information and that these jurisdictional conditions stood fulfilled.

Although the BMA does not expressly mandate recording of satisfaction, this requirement is implicit in its statutory architecture and is reinforced by established jurisprudence under analogous provisions such as sections 153C and 158BD of the Income-tax Act. Courts consistently hold that recording satisfaction is a **jurisdictional prerequisite**, not a procedural nicety.

Key decisions include:

- *Janki Exports International v. UOI* (Delhi HC)
- *Amity Hotels Pvt. Ltd. v. CIT* (Delhi HC)
- *Pepsi Foods (P.) Ltd. v. ACIT* (Delhi HC), SLP dismissed by SC
- *Pr. CIT v. Nikki Drugs & Chemicals (P.) Ltd.* (Delhi HC)

A notice issued without prior satisfaction is void ab initio and incapable of conferring jurisdiction.

6.2 Time Limit for Issuance of Notice under Section 10: Requirement of Reasonable Promptness

Although Section 10 does not specify a time limit for issuance or service of notice, the statutory language-"**upon receipt of information**" or "**when information comes to his notice**"-imposes an inherent temporal obligation on the AO.

This becomes particularly significant in light of the **Proviso to Section 3(1)**, which taxes an undisclosed foreign asset in the *previous year in which the asset comes to the AO's notice*. Thus, the moment information reaches the AO is legally determinative. The AO cannot delay issuance of notice at his **ipsi dixit**, because delay directly alters the statutorily prescribed year of chargeability.

It is a settled legal principle that where a statute is silent on limitation, the statutory power must be exercised **within a reasonable time**. This doctrine has been repeatedly read into fiscal laws to prevent arbitrary or stale proceedings.

Judicial backing for the "reasonable time" doctrine includes:

- *Mohd. Atiq v. ITO* [1962] 46 ITR 452 (All.)
- *Krishna Bhatta v. ITO* [1981] 132 ITR 21 (Ker.)
- *CIT v. Padampat Singhania (HUF)* [2006] 280 ITR 114 (All.)
- *Bisheshwar Lal v. ITO* [1970] 75 ITR 698 (All.)
- *K.P. Narayanappa Setty & Co. v. CIT* [1975] 100 ITR 17 (AP)
- *Ram Kishan Baldeo Prasad v. CIT* [1967] 65 ITR 491 (All.)

Most notably, in **Parle International Ltd. v. UOI**, W.P. No. 12904/2019, the Bombay High Court held that even where no limitation exists, one must be read into the statute. Reviving proceedings after 13 years was held to be wholly unreasonable. The show-cause notice and subsequent adjudication were quashed.

6.3 Jurisdictional Consequences of Incorrect or Withdrawn Section 10 Notice: ITAT Guidance Two recent Tribunal rulings directly affirm that a defective Section 10 notice is *fatal* **to the assessment.**

a. Smt. Anandi Kaushik Laijawala vs. Deputy Director of Income-tax (Inv.) [2025] 172 taxmann.com 121 (Mumbai - Trib.) [14-02-2025]

The Mumbai ITAT held:

- Under Section 72(c), where a foreign asset existed prior to the BMA and was not disclosed under Section 59, the asset is deemed acquired in the year in which a **valid Section 10 notice** is issued.
- The AO initially issued a notice and subsequently withdrew it, issuing fresh notices for a different assessment year.
- The assessment made for the earlier AY had no jurisdiction because the foundational notice did not survive.
- Section 81 (curing of defects) cannot rescue a notice suffering from such a substantive jurisdictional flaw.

Result: The entire assessment was quashed.

b. ***Smt. Elangovan Malarmangai @ Swetha v. Addl. CIT*** **(Chennai ITAT, 30.04.2025)**

- A Section 10(1) notice issued in 2020 incorrectly mentioned AY 2017–18 based on year of asset discovery (2016).
- ITAT held the correct AY was **AY 2020–21**, the AY linked to the year of notice issuance.
- Incorrect AY is not a curable procedural defect under Section 81; it is a **jurisdictional error**.
- Penalty proceedings under Section 41, being derivative, also fell.

Result: Entire assessment and penalty proceedings quashed.

7. Under what circumstances can jurisdiction be invoked under Section 10 of the Black Money Act?

Jurisdiction under **Section 10** of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 ("BMA") can be invoked **only when the Assessing Officer (AO) possesses credible material indicating the existence of an *undisclosed foreign asset* as defined under Section 2(11)**. Section 10 is not a roving power; it is a **jurisdictional provision** that requires satisfaction based on **tangible evidence**, not suspicion.

Under Section 10(1), the AO must first issue a **show-cause notice** calling upon the assessee to produce information or evidence relating to such foreign income or asset. Only after conducting inquiries, examining the material, and granting proper opportunity of hearing can jurisdiction culminate into an assessment under Section 10(3).

The following recent judicial precedents clarify **when Section 10 can-and cannot-be invoked**:

a. Mere Ownership or Directorship in a Foreign Entity is NOT Sufficient (Ref : Krishna Das Agarwal v. DDIT/ADIT (Inv.) [2023] 150 taxmann.com 290 (Jaipur Trib.)

The Jaipur ITAT held that **jurisdiction under Section 10 cannot be invoked merely because an assessee is a shareholder, director, or promoter in a foreign company**. Unless the AO proves that:

1. the foreign asset belongs to the assessee, and
2. it is *undisclosed* within the meaning of Section 2(11), the BMA does not apply.

In this case, bank accounts and investments were held by a UAE company-a distinct legal entity. No evidence showed that the assessee funded or owned those assets. Accordingly, the assessment was quashed.

b. Where the Foreign Asset is Already Disclosed or Settled Prior to BMA Arun Mammen v. DDIT (Inv.) (supra)

The Madras High Court held that **a notice under Section 10 was void ab initio** where:

- the assessee had disclosed foreign income under the Income-tax Act prior to 1 July 2015, and
- the matter was settled under Chapter XIX-A (Settlement Commission).

Since the BMA does not apply to income or assets already assessed or settled before its commencement, **jurisdiction never arose**.

c. Beneficial Ownership Must Be Proven With Clear Nexus and Funding ACIT v. Jatinder Mehra [2021] 128 taxmann.com 152 (Delhi Trib.)

The Delhi Tribunal held that **mere mention of an assessee as "beneficial owner" in foreign bank records is insufficient**. The AO must establish:

- direct or indirect ownership,
- control or benefit, and
- the *source of funding* of the foreign asset.

Without such proof, the BMA cannot be invoked.

d. Jurisdiction Fails Where There Is No Evidence Linking the Assessee to the Asset Anurag Kejriwal v. ADIT (Inv.) [2025] 173 taxmann.com 186 (Kolkata Trib.)

In this case, the AO relied solely on foreign information alleging Swiss bank accounts. The assessee proved he was **not even present in Switzerland** when the accounts were opened. With no evidence linking him to ownership or funding, all proceedings under Section 10 and penalties under Section 41 were quashed as **without jurisdiction**.

8. Whether jurisdiction under the Black Money Act arises from the year of investment or the year of discovery of the undisclosed asset?

Jurisdiction under the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 is generally understood to arise from the year in which the undisclosed foreign asset comes to the notice of the Assessing Officer, and not from the year of original investment. This position was affirmed in ***Joint Commissioner of Income-tax v. Vikash Marda* [2025] 174 taxmann.com 251 (Kolkata – Trib.)** (order dated 23-12-2024), where the assessee, an Indian citizen, had invested in a Non-Retirement Fund (NRF) out of salary income already taxed in the USA. Since the information regarding this investment reached the Assessing Officer only in **FY 2018-19**, jurisdiction could be assumed only for **Assessment Year 2019-20**. Accordingly, assessments framed under Section 10(3) and penalties imposed under Section 41 for AYs **2014-15 to 2016-17** were held to be without jurisdiction and were quashed.

However, a **contrasting view** was taken by the Mumbai Tribunal in *Rashesh Manhar Bhansali v. ACIT (Central Circle-1), Mumbai* [2021] 132 taxmann.com 20 (Mumbai – Trib.). The Tribunal held that, for the purposes of the BMA Act, the **relevant taxable event** is **the point at which the undisclosed foreign asset comes to the notice of the tax authorities**, and it is **immaterial** whether the asset existed at the time of taxation or even when the BMA Act came into force. The Tribunal essentially upheld a broader interpretation that the BMA may apply retrospectively **in relation to the discovery of the asset**, though not retrospectively in terms of penal consequences under Article 20(1) of the Constitution.

9. Do technical lapses or bona fide mistakes attract the penal provisions of the Black Money Act?

The use of the word **"may"** in the penalty provisions from Sections 41 to 43 of the Act makes it abundantly clear that the legislative intent behind the Black Money Act, 2015 is to deter and penalise only those persons who wilfully conceal, fail to disclose, or otherwise attempt to keep outside the Indian tax net their foreign income or assets. Technical breaches in disclosure, without any element of deceit or deliberate defiance of law, do not attract the Black Money Act. This ratio was upheld in *Prasad Nimmagadda v. Director of Income-tax, Investigation* [2025] 173 taxmann.com 444 (Hyderabad - Trib.) [16-01-2025], wherein the Hon'ble ITAT categorically held that although Section 43 is couched in mandatory language, it does not impose an automatic penalty for every non-disclosure. The requirement of a show-cause notice under Section 46 ensures that the assessee must be given an opportunity to explain. In that case, since the Assessing Officer himself had accepted the source of investment under Sections 3 and 10, the Tribunal found that the failure to re-disclose the continuing investment in the subsequent year, when there was no fresh investment, was at best a bona fide mistake; hence, no penalty could be sustained.

Similarly, in *Palanirajan Rajarajan v. Additional Commissioner of Income-tax* [2025] 172 taxmann.com 817 (Chennai - Trib.) [03-02-2025], the Hon'ble ITAT observed that the language of Section 43 inherently vests a discretionary power in the Assessing Officer. The legislative intent was not to penalise trivial or technical lapses but only to deter wilful concealment of foreign income or assets. It further held that mere non-disclosure of a foreign asset in the return of income is not, by itself, sufficient to invoke Section 43, particularly where the lapse is attributable to inadvertence or misunderstanding.

Reference may also be made to *Vinil Venugopal & Ranjeeta Vinil v. DDIT* (BMA Nos. 33 & 34/Mum/2024), order dated 14 October 2025, **[2025] 179 taxmann.com 618 (Mumbai - Trib.) [14-10-2025],** where the Special Bench considered the precise issue of whether penalty under Section 43 is mandatory once default is established, or whether the Assessing Officer has discretion. The Special Bench held that penalty under Section 43 is discretionary, not mandatory, and that the Assessing Officer is not bound to levy penalty merely because a foreign asset was not reported in Schedule FA.

In *Additional Commissioner of Income-tax v. Leena Gandhi Tiwari* [2022] 136 taxmann.com 409 (Mumbai - Trib.), where the assessee was only a signatory to her mother's foreign bank account and the non-disclosure in the original return was a bona fide mistake later corrected in the section 153A return, penalty under Section 43 of the BMA was held unwarranted. In *Sanjay Bhupatrai Shah v. DDIT* [2025] 173 taxmann.com 316 (Mumbai - Trib.) [24-01-2025], since the assessee was merely a joint holder for administrative purposes and not a beneficial owner, and the non-disclosure arose from a bona fide belief, penalty under Section 43 for not reporting the asset in Schedule FA was deleted. In *K. Mohammed Haris v. Income-tax Department* [2023] 147 taxmann.com 370 (Karnataka), disclosure of foreign assets in a validly filed revised return under Section 139(5) was held not to constitute wilful failure, and therefore Sections 4 and 50 of the BMA were not attracted.

In *Ocean Diving Centre Ltd. v. CIT (Appeals)* [2023] 156 taxmann.com 360 (Mumbai - Trib.) [30-08-2023], where the assessee had already disclosed its foreign investment in the audited balance sheet and in the return (Schedule A-BS), it was held that statutory compliance had been made and therefore Section 43 did not apply.

10. Whether Black Money Act is applicable to Non-Residents and/ or Resident but not Ordinarily Resident?

A comprehensive reading of Section 2(2) and Section 3 indicates that the of the Black Money Act is primarily applicable only to Resident and Ordinarily Resident of India having undisclosed foreign income or asset. Further, such total undisclosed foreign income and asset shall be charged at the rate of 30%.

Reliance is placed on the case of ***Timothy John Brinkman vs. Director of Income-tax (Inv.) [2025] 173 taxmann.com 66 (Mumbai - Trib.)[04-02-2025]*** wherein it was opined that where the *Assessee, a British citizen, was only a tax resident in India for impugned assessment year and disclosed foreign asset in revised return which was filed within prescribed time limit, there was no basis for rejecting return, nor had revenue authorities identified any discrepancies in declaration made by assessee. Further, revenue authorities had failed to establish that assessee was previously an Indian citizen or that foreign investment was made using undisclosed income (black money) from India, therefore, penalty imposed under section 43 was to be deleted.*

CONCLUSION

The decade-long evolution of the Black Money Act demonstrates both its potency and its fragility. While the statute was enacted to curb offshore tax evasion, attempts at expansive or retrospective application have attracted strong judicial resistance. Courts have emphasized that:

- penal consequences cannot apply retrospectively;
- jurisdictional foundations must be rigorously satisfied
- the ITA and BMA cannot be invoked concurrently; and
- bona fide errors do not attract penalties.

As India continues to strengthen global tax information-sharing frameworks, the BMA remains an important enforcement tool. Yet its long-term legitimacy rests on principled application consistent with constitutional safeguards.

The Supreme Court's forthcoming decisions-particularly on retrospectivity and jurisdiction-will decisively shape the statute's trajectory for the next decade.

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Revisional Powers under Section 108 of the GST Act: Balancing Revenue Protection and Taxpayer Rights

Executive Summary

This article attempts to explore the origin, scope, and legislative intent behind the provision, as well as the legal complexities and judicial interpretations that have shaped its application.

The discussion highlights the provision's broad ambit and the resulting concerns regarding its potential for arbitrary use by the tax authorities. Keeping in view the experience of the past through an examination of some of the judicial precedents, the article evaluates issues relating to the scope of original proceedings and the extent of permissible revisions. While acknowledging that Section 108 of the GST Act serves as an important supervisory mechanism to safeguard revenue interests, the article underscores the absence of adequate procedural safeguards, particularly the lack of mandatory notice requirements and ambiguity in limitation provisions, which contribute to uncertainty for taxpayers. These aspects, and their implications within the framework of an equitable and predictable tax regime, form the central focus of the analysis.

Introduction

Vide Section 108 of the Central Goods and Services Tax Act, 2017 / State Goods and Services Tax Act, 2017 (collectively the "**Act**"), a mechanism is provided for revision of orders passed by officers subordinate to the revisional authority.

The provision states that a revisional authority can, either *suo motu* or on receipt of information or request from the Commissioner of State or Union Territory tax, call for and examine the record of any proceedings if he considers that any decision or order passed by a subordinate officer is erroneous insofar as it is prejudicial to the interest of the revenue, and is illegal or improper, or fails to consider material facts (whether or not available at the time at the time of issuance of the order).

The provision empowers the officer to stay the decision or order's implementation for as long as he deems fit and pass an order after the concerned party is given an opportunity to be heard. Such an order may result in enhancing or modifying or annulling the order/decision.

Revisionary proceedings under erstwhile VAT regime and Income Tax provisions

Sections 263 and 264 of the Income Tax Act, 1961 ("**IT Act**") provide for the powers of the revisional authority. Section 263 of the IT Act gives certain officers the authority to request and review records of any proceedings under the IT Act. If the officer believes that an order issued by the Assessing Officer is incorrect in a way that harms the interests of the revenue, he may change or revoke the order, or order a new assessment, provided that the assessee has been given an opportunity to be heard.

The two main requirements for invoking powers under Section 263 of the IT Act are (i) that the order is incorrect and (ii) that it is detrimental to revenue. Mere change of opinion is not enough for the authority to examine the records of any proceedings under the Act.

Similarly, under the erstwhile Value Added Tax regime (**"VAT Act"**), specific provisions were contained wherein certain officers were empowered to examine records of an order passed by a lower authority if they consider that an order is erroneous insofar as it is prejudicial to the interests of the revenue and, following the required investigation, issue any order. This power was generally known as '*suo-moto* revision'.

Taking a cue from the aforesaid enactments, specifically, Section 64 of the Karnataka Value Added Tax Act, 2003 ("**KVAT Act**"), the GST regime under Section 108 of the Act empowers the superior officers to revise their sub-ordinates orders, while certain principles have been modified under such provision to fit the theme of GST law.

Scope of Section 108 of the Act

The powers under Section 108 of the Act can be invoked if the revisional authority considers that any decision or order passed by a subordinate officer is:

- *erroneous (in so far as it is prejudicial to the interest of revenue)* and
- *illegal* or;
- *improper* or;
- *has not taken into account certain material facts (whether available at the time of issuance or not)*, or;
- *is in consequence of an observation by the CAG*.

While order would necessarily refer to assessment order, the scope of revisional power vested with officers under the Act is broadened by the inclusion of the phrase 'decision'. Crucially, any "intimation" provided by an officer is deemed to be a "decision". While the phrase intimation has not been defined under the provisions of the GST Laws, a bare reading of provisions and rules would indicate that this would refer to an intimation of demand, which is communicated in terms of Section 73(5) of the CGST Act read with Rule 142(1A) of the CGST Rules.

Sub-section (2) restricts the scope of powers that may be exercised under Section 108(1) of the Act in the following ways:

1. Orders appealed before the appellate authority/tribunal, High Courts or the Supreme Court cannot be revised. However, any point not raised and decided in appeal may be interfered with by the revisional authority within one year from the date of the appeal order, or within three years of the original order sought to be revised, whichever is later.
2. If the six-month period for a department appeal has not yet expired, or more than three years have passed since the order has been passed, revisional power cannot be exercised. However, sub-section (4) states that when issues raised in a decision or order sought to be revised contain issues that were appealed to the High Courts or the Supreme Court, the period spent in appeal is excluded from this limitation period. Interim orders staying the exercise of powers under Section 108 of the Act are also to be excluded for calculating limitation.
3. If the order was previously taken for revision at an earlier stage, revisional power cannot be exercised again at a later stage.
4. A revisional order passed under Section 108(1) of the Act cannot be revised.

Unless appealed, every revisional order is final and binding on the parties. Any order passed under Section 108 shall not be subject to further revision by the Revisional Authority, in accordance with sub-section 2(d) of the said Section.

In ***Dinesh Infraprojects Pvt. Ltd. v. State of West Bengal***[1]**,** an application was filed by the revenue seeking permission to invoke Section 108 of the Act to revise an order-in-appeal, which was in challenge before the High Court. The Department contended that the appeal order was erroneous as it did not consider the inadmissibility of credit under Section 16(4) of the Act, which, if considered, would create liability under IGST as well. The Hon'ble Calcutta High Court observed that no demand on IGST had ever been made, and such a revision would also enhance the demand under the CGST and SGST heads. It further observed that Section 75(7) of the Act does not permit the demand of tax, interest and penalty to be beyond the scope of the notice. It was therefore concluded that Section 108 of the Act does not permit the revisional authority to improve upon the show cause notice, and the power is limited to correcting an erroneous order if the same is prejudicial to the interest of revenue. Hence, the application was dismissed.

The aforesaid analysis would clearly indicate that apart from time restrictions, the nature of proceedings which can be revised, and the scope of the revisionary proceedings has been clearly spelt out, making such a provision a complete code in itself.

1 (2025) 33 Centax 351 (Cal.)

Concerns

In practice, despite containing language more restrictive than VAT laws and the IT Act, taxpayers continue to face challenges with the arbitrary invocation of Section 108 of the Act. Since the revisionary order is appealable, High Courts are predisposed to exercising caution while sitting in writ jurisdiction over revision orders.

In ***North End Food Marketing Pvt. Ltd. v. State of U.P.,***[2] the Hon'ble Allahabad High Court observed that the revisionary authority must necessarily call for an examination of the records of a case before assuming jurisdiction to pass any order under Section 108 of the Act. It noted that the revisionary authority had assumed jurisdiction solely on the basis of a letter sent by an officer, without calling for and examining the record.

Section 108 of the Act provides powers similar to that of a department appeal, while giving a longer period of limitation for the power to be invoked. The scope of Section 108 of the Act is wide enough for the revisional authority to claim that a dispute which could have been (but was not) appealed within 6 months by the Department, is an order that is erroneous, prejudicial to the interests of revenue, illegal, improper or has not considered material facts. This is a marginally higher bar than the illegal/ improper requirement under Section 107 of the Act.

In ***HCC VCCL JV v. Union of India***[3]***,*** the Delhi High Court quashed a revision order that stayed the operation of an order sanctioning a refund, alleging that ITC was improperly availed. The Court held that Section 108 empowers revision only when an order is found *erroneous, illegal, or prejudicial to the revenue* on its own merits, and not based on subsequent intelligence or unrelated issues. The alleged ITC irregularities had no nexus with the refund order, which was based on legitimate cash ledger balances. Further, the Court held that, in the absence of any finding that the refund order was erroneous or unsustainable, the invocation of Section 108 of the Act was unjustified.

Another point to be noted is that, unlike the second *proviso* to Section 107(11) of the Act, Section 108 does not allow the revisional authority to issue a show cause notice on a fresh issue, not already contemplated in the original decision or order. The scope of the enhancement or modification must, therefore, necessarily be limited to the scope contemplated in the show cause notice/order.

One key concern that must be highlighted is that like its erstwhile renditions (Section 64 of the KVAT Act), Section 108 of the Act does not prescribe any timelines for the revisional authority to issue an order after invoking powers under the said Section. In ***Abhiram Infra Projects Pvt. Ltd. v. Addl. Commr. of Commercial Taxes,***[4] the Court held that mere 'calling for records' to initiate proceedings under Section 64 of the KVAT Act, satisfies the 4-year limitation period prescribed in Section 64(3)(c) of

2 2021-VIL-621-ALH.
3 2024-VIL-1208-DEL.
4 S.T.A. 4/2023.

the KVAT Act. Essentially, it held that once proceedings were initiated, the revisional authority could pass a final order even after expiry of 4 years and there was no outer time limit for the same.

In my view, this position is erroneous. The Hon'ble Supreme Court in ***Shivamma (Dead) by L.Rs. v. Karnataka Housing Board,***[5] observed that limitation laws are grounded in public policy as it is in public interest to put an end to litigation. Public interest lies in compelling efficiency, responsibility, and timely action. The Court further noted that *lis* cannot be kept in a state of uncertainty or suspense.

In the context of the Punjab General Sales Tax Act, 1948, the Hon'ble Supreme Court in ***State of Punjab & Ors. v. M/s Shreyans Indus Ltd.,***[6] held that the expiry of the 3-year period to complete an assessment creates a right in the assessee to not be subject to further proceedings, including in the form of the Commissioner extending the original limitation period in terms of Section 11(10) of the said Act. An equitable reading, therefore, meant that the Commissioner could not extend the 3-year limitation period, if the said 3 years had already lapsed. It also noted that Section 11(10) of the said Act does not prescribe an upper limit for the extension, and hence, the same must be justified by the Commissioner.

The above decisions indicate that if a Section of the Act does not prescribe a time-limit for passing of an order, the same must be reasonable and equitable to ensure that taxpayer's rights remain protected.

Conclusion

Section 108 of the Act confers revisional powers upon the department to revise orders deemed prejudicial to the interest of the revenue, ensuring decisions are fair and in accordance with revenue interests. However, the provision's broad scope and potential for arbitrary invocation raise concerns among taxpayers. Although the revisional power draws inspiration from the erstwhile VAT Act and IT Act, the unique aspects of the GST law, coupled with the absence of adequate safeguards, exacerbate the risk of misuse.

The same has been an issue before various courts all over the country, necessitating judicial intervention to prevent overreach and emphasise the importance of revisional authorities acting within their jurisdiction and adhering to principles of natural justice. To ensure fairness and predictability in tax administration, it is essential to strike a balance between revenue interests and taxpayer rights. Clear guidelines and judicial precedents are imperative to guide revisional authorities in exercising their powers judiciously, preventing misuse, and fostering a more certain and equitable tax environment. Ultimately, the effective implementation of Section 108 of the Act hinges on achieving a balance between revenue protection and taxpayer protection, thereby promoting trust and cooperation within the GST framework.

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5 Civil Appeal No. 11794/2025, MANU/SC/1262/2025.
6 2016-VIL-11-SC.

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GOOD 'PRACTICES' FOR A 'GOOD' PRACTICE

Introduction

We all want to have a good and thriving practice, whether as a tax consultant, auditor or legal practitioner. We all have our heroes in the profession. Those who we emulate and aspire to become like. We also have the villain who personify the one never to become. Personalities are not too far from their organizations and the culture in those organizations. As a keen observer of the 'good' and the 'bad' and drawing views held by young professionals about their future in the profession by reflecting on current goings-on, personal notes accumulated over the years merits to be shared if it can provide some direction to one's own approach to moulding a 'good practice'.

Purposeful and deliberate

We all have a list of things to do for the day, week, month, year and even a decade. Consider as a student, successfully completing that 3-year course was the entire purpose on our hands at that time. Every task we undertook carried us one step closer to that purpose. As a practitioner too, there is a purpose, and all tasks we take up adds up to the purpose. Anything that distracts from that purpose, we know, must be avoided. Rest and recuperating are obviously inbuilt to that purpose. And personal life with quality does not lie beyond that purpose too. We are aware that every step undertaken must be deliberate and with prejudice, as any misstep will have consequences and affect the accomplishment of that purpose or the time taken for its accomplishment. To work towards that purpose is not 24-by-7, but in such a manner that makes our efforts efficient and effective in accomplishing that purpose.

Courtesy about time

Time is limited for everyone and for everything. Nothing that requires unlimited duration of time for its completion is even worth attempting. It is the lure of the result that propels each one of us forward. Being on time to a meeting is just one instance of self-awareness about the limited time that is available for doing the task at hand. Delay in arriving at any meeting, is a clear message that either the agenda is not interesting or another activity that caused the delay was more interesting and rewarding.

We are first, courteous to self about use of our own time, before we can be courteous to others about use of their time. It is seen in the efficiency with which we map tasks to time available for their completion. Those who are discourteous in the use of their own time, are unlikely to mysteriously become courteous about others' time. One is either courteous about time always or not at all. It is not possible for one to be selectively courteous about time. If one is late for a personal function, you can be sure that that person is incapable of arriving on time to official meetings. Excuse for delay, will be the exception. Excuse will be such that it is impossible to fault it. It will be true and exceptional, that lies beyond the bounds of sincere time management.

When we are 'on time, every time' then that will be seen in 'every activity' we do. Makes us reliable. Skill affects outcome. Reliability affects efforts. Expectation of outcome guides nature and quality of efforts needed. Reliable people are able to forecast outcome from given effort. Reliability gives direction to skill-building. With adequate direction, and consistency of efforts, skills get built. And eventually, there will be plenty of outcome to show.

Lessons caught

People are inspirational, either for good or for bad. Who to become like is less attractive that who not to be like. Lecturing seldom works, especially, when individuality is something worth seeking in life's long journey. Habits-in-action are observed. Someone said it well 'lesson caught is better than lesson taught'. Whether in the attention paid to time, efforts, skills or execution of tasks by putting all these together, lessons will be caught. It is not possible to pass off as being knowledgeable about the work at hand, especially, among younger peers. They know when to call 'a bluff'. Usually, even the client can see through a bluff. Bluffing not only leaves everyone without an answer at present but also erodes trust and confidence in the process of reaching out for professional support and guidance.

Good answers

"I don't know" is not a good answer. It is an answer that contains truth and preserves trust and confidence but also demands that effects will be made to find out and revert with the right information. Such an admission is very disturbing, because it exposes the omission (to have already read and understood the right information), especially, when it is in the pith of one's area of expertise. It is true that everyone cannot know everything. Whether one should have known it or not, will be decided by 'the thing' that was put up for a response. Was 'the thing' something that one should have known or could not be expected to know beforehand will be greatly affected by area of expertise understood by the client. Exceptional issues do not come up every time. And if everything is claimed to be of exceptional nature, then perhaps the area of expertise is in something else.

"I don't provide those services" is another important aspect that professionals are guilty of admitting. It is possible to be aware of many things, but it is impossible to have expertise in everything. It is remarkable that a client has such high expectations from a professional. Such a client does not value the effort needed for the degree of expertise in every one of those areas. If the ask is about routine matters, one should

be able to provide the right information, especially, when a professional is engaged in a multi-disciplinary practice. Given the area of expertise professed, being up-to-date on matters within that expertise is par for course.

"My services are not available to you" is a self-respecting form of declining to provide services to those who do not value the service itself. Professionals bring themselves in grief before taking this position with any client and for good reason. Those who exploit and not half as bad as those who allow themselves to be exploited. In business, trying to get a 'good deal' is the norm and professional services are not out of bounds. It is the professional who must guide this process of negotiation, by explain the efforts involved and risks attendant to outcome. Clients are in the business of constant negotiations and managing known risks. Uncertainty about the risks involved can be unsettling. Everyone's time has a cost to it. And those who utilize costs, know that it must be paid to purchase. When terms are offered, client is welcome to accept or reject the offer. Long-standing relationship and business interspersed with personal engagement to derisk possibilities of rejecting terms offered are all irrational strategies that have long been forgotten. This is business for professionals as much as it is for clients, and as such involves constant negotiations and managing known risks.

'Shelf life' of past knowledge

People hoard knowledge, as if by sharing it will not be available anymore. Usually, it is outdated knowledge that is hoarded. Those who choose not to hoard knowledge, know the value of giving it away. Giving away knowledge makes room for acquiring new knowledge. Professionals know that all knowledge has limited shelf-life. Without updating, software gets outdated and dinosaurs got fossilized. Professionals know the value of keeping their subject knowledge up-to-date. Clarifications, amendments and judicial decisions provide professionals a constant flow of new information. Deep study, comparative analysis and student-like deliberations bring out valuable insights that bear the *indicia* of expertise of professionals.

Reading list

We all have a 'to do' list. We seldom keep a 'to read' list. Reading for an assignment is good because one cannot proceed with giving advice or carrying out an assignment on-the-fly. Reference to books is best practice. Apart from assignment-specific reading, like some put it elegantly that *"time taken to sharpen the axe is essential to wielding the axe well"*. A learned judge said that 'one should education oneself about the subject and around the subject'. To know about the subject requires knowing many things that affects that subject, how processes work, how people involved make decisions, what alternatives may exist, how options have to be eliminated, what is past experience, what has changed, how does any change alter present experience and so on. Being curious about the field has all the makings of an enthusiast, but being sincere about the field has the makings on an expert.

Invested in knowledge

Jumping from one trending subject speciality to another is not unknown among professionals. As the saying goes *"rolling stone gathers no moss"*, expertise does not come to these 'rolling stones'. Expertise comes by investing in deep study, learning from those who have travelled the path before and immersing in contemplation and putting original thought in writing, and finding out how terribly wrong those conclusions reached were, and going back and doing it all over again. There are plenty of resource material available nowadays, both physical and online, that is hardly any excuse for one to take shelter. Senior professionals have shown by example when they hesitated to appropriate any recognition as the expert in the field in spite of having have scaled peaks of professional accomplishments. New subject areas have emerged in the past. New subject areas are current developing. And there will be new ones yet to come up in the future. Investing in knowledge has been the go-to strategy always.

Integrity in work

Honesty is not the only form that integrity takes. Integrity is wider and deeper. Integrity is not morality. A well-respected Senior Advocate said that even a thief is entitled to competent representation in the trial. It is not about extending our professional skills to crooks, that will not be. It is to examine the defence that a notice warrants and to offer expertise to a paying client. Outcome rests entirely in the hands of authorities named in the law. A deserving refund may be lost, and a valid demand may be dropped, both due to operation of limitation. Legislature has not appointed Officers to be the guardians of justice. Legislature has placed everyone – taxpayers and tax administration – under a mandate to follow the law, and justice will take care of itself. Integrity is about being true to the 'rule of law' and not superimposing one's own sense of right and wrong. Whether it is audit or taxation, whether it is compliance or reporting and whether it is litigation or advisory, integrity is essential element in the approach to professional services.

Business of profession

Covid exposed the failings of professionals with great commercial acumen, capable of advising business about making their own decisions with prudence, where professionals were unable to collect their fee. Office, library, team, infrastructure, skill-building and knowledge enhancement are all components of the profession. And all these come at a cost. Being true to one's profession requires being true to those over whom each professional has authority, responsibility and accountability. Profession cannot be run like charity. Profession begs to be run like a business. And business involves constant negotiations and managing known risks.

Evaluate terms, negotiate, agree and enforce those terms - clients, team and society. Identity risks, attempt mitigation and then manage them. It would be foolhardy to ignore aspects of attention to every piece of work requested and billing for every piece of work done. Whether it is more or less, no professional's time can be consumed by a client and not have to pay for it. Responsibility towards internal stakeholders - self, team and family – demands external stakeholders be held accountable for their engagement with professional. Professional is not a person, but the profession of being the bridge between regulator and the regulated, which diligent persons have invested their prime years to undergo extensive training to develop expertise in and offer the fruits of their labour for the welfare of society. There cannot be a list of best practices in the practice of the professional. But there might be list of good 'practices' which, when practiced well could make the practice 'good'!

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RECTIFICATION OF ERRORS UNDER SECTION 161 OF THE CGST ACT, 2017

Introduction

The topic at the first though reminded of Lord Krishna's life where Krishna has repeatedly provided chance as an opportunity to RECTIFY mistakes so that the matters are not stretched and closed without going through more complex process.

This can be enumerated from the few illustrations as under:

Kauravas and Duryodhana

- Opportunities given:
  Krishna personally went as a śānti-dūta (peace envoy) to Hastinapura, offering the Kauravas terms as mild as "give the Pāṇḍavas just five villages.
- Message:
  Even the gravest offender is offered a path of reconciliation before war.
- Lesson:
  Rectification is possible, but when ego blinds a person, even the clearest chance is wasted.

Shishupāla's Hundred Forgiven Offences

- Opportunity:
  Krishna is said to have promised Shishupāla's mother He would forgive a undred insults. Only after the hundredth did He strike.
- Lesson:
  Divine patience allows repeated chances to reform; but persistent, deliberate wrong eventually invites consequences.

Similarly, Section 161 of the CGST Act, 2017 provides a streamlined mechanism for correcting certain types of mistakes in GST-related documents issued by authorities. Its aim is to resolve errors that are clearly visible, without subjecting taxpayers and authorities to lengthy legal procedures.

Purpose and Importance

Section 161 allows errors that are obvious and do not require elaborate investigation—such as typographical, factual, or clerical mistakes—to be corrected quickly and efficiently. This promotes administrative fairness and helps avoid unnecessary appeals or disputes.

Scope of Rectifiable Errors

- Types of Errors Covered: Only those mistakes that are “apparent on the face of the record” may be rectified. Such errors are clear without detailed analysis, for example, typing mistakes, calculation errors, or simple factual oversights.
- Application: This provision applies to any decision, order, notice, certificate, or other document issued under the GST Act.

Who Can Initiate Rectification

- Initiators: Rectification can be initiated by the GST authority itself, by any other officer, or upon application by the affected taxpayer.

Time Limit and Procedural Safeguards

- Time Restriction: All rectifications must be made within six months from the date of the original document. This limitation ensures that only recent and obvious mistakes are addressed and that cases are not indefinitely reopened.
- Safeguard for Taxpayers: If the correction could increase a taxpayer’s liability or reduce their refund or input tax credit, the taxpayer must be given an opportunity to be heard before any adverse change is made. This ensures due process and protects taxpayer rights.

Exclusions and Limits

- Limits: Section 161 cannot be used for errors that require complex reasoning or in-depth debate. Issues that are not immediately clear or that are subject to differing interpretations must be addressed through formal appeals or review mechanisms.

Procedural Summary Table

Feature	Details
Authority Empowered	The same officer or authority who issued the order, notice, certificate or document can carry out the rectification. The power is not confined to adjudicating officers; it covers “any authority” under the CGST Act
Type of Mistake	Only an **“error apparent on the face of record”*** can be corrected. This phrase has been consistently interpreted by courts (including under the Income-tax Act and other fiscal statutes) to mean an error which is self-evident and does not require long-drawn reasoning or debate.

Feature	Details
Initiation	**Suo motu** by the officer, or on application by the affected taxpayer, or on the instance of any other officer under the Act
Time Limit	**Six months** from the date of the order or document sought to be rectified. This limit is strict; if missed, the only recourse is appeal or revision.
Natural Justice	Debatable or complex errors requiring detailed examination. If rectification will increase tax liability or reduce ITC/refund, the taxpayer must be given a **reasonable opportunity of being heard**

Section 161 thus provides a practical balance: it permits quick correction of undeniable errors while upholding procedural fairness, supporting both effective tax administration and taxpayer protection under the GST framework.

*** Understanding "Error Apparent on the Face of Record"**

This expression is borrowed from earlier tax legislation and judicial interpretation. Courts have repeatedly explained it:

- **Obvious & Patent Mistake:** One that is manifest and does not require elaborate argument.
- **Examples:**
  - Miscalculation of tax or interest.
  - Typing errors and mistakes such as incorrect GSTIN, wrong date, or wrong rate plainly seen and evident from records.
  - Omission to consider a binding Supreme Court judgment that was in force on the date of the order.
- **Not Included:**
  - Issues requiring fresh appraisal of evidence.
  - Debatable points of law or change of opinion.
  - Matters where two plausible views exist.

Judicial Guidance

The Supreme Court in ***T.S. Balaram v. Volkart Brothers*** **(82 ITR 50)**, a leading income-tax case often cited even in GST context: a decision on a **debatable point of law is not a mistake apparent from record**.

Recent rulings (e.g., Madras High Court) demand that GST authorities' **issue 'speaking orders'** stating reasons for accepting or rejecting rectification requests, rather than **cryptic refusals**. The **Allahabad High Court reiterated** that Section 161 does **not allow for recall or review** of orders, only rectification of indisputable errors.

The above rulings summarises that rectification under Section 161 must **not be used for re-arguing or appealing the merits of the case**. It is **strictly confined to**

correcting mistakes apparent from the record. Rectification does not interrupt or extend appeal deadlines, and fresh rights of appeal arise only if the rectification order alters the original outcome.

Rectification Vs Review/Revision

While rectification targets simple, self-evident errors on the face of the record, review and revision involve a deeper examination of the merits or legality of orders, potentially altering or annulling them.

Particulars	Rectification u/s 161	Review/Revision
Person authorised	Authority who has passed the order	Higher authority or designated authority other than the one who has passed the order.
Type of Mistake	Clerical, factual, or legal, but evident and undisputable	Any type of error, including improper exercise of jurisdiction
Time Limit	3 months for rectification application; 6 months for completion	Up to 3 years refer Section 108 of the CGST Act. If not appealed
Modify or Redo assessment	Cannot be done only clerical and simple corrections can be done	Can annul, modify, enhance after full review or revision
Responsibility of the taxpayer	Opportunity to be heard will be given only if adverse to the taxpayer	Mandatorily hearing has to be given to the taxpayer

Procedure for Taxpayers to apply for Rectification

While the Act does not prescribe a rigid format, the usual practice is:

Application/Letter

- Addressed to the jurisdictional officer who issued the order.
- Clearly identify the order/document and describe the apparent error.

Timeline

- File within six months from the date of the order.

Hearing

- If rectification increases liability or reduces ITC/refund, the officer has to issue a notice of hearing.

Order of Rectification

- The officer passes a speaking order recording the correction and its impact.
- This order itself is appealable under Section 107 if the taxpayer is aggrieved.

Suo Motu Rectification by Department

Section 161 also empowers the officer to rectify errors on his own motion or when another officer points out the error. This is useful where:

- Clerical errors in a notice or order come to light.
- IT system errors result in misstatement of figures.

Even here, if the rectification is prejudicial to the taxpayer, a hearing is mandatory.

Common Scenarios Where Section 161 Is Preferable

- There is a typing or wrong figure (for example, an amount is misstated due to a calculation error).
- A name, date, or GSTIN is incorrectly printed on the order, certificate, or notice.
- Documents submitted were omitted/overlooked accidentally.
- The error does not require the authority to revisit evidence or arguments already considered or change its interpretation of law.
- Rectification will not fundamentally alter the nature of the order, but only supplement or correct obvious mistakes.

Why Section 161 Is Advantageous in These Situations

- Rectification is faster and simpler, avoiding the detailed procedure and time required for review or revision.
- Review or revision remedies address more fundamental errors or matters of jurisdiction which involve lengthy re-examination, not suitable for simple mistakes.
- Using Section 161 preserves the original order except for the correction, maintaining clarity and continuity in tax proceedings.
- It can be initiated by either the taxpayer or the authority, and as long as it is within the time limit and the error is apparent, no elaborate process is required.

When Not to Use Section 161

If the error involves debatable issues, fresh evidence, reinterpretation of law, or a jurisdictional lapse, review or revision is the appropriate remedy. Section 161 is not a substitute for disputing the merits or legality of the order.

Practical Illustrations

Situation	Rectifiable under S. 161?	Reason
Officer miscalculates interest by applying 18% instead of 12% despite clear statutory rate	✓	Purely arithmetical
Wrong GSTIN typed in order	✓	Clerical
Officer ignores a binding Supreme Court judgment available at the time	✓	Apparent legal mistake
Dispute whether a transaction is supply of goods or service	✓	Debatable, needs interpretation

Situation	Rectifiable under S. 161?	Reason
Claim of ITC disallowed based on differing view of “blocked credit”	✓	Requires detailed legal analysis

Key cases where courts allowed rectification under section 161

Courts have allowed rectification under Section 161 in several key cases, emphasizing its limited scope and requirement for clear, self-evident mistakes. Below are prominent judicial decisions illustrating when rectification was permitted:

JKS Construction v. State Tax Officer (2025)

- Facts: The taxpayer mistakenly reported ₹6.27 crore as taxable value instead of ₹62.76 lakh in the GSTR-9 return, resulting in a vastly inflated tax assessment.
- Held: The High Court held this was a clerical error apparent from the record and allowed rectification under Section 161, quashing the assessment order and permitting correction subject to procedural compliance.

Madras High Court-Cryptic Rejection Not Sustainable (2025)

- Facts: The taxpayer’s rectification application was rejected with a one-liner, “No apparent error.”
- Held: The Madras HC quashed the rejection, emphasizing that authorities must give a “speaking order” and reasons for rejection. If the mistake is factual or clerical and apparent from the record (e.g., typo, missing or wrongly printed detail), rectification must be considered in light of natural justice and with proper hearing.

M/s Mark Agencies v. Department of Trade and Taxes & Anr. (Delhi HC, 2025)

- Facts: The department rejected a rectification request without granting a hearing.
- Held: The Delhi HC held that principles of natural justice mandate a hearing when a rectification order may adversely affect any party. The Court allowed rectification for objective, on-record mistakes and clarified that taxpayer rights must be respected in the process.

Sajal Kumar Das v. State of West Bengal (Calcutta HC, 2024)

- Facts: Revenue authorities attempted to rewrite a substantive part of an order under the guise of rectification.
- Held: The HC clarified that Section 161 cannot be used for substantive changes. Only apparent errors-like factual, clerical, or arithmetic-can be rectified. The rewritten order was quashed.

Allahabad High Court-Rectification v. Recall (2025)

- Facts: The department sought to recall an appellate order by filing a rectification application, citing a pending SLP before the Supreme Court.

- Held: The HC held that Section 161 does not empower recall or review of orders, only correction of apparent mistakes. Mere pending litigation or dissatisfaction does not warrant rectification.

These cases underscore that rectification under Section 161 is allowed only for mistakes that are patent, undisputable, and appear plainly from the record-such as numerical misstatements, typos, or missed details-while maintaining procedural fairness and natural justice. Substantive review or re-evaluation of legal matters falls outside Section 161's ambit.

Recent Supreme Court rulings have narrowed the relief available under Section 161 of the CGST Act (and similarly under Section 161 of the CrPC in the criminal context) mainly to restrict its use to correcting only true "apparent errors" and emphasizing evidentiary safeguards. Key reasons and rulings include:

Renuka Prasad v. State (2025)

- The Supreme Court reaffirmed that statements recorded under Section 161 CrPC have no substantive evidentiary value unless the witness testifies and confirms the statement in court.
- The Investigating Officer's testimony based solely on Section 161 statements cannot substitute for witnesses' direct examination.
- This ruling emphasized that reliance on such statements alone violates Section 162 CrPC and leads to wrongful convictions.
- By analogy, in tax law, this limits Section 161 CGST rectification to correcting undisputed clerical or arithmetical errors, not for re-arguing contested facts or legal interpretations.

To summarise the above cases in a nutshell which clearly brings out the essence of interpreting Section 161 is as under:

- The recent Allahabad High Court and Madras High Court rulings cited by the Supreme Court underline that Section 161 relief **cannot be used to review or recall entire orders** or appellate decisions.
- Rectification is confined to errors that are **"obvious from the record"** without requiring long reasoning or fresh evidence.
- Courts demand **"speaking orders"** with reasons when rejecting rectification applications to avoid blanket or cryptic dismissals.

Conclusion

Just as Lord Krishna's approach in offering opportunities for correction reflected balance between justice and compassion, Section 161 of the CGST Act embodies a similar principle within tax administration - correction without conflict. It recognizes that human or clerical errors are inevitable but ensures they do not evolve into prolonged disputes. The provision preserves the integrity of governance by enabling authorities and taxpayers alike to rectify apparent mistakes swiftly, without reopening settled matters. When used with prudence and within its limited scope, Section 161 becomes not merely a procedural tool but a safeguard of fairness, accountability, and administrative efficiency - **aligning legal precision with moral equity.**

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TAXATION OF PARTNERSHIP FIRMS AND LIMITED LIABILITY PARTNERSHIPS IN INDIA

Introduction

Partnership Firms and Limited Liability Partnerships (LLPs) remain pivotal business structures in India, owing to regulatory flexibility and succession advantages. With the Income Tax Act, 2025 re-codifying several sections, precise compliance and statutory referencing are paramount. This article offers a comprehensive comparative analysis of the new and old tax regimes for firms and LLPs, covering detailed provisions, major practical issues, key compliance traps, and the most relevant judicial pronouncements.

1. Core Statutory Framework-Comparative Table

Aspect	IT Act, 1961	IT Act, 2025	Practice/Compliance Notes
Remuneration & Interest	S. 40(b)	S. 35e	Limits unchanged; “working partner” only; LLP agreement required
TDS on Payments to Partners	S. 194T	S. 393C Table	10% TDS if aggregate >₹20,000 / partner/year; very broad in scope
Share of Profit Exemption	S. 10(2A)	Schedule III, S. No. 2	Entirely exempt in the hands of partner
Conversion to LLP-Capital Gains Exemption	S. 47(xiiib)	S. 70(ze)	Strict multi-point eligibility-see conversion table
Presumptive Taxation	S.44AD/ 44ADA	S. 58 (Table)	LLPs excluded-books & audit always needed
AMT (Alternate Minimum Tax)	S. 115JC	S. 206	18.5% if adj. income > ₹20 lakhs; applies to LLPs

Aspect	IT Act, 1961	IT Act, 2025	Practice/Compliance Notes
Tax Audit Threshold	S. 44AB	S. 58 (Table)	₹1cr/₹50L/₹10cr (digital)– books/ audit compulsory for LLPs
Capital Gains on Reconstitution	S. 45(4)	S. 67	Distributed assets/money over capital a/c taxed to firm/LLP

2. Remuneration & Interest-Legal Limits and Compliance

Remuneration and interest paid to partners are deductible only within specific statutory boundaries, designed to prevent profit conversion to tax-free personal income. **Section 40b** (Section 35e in 2025) allows deduction for remuneration exclusively to "working partners" and only if authorized by the partnership/LLP agreement.

- **Deduction limits**:
  - Higher of ₹3,00,000 or 90% of first ₹6 lakhs of book profit (or in case of loss), plus 60% of remaining book profit.
- **Interest**: Deductible up to 12% p.a. (simple interest, not compounded) as authorized by agreement, but only on capital and not on partner loans.
  - **Related party control** (S. 40A(2)): Excessive payments to related persons are fully disallowable; reasonableness and market benchmarking is required and must be proven with documentation.

Item	Section (1961 / 2025 Act)	Limits/Details	Compliance/Claim Notes
Remuneration	S. 40b / S. 35e	Higher of ₹3L or 90% of ₹6L book profit; 60% thereafter	Explicit LLP agreement, "working" partner status must be demonstrated
Interest on Capital	S. 40b / S. 35e	Max 12% p.a., simple interest only	Paid to capital account, not on partner loans

3. TDS Provisions—Section 194T

Section 194T (Section 393C Table in 2025) mandates that TDS at 10% be deducted by firms/LLPs on all forms of payments-salary, bonus, commission, and interest-to a partner once the total annual payment crosses ₹20,000. TDS must be deducted at the time of credit or payment, whichever occurs first, and applies to all eligible payments other than pure capital withdrawal or tax-exempt profit-share (see S. 10(2A) / Sch. III in 2025). Non-deduction can result in loss of deduction for the payer and significant penalties for non-compliance. For interest payments, interest on capital requires TDS but interest on loans from partners is exempt (per S. 194A(3)(iv)), clarifying frequent points of audit dispute.

Payment Type	Section (1961 / 2025 Act)	TDS Applicability
Remuneration	S. 194 T / S. 393C Table	Aggregate > ₹20,000/partner/ year
Commission/Bonus	S. 194 T / S. 393C Table	As above, on all such payouts
Interest on Capital	S. 194 T / S. 393C Table	Simple interest, not on loans
Capital Withdrawals / Share of Profit	S. 10(2A) / Sch. III, S. No. 2	No TDS (tax-exempt in partner's hands)

4. Presumptive Taxation, Alternate Minimum Tax (AMT), and Audit

- **Presumptive Taxation**: LLPs are *expressly* excluded from regimes under S. 44AD and S. 44ADA, requiring them to always maintain full accounts and undergo statutory audit.
- **AMT**: LLPs must pay AMT at 18.5% (plus surcharge/cess) on adjusted total income >₹20 lakhs (S. 115JC); AMT credit can be carried forward for 15 years but does not transfer in the event of conversion to LLP.
- **Tax Audit**: Statutory audit is mandatory for businesses with gross receipts over ₹1 crore (₹10 crore for 95%+ digital receipts/payments), and for professionals above ₹50 lakh-all LLPs must appoint an auditor and submit audited returns if thresholds are breached.

5. Conversion to LLP-Section 47 (xiiib) (S. 70(ze) in 2025) Detailed Checklist

Conversion of a company or firm to an LLP enjoys capital gains exemption under strict multi-pronged conditions. **Section 47 (xiiib) (70(ze) in 2025)** applies only if:

Conversion Condition	Threshold/Eligibility
All assets and liabilities transfer to LLP	No asset or liability should remain with old entity
All partners/shareholders prior to conversion become LLP partners	No outside persons post-conversion
Capital and profit-sharing ratio for partners is maintained post-conversion	Shares mirror prior holding/interest
No extra consideration paid out to partners	Only capital and profit-share allowed
Minimum 50% profit share for former partners 5 years post-conversion	Stability required for exemption
Turnover/gross receipts ≤ ₹60 lakh in any of past 3 years	Objective financial cap
Asset value ≤ ₹5 crore in any of past 3 years	Objective asset cap
No withdrawal from pre-conversion accumulated profits for 3 years post	Prevents tax-free siphoning of profits
Proper documentation and full compliance	LLP agreement, asset registers essential

Breach of any above conditions-even years after conversion-results in retrospective withdrawal of exemption, instant capital gains tax, and reversal of associated loss/depreciation carry-forward benefits.

6. Effects of Conversion

- **Tax Neutrality**: If all conditions are satisfied at conversion and post-conversion (5-year and 3-year tests), the LLP receives assets at book value; no capital gains.
- **Losses/Depreciation**: Carried forward only if every condition is satisfied (per S. 72A(6A)), else lost.
- **MAT Credit**: Not transferable to LLP.

7. Capital Gains on Reconstitution (Retirement/Dissolution)

Section 67 (2025 Act; previously S. 45(4)) taxes capital gains in the hands of the firm or LLP where, upon reconstitution, money / capital assets are distributed to a partner exceeding their capital account balance. The provision counters avoidance through asset revaluation and capital extraction at partner exit.

Key Point	Section (1961 / 2025)	Details/Trigger
Taxable Event	S. 45 (4) / S. 67	Money/assets distributed > capital a/c
Computation	S. 45 (4) / S. 67	Excess distributed = capital gain
Key Precedents	PCIT v. National Company (SC), Celerity Power (ITAT)	Revaluations and withdrawals can trigger capital gains assessed to the firm/LLP, not partner alone

8. Judicial Precedents-Selected Summaries

Case	Key Issue/Principle	Key Held
Texspin Engineering (Bom HC)	Conversion to company/ LLP	Not a "transfer" if only form changes
Celerity Power LLP (ITAT Mumbai)	Breach of exemption conditions	Exemption and loss set-off denied; book value paramount
Domino Printing Science Plc (AAR)	Rights extinguished on conversion	Capital gains apply if conditions breached
Aravali Polymers ITAT	Book value for capital gains	Favors assessees if statute followed
ISC Specialty Chemicals LLP (Kerala)	Strict conversion compliance	Retrospective taxation if breach occurs
PCIT v. National Company (SC)	Retirement/ reconstitution payouts	S. 45(4)/S. 67 triggers capital gains to the entity

Conclusion

India's direct tax regime for partnership firms and LLPs, as restated under the Income Tax Act, 2025, remains robust but increasingly demanding for those seeking fiscal neutrality. Substantive core rules on remuneration, TDS, reconstitution, and conversion have not changed, but the obligatory referencing, compliance, and record-keeping requirements have tightened. Judicial pronouncements consistently favor substance over form; practitioners must ensure not only structural compliance at the point of entity formation or conversion but continued compliance throughout the statutory look-back and lock-in periods.

Professional Disclaimer:

This article is intended for academic and professional reference only. Statutes and case law may change, and this overview does not substitute for direct legal or tax advice. Practitioners and readers should consult the Income Tax Act, 2025, notifications, and current case law and seek expert advice before acting on the contents above. No liability is accepted for actions based solely on this critique.

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CORPORATE ACCOUNTABILITY UNDER GST: BALANCING GUILT AND GOOD FAITH.

This article explains how Section 137 of the Central Goods and Services Tax (CGST) Act, 2017 deals with offences committed by companies and other organisations under the GST law. It describes how the section holds not only the company but also those in charge of running it such as directors, partners, and key managerial personnel responsible for violations of the law. At the same time, it protects those who can prove that they acted honestly and took all reasonable care to prevent the offence. The discussion connects this provision with similar rules under the Companies Act, 2013, showing how corporate responsibility and personal accountability are balanced. It also highlights key Supreme Court judgments explaining that liability under GST is not automatic and must be based on proof of involvement or negligence. The article underlines that Section 137 promotes responsible management, fair enforcement, and a culture of compliance within the GST system.

A company is treated in law as a separate legal person, different from its shareholders and management. This idea, first recognised in Salomon v. Salomon & Co. Ltd., means that the company itself is normally responsible for its actions. However, since a company can act only through human beings, the law often holds its directors and key officers responsible when they are the ones who control or manage its affairs. The reasoning is simple, those who have the power to make decisions should also bear responsibility if something goes wrong, especially when their role or neglect has caused the problem. Directors and key managerial personnel act in a statutory and fiduciary capacity, which means they must act honestly, carefully, and in the best interest of the company.

Even so, there is an important difference between the company's liability and that of its directors. Criminal intent, or mensrea, is personal, and no one should be punished just because they hold a particular office. The Supreme Court in Sunil Bharti Mittal v. CBI (2015)[1] made it clear that vicarious liability, i.e. holding someone responsible for the acts of another arises only when the law specifically provides for it. The intent or actions of a company cannot automatically be treated as those of its directors unless there is clear proof that they played a role in the offence. Similarly, in SMS Pharmaceuticals v. Neeta Bhalla (2005) [2], the Court said that a complaint must show specific facts explaining how a director was actually in charge of and responsible for running the business at the time of the offence. Merely being a director, chairman, or managing director is not enough to attract criminal liability.

This approach forms the basis of Indian company law. A company can be prosecuted and punished as a separate entity, but its directors or officers can be held personally liable only when the statute clearly says so and when evidence proves their direct involvement, consent, or negligence. Section 2(60) of the Companies Act, 2013 defines an “officer in default” to identify those who may be held responsible for violations. Section 149(12) adds that independent and non-executive directors are liable only when the offence happened with their knowledge, consent, or connivance, or when it was caused by their failure to exercise proper care. In National Small Industries Corporation Ltd. v. Harmeet Singh Paintal (2010)[3], the Supreme Court again clarified that non-executive directors who are not involved in daily management cannot be held liable without clear evidence of their participation in the wrongdoing.

Indian criminal law is cautious about extending vicarious liability. The courts try to strike a balance between ensuring accountability and preventing misuse. On one hand, directors cannot escape responsibility if they knowingly take part in fraud, approve false statements, or ignore warning signs. On the other hand, they cannot be punished automatically just because they hold a certain post. This balanced approach protects independent and nominee directors who mainly perform supervisory or advisory roles. Personal criminal liability arises only when there is real fault or clear negligence. It is therefore important to determine what part of a company’s activities a director was involved in whether financial management, compliance, or daily operations because this helps decide whether he or she can be held liable.

The same reasoning applies under tax laws, including the Goods and Services Tax regime. Section 137 of the Central Goods and Services Tax Act, 2017 deals with vicarious criminal liability. It means that when a company or firm commits an offence, the people responsible for running it can also be punished. The section says that if a company, partnership, or association breaks the law, everyone in charge of its affairs at that time is deemed guilty along with the company itself. However, it also gives protection to officers who can prove that the offence happened without their knowledge or that they took all reasonable care to prevent it. In this way, the provision balances punishment for those truly responsible with protection for those who acted honestly and carefully.

Earlier tax laws viewed offences as personal wrongs of individuals, but modern laws recognise that business decisions are often collective. Section 137 reflects this change. It allows authorities to look beyond the company, to identify individuals actually at fault, while shielding management that has acted in good faith and shown due diligence. It works as both a sword and a shield. It punishes those who intentionally break the law and protects those who have done their duty sincerely.

Under this provision, if a company commits an offence, everyone who was in charge of and responsible for its business can be treated as guilty. The word "company" covers not only companies under the Companies Act but also firms, LLPs, and associations of individuals. In the case of a partnership, a "director" means a partner. The section also states that if the offence was committed with the consent, connivance, or negligence of any director, manager, secretary, or officer, that person is also guilty. The inclusion of "negligence" shows that even carelessness can lead to liability if it causes a legal breach. The law extends the same rule to partnerships, LLPs, Hindu Undivided Families, and trusts, fixing responsibility on partners, kartas, or managing trustees.

The section also contains an important safeguard. It says that no person shall be punished if he proves that the offence happened without his knowledge or that he exercised all due diligence to prevent it. This makes the law fair because even the most sincere officer cannot control every action in a large organisation. The saving clause changes the character of Section 137 from a harsh rule to a balanced one. It ensures that only those who are truly at fault are punished.

The Companies Act, 2013 helps in identifying who is responsible for the conduct of business. Under Section 2(51), Key Managerial Personnel (KMP) include the Chief Executive Officer, Managing Director, Company Secretary, Whole-Time Director, and Chief Financial Officer. These are generally the people who handle the company's daily affairs and fall within the scope of Section 137. In an LLP, the designated partners perform that role, while in a Hindu Undivided Family or trust, the Karta or managing trustee would be considered responsible. Liability, therefore, depends on actual control, not just on one's title.

The courts have explained how Section 137 and similar laws should be applied. In Sheoratan Agarwal v. State of Madhya Pradesh (1984) [4], the Supreme Court held that once it is shown that a person was in charge of and responsible for the business, the burden shifts to that person to prove that the offence occurred without his knowledge or despite his due diligence. In Ravindranatha Bajpe v. Mangalore Special Economic Zone Ltd. (2021)[5], the Court said that being a director or chairman by itself does not make one guilty, there must be clear facts showing how that person was involved in the offence. In Union of India v. Shantanu Sanjay Hundekari (2025)[6], a GST case, the Court emphasised that Sections 122(1A) and 137 cannot be used blindly. Employees or authorised signatories cannot be prosecuted just because the company is accused. There must be evidence that they had control over or knowingly participated in the wrongdoing. These decisions make it clear that liability under Section 137 is not automatic and depends on real proof of involvement, consent, or negligence.

The saving clause in sub-section (4) plays a key role in keeping the law fair. It accepts that officers cannot predict or prevent every error or fraud in a complex organisation. To claim this defence, a person must show that he did not know about the offence and that he took all reasonable steps to prevent it. Due diligence means taking all the care that a careful manager would take to make sure the company follows the law. Courts look for evidence such as compliance manuals, audit reports, control systems, training records, or board meeting minutes showing that the officer was actively supervising compliance. For example, if a finance director can show that a subordinate filed false returns despite a proper system of internal checks and regular audits, he would be protected under this provision.

This approach promotes better governance and accountability. Section 137 indirectly encourages every company or firm to maintain a proper compliance structure. It is not enough to claim honesty; officers must be able to prove it with records. Boards should assign clear responsibilities for GST compliance, hold regular reviews, and maintain evidence of supervision. Internal audits, training, and written instructions not only improve efficiency but also serve as protection if something goes wrong. Tax officers, on their part, should use Section 137 carefully and only when there is genuine evidence of involvement or negligence. The object of the law is to prevent deliberate evasion, not to punish unintentional errors.

When a director or officer faces proceedings under Section 137, there are two main defences available. The first is to show that he was not in charge of or responsible for the business when the offence occurred. The second is to prove that he took all reasonable care and acted diligently. Both require proper documents and evidence. Providing such information early can sometimes stop prosecution before it starts. If the case reaches court, the judge looks at whether the officer's explanation appears reasonable and supported by facts. The law does not require proof that prevention was impossible only that reasonable precautions were taken in good faith.

Section 137, therefore, keeps a fine balance between responsibility and fairness. It prevents guilty persons from hiding behind the company while protecting those who acted honestly and carefully. It ensures that punishment is based on real fault, not on official title or position. It shows that corporate liability must go hand in hand with fairness and evidence. The larger message is that tax compliance is part of good corporate conduct. Directors who maintain proper systems, records, and transparency protect both themselves and their companies. The purpose of the provision is not to create fear but to build trust in honest and disciplined business practices. At the same time, authorities must avoid using criminal law as a tool for recovery and must act only when there is genuine proof of fraud or gross negligence. Section 137, like similar provisions in other laws, is strong enough to punish wrongdoing but fair enough to protect integrity.

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RELEVANCE OF STATEMENTS UNDER SECTION 136 OF CGST ACT, 2017

Background and Introduction

Section 136 of the Central Goods and Services Tax (CGST) Act, 2017 is a specialized provision governing the relavancy of statements, tendered before GST Officers in any inquiry or proceeding, in judicial, more specifically prosecution proceedings launched by GST authorities. This article is written with an objective to provide a detailed analysis of the said Section 136 – to discuss its scope, evidentiary value and procedural aspects and therefore, analyze its impact and influence in prosecution proceedings before Courts.

It is recommended that necessary provisions of The Indian Evidence Act, 1872, an Indian statute of the colonial era which stands recently overhauled by the Bharatiya Sakshya Adhiniyam, 2023 (hereinafter "BSA 2023") be also referred to, if and when applicable, while reading and applying Section 136 along with Section 70 of the CGST Act.

Text and Scope of Section 136:

In Indirect tax administration, statements recorded by departmental officers have historically been treated with near-sacrosanct status. For decades, officers of Customs and Central Excise had proceeded on the assumption that whatever is recorded during investigation is sufficient "evidence" to prove allegations framed during adjudication or prosecution proceedings. The said assumption and resultant approach often created systemic abuse for dealers, transporters, job-workers, and even employees, who generally signed statements under duress or out of fear or without proper understanding of the consequences, and thereafter, such statements were used against them in adjudication/ appellate/ recovery/ prosecution proceedings. Understanding the fallouts of this kind of impact, Section 136 of CGST Act finds its intent and origin in Section 9D in the Central Excise Act, 1944, which creates mandatory safeguards for the relevancy of statements. The said Section 9D read as under

"SECTION 9D. Relevancy of statements under certain circumstances.

1. A statement made and signed by a person before any Central Excise Officer of a gazetted rank during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, -

(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable; or

(b) when the person who made the statement is examined as a witness in the case before the Court and the Court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

2. The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceeding under this Act, other than a proceeding before a Court, as they apply in relation to a proceeding before a Court."

With the advent of the Goods and Services Tax (GST), excise has largely receded, but the investigative mindset continues. Section 136 of the CGST Act, 2017 replicates the investigative and evidentiary framework, raising similar concerns. The said Section 136 of the CGST Act 2017 reads as follows:

"SECTION 136. Relevancy of statements under certain circumstances. - *A statement made and signed by a person on appearance <u>in response to any summons issued under section 70</u> during the course of any inquiry or proceedings under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, –*

(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable; or

(b) when the person who made the statement is examined as a witness in the case before the court and the court is of the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice."

The said Section though echoes the intent and purpose like Section 9D of the legacy law of Central Excise, it has a more specifically defined scope. The kind of Statement, the relevance of the Statement and the purpose for which such Statement is applicable is all defined in express words.

Thus, it is understood that the scope of Section 136 extends to only those Statements which are made and signed by a person in response to a summons issued under Section 70 during any inquiry or proceeding. This is a notable distinguishing feature against the earlier Central Excise law.

It further states that such Statements made can be used for proving the truth of the facts in any prosecution for an offence under the CGST Act in certain particular circumstances.

Let us now understand in which circumstances these statements can be used in terms of Section 136:

(i) If the person who made the Statement is dead and not available to give evidence in proceedings of prosecution for any offence under CGST Act.

(ii) If the person who made the Statement cannot be found or is incapable of giving evidence in proceedings of prosecution for any offence under CGST Act.

(iii) If the person who made the Statement is kept out of the way by the opposing party, or cannot be brought before the court without unreasonable delay/ expense for giving evidence in proceedings of prosecution for any offence under CGST Act.

In these specific cases, the said Statement made in response to any summons under Section 70 can be read in evidence much like a deposition of the said person.

Besides, the above, the following circumstance is also covered in Section 136:

(iv) If the person testifies by appearing as witness in the Court, however, the court is of opinion that in view of circumstances of the case, in the interest of justice, the statement should be admitted in evidence. This provision appears to be legislated with the intent to give the judiciary the discretion to admit the earlier statement, especially in cases where confrontation of a hostile witness may be required with their prior sworn statement.

In effect, it can thus be said that this Section 136 carves out an exception to the normal layman or revenue's understanding that any statement made at any point of time by any person can invariably be used as substantive evidence in proceedings under other applicable laws or even in criminal trials or other proceedings of law also.

In other words, it can also be said that this provision provides the lawful basis to take such statements for serving as substantive evidence of guilt in a GST offence related prosecution, even if the person who made the Statement remains absent in proceedings or turns hostile, if the Statement was given in response to summons under Section 70.

Section 136 thus statutorily imbues investigative statements with a probative value similar to testimony, provided the statutory conditions are satisfied. However, notably and interestingly, the language confines/ restricts this use to **"prosecution for an offence under this Act"** – meaning that such statements are meant to be relied upon in prosecution trial for GST offences alone, and not for any departmental adjudication or civil assessment proceedings under any other applicable law. In fact, courts and tribunals have held that Section 136 cannot be invoked to bootstrap evidence for purposes like tax adjudication or penalty orders, which must be based on duly proven documentary evidence and shall also be subject to cross-examination in those proceedings.

A finer comparative analysis of Section 136 of the CGST Act, 2017 and the provision in legacy law, i.e. Section 9D of the Central Excise Act, 1944, clearly establishes that statements recorded under Section 70 of the CGST Act, 2017 are not relevant for the purpose of adjudication and other proceedings under the CGST Act, 2017, because there is no corresponding provision in Section 136 of the CGST Act, 2017, like that existed under sub-section (2) of the Section 9D of the Central Excise Act, 1944 stipulating that the statements recorded under Section 14 of the Central Excise Act, 1944, would be applicable even in departmental proceedings like adjudication and other quasi judicial proceedings other than court proceedings. This distinction between Section 9D of legacy law appears to have been consciously excluded in the GST law.

Detailed Discussion on procedural and evidentiary aspects:

The primary condition for applying Section 136 is that the concerned statement must have been recorded in response to a **summons issued by a proper officer under Section 70** of the CGST Act.

Section 70 empowers GST officers to summon any person to give evidence or produce documents, and it declares that any such inquiry "shall be deemed to be a judicial proceeding" in terms of section 193 and section 228 of the Indian Penal Code, which has been recently replaced by the **Bharatiya Nyaya Sanhita (BNS), 2023** (hereinafter "**BNS 2023")**.

The relevant Section 70 of CGST Act, 2017 in this regard reads as follows:

"SECTION 70. Power to summon persons to give evidence and produce documents.

1. *The proper officer under this Act shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry in the same manner, as provided in the case of a civil court under the provisions of the Code of Civil Procedure, 1908 (5 of 1908).*

2. *Every such inquiry referred to in sub-section (1) shall be deemed to be a "judicial proceedings" within the meaning of section 193 and section 228 of the Indian Penal Code (45 of 1860)."*

To simplify, a 'judicial proceeding' for the purposes of Section 193 can cover/ include the following:

- **Trials**: A trial before any court, including a Court-martial.
- **Preliminary investigation**: An investigation that is directed by law to precede a court proceeding.
- **Legal inquiry**: An inquiry conducted by a Magistrate or equivalent authority to determine if someone should be committed for trial.

It needs to be clearly understood that any person giving a statement before a GST officer is under a legal duty to speak the truth, akin to an oath in a court proceeding. the statements are usually recorded in writing by the officer who takes the statement, and the person tendering it is asked to read and sign the statement, affirming its accuracy and voluntary nature.

Now, if a statement given by a taxpayer is later retracted by the person who made it, claiming that it was made under duress or was not voluntary or is not true, the burden lies on that person to prove the vitiating circumstances that undermine its voluntariness or reliability or truth. As a process, the judiciary will presume that the statement was made voluntarily and is reliable and true, unless otherwise proved by the person who made it. The person who made the statement is bound to discharge the burden of proof that it was under duress or out of fear and not voluntary and thus, not true. Extra-judicial confessions/ admissions before GST officers can be the basis of conviction, unless it is proven that they are involuntary or untrue or rendered in an unstable state of mind.

It is well known that retractions ought to be made at the earliest opportunity and need to be proven as well. Any confession recorded by tax authorities is generally admissible, unless it is retracted sooner or later. Scrutiny for delay in retraction and/ or corroboration by independent evidence as a matter of prudence would lie in such cases and prayer may be made to the judiciary when such instances come to light.

Evidentiary value of admissions before GST officers is subject to the general safeguards of **voluntariness** and it is well known that any confession obtained by inducement, threat or promise having reference to the charge, by a person in authority, is irrelevant in criminal proceedings. BSA 2023 has *widened* the language by explicitly including “coercion” as a factor that vitiates a confession. Thus, if a GST officer’s methods violate free will – e.g. having put undue pressure during interrogation – the statement can be challenged as involuntary and challenged to be inadmissible. However, the burden would lie on the maker of the Statement to prove it was given under coercion. Section 136 (b) of CGST Act itself implicitly safeguards this by requiring the court to use the statement only “in the interest of justice,” which implies that if a statement appears untrustworthy or extracted by coercion, the court is not bound to admit it.

There is one more aspect to deliberate upon that statements to GST officers do not meet the conditions of BSA 2023 or erstwhile IEA since these statements are ex parte statements, and are not subject to cross-examination when they are made or when they are used later. Section 136 CGST Act therefore fills this gap by creating a *bespoke exception* for GST investigations allowing those statements to be treated akin to former testimony or depositions for the purpose of the GST criminal trial. In case of non-retraction, reliability and admissibility may be presumed or need corroboration is the question that we are trying to brainstorm.

Second aspect comes in when any proceeding is based on third party statements. What is their relevance, admissibility and standing in GST proceedings. It has been settled n many cases of the legacy law in Central Excise and Customs that principles of natural justice are not considered to be violated for not summoning third party/ co-noticee for cross-examination. It has been held many a times that the principles of natural justice do not require that persons who have given information should be examined in the presence of the assessee/ appellant or should be allowed to be cross-examined by them on the statements made before the tax authorities. Rather it has even been held that in a quasi-judicial proceeding, strict rules of evidence need not to be followed. Cross examination cannot be claimed as a matter of right. But then there are many precedents where Honorable Courts have held that adjudicating authorities should not reach conclusions merely only on the basis of the statements of the concerned third persons but also serious delve into the incriminating records and evidence before them. seized. Corroboration by the records seized or produced at any stage of proceedings shall carry immense value, and in deserving cases, where corroboration itself indicates that the statement relied upon for framing charges is not reliable, there cannot be any presumption and cross examination of third persons ought not be allowed. If it be so, then the not allowing of cross examination of third party becomes primary reason to challenge in judicial proceedings.

Interestingly, in a recent judgement in the case of **Vallabh Textiles v. Additional Commissioner [W.P.(C) NO. 4576 OF 2025, dated 9th April 2025],** Hon'ble High Court of Delhi took a restrictive approach toward the requirement of cross examination. The Court observed that "…..while cross-examination would be required in certain cases, it need not be given as a matter of right in all cases. The provision of the opportunity to cross-examine depends on the facts and circumstances of each case and is warranted only when the party seeking such an opportunity is able to demonstrate that prejudice would be caused in the absence thereof. …..Persons seeking cross-examination ought to give specific reasons why cross-examination is needed in a particular situation and that too of specific witnesses.." The Hon'ble Apex Court later affirmed the views of Delhi Court by dismissing the SLP in [SLP(C) No. 013670. The said judgment has made things quite clear and puts light on 138 of the Indian Evidence Act which is now re-enacted under Section 143 of the Bharatiya Sakshya Adhiniyam (BSA) and sets the framework with regard to relevancy and examination of statements and witness thereagainst.

Similarly, when it comes to corroboration of denial of charges admitted or affirmed by witness in statements during investigation, claiming that statements were not free and under duress or coercion, in such situation also cross examination of witness becomes a vital need, even if it is not a fundamental right for asserting in adjudication or other quasi judicial proceedings. Meaning thereby, if any statement is relied upon for framing charges of recovery or prosecution, but it is not corroborated, whether or not statements stand retracted, and where evidence proving the statement to be false/ presumptive/ untrue can be produced even in later proceedings, the statement will lose relevance and becomes vulnerable to be questioned/ ignored in adjudicating or deciding the case finally according to the evidence produced.

Thus, we can summate that statements are good enough to be considered relevant to hold that the accused/ alleged taxpayer is guilty unless otherwise proved. Mere denial of statement does not aid relief/ defence unless burden to prove otherwise is discharged. Even under the classical rule, the prosecution in a criminal case must prove the accused's guilt beyond reasonable doubt, and there is a presumption of innocence. However, special statutes governing economic and tax offences often contain provisions reversing or modifying the usual burden for certain facts (especially the accused's mental state). The CGST Act is no exception: **Section 135 of the CGST Act** enacts a **"presumption of culpable mental state"** for offences under the Act. It provides that in any prosecution which requires a culpable mental state (e.g. intent to evade tax), the court *shall presume* the existence of such mental state, but the accused may rebut it by proof to the contrary. The term "culpable mental state" is defined to include intent, motive, knowledge of facts, and belief. This presumption is rebuttable – the accused needs to show that he had no such mental state in committing the act (typically, the standard of proof for rebuttal is on a "preponderance of probabilities").

Few pointers that may seem important are:

a. Even if any search/ inspection proceedings wherein statement was made is held to be illegal due to technical reasons, evidence gathered thereunder, if remained unrebutted, is subject to use in trial.

b. General corroboration before convicting on a retracted statement may theoretically lie, but absence of corroboration can be fatal.

c. Prompt and reasoned retraction (e.g., first available opportunity) carries greater credibility. Bare allegations of coercion, without medical/legal contemporaneous proof, seldom succeed. However, proof like medical situation/ CCTV footage, if kept and referred may go a long way in spite of delay in retraction.

d. Prosecution Counsel may prove voluntariness/ no threat/ Inducement, by producing copy of mere statement and may lead **independent corroboration** (documents, chats, transporters, bank trails) while also explaining delay between statement and retraction. However, **defence** may need to work hard to prove earliest possible opportunity to retract based on medical/ legal record (injuries, detention), expose inconsistencies, and also seek cross-examination of recording officer and panch witnesses.

Keeping all the above in mind, it may be summated that unless in specified circumstances, statements made in proceedings in general, may require corroboration and cannot be invariably used for proving guilt and framing charges in trial. Nevertheless, strong defence is to be used. Non co-operation in proceedings may empower judiciary to presume statements as true without any further corroboration. However, evidence gathered in statements in response to summons or otherwise cannot be used against the person who tendered the statement in other matters of GST like adjudication/ appellate/ recovery or any other proceedings under any other law unless the burden of framing and proving the charges is discharged by the alleging officer/ authority. Section 135 and Section 136 are with regard to functions of judiciary and not the administrative or quasi-judicial authorities of GST or other laws. The issue that finally remains is that the powers of the legislated GST law shall still remain subject to the powers and wisdom of the judiciary depending on the circumstances of each case. The judiciary can invalidate laws passed by the legislature if they are found to be arbitrary or unconstitutional. The relationship between the judiciary and legislature is a core part of the separation of powers doctrine, where each branch has its own distinct functions. While the legislature makes laws, the judiciary interprets them. The judiciary interprets and defends the Constitution, ensuring that legislative acts comply with its principles. The judiciary's power ensures that laws do not violate the rights guaranteed to citizens. Section 136 is an important provision in this regard when it comes to statements and their relevancy in GST related trials.

The above views are of the author herself and academic views/ opinion of learned members on the subject, even if in the contrary are welcome. AIFTP does not own any responsibility towards any views expressed in the article and any reader following the opinions/ views in the article shall do so at his own risk or after proper professional advisory in any matter of business impact/ statutory compliance on issues covered in the article above.

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RENEWAL OF CHARITABLE AND RELIGIOUS TRUSTS AND INSTITUTIONS –GROSS RECEIPTS UPTO RS. 5 CRORES - FORM 10AB U/S. 12AB NEEDED ? - EVEN IF VALIDITY OF REGISTRATION ALREADY INCREASED FROM 5 YEARS TO 10 YEARS?

Charitable trusts and institutions, registered under section 12AB and 80G of the Income Tax Act, 1961 ('the Act') are having registration Certificates in Form No. 10AC or Form No. 10AD, which are valid for period from AY 2022-23 to AY 2026-27 (5 Years) in majority of the cases.

The provisions relating to registration of charitable and religious trusts and institutions had undergone paradigm shift vide Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 applicable w.e.f. 01.04.2021, whereby, all the trusts and institutions who were earlier registered under Section 12AA and Section 80G from past many years (i.e. having Registration Certificates upto 31.03.2021) had to apply for renewal of their Registrations, which are now valid for a period of 5 years, i.e. generally from AY 2022-23 to AY 2026-27 in majority of the cases.

In new / fresh registrations cases, applications were filed in Form No. 10A, which were granted provisional registration Certificate in Form No. 10AC for a period of 3 years and application was again filed for renewal of the said provisional registration (i.e. for conversion of provisional registration into final registration), which, upon approval, were granted Registration Certificate in Form No. 10AD by the Jurisdictional CIT(Exemption) having validity of 5 Years as per item (A) of sub-clause (ii) of Clause (b) of sub-section (1) of Section 12AB of the Act [i.e. Section 12AB(1)(b)(ii)(A)]

As per the provisions of sub-clause (ii) of clause (ac) of sub-section (1) of Section 12A of the Act [i.e. Section 12A(1)(ac)(ii)], application for renewal of registration was required to be filed at least 6 months prior to expiry of the registration period. In majority of the trusts and institutions, the registrations are valid upto AY 2026-27, which means upto FY 2025-26, i.e. upto 31.03.2026, and as per Section 12A(1)(ac)(ii), application was required to be filed 6 months prior to 31.03.2026, i.e. application in Form No. 10AB for renewal was required to be filed on or before 30.09.2025.

Validity of 5 Years increased to 10 Years vide Finance Act, 2025:-

In order to reduce the compliance burden on small trusts or institutions, a Proviso was inserted in sub-section (1) of Section 12AB of the Act, vide Finance Act, 2025, w.e.f. 01.04.2025, as per which, the period of validity of registration was increased from 5 years to 10 years, in cases, where application had been made under sub-clause (i) to (v) of clause (ac) of sub-section (1) of Section 12A [i.e. Section 12A(1)(ac)(i) to (v)], and the total income of the trust, without giving effect of Section 11 or 12 of the Act, does not exceeds Rs. 5 Crores during each of the 2 previous years, preceding to the previous year in which such application is made ('small trusts or institutions').

The said Proviso inserted vide Finance Act, 2025 applicable w.e.f. 01.04.2025 is as under:

*"**Provided** that where an application **is** made under sub-clauses (i) to (v) of the said clause, and the total income of such trust or institution, without giving effect to the provisions of sections 11 and 12, does not exceed rupees five crores during each of the two previous years, preceding the previous year in which such application is made, the provisions of this sub-section shall have effect as if for the words **"five years"**, the words **"ten years" had** been substituted."*

The wordings of the above Proviso, indicate that if the application for renewal was filed under sub-clauses (i) to (v), for small trusts or institutions, then in such cases, in sub-section (1) of Section 12AB, for the words 5 years, the words 10 years had been substituted, i.e. the Registration Certificate granted for 5 years, should be treated as Registration Certificate granted for 10 Years, in accordance with the Proviso to Sub-section (1) of Section 12AB. The words used in the Phrase is "***had** been substituted*", which indicates past tense and which means that it should also apply on the existing registration certificates granted prior to 01.04.2025, and not only on the Registration Certificates granted in respect of applications filed on or after 01.04.2025.

Validity of 10 yrs. : Intention expressed in Finance Bill & Budget Speech:-

The Memorandum explaining the provisions in the Finance Bill, 2025 will be relevant and guiding in this regard. The relevant extract of the same is as under:

III. Period of registration of smaller trusts or institutions

Section 12AB provides registration of trust or institution for a period of 5 years or provisional registration (where activities have not commenced at the time of filing application for registration) for a period of 3 years. At the expiry of such registration or provisional registration, or in case of provisional registration, if the activities of the trust or institution have commenced, the trust or institution is required to make application for further registration.

2. ***It has been noted that applying for registration after every 5 years, increases the compliance burden for trusts or institutions, especially for the smaller trusts or institutions.***

3. ***To reduce the compliance burden for the smaller trusts or institutions, it is proposed to increase the period of validity of registration of trust or institution from 5 years to 10 years, in cases where the trust or institution made an application under sub-clause (i) to (v) of the clause (ac) of sub-section (1) of section 12A****, and the total income of such trust or institution, without giving effect to the provisions of sections 11 and 12, does not exceed Rs. 5 crores during each of the two previous year, preceding to the previous year in which such application is made.*

4. These amendments will take effect from the 1st day of April, 2025."

On perusal of the above extract of the Memorandum explaining the provisions in the Finance Bill, 2025, it can be understood that the language used is *"... it is proposed to* ***increase the period of validity of registration*** *of trust or institution from 5 years to 10 years..."*, which means that the validity of registration is sought to be increased and *"in cases where the trust or institution* ***made*** *an application"*, the words 'made' instead of 'makes', indicate past tense and thus, it can be inferred that the Proviso shall also apply to applications **'made'** earlier also.

The **Speech of the Honourable Union Finance Minister** Smt. Nirmala Sitharaman is also relevant and guiding in this regard. The relevant extract of the Budget Speech is as under:

*"**Reducing Compliance Burden***

142. ***I propose to reduce the compliance burden for small charitable trusts/ institutions by increasing their period of registration from 5 years to 10 years.*** *It is also proposed that disproportionate consequences do not arise for minor defaults, such as incomplete applications filed by charitable entities."*

The above wordings of the Budget Speech of the Honourable Union Finance Minister also indicate that the period of registration has been increased from 5 years to 10 years.

Validity of 10 yrs. automatic because sub-clauses (i) to (v) included : otherwise reference would have been to clause (ii) only,

Further, if it had been the intention of legislature to provide such extension only for registration certificates granted in respect of applications filed u/s. 12A(1)(ac)(ii), it would have excluded other sub-clauses, whereas, the Act clearly includes sub-clauses (i) to (v), indicating a broader legislative intent. Inclusion of sub-clause (i), which is for renewal of existing trusts which were registered under section 12AA prior to amendment vide Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020, further strengthens this view.

Thus, in view of the above amendment made vide Finance Act, 2025, from the Memorandum explaining the provisions of the Finance Bill, 2025 and the Budget Speech, it can be inferred that the existing registration certificates shall be valid for a period of upto 10 years.

Clarification needed from CBDT:-

However, no such clarity has been provided by the Income Tax Department / CBDT. Further, in absence of such clarification, since all the existing registration certificates have generally AY 2026-27 mentioned and whether new registration certificates would be issued to such trusts or institutions or not?

In absence of any such clarification, it is better that most of the trust and institutions have filed Form No. 10AB on or before 30.09.2025 taking a conservative view. If any of the trust or institution has missed the due date and could not file renewal application upto 30-9-2025 then they can apply form for renewal of registration now with condonation of delay and can also contest on above contention that there was no need to apply for renewal for above referred trust and institutions.

For trusts & institutions having gross receipts exceeding Rs. 5 Crores:-

Further, as regards trusts or institutions, having total income of more than Rs. 5 Crores, before giving effect to the provisions of Section 11 or 12, then such trusts or institutions have not been provided with any relaxation and such trusts or institutions were required to file application for renewal of registration u/s. 12AB atleast 6 months prior to the expiry of the registration, i.e. on or before 30.09.2025 where the registration is valid upto AY 2026-27.

Whether relaxation of 10 year applicable to 80G also?

It is pertinent to note that period of validity of registration has been increased only under section 12AB and not under section 80G and the said Registration Certificates are valid only for 5 Years. Thus, where a trust is registered under 80G as well, application for renewal of registration U/s. 80G was required to be filed on or before 30.09.2025.

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THE BURDEN OF INNOCENCE

I. EXECUTIVE SUMMARY / SYNOPSIS

1. This article is a critical analysis of Section 135 of the Central Goods and Services Tax (CGST) Act, 2017[1] which brings in the reverse onus clause by the presumption of a "culpable mental state" (mens rea) in any prosecution under the Act. It disassembles the provision, drawing particular attention to its inherent character of being the most onerous: the accused being required to disprove their guilt by presenting evidence "beyond reasonable doubt," a form of evidence that is typically only used for the prosecution. The article explains Section 135 by employing a comparative legal approach, showing similarities with analogous regulations in the NDPS Act[2], PMLA[3], Customs Act[4] and Income Tax Act[5] which in turn reinforces the legislature's intention to impose draconian penalties for fiscal offenses.

2. The article then evaluates the statute under the constitutional guarantees of a fair trial and the presumption of innocence as they appear in Article 21[6]. It highlights an indispensable bulwark laid down by the apex bench the so-called "foundational facts" doctrine which obliges the prosecution to initially establish the core elements of the crime before the responsibility of proof could ever be diverted to the accused. The article concludes by examining into the consequent impacts of that statute on business and individual freedom, claiming that even though it is true for the state to be concerned with revenue loss, the court should remain as a final judge balancing this aim along with the most vital tenets of justice and the rule of law.

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Central Goods and Services Tax Act 2017, s 135.

2 The Narcotic Drugs and Psychotropic Substances Act 1985

3 The Prevention of Money Laundering Act 2002;

4 The Customs Act, 1962.

5 The Income Tax Act 1961.

6 The Constitution of India 1950, art 21.

II. Introduction: The Guilty Mind in Economic Offenses

3. The Latin phrase *actus non facit reum nisi mens sit rea*[7], literally meaning "the act is not culpable unless the mind is guilty," reflects a central and fundamental aspect of criminal law all over the world and throughout history. It is this principle that is the golden thread that runs throughout the entire criminal law[8]. It is a primary measure by which the law can distinguish between a tragic accident and a willful crime, thereby preserving the liberty of the individuals before the overwhelming power of the state.

4. However, the landscape of modern governance has undergone a huge shift particularly in the realm of socio-economic and fiscal legislation. This legislative trend is based on the premises of 47th Law Commission Report (1972) on the Trial and Punishment of Social and Economic Offences[9], which for the evasion of tax suggested not guilt, but the burden of proof be shifted to the accused as a deterrent. Believing in this principle, the law-makers implemented the "reverse onus" provisions in order to bring to justice those individuals involved in complex financial crimes with intent to conceal the truth.

5. To demonstrate such a shift, one need only look at Section 135 of the CGST Act, 2017[10]. This clause is a clear and vivid example of how spontaneous modern fiscal legislation takes a stringent approach on enforcement. In a nutshell, to any prosecution primarily under the CGST Act that seeks a "culpable mental state," Section 135 requires the court to simply regard it as a matter of fact by starting with a presumption of guilt. Consequently, the accused has to bear the burden of the proof and he or she then needs to show that they were of an innocent mental state altogether.

III. Anatomy of a Presumption: Deconstructing Section 135 of the CGST Act.

A. The Statutory Mandate: "The court shall presume..."

6. The clause starts with an absolute prohibitory command: *"In any prosecution for an offence under this Act which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state..."*[11]. The phrase "shall presume" is of paramount significance. It is not a discretionary inference of the court depending upon the facts; this is a legal presumption that is mandatory. The prosecution is no more to be the one who first bears the burden to present evidence of the state of mind, but the trial begins rather with the accused's culpability on this point already presumed as a matter of law.

B. Defining the "Culpable Mental State"

7. The explanation of Section 135 provides a comprehensive definition of what is known in law as a *"culpable mental state,"* to include such things as *"intention, motive, knowledge of a fact, and belief in, or reason to believe, a fact."*[12] These items have a parallel in the standard criminal law notions of mens rea.

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7 Bryan A Garner (ed), *Black's Law Dictionary* (11th edn, Thomson Reuters 2019).
8 Woolmington v DPP [1935] AC 462
9 Law Commission of India, The Trial and Punishment of Social and Economic Offences (Report No 47, 1972)
10 Central Goods and Services Tax Act 2017, s 135.
11 CGST Act, s 135(1).
12 CGST Act, s 135, Explanation 1.

(a) **Intention and Motive:** These have the highest degree of culpability, referring to the preconceived intention to perform an act or set objectives.

(b) **Knowledge:** This means being aware of certain facts or being virtually certain that a certain outcome will arise from a persons actions.

(c) **Belief in, or reason to believe:** *"Reason to believe,"* which is found in other legal provisions, means enough for a sane person to come to this or that conclusion. When combined, it is used with reverse onus, it can mean that things are unintentionally criminalized not only by fraud but also by acts of gross negligence or even acts that the court finds later non-objectively unreasonable.

C. The Dual Burden: Reverse Onus and the Standard of Proof

8. The pivotal power of Section 135 lies in its undoing of the conventional burden of proof. For instance, an issuance of invoice without actually supplying goods is the act (actus reus) that the prosecution has to establish and thereafter the defendant will be completely liable for everything. The statute states that *"... but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution...."*[13]. On the contrary, the provision's that are most stringent and unconstitutional are the unparalleled proof standard this defense demands. In the second explanation, the accused is needed to give the proof "beyond reasonable doubt" rather than "preponderance of probabilities"[14] that is very low in other reverse onus clauses. This unique transformation in order to get an acquittal burdens the accused with the same heavy responsibility which is usually reserved only for the prosecutor to get a conviction.

IV.The Family of Presumptions: A Statutory Comparison

9. Section 135 is part of a group of similar clauses in special statutes. A comparison reveals a common scheme in the legislation and these provisions, along with Section 135. The tables below show the variation in their application and interpretation:

A. Group A: Statutes Requiring Proof "Beyond Reasonable Doubt"

Statute & Section	Presumption & Trigger	Accused's Burden & Standard of Proof	Key Nuances & Judicial Interpretation
CGST Act, 2017 *(Section 135)*[1]	Presumes a **"culpable mental state"** (*mens rea*) as soon as the prosecution establishes the physical act (*actus reus*).	Must prove the **absence** of a guilty mind to the exceptionally high standard of **"Beyond Reasonable Doubt."**	Sets the modern benchmark for stringent reverse onus clauses in fiscal legislation, treating tax evasion with utmost severity.

13 CGST Act, s 135, Explanation 1.
14 CGST Act, s 135, Explanation 2.

Statute & Section	Presumption & Trigger	Accused's Burden & Standard of Proof	Key Nuances & Judicial Interpretation
NDPS Act, 1985 *(Section 35)*[2]	Presumes a **"culpable mental state"** once foundational facts (e.g., possession of contraband) are proven.	Must prove the **absence** of a guilty mind to the standard of **"Beyond Reasonable Doubt."**	The text is virtually identical to the CGST provision, signifying a clear legislative intent to equate the seriousness of major tax evasion with that of drug trafficking.
Income Tax Act, 1961 *(Section 278-E)*[3]	Presumes a **"culpable mental state"** once the prosecution establishes the physical act (*actus reus*).	Must prove the **absence** of a guilty mind to the standard of **"Beyond Reasonable Doubt."**	Reinforces a consistent and severe procedural approach adopted by the legislature across India's primary fiscal statutes.

C. **Group B: Statutes Requiring Proof by "Preponderance of Probabilities"**

Statute & Section	Presumption & Trigger	Accused's Burden & Standard of Proof	Key Nuances & Judicial Interpretation
PMLA, 2002 *(Section 24)*[4]	When the foundation facts are established by the prosecution (that a scheduled offense occurred, generating proceeds of crime, and the accused is connected to them), then the court shall, by law, presume that the property is involved in money laundering.	The presumption must be rebutted. This is judicially interpreted as being by a "Preponderance of Probabilities" (which is a lower standard than that of the prosecution)	The Supreme Court in ***Vijay Madanlal***[5] supported the reverse burden of proof in this way. The "change" of the burden happens only after the prosecution has fulfilled its first burden of proof by proving the foundational facts, which is the reason to prevent the arbitrary use of the presumption.
Customs Act, 1962 *(Section 123)*[6]	**Conditional Trigger:** Presumes goods are smuggled **only if** seized by a proper Customs Officer under a "reasonable belief." The prosecution must prove these foundational facts first.	Must prove the goods are not smuggled to the standard of **"Preponderance of Probabilities"** as judicially interpreted in the case of *Indru Ramchand Bharvani v Union of India*[7].	The application of this reverse onus is significantly narrower. The clause is not triggered if another agency (e.g., police) makes the initial seizure, making the trigger conditions paramount.

10. This comparative analysis reveals a legally significant, common judicial principle that retains its power through the cross-statutory examinations. Irrespective of different acts, the courts have always decided that the reverse burden cannot be

shifted without the violation of the accused. Along with the charge of primary wrongdoing, the prosecution must first present valid evidence proving the essential elements of the crime.

V.The Constitutional Crucible: Testing Section 135 Against Fundamental Rights

A. Presumption of Innocence: A Fundamental Human Right

11. Although the Constitution of India does not explicitly mention a "presumption of innocence" clause, the Supreme Court has consistently upheld its status as a non-negotiable element of the legal system. The presumption of innocence has been held to be a human right and also a part of the right to life and personal liberty under Article 21[15], which provides that no one shall be deprived of life or liberty except by a procedure that is "fair, just, and reasonable."[16] A procedure which assumes guilt and compels an accused person to show their innocence to a degree which is almost impossible runs the risk of being arbitrary and unfair, therefore, violating Article 21[17].

B. Judicial Balancing Act: The Doctrine of "Foundational Facts"

12. In intertwined circumstances, the courts have performed a very careful exercise in balancing. Not only have the courts bypassed repercussions of the laws like encroachment upon the public policy of the unresolved serious economic crimes, but they have also "read down" the clauses by laying down preconditions, ethically statutory on the prosecution.

13. The historic decision of the Supreme Court in ***Noor Aga v. State of Punjab & Anr (2008)***[18]**,** involves the NDPS Act but still is the definitive constitutional structure that applies to Section 135. The Court arrived to a conclusion that although "limited inroads" into the presumptive of innocence are allowed for compelling reasons of public interest, any reverse onus issue has to be viewed from the perspective of Article 14 (Right to Equality) and Article 21[19]. The most principal safegaurd the Court articulated was the "foundational facts" doctrine. It stated that the presumption is not activated by a mere charge. The prosecution has the task of firstly showing the foundational factors of the crime beyond reasonable doubt.

14. If one were to apply this to the CGST Act, the tax department cannot just simply name an alleged offense under Section 132[20] (like fraudulent availment of Input Tax Credit) and employ the presumption in Section 135. They must first provide credible evidence which shows that the accused enjoyed the credit on their actual document fraudulently (like on fake invoices). Only when the court is equitably convinced that the said foundational facts are established beyond doubt can the accused be shifted with the burden of proving that there was no culpable mental state. This judicial restraint holds firm by not allowing the presumption of guilt to be used as a weapon to launch frivolous

15 The Constitution of India 1950, art 21.
16 Maneka Gandhi v Union of India [1978] 1 SCC 248
17 Ibid.
18 *Noor Aga v State of Punjab* (2008) 16 SCC 417.
19 The Constitution of India 1950, arts 14, 21.
20 CGST Act, s 132.

or unsubstantiated prosecution. This principle was exactly reiterated in Section 278-E of the Income Tax Act that is analogous to this by the court in ***Prakash Nath Khanna & Anr. v. Commissioner of Income Tax and Anr (2004)***[21]***,*** where it was pointed out that the prosecution must not be entitled to the statutory presumption unless it first fulfilled its own burden of proof on the foundational facts.

C. The Challenge to Constitutional Validity

15. The CGST Act's penal provisions were first questioned in terms of constitutionality in ***Devendra Dwivedi Versus Union of India and Others (2022) 11 SCC 455***[22]***.*** The Supreme Court rejected this petition on the basis of procedural issues and ordered petitioners to approach the High Courts under Article 226 for an "efficacious remedy." Later, in its landmark ruling ***Radhika Agarwal Versus Union Of India And Others (2018)***[23]***,*** the Court upheld the validity of Sections 69 (arrest) and 70 (summons) substantively, but with strong procedural safeguards. Importantly, the bench was clear to state that it did not address the question of the validity of Section 135, which stipulates a "culpable mental state." The court reasoned in the case of ***Radhika Agarwal*** as follows[24]:

"76. In some of the cases, Section 135 of the GST Acts which relates to culpable mental intent has been challenged. We are not examining the said aspect as prosecution has not been initiated in any of these cases. If any person is aggrieved and is advised to challenge the said Section, he/she may do so before the High Court."

Consequently, the main constitutional argument concerning this reverse burden of proof provision remains in a state of question, pending a decisive resolution by the Supreme Court in an appropriate future case.

VI.The Human Reality: The Accused's Uphill Battle

16. Beyond the theoretical framework of law, Section 135 represents an exceptionally tough challenge for any director, entrepreneur, or professional charged under the CGST Act. The principal dilemma lies in the actual impossibility of substantiating a negative that is, to show that there was no such thing as a thought, intention, or knowledge. For example, how could a chief officer of a huge enterprise incontrovertibly establish that they were not cognizant of a single fraudulent invoice detailed by one of thousands of suppliers? This obligation to convincingly disprove one's malicious mental condition confuses the crucial distinction between intentional misconduct and mere negligence, thus causing the possibility to condemn both equally.

17. The impact of such a meticulous provision not only runs through individual cases but also stands to largely affect the entire business realm, drawing a chilling effect on commerce. In fact, the risk of criminal prosecution which, at times, creates the presumption of guilt, frightens entrepreneurship and cuts off the

21 *Prakash Nath Khanna v Commissioner of Income Tax* (2004) 9 SCC 686.
22 Devendra Dwivedi v. Union of India and Ors (2022) 11 SCC 455,
23 *Radhika Agarwal v Union of India* (2018) INSC 272.
24 *Ibid* [75].

business transactions that are legal but complicated; thus, a dystopian reality for the provision to be flung as a weapon of coercion. It becomes a punishment in itself when the commencement of the proceedings triggers the provision's use as a coercion weapon. The overpowering environment of commercial criminal law puts the judiciary in the position of the only remaining, and the most, crucial ally against injustice. The courts' act of constantly standing within the periphery acts as the gatekeepers from whom the prosecution is required first to present all foundational determinants before the burden turns heavy upon the accused. It similarly is not only ways of procedures but also the first defense that corresponds the way the law is applied with the just and fair conditions that safeguards the individual's liberty.

VII. Conclusion: Balancing Revenue Objectives with the Rule of Law

18. The movement from the classic common law principle of mens rea to the bleak statutory presumption in Section 135 of the CGST Act shows a fundamental tension in modern governance. On one hand, the state has a legitimate and compelling interest in securing its revenue and punishing economic offenses that are detrimental to the national economy. The argument, as was put by the 47th Law Commission Report, of being tough on crime is understandable and rationally acceptable.

19. But this legitimate interest doesn't exist in a constitutional vacuum. Therefore, it should be pursued under the framework of fundamental rights. These powers of the presumption of innocence and a fair trial are not mere legal niceties that may be managed by administrative efficiency or become the essence of the rule of law. The judicial principles that have developed, especially the requirement of proof of "foundational facts" before a reverse onus is implemented, are not loopholes for the guilty but rather keys to keep the innocent safe.

20. Even if Section 135 is a legal reality, its application and interpretation are not absolute, but conditional. The future of fiscal criminal law in the country will be determined by the judiciary's capacity to walk the tightrope: to give power to the state to prosecute economic crime properly and at the same time to protect the individual from the overwhelming and potentially unjust power of a statutory presumption of guilt. Although the statute may have shifted the burden of proof, the ultimate responsibility for delivering justice, remains, as it must, strenuously with the courts.

(Footnotes)

1 CGST Act, s 135.

2 Narcotic Drugs and Psychotropic Substances Act 1985, s 35.

3 Income Tax Act 1961, s 278-E.

4 Prevention of Money Laundering Act 2002, s 24.

5 *Vijay Madanlal Choudhary Versus Union of India* [2022] SCC OnLine SC 929

6 Customs Act 1962, s 123.

7 *Indru Ramchand Bharvani v Union of India* AIRONLINE 1988 SC 2

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PRESUMPTION REGARDING DOCUMENTS UNDER SECTION 144 AND ADMISSIBILITY OF MICROFILMS ETC. AS EVIDENCE UNDER SECTION 145 OF THE CGST ACT, 2017

Abstract

The Goods and Services Tax (GST) was introduced in India in 2017 as a landmark reform that consolidated the country's indirect taxation system. With this transformation came a growing reliance on technology-digital filing, electronic invoices, online returns, and e-assessments became the norm. This digital revolution in tax administration required a corresponding evolution in evidentiary law. The Central Goods and Services Tax Act, 2017[1] (hereinafter referred to as "**CGST Act**") responded through Sections 144[2] and 145[3], which together form the evidentiary foundation for GST enforcement.

Section 144 deals with **presumptions regarding documents**, allowing courts and tax authorities to assume that certain documents produced, seized, or received from abroad are genuine unless proved otherwise. Section 145, on the other hand, recognizes **microfilms, facsimile copies, and computer outputs** as valid documentary evidence, bringing digital and reproduced records within the fold of admissibility. These provisions mark a clear departure from traditional rules under the Indian Evidence Act, 1872[4], which was conceived in a pre-digital era.

This article provides an in-depth doctrinal and comparative analysis of Sections 144 and 145 of the CGST Act. It discusses their historical roots, legislative purpose, and judicial interpretation, and situates them within the broader international context by comparing similar provisions in the United Kingdom, Australia, Canada, and Singapore. It also examines their interaction with the Indian Evidence Act and the Information Technology Act, 2000[5], evaluates their practical implications, and explores the challenges faced in enforcement.

1 *The Central Goods and Services Tax Act, 2017*, No. 12 of 2017, Acts of Parliament, 2017 (India).
2 *The Central Goods and Services Tax Act, 2017*, No. 12 of 2017, § 144
3 *The Central Goods and Services Tax Act, 2017*, No. 12 of 2017, § 145
4 *The Indian Evidence Act, 1872*, No. 1 of 1872, Acts of Parliament, 1872 (India).
5 *The Information Technology Act, 2000*, No. 21 of 2000, Acts of Parliament, 2000(India).

Introduction

The Goods and Services Tax (GST) has reshaped the landscape of indirect taxation in India. It unified numerous taxes, promoted transparency, and pushed the administration of tax law into the digital era. With most returns, invoices, and documents now filed electronically, the legal framework had to evolve to accommodate this new digital reality.

Two provisions of the CGST Act-Section 144 and Section 145-represent this evolution in the evidentiary domain. Section 144 establishes a presumption as to the authenticity of documents produced, seized, or received during proceedings, unless the contrary is proved. Section 145, meanwhile, provides for the admissibility of microfilms, facsimile copies, and computer outputs as evidence. Together, they simplify the process of proving documents in tax cases and align Indian tax law with global digital governance practices.

While these provisions make enforcement faster and more efficient, they also raise important questions about procedural fairness, evidentiary standards, and the protection of taxpayer rights. This article examines these provisions in depth, exploring their legislative history, comparative frameworks, and future implications.

Historical and Legislative Intent

Before the GST regime, Indian tax laws such as the Customs Act, 1962[6], and the Central Excise Act, 1944[7], contained similar provisions allowing presumptions about the authenticity of seized or produced documents. These provisions were designed to ease the evidentiary burden on the tax department, preventing endless litigation over whether official records were genuine.

When the GST was conceived, the Kelkar Committee[8] on Tax Reforms and the GST Council emphasized the need for a modern evidentiary structure suited to a digital ecosystem. The drafters of the CGST Act looked at international models-particularly those of the UK, Australia, Canada, and Singapore-where presumptions regarding official records were already part of tax administration law.

Thus, Section 144 was enacted to introduce a rebuttable presumption regarding documents-meaning that the court assumes their authenticity unless someone produces credible evidence to the contrary. This saves time and simplifies tax adjudication. Similarly, Section 145 was designed to recognize the legal validity of digital records and other reproductions such as microfilms or computer printouts-essential in an era when physical paper trails are being replaced by electronic data.

Section 144: Presumption as to Documents

Purpose and Rationale - The main goal of Section 144 is administrative efficiency. Tax proceedings often involve massive volumes of invoices, ledgers, and statements. Without a presumption of authenticity, proving every document's genuineness

6 *The Customs Act, 1962*, No. 52 of 1962, Acts of Parliament, 1962 (India)
7 *The Central Excise Act, 1944*, No. 1 of 1944, Acts of Parliament, 1944 (India).
8 *Kelkar Committee Report on Tax Reforms*, Government of India, Ministry of Finance, 2002.

would be practically impossible. Section 144 eases this burden for tax officers by allowing them to rely on the documents produced or seized, while still giving taxpayers the opportunity to challenge them.

Nature of the Presumption - Importantly, this presumption is rebuttable, not absolute. Taxpayers can still prove that a document is forged, tampered with, or otherwise unreliable. This balance ensures fairness while enabling efficiency. Courts have repeatedly emphasized that presumptions should never override principles of natural justice-a taxpayer must always have the opportunity to contest authenticity with credible evidence.

Similar presumptions exist in other Indian laws. For example, the Indian Evidence Act presumes the genuineness of public documents (Sections 79–90A) and ancient documents (Section 90), but such presumptions are limited and conditional. Section 144 of the CGST Act, however, extends the presumption to all documents relevant to GST proceedings, regardless of age or form.

❖ Section 145: Admissibility of Microfilms, Facsimile Copies, and Computer Outputs

Section 145 recognizes that in the modern world, many records exist only in electronic or reproduced form. It declares that microfilms, facsimile copies, and computer-generated printouts are to be treated as valid "documents" under the CGST Act. They can be admitted as evidence even without producing the original document.

This is a major departure from older evidentiary norms, where only original documents were admissible unless specific exceptions applied. Section 145 brings GST proceedings into line with digital realities-where invoices, e-way bills, and filings are all electronically maintained.

However, the law also includes an important safeguard. Under **Section 145(2)**, a certificate must accompany any electronic record to confirm:

- the identity of the document,
- the manner in which it was produced,
- the device used, and
- that it was produced in the ordinary course of business.

This mirrors the **Section 65B(4)[9] certificate** requirement of the **Indian Evidence Act**, as interpreted by the Hon'ble Supreme Court in the case titled as *Anvar P.V. v. P.K. Basheer*[10] (2014) and *Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal* [11](2020). The purpose of this certification is to ensure reliability and prevent manipulation of electronic records.

When the apropos judicial rulings are applied in GST proceedings, they help ensure a fairer and more transparent process for handling and recording evidence. These

9 *The Indian Evidence Act, 1872*, No. 1 of 1872, § 65B
10 *Anvar P.V. v. P.K. Basheer*, (2014) 10 SCC 473
11 *Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal*, (2020) 7 SCC 1

judgments make it clear that electronic evidence such as computer printouts, must comply with the certification requirements under Section 145(2) of the CGST Act. Without such certification, the evidence is inadmissible.

Therefore, tax officers must handle digital records with care, maintaining a proper chain of custody and obtaining the required certificates. Likewise, taxpayers need to preserve their electronic invoices and returns in an authentic and verifiable form, ready for legal examination if needed.

These judicial principles have significantly influenced how Sections 144 and 145 are applied in practice. Authorities cannot rely on uncertified electronic evidence, and taxpayers have the right to challenge any evidence that does not meet procedural standards. On the other hand, once admissibility is properly established, Section 144 allows the court to presume the authenticity of documents, thereby streamlining adjudication and ensuring efficiency in proceedings.

❖ Comparative Analysis with the Indian Evidence Act

The CGST Act establishes a special evidentiary framework for tax proceedings, distinct from the general rules in the Indian Evidence Act, 1872. As CGST Act is special law as compared to Evidence act it will have an overriding effect. The table below summarizes key differences:

S.N.	Aspect	Indian Evidence Act	CGST Act
1	Presumption of authenticity	Limited to specific categories (Sections 79–90A)	Broad presumption under Section 144 for all documents in GST proceedings
2	Age requirement	30 years (ancient documents)	No age limit
3	Stamp duty bar	Unstamped documents inadmissible	Admissible under Section 144 even if unstamped
4	Electronic evidence	Governed by Section 65B	Mirrored under Section 145 with simpler procedural adaptation

This shows that the CGST Act balances **administrative practicality** along with procedural fairness. Its evidentiary rules are crafted to fit the volume and velocity of digital tax transactions.

❖ Comparison with International Framework

1. United Kingdom - Section 114 of the *UK VAT Act, 1994*[12], creates a presumption that official records and certified documents are genuine unless proven otherwise. This facilitates speedy adjudication and prevents delays over authenticity disputes.

12 *Value Added Tax Act 1994*, c. 23, § 114 (U.K.)

2. Australia - Section 284-90 of *A New Tax System (Goods and Services Tax) Act, 1999*[13], recognizes business and electronic records as valid evidence. Australian tribunals focus more on the substantive accuracy of tax data than the format in which it is presented.
3. Canada - Under Section 290 of the *Excise Tax Act, 1985*[14] certified copies and seized records are admissible as evidence without additional proof. Courts presume authenticity but allow taxpayers to rebut if they show procedural irregularities.
4. Singapore - Section 87 of the *Singapore GST Act, 1933*[15] grants legal recognition to digital and physical records held by tax authorities, emphasizing quick dispute resolution and e-governance.

The above categorically establish that India's Sections 144 and 145 clearly align with these international models, representing a convergence toward globally accepted evidentiary standards in taxation.

❖ Doctrinal and Policy Perspectives

Section 144 embodies the doctrine of rebuttable presumption, where the law temporarily shifts the burden of proof to promote efficiency while preserving fairness. Section 145 reflects the principle of functional equivalence, treating electronic records as equal to paper documents.

Together, they illustrate the shift from traditional evidentiary rigidity to technological pragmatism-acknowledging that authenticity in the digital age can be verified through technical safeguards rather than physical signatures.

From a policy standpoint, these provisions serve three primary objectives:

1. **Efficiency:** They minimize evidentiary disputes and accelerate tax enforcement.
2. **Fairness:** They maintain the taxpayer's right to rebut and ensure transparency in documentary handling.
3. **Adaptability:** They align Indian tax law with technological realities, ensuring that evidence law evolves alongside digital governance.

❖ Practical Implications and Enforcement Challenges

While the provisions are progressive, their implementation poses several challenges:

1. **Certification Compliance:** Authorities must strictly comply with the certification process under Section 145(2). Any lapse can render key evidence inadmissible.
2. **Chain of Custody:** Digital evidence must be properly preserved and documented to prevent allegations of tampering.
3. **Cybersecurity Risks:** As GST relies on online data, issues like hacking, data breaches, or unauthorized access can compromise evidentiary integrity.

13 *A New Tax System (Goods and Services Tax) Act 1999* (Cth), § 284-90 (Austl.)
14 *Excise Tax Act*, R.S.C. 1985, c. E-15, § 290 (Can.).
15 *Goods and Services Tax Act 1993* (Cap. 117A), § 87 (Sing.).

4. **Training and Awareness:** Both tax officials and practitioners require training in digital evidence management and Section 65B/145 compliance.
5. **Judicial Consistency:** Courts need to ensure consistent interpretation across jurisdictions to avoid procedural confusion.

Despite these challenges, Sections 144 and 145 have significantly improved the speed and reliability of GST adjudication. They reflect a balance between administrative convenience and procedural justice.

❖ Policy and Future Developments

Looking ahead, India's evidentiary framework for GST will likely evolve with advances in technology. **Blockchain-based e-invoicing** and **AI-driven audit trails** could make tax records tamper-proof, reducing disputes about authenticity.

Legislative reforms might also clarify procedural standards for rebutting presumptions or strengthen safeguards for data security. As jurisprudence under Sections 144 and 145 matures, courts will continue refining how digital evidence is handled in tax proceedings.

Ultimately, these provisions symbolize India's broader movement toward a digital rule of law, where administrative efficiency and legal integrity coexist.

❖ Conclusion

Sections 144 and 145 of the CGST Act represent a significant step forward in harmonizing India's evidentiary laws with the demands of a digital economy. Section 144 enables efficient adjudication by presuming the authenticity of documents, while Section 145 legitimizes modern forms of evidence like microfilms and computer outputs.

Together, they establish a framework that is both pragmatic and fair-balancing the State's need for effective tax enforcement with the taxpayer's right to contest authenticity. Their alignment with the Indian Evidence Act, the Information Technology Act, and international tax standards underscores India's commitment to transparent and technologically adaptive governance.

As courts continue to interpret these provisions, and as technology evolves, the evidentiary principles they embody will remain central to maintaining trust and integrity within the GST system. These sections are not merely procedural rules-they are foundational to ensuring that the world's largest digital tax regime functions with both efficiency and justice.

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INTERPLAY BETWEEN SECTIONS 73, 74, 74A & 122 OF THE CENTRAL GOODS AND SERVICE TAX ACT, 2017

In the world of indirect taxation, focus around compliance and enforcement mechanisms is imperative.

Sections 73 74A 74 of the CGST Act deal with demand and recovery of tax, while Section 122 pertains to penalties for specific offences. While these provisions often operate together, it's important to understand how they are both connected-and not connected.

1. **How They Are Connected:**

- Sections 73 & 74 address cases where tax has not been paid, short paid, or ITC has been wrongly availed/utilized.
- The nature of intent-whether it's due to fraud, willful misstatement, or suppression of facts-determines whether Section 73 (without intent) or Section 74 (with intent) applies.
- Section 122 triggers when certain offences occur, such as issuance of fake invoices or incorrect availing of ITC. These can also form the basis for proceedings under Section 73/74.
- In practice, Section 122 penalties are often imposed in addition to the tax demand raised under Section 73/74.

2. **How They Are Not Connected:**

- Section 122 is independent. It doesn't rely on completion or success of proceedings under Section 73/74.
- A person can be penalized under Section 122 even if no tax demand is raised (e.g., for procedural contraventions or aiding in fraud). • Multiple persons can be penalized under Section 122 (e.g., recipients, transporters), whereas tax demand under 73/74 is typically limited to the supplier unpaid/short-paid tax, erroneous refunds, or wrongly availed Input Tax Credit (ITC). The key differentiator is the taxpayer's intent:

Basis Section 73 (Non-Fraud) Section 74 (Fraud/Suppression/Wilful Misstatement) Intent Genuine mistake, no intention to evade tax. Deliberate fraud, wilful misstatement, or suppression of facts to evade tax.

Time Limit (Order) Within three years from the annual return due date for the relevant financial year. Within five years from the annual return due date for the relevant financial year.

Penalty 10% of the tax or ₹10,000, whichever is higher. Up to 100% of the tax amount.

Voluntary Payment Full waiver of penalty if tax and interest are paid before the Show Cause Notice (SCN) is issued. Reduced penalty (e.g., 15% or 25% depending on the stage of payment) if paid early.

Section122: Penalties for Specific Offences

Section 122 falls under a separate chapter (Chapter XIX, Offences and Penalties) and lists numerous specific offences for which a penalty can be imposed, many of which are not directly tied to the determination of tax liability under Section 73 or 74.

- Standalone Provision: Penalties under Section 122 can often be imposed independently of demand proceedings under Section 73 or 74, especially for offences like issuing fake invoices or circular trading, which are offences in themselves, regardless of whether tax evasion is finally proven in a demand case.
- While Section 73/74 proceedings are primarily against the person chargeable with tax, Section 122(1A) allows for penalties on “any person” (including directors, employees, etc.) who facilitates or benefits from a fraudulent transaction.

Interplay and Relationship

The key aspects of their interaction are:

1. **Mutual Exclusivity for the Same Act:** Section 75(13) of the CGST Act clarifies that if a penalty is imposed under Section 73 or 74, no penalty for the same act or omission can be imposed on the same person under any other provision (including Section 122). This prevents double jeopardy.
2. **Independent Proceedings:** Per Contra the Allahabad High Court has held that proceedings under Section 122 are independent of those under Section 73/74. The conclusion of a Section 74 proceeding (e.g., if the tax demand is dropped for lack of proof of intent) does not automatically terminate a separate penalty proceeding under Section 122 if the latter is based on distinct contraventions (e.g., fake invoicing activity itself).
3. **Procedural Linkage:** Show Cause Notices (SCNs) and orders issued under Sections 73 or 74 often propose penalties with reference to the relevant clauses of Section 122. This indicates that Sections 73/74 are considered the “proceedings” sections, while Section 122 creates the “liability” for the specific penalty amount in certain situations.

4. **Differing Objectives:** Section 73/74 primarily focus on revenue recovery, while Section 122 focuses on punitive action and deterrence against specific fraudulent practices.

Section 74A has been inserted by the Finance (2) Act, 2024 on 16.08.2024 with effect from 01.11.2024 and produced as follows:-

74A. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for any reason pertaining to Financial Year 2024-25 onward.

(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded, or where input tax credit has been wrongly availed or utilised, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty leviable under the provisions of this Act or the rules made thereunder:

PROVIDED that no notice shall be issued, if the tax which has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised in a financial yer is less than one thousand rupees.

(2) The proper officer shall issue the notice under sub-section (1) within forty-two months from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within forty-two months from the date of erroneous refund.

(3) Where a notice has been issued for any period under sub-section (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for such periods other than those covered under sub-section (1), on the person chargeable with tax.

(4) The service of such statement shall be deemed to be service of notice on such person under sub-section (1), subject to the condition that the grounds relied upon for such tax periods other than those covered under sub-section (1) are the same as are mentioned in the earlier notice.

(5) The penalty in case where any tax which has not been paid or short paid or erroneously refunded, or where input tax credit has been wrongly availed or utilised,-

Sections 73, 74, and the new Section 74A of the CGST Act deal with the **determination and recovery of tax demand** along with applicable penalties, while Section 122 provides for **standalone penalties** for specific offences.

Sections 73, 74, and 74A: Demand and Recovery

These sections are the primary mechanisms for tax authorities to recover unpaid or short-paid tax, erroneous refunds, or wrongly availed Input Tax Credit (ITC). The key differences lie in the presence of fraud and the applicable financial year.

Feature	Section 73("No-Fraud" cases)	Section 74 ("Fraud" cases)	Section 74A (From FY 2024-25)
Applicability (FY)	Up to FY 2023-24	Up to FY 2023-24	From FY 2024-25 onwards
Intent	No fraud, willful misstatement, or suppression of facts	Involves fraud, willful misstatement, or suppression of facts	Covers both fraud and non-fraud cases under one provision
Time Limit for SCN	2 years 9 months from the annual return due date (3 years for order)	5 years from the annual return due date	42 months from the annual return due date
Penalty	Lower penalty (up to 10% of tax or ₹10,000, whichever is higher)	Higher penalty (up to 100% of the tax amount)	Proportional penalties based on intent (lower for non-fraud, higher for fraud)
Early Payment Relief	Tax + Interest (no penalty if paid within 30 days of SCN)	Reduced penalty available if paid early (e.g., 15% within 30 days of SCN)	Longer period (60 days) for reduced penalty benefit

Section 122: General Penalties

Section 122 falls under Chapter XIX (Offences and Penalties) and is an independent provision for imposing penalties for specific contraventions listed within the section (e.g., issuing fake invoices, non-filing of returns, etc.).

- **Independence**: Penalties under Section 122 are generally for distinct offences and can be imposed even if proceedings under Section 73 or 74/74A fail, or are dropped, provided the specific contravention is established.
- **Interplay with 73/74/74A**: While Sections 73, 74, and 74A focus on recovering specific tax liabilities and their associated penalties, Section 122 addresses a broader range of offences. If a penalty is imposed under Sections 73, 74, or 74A for the non-payment/short-payment of tax, a separate penalty for the *same act* cannot be imposed under Section 122.
- **Adjudication**: Penalties under Section 122 represent a civil liability and are adjudicated by the proper officer within the GST department, independent of any potential criminal prosecution.

In a significant ruling ***on May 29, 2025, the Allahabad High Court dismissed Patanjali Ayurved's*** plea challenging a ₹273.5 crore penalty under the Goods and Services Tax (GST) Act. The judgment delivers a strong message on tax compliance and the civil nature of GST penalties.

In an earlier adjudication order dated January 10, 2025, the GST department dropped the tax demand under Section 74 of the CGST Act after determining that Patanjali's sales exceeded its purchases, thus indicating valid Input Tax Credit (ITC) claims.

Despite this, authorities proceeded with penalty proceedings under Section 122, prompting Patanjali to approach the High Court once again.

Sections 74 and 122 Address Different Violations

Patanjali argued that since the tax demand under Section 74 was withdrawn, the penalty under Section 122 should also be nullified. However, the Court rejected this argument, stating that both sections cater to different aspects of GST law.

"The contravention under Section 73/74 need not necessarily be a contravention covered under Section 122 of the CGST Act," the Bench observed.

Similarly the Allahabad High Court, in the case of ***HCL Infotech Ltd vs. Commissioner, Commercial Tax And Another***, delivered a significant judgment authored by **Justice Shekhar B. Saraf** on September 27, 2024 (Neutral Citation No. - 2024:AHC:158274-DB).

Key Rulings of the Judgment

- **Requirement for Prima Facie Satisfaction of Fraud:** The court ruled that before initiating proceedings under Section 74 of the CGST/UPGST Act (which involves an extended limitation period due to fraud, willful misstatement, or suppression of facts to evade tax), the adjudicating authority must explicitly record its *prima facie* satisfaction that such elements exist.
- **Insufficient Show Cause Notice (SCN):** The specific show cause notice issued to HCL Infotech Ltd under Section 74 was found to be jurisdictionally defective because it merely alleged excessive Input Tax Credit (ITC) without containing any specific allegations or prima facie evidence of fraud, willful misstatement, or suppression of facts.
- **Distinction Between Section 73 and 74:** The judgment highlighted the clear distinction between Section 73 proceedings (non-fraudulent errors) and Section 74 proceedings (fraudulent activities). Once Section 73 proceedings have concluded, reopening the matter under Section 74 for the same facts requires explicit justification of fraud, which was absent in this case.
- **Quashing of the SCN:** Consequently, the Allahabad High Court quashed the impugned show cause notice, allowing the writ petition filed by HCL Infotech Ltd. The court left it open for the tax authorities to issue a fresh, legally compliant show cause notice if they had the necessary evidence and recorded the required satisfaction regarding fraud or suppression of facts.

This decision emphasizes the importance of procedural fairness and the necessity for tax authorities to strictly adhere to statutory preconditions when invoking extended limitation periods in tax matters.

In *M/s Vadilal Enterprises Limited v. State Of U.P.*, the Allahabad High Court quashed a show cause notice issued under Section 74 of the CGST Act because the notice lacked the necessary allegations of fraud, wilful misstatement, or suppression of facts. The court ruled that without these specific elements, a Section 74 notice is unsustainable and issued without jurisdiction, as Section 74 can only be invoked in cases of fraud or willful misstatement, not for simple discrepancies that were already the subject of a previous Section 73 notice.

Key aspects of the case

- **Nature of the notice**: The petitioner, Vadilal Enterprises, challenged a show cause notice (SCN) issued under Section 74 of the CGST Act, 2017, demanding a significant amount of tax.
- **Lack of necessary allegations**: The court found that the SCN failed to include the essential ingredients for Section 74, which are fraud, wilful misstatement, or suppression of material facts.
- **Previous proceedings**: An earlier notice had been issued under Section 73 of the CGST Act regarding the same issues, and the petitioner had responded to it.
- **Court's reasoning**: The court determined that the new notice, which was issued after the Section 73 proceedings were disposed of due to discrepancies, was not based on any allegations of fraud. It was simply seeking further explanation because the previous explanation was deemed insufficient.
- **Judgment**: The court quashed the Section 74 notice, stating it was without jurisdiction, and allowed the respondents to initiate proceedings as per the law, provided they follow the correct legal procedure

Introspection of Interplay

The primary interplay is that Sections 73, 74, and 74A are the procedural mechanisms for determining and recovering specific tax demands based on the financial year and the presence of fraud, while Section 122 is a standalone penalty provision for various other statutory breaches that may or may not be directly linked to the demand determination process. The introduction of Section 74A from FY 2024-25 streamlines the demand process by merging fraud and non-fraud time limits and penalty structures into a single provision, simplifying the adjudication process going forward.


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INTERLINKING THE GST REGIME AND THE INSOLVENCY FRAMEWORK: A LEGAL AND PROCEDURAL ANALYSIS

Introduction

The Insolvency and Bankruptcy Code (IBC) enacted in 2016, consolidated India's fragmented insolvency laws into a single legislation that is transparent, time-bound, and economically viable. Similarly, the Goods and Services Tax (GST) implemented in 2017 unified multiple indirect taxes into a single framework to facilitate ease of doing business. While IBC governs insolvency resolution, GST ensures continuous tax compliance and revenue collection. When these two systems intersect especially when a company under insolvency has unpaid GST dues, the question arises: can tax recovery proceedings continue? The government and judiciary have consistently worked toward creating procedural harmony between the two frameworks.

Legal Framework and Overlap

The CGST Act empowers tax authorities to levy and collect taxes and enforce recovery through Sections 73 to 79. Meanwhile, the IBC under Section 14, provides a moratorium upon admission of an insolvency petition prohibiting recovery or attachment actions. Section 31 makes an approved resolution plan binding on all stakeholders including government departments. Section 238 of IBC further gives it overriding authority over other laws establishing that insolvency proceedings take precedence over tax recovery. This overlap often creates friction between tax administrators and insolvency professionals requiring judicial interpretation and CBIC guidance.

Lifecycle of Tax Dues under CIRP

Pre-CIRP stage	All pending tax liabilities → Filed by GST officer as claims before NCLT.
CIRP commencement	Moratorium begins; recovery suspended.
During CIRP	RP ensures compliance using new GSTIN and maintains ITC continuity.
Resolution Plan Approval	All prior dues extinguished except as admitted.
Post-Resolution	New management assumes fresh tax liabilities.

GST Liability Prior to Insolvency Commencement

Pre-insolvency tax dues are treated as 'operational debts' under Section 5(21) of IBC. As clarified in **CBIC Circular No. 134/04/2020-GST dated 23 March 2020** no coercive action can be taken for recovery of dues prior to the commencement of CIRP. The tax department must file its claim before the National Company Law Tribunal (NCLT) to be included in the resolution process. Section 53 of the IBC specifies the waterfall mechanism for distribution of assets during liquidation placing government dues below secured creditors and workmen's dues but above shareholder equity. This provision ensures equitable treatment of creditors while balancing government revenue interests.

GST Compliance During CIRP

Once the Corporate Insolvency Resolution Process (CIRP) begins, the management of the company vests with the Interim Resolution Professional (IRP) or Resolution Professional (RP) who must ensure compliance with tax laws.

Need for Separate GST Registration: As per **Notification No. 11/2020-Central Tax, dated 21 March 2020**, the IRP/RP must obtain a new GST registration within 30 days of appointment in every state where the corporate debtor was previously registered. This new registration distinguishes the entity during CIRP from its pre-insolvency operations. CBIC also directed that GST registration of entities under CIRP should not be canceled but may be suspended if necessary.

Filing of First GST Return by the Newly Registered Entity: Once the new registration is obtained the IRP/RP must file the first GST return for the period from the date of appointment until the new registration is granted. As clarified by CBIC, the IRP/RP is responsible only for compliances during the CIRP period while pre-CIRP filings remain the obligation of the previous management. If the earlier registration was canceled but the revocation period is still open it should be restored to maintain compliance continuity. This ensures clear segregation of tax responsibilities between pre- and post-insolvency phases.

Eligibility of Input Tax Credit

During the CIRP the newly registered person under GST obtaining registration can avail input tax credit (ITC) on goods and services received from the date of appointment of the IRP/RP up to the date of the new registration. This ITC remains admissible even if the prescribed time limit for availing ITC under Section 16(4) has lapsed or the supplier has not furnished the corresponding outward details in GSTR-1. The CBIC has clarified that this relaxation applies only to the first return filed under the new registration.

During CIRP, IRPs often face difficulties in claiming ITC for invoices issued before obtaining new registration. The government addressed this via the special procedure under **Notification No. 11/2020-Central Tax**. The RP can claim ITC on invoices for goods or services received after the date of appointment even if they bear the old GSTIN provided they comply with Chapter V of the CGST Act.

For example, where an IRP was appointed on 1 April 2020 and the new registration was granted on 20 April 2020, ITC on inward supplies amounting to Rs. 9 lakh received during that period can be claimed in the first return under the new GSTIN while earlier ITC of Rs. 4.5 lakh under the erstwhile registration may be eligible but there are no specific procedures with respect to its adjustment/utilization.

Balance in Electronic Cash Ledger

When a corporate debtor enters the CIRP any amount deposited by the IRP/RP in the electronic cash ledger of the erstwhile registered entity becomes eligible for refund provided such deposit is made after the date of their appointment and before the issuance of a new GST registration. As clarified by CBIC, this refund can be claimed under the category "Refund from Electronic Cash Ledger" even if the corresponding GSTR-3B or GSTR-1 returns for that period have not been filed.

For instance, if an IRP deposited Rs. 2 lakh under the IGST head on 10 April 2020, such amount would be refundable to the IRP under the erstwhile registration following the prescribed procedures. This clarification ensures that funds deposited during the transition phase of insolvency are not blocked thereby preserving liquidity and enabling the IRP/RP to maintain the entity as a going concern during the CIRP period.

Moratorium and Suspension of Recovery

Section 14 of the IBC introduces a moratorium that halts all suits and recovery actions against the corporate debtor. The ***Supreme Court*** in the case of ***Sundaresh Bhatt, Liquidator of ABG Shipyard Ltd. v. CBIC (2022***)[1] *held that while assessment proceedings may continue to determine tax liability, all recovery actions remain barred during the moratorium. The Court balanced fiscal and insolvency objectives by allowing quantification but prohibiting execution of tax recovery. This balance ensures that while the government's claim is recorded business revival efforts are not obstructed. CBIC has reiterated that tax officers should file claims with the RP instead of issuing recovery notices.*

Moreover, **CBIC's Circular No. 187/19/2022-GST dated 27 December 2022** extended this reasoning by clarifying that once a resolution plan under IBC is approved, any pre-CIRP demand stands superseded. Jurisdictional Commissioners must issue under Rule 161 in FORM GST DRC-25 to formally reduce or nullify such demands in accordance with Section 84 of the CGST Act. The inclusion of IBC orders within the expression "other proceedings" under Section 84 CGST Act provides statutory legitimacy to these reductions. This ensures uniformity across field formations and prevents revival of extinguished liabilities.

Government as an Operational Creditor

Under IBC, tax authorities are categorized as operational creditors. This classification has significant implications under Section 53 as government dues rank below secured creditors. The landmark ruling in ***Ghanashyam Mishra & Sons Pvt. Ltd. v. Edelweiss ARC (2021)***[2] Supreme Court confirmed that once a resolution plan is approved all pre-insolvency dues including those of the government stand extinguished. However, in ***Rainbow Papers Ltd. (2022)***[3], the Supreme Court briefly

1 [2022] 141 taxmann.com 471 (SC)
2 (2021) 9 SCC 657; 2021 SCC OnLine SC 313
3 2022 SCC OnLine SC 1162

treated the state tax department as a secured creditor under the Gujarat VAT Act creating interpretational challenges. Subsequent clarifications and judgments reaffirmed that tax dues are operational in nature ensuring consistency in resolution priorities.

Comparative Overview: Pre- and Post-CIRP GST Compliance

Compliance Area	Before CIRP	During CIRP (Managed by IRP/RP)	Post-Resolution
GST Registration	Existing registration	New registration under Notification 11/2020	New entity registration continues
Returns filing	Managed by suspended board	Managed by RP	Managed by new management
ITC Eligibility	Available till CIRP date	Available for invoices post-appointment	Fresh accruals
Recovery Actions	Permitted	Prohibited due to moratorium	Permitted only after closure
Liability for Tax Dues	Corporate debtor	RP (CIRP period)	Resolution applicant

Judicial Evolution

The interplay between GST and IBC has evolved through a series of landmark judgments, each clarifying the balance between revenue recovery and insolvency resolution. In ***Principal Commissioner of Income Tax* v. *Monnet Ispat and Energy Ltd.* (2018)**[4], the **Supreme Court** upheld the overriding effect of Section 238 of the IBC, confirming that where conflicts arise between the IBC and fiscal statutes, the IBC prevails. This laid the foundation for treating insolvency resolution as a comprehensive, binding process for all creditors including the sovereign.

The Supreme Court in the case of ***Ghanashyam Mishra & Sons Pvt. Ltd. v. Edelweiss ARC* (2021)** clarified that government authorities are bound by the resolution plan and cannot enforce pre-CIRP dues that were not submitted.

Further, in ***Sundaresh Bhatt, Liquidator of ABG Shipyard Ltd. v. CBIC* (2022)**, the Supreme Court ruled that no recovery under the CGST Act can be pursued during the moratorium under Section 14 of the IBC, though assessment may continue to quantify liability. This distinction preserved procedural fairness while maintaining the sanctity of the moratorium. Together, these cases demonstrate a consistent judicial intent to promote resolution over revenue collection.

Practical Challenges

Despite judicial clarity, several operational challenges continue to impede smooth coordination:

1. **Multiple Registrations:** Insolvency professionals often encounter hurdles where multiple GST registrations exist within one state or premises are inaccessible.

4 304 CTR 233 (SC); 169 DTR 262 (SC).

2. **ITC Transfer Mechanism:** The law remains silent on the transfer of unutilized ITC from the old registration to the new CIRP registration. Absence of an automated transfer process results in stranded credits.

3. **Cash-ledger Refund Delays:** Although permitted in principle, jurisdictional differences in refund procedures lead to inconsistencies and liquidity blockages. This ambiguity also often leads to delays in closing CIRP accounts and finalizing tax reconciliations.

4. **Transition to Liquidation:** Ambiguity persists regarding whether the CIRP-period GST registration continues in liquidation or a fresh registration is required.

5. **Inter-departmental Coordination:** Lack of integration between GST Nodal Offices, NCLT Benches and IBBI databases results in duplication of demands or delayed claim recognition.

These gaps necessitate further clarification to support seamless business revival under IBC.

Policy Recommendations

To achieve smoother coordination between IBC and GST, a joint mechanism between CBIC and IBBI should be institutionalized. Automatic claim filing through portal integration, standardized communication between tax officers and RPs and specialized training can enhance efficiency. Legislative clarification regarding the treatment of tax dues during liquidation and the transferability of ITC would eliminate ambiguity. Introducing a digital claim reconciliation system within the GST portal could further streamline government participation in insolvency processes.

Conclusion

The convergence of GST and IBC symbolizes India's progressive economic governance. Initially, the lack of clarity created procedural confusion and litigation but judicial interpretations and CBIC circulars have paved the way for coherence. Effective implementation now depends on administrative cooperation and technological integration. By recognizing insolvency not as a tax default but as an opportunity for business revival both laws can complement each other. Harmonizing these frameworks will ensure that fiscal discipline and enterprise revival work hand in hand to sustain economic growth.

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4. Grant Thornton India LLP – Impact of GST on Companies under IBC, June 2020
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7. Insolvency and Bankruptcy Code, 2016

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GST IMPLICATIONS ON TRUSTS

A. Background

1. A well-known subhashita *says 'Paropakaram artham idam shariram'*, which means this body is meant for helping others. Charity given without expectation of return, at the proper time and place, and to a worthy person is considered to be in the mode of goodness[1]. In India, public trusts are essentially are created / set up for charitable or religious purposes.

B. Meaning and scope of Trust

2. A trust is a fiduciary relationship in which a trustor gives another party, known as a trustee, the right to hold title to property or assets for the benefit of a third party. A "trust" is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner[2].

3. A trust constituted for the benefit of individual(s) who are, or within given time may be definitely ascertained is called a private trust. Thus, in a private trust, beneficiaries are specific individuals such as family members, friends, and relatives etc. and capable of being ascertained. Similarly, A family trust is is established by any person during his lifetime to manage certain assets or investments and support beneficiaries, such as family members. It is important to note that a family cannot be termed as public.

4. On the contrary, in public trust, beneficiary is public or class of public at large and generally they are uncertain and not confined to any specific individuals. Unlike in the case of private trusts, wherein the beneficiaries are specified persons, in the case of a public trust, benefit of activities of trust is available to a substantial segment of public.

5. Trusts, are being recognised legal entities in India, may be either Private or Public depending on whether their beneficiaries are specific individuals

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1 Bhagavad Geeta –17 Adhyaya 20 shloka
2 Section 2 of Indian Trust Act, 1882

or the public at large. In the latter case, the dominant consideration is public interest. It would be relevant to note that taking into account the public purposes for which the trusts are being set up, incomes of the trusts which are set up for charitable or religious purposes are exempt from income tax, subject to certain conditions, procedures and limitations as specified therein under the statutory provisions[3].

C. Background to introduction of GST

6. Prior to introduction of Goods and Services Tax(GST), India had multiple taxes like excise, service tax levied by the Centre and sales tax/VAT, entry tax, luxury tax or entertainment tax levied by states. It was with the objective of achieving one nation one tax leading to unified market, GST was introduced by subsuming various taxes levied and collected by states as well as by the Union.

7. Article 246A empowers States and Centre to enact legislations with respect to GST as regards intra state supplies. However such legislative powers are limited to Centre in case of intra state supplies. Apex Court observed that not only the levy but collection, recovery penal consequences for non payment are incidental to the power to levy and collection of GST under Article 246A[4] .

D. GST is a business tax:

8. GST is a value added tax, which applies to all 'commercial activities', involving supply of goods or services or both. GST is destination-based consumption tax as it is borne by the consumer/end user in the supply chain[5]. This is very much conspicuous from the provisions of section 9[6] which provides for levy of GST and section 7 which defines the scope of phrase 'supply' to mean all forms of supply of goods or services or both made or agreed to be made for a consideration by a person in the course of furtherance of business.

9. Phrase 'business'[7] is defined to mean any trade, commerce, manufacture, profession, vocation, adventure, wager or any other similar activity, whether or not it is for a pecuniary benefit. Further, any activity or transaction in connection with or incidental or ancillary to the above would also get covered under the ambit of business. Pecuniary benefit would be relevant where the supplier is undertaking business.[8]

10. It is interesting to note that the phrase 'business' is defined in section 2(13) of the Income Tax Act, 1961 to include any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture; Further, section 2(15) of the aforesaid income tax statute which defines the phrase "charitable purpose" specifically provides that advancement of any other object of general public utility shall not be a charitable purpose, if it involves the carrying on of any activity in the nature of trade, commerce or business,

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3 See section 11- 13 of Income Tax Act, 1961
4 Radhika Agarwal Vs. Union of India, 2025 (392) E.L.T. 273 (S.C.)
5 Union of India vs. VKC Footsteps India (P) Ltd, 2021 130 taxmann.com 193 (SC) which in turn refers to All India Federation of Tax Practitioners Vs. Union of India - Referred to in Goa University vs. JCCGST (2025) 29 Centax 281 (Bom.)
6 Central Goods and Services Tax Act, 2017
7 Section 2(17) of CGST Act, 2017
8 Sai Publication Fund (2002) 126 STC 288 (SC)

or any activity of rendering any service in relation to any trade, commerce or business. Supreme Court[9] held that the term "commercial activity" would mean something pertaining to commerce or connected with or engaged in commerce; mercantile; having profit as the main aim.

11. Hon'ble Supreme Court in *Sai Publication Fund*[10], while analysing the scope of the term 'business' as defined in Section 2(5A) of the Bombay Sales Tax Act, 1959 observed that mere sale of books pertaining to Saibaba of Shirdi on nominal charge to meet the cost could not be said to be 'business' as its main object was to spread the message of Saibaba and that the Trust was not carrying on trade, commerce etc. in the sense of occupation to be a dealer. Consequently, it is observed that that where the main and dominant activity cannot be termed as business, the ancillary activity cannot also be termed as business.

12. Supreme Court in the case of Ahmedabad Urban Development Authority[11], while examining the issue of eligibility to claim income tax exemption for charitable purposes, observed that the fee or cess, or other consideration is to provide an essential service, in larger public interest, such as water cess or sewage cess or fee, such consideration, received by a statutory body, would not be considered "trade, commerce or business" or service in relation to those.

13. The High Courts in Goa University[12] and Bangalore North University[13] held that the activities of university, which imparts education, cannot be termed as business and consequently not amenable to GST. The courts further observed that the fee charged by the universities, being in the nature of statutory fee, cannot qualify to be consideration.

14. Interesting to note that Delhi High Court in the case of Central Electricity Regulatory Commission[14] held that the regulatory functions discharged by statutory bodies do not fall within the scope of the word 'business'. It was further observed that regulatory fee charged cannot termed as consideration received in the course or furtherance of business. Similarly, sale of prospectus by university was held to be not a business activity[15].

15. Similarly, a view is possible that in case of a public trust engaged in the charitable or religious activities, is not engaged in business to attract levy fo GST as the activities would not fall within the scope of the phrase 'business'.

E. *Exemption from GST*

16. Assuming that the activities of a public charitable or religious trust could be termed as supply, following exemptions entries would be relevant in the context of such charitable institution. It appears from the clarifications issued by the

9 Laxmi Engg. Works v. P.S.G. Industrial Institute [1995] 3 SCC 583
10 (2002) 126 STC 288 (SC)
11 (2023) 4 SCC 561
12 Goa University vs. JCCGST (2025) 29 Centax 281 (Bom.)
13 Bangalore North University vs. Union of India [2025] 178 taxmann.com 234 (Karnataka)
14 2025 (95) G.S.T.L. 277 (Del.)
15 Banasthali Vidyapith [2015] 55 taxmann.com 462 (Rajasthan))

CBIC, the activities of trusts assumed to be taxable unless exempt[16]. However, an entry in exemption notification cannot itself to be considered that the said activity is leviable to tax. Exemption operations after levy[17], which shall be tested on the touchstone of Section 7.:

I.Entry No. 1[18] : Services by way of charitable activities by an entity registered under Section 12AA of the Income Tax Act. The phrase 'charitable activities' has been defined in a restrictive manner to mean as below:

charitable activities" means activities relating to -

(i) public health by way of,-

(A) care or counseling of

(I) terminally ill persons or persons with severe physical or mental disability;

(II) persons afflicted with HIV or AIDS;

(III) persons addicted to a dependence-forming substance such as narcotics drugs or alcohol; or

(B) public awareness of preventive health, family planning or prevention of HIV infection;

(ii) advancement of religion, spirituality or yoga;

(iii) advancement of educational programmes or skill development relating to,-

(A) abandoned, orphaned or homeless children;

(B) physically or mentally abused and traumatized persons;

(C) prisoners; or

(D) persons over the age of 65 years residing in a rural area;

(iv) preservation of environment including watershed, forests and wildlife;

Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic[19]. Similarly, spirituality is to discover what it is already, not to create, not to develop[20]. Yoga is a discipline to improve or develop one's inherent power in a balanced manner[21]. It appears that entities engaged in advancement of religion, spirituality or yoga would be termed as engaged in charitable activities, which is registered under section 12AA of the Income-tax Act, 1961 would be eligible for exemption from tax. It is interesting to note that an entity is considered as charitable institution, for the purpose of income tax exemption' only where its objective is not to carry on business.

16 C.B.E. & C. Flyer No. 40, dated 1-1-2018, C.B.I. & C. Circular No. 66/40/2018-GST, dated 26-9-2018 & 32/06/2018-GST, dated 12-2-2018
17 Peekay Rolling Mills 2009 (13) S.T.R. 305 (S.C.)
18 Notification No. 12/2017-CT(R) dated 28 June 2017
19 Commissioner H.R.E v. Sti Lakshmindra Thirtha Swamiar, Sri Shrirur Mutt., AIR 1954 SC 282
20 Chambers English Dictionary
21 Website of Ministry of AYUSH

II. Entry 13:Services of conduct of any religious ceremony and renting of precincts of religious place meant for general public subject to certain conditions and exceptions as below:

   (i) renting of rooms where charges are one thousand rupees or more per day;

   (ii) renting of premises, community halls, kalyanmandapam or open area, and the like where charges are ten thousand rupees or more per day;

   (iii) renting of shops or other spaces for business or commerce where charges are ten thousand rupees or more per month

III. Entry 66 & 74: Where educational institutions or healthcare services are run by trust, such services are exempt under entries 66 and 74 respectively.

IV. Entry No. 10 of Notification no. 9/2017-Integrated Tax (Rate), dated 28-6-2017, exempts import of services received by a charitable trusts registered under Section 12AA of Income-tax Act receives.

17. Conclusion: GST is a levy on the supply of goods or services or both in the course of business. Whether, an entity undertaking activities which could be termed as business has to be assessed based on facts and circumstances of each case. However, the decisions rendered under the erstwhile sales tax or under the income tax statutes would certainly be guiding factor, especially on the aspect of charitable activities. Further, where activities of trust are held to be leviable to GST, eligibility to the exemption entries summarized above could be examined.

Synopsis:

GST on public trusts have to be seen on the first principles as to whether the said activities would fit in the scope of supply in the course or furtherance of business. The wealth of decisions handed over under the erstwhile indirect tax laws and the Income tax laws show that charitable activities perse cannot be termed as business activities. The levy of GST on trusts has to be examined bearing in mind the said decisions. However, even if the activities are held leviable, certain supplies by such institutions are specifically exempted from tax.

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ART OF DRAFTING AND PLEADINGS IN GST

An American Poet Henry Longfellow said *"The heights of great men reach and kept, were not attained by sudden flight, but they, whilst their companions slept, were toiling upward in the night"*

The above words will equally apply to the Tax Advocates, Chartered Accountants, GST Practitioners and other Tax Professionals, as no doubt they will have toiled into the night to draft the writ petitions, replies to show cause notices, grounds of appeals etc.

The ***pen*** is ***mightier*** than the ***sword***. Confusion in a drafting can be astonish and result in unforeseeable consequences, surely that cannot be the intent while drafting.

I have been inspired by the talk on the topic aired on youtube by CA. Bimal Jain and drove to write this article.

But the Indian economy now has changed, and with that change has also come a new breed of both businessmen and tax professionals all over the Country. This modern approach ignores the maxim "***Law is for justice and not justice for law***", a principle which was historically applicable particularly to Tax cases. As a result, disputes arising from the orders passed by the Tax authorities to day can be long drawn out and expensive undertakings, whether parties seek to resolve them before a court or by arbitration.

Drafting is an art and not a mere skill and that every artist has his/her own way of doing it. Every Tax Professional/Practitioner must know the art of drafting. The primary objective of this article is to make the reader understand **what is drafting**, **why it is needed** in today's tax practice and **what are the basic points** to be kept in mind while drafting the replies to show cause notices, petitions, grounds of appeal etc.

This article does not intend to provide legal opinion, but just practical guidance for drafting.

Effective drafting entails understanding how the actual supply of goods or services or both will actually takes place, familiarity with applicable laws, circulars, notifications, press notes, relevant case laws and their implications, knowledge and command over language and the ability to concisely articulate these in a document and may continue to evolve during the life of the case.

Contradictory words in a petition, reply of objection shall result in much litigation, pain and expense for the clients. To put it in simple words, drafting skill is one's ability to express one's though process in writing. Metaphorically speaking, every case is like a new canvas for a draftsman. A Tax Professional (Painter) is supposed to paint his client's case on the canvas. The painter must be clear in his thoughts, artistic and the meaning of the painting must be conveyed to those who see it. On a practical note, the language and tone of every document must be clear and unambiguous. One should bear in mind that a document is never drafted for the academic pleasure of the draftsman. A document is a living thing – it has to live and face the scrutiny of several interested parties (the client, adjudicating authorities, courts etc.) Therefore, it has to be carefully crafted so as to protect client's interest to the utmost, be legally compliant and legible to all. Tax Professional has to be an excellent wordsmith and storyteller.

Tax Professional needs:

(a) Knowledge of GST Act and Rules;
(b) Knowledge about the client and its business;
(c) Analytical skills;
(d) Ability to read between the lines; and
(e) Foresightedness.

Pleadings:

"Pleading" is not defined under any of the fiscal laws. When it is not defined under the fiscal laws, one has to follow/consult the **'Code of Civil Procedure, 1908' (CPC).** According to Rule 1 of Order VI of CPC defined as **'Pleading'** shall mean plaint or written statement.

Pleadings being foundation of litigation must contain only relevant material by excluding irrelevant and unnecessary information. To gather true spirit behind a plea it should be read as a whole. This does not distract one from performing his obligations as required under a statute.

As per Rule 2 of Order VI of CPC – Pleading to state material facts and not evidence.

(1) Every pleading shall contain only a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be but not the evidence by which they are to be proved.
(2) Every pleading shall, be divided into paragraphs, numbered consecutively, each allegation being, so far as is convenient, contained in a separate paragraph.
(3) Dates, sums and numbers shall be expressed in a pleading in figures as well as in words.

Pleadings of parties being foundation of the case cannot be given up and set out a new and different case.

As per Rule 4 – Particulars to be given where necessary – In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, willful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading.

The above Rules of Order VI to the CPC are exemplary and according to need of the draftsman, the pleadings may change from case to case basis.

Since no book on drafting and pleadings in GST, one has to resort to his own style of drafting but following with rules. I am enumerating a few of such rules or points for the benefit of the readers. While venturing to draft a reply to the show cause notice, three components should bear in mind.

a) Analysis of Show Cause Notice;

b) Evidence or information and Grounds to issue Show Cause Notice;

c) Identifying the missing points in the Show Cause Notice.

To submit objections in reply to show cause notice, an opportunity shall be provided to the registered taxable person. Allowing time to file objections is affording an opportunity, in compliance with the principles of natural justice or otherwise it shall be treated as denial of the opportunity. *Audi Alteram Partem* principle should be followed. Subject to maximum of three adjournments can be granted by the GST authorities provided sufficient reasons shown.

The following points to be kept in mind while drafting the reply of objections or writ petitions etc.

i) After receiving the Show Cause Notice, one should read the Show Cause Notice like a student reads the question paper in the Examination Hall;

ii) One should understand the contents of the Show Cause Notice and note down the contentions averred by the authorities and jot down the point wise to enable to draft the reply;

iii) Ensure that all the points covered under the draft as reply to the Show Cause Notice, because the reply to the Show Cause Notice is **<u>heart</u>** to the litigation. The adjudicating authorities cannot go beyond the Show Cause Notice;

iv) It is most important to ensure that, the Show Cause Notice or Notices or Summons or Orders of assessment is served on registered taxable person through the specified mode of service;

v) And the said Show Cause Notice or Notices or Summons or Orders of assessment are duly signed by the authority as prescribed under Section 26(3) of the Act and as conferred under the Act.

vi) And the said Show Cause Notice or Notices or Summons or Orders of assessment are duly sent under Document Identification Number (which is mandated by CBIC) as issued by the Central Tax Department.

vii) Drafting should be in simple and lucid language, don't use any argumentative words or language.

viii) The points of defence should be point by point in a tabulated format, for easy and better understanding;

ix) The drafting should be confined to the law enunciated on the subject, unless it is demand the situation to refer to any case laws, that too the clear and direct bearing on the relevant subject, it is advised to refer such case laws only, if any iota of doubt arises in the mind of draftsman, then he/she should not resort to refer the case laws. Don't base on the head note of the case law alone, it is advised to read the entire text of case law for at least three times so that one can adjudge the facts of the case on hand and facts of the judgment;

x) List of dates and events should be given in a chronological order, which plays most important role in the drafting and pleadings.

Hon'ble Ladyship Ms. Justice Indira Banerjee, Supreme Court of India, advice to young practitioners:

1. When you get a brief, be fully prepared. Read the brief carefully in detail from the back sheet till the end, and find out the answer to every question that could arise.

2. Make a list of dates with corresponding page numbers and written notes of arguments. Look up the law.

3. Be ready with precedents. Only cite those judgments which are relevant and to the point.

4. Be punctual in Court, properly groomed and courteous.

5. Be respectful to the Court, but you need not be subservient to the Court.

6. Do not mislead the Court, have a professional approach. Be honest. Never lie before the Court.

As always suggests our beloved CA. S. Venkataramani ji,

(a) to spare two hours a day to look into the GSTN portal for the notices, orders;

(b) to read the law on the subject either direct tax or indirect tax or allied laws on every day basis;

(c) to meet the fellow fraternity members to discuss on the subjects once in a week.

The above a few in number.

Conclusion:

Rome was not built in a day. Drafting is something which can be learnt, cultivated and improved with practice. Like sportspersons or other artisans, drafting skills can also improve with time and experience. Finally, a good draftsman is one who is able to anticipate how a reply is likely to be interpreted by a Court or departmental officials and try and ensure that the Court will decide as per the clear intent of the parties which must be easily found in drafting.

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Wish you all a Happy Learning

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TAXABILITY OF GIFTS RECEIVED BY NON-RESIDENTS AND RNORS UNDER THE INDIAN INCOME-TAX ACT: A COMPREHENSIVE ANALYSIS

1. Introduction

In recent years, cross-border gifting has become a common feature in Indian households with members settled abroad. What was once a simple family arrangement where parents supporting children overseas, siblings transferring funds, or relatives giving gifts on life events, now sits within a detailed statutory framework. The reason is straightforward that the tax treatment of gifts has evolved from a peripheral issue to an important anti-avoidance tool in Indian tax law.

India taxes gifts not because every gift represents income in the traditional sense, but because the mechanism of a gift can be misused to move funds without leaving the usual tax trail. After the abolition of the Gift Tax Act, the legislature progressively enacted anti-abuse provisions: starting with section 56(2)(v), then sections 56(2)(vi) and 56(2)(vii), and culminating in the comprehensive regime under section 56(2)(x) from 1 April 2017.

A particular area of complexity concerns the treatment of gifts received by Non-Residents (NRs) and Not Ordinarily Residents (RNORs). Historically, a gift made by a resident to a non-resident outside India escaped tax altogether, simply because the income neither accrued nor was received in India under the old framework. As outward remittances increased and families increasingly structured global holdings, this gap became more pronounced. To address it, the Finance (No. 2) Act, 2019 introduced section 9(1)(viii), creating a deeming fiction that treats certain gifts made by a resident to a non-resident outside India as income accruing in India. The scope of this provision was further extended by the Finance Act, 2023 to cover RNORs as well.

These changes have had significant practical implications. Many taxpayers still assume that gifts to children abroad, or small family transfers made outside India, remain outside the Indian tax net. Others overlook that gifts of property and shares follow a distinct rule-set, and with growing information exchange and sharper enforcement, these gaps in understanding can give rise to genuine tax exposure.

From a compliance perspective, the issues extend beyond tax. A resident's foreign gift must align with FEMA, LRS limits, documentation norms, and where immovable property is involved, the benami law framework. Failure on any of these fronts can raise questions even when the underlying intention is bona fide.

Given the increasing mobility of Indian families and the frequency with which assets and funds now move across borders, clarity on the taxability of gifts in the hands of NRIs has become essential. This article examines the statutory structure, judicial thinking, and practical considerations, with a view to providing a clear and balanced understanding of the law as it stands today.

2. Statutory Framework: Gifts as Income

The point of departure is section 2(24)(xviia) of the Income Tax Act, 1961 ("Act"), which includes within "income" any sum of money or value of property referred to in section 56(2)(x). Although section 56(2)(x) is colloquially referred to as the "gift tax provision," the word *gift* does not appear anywhere in the section. This omission is deliberate. If the legislature had used the word "gift," transactions with token consideration (e.g., sale for ₹1) could escape scrutiny. Instead, the section focuses on the *receipt* of money or property without consideration, or for inadequate consideration, and taxes the entire receipt or differential subject to a threshold limit of ₹50,000.

Section 56(2)(x), in turn, taxes:

- Money received without consideration;
- Immovable property received without or for inadequate consideration;
- Specified movable property received without or for inadequate consideration;

subject to the established exceptions (e.g., relatives, marriage, inheritance, trusts for relatives).

However, for a non-resident recipient, this charge becomes operative only where such income is taxable under section 5 or section 9. Historically, this left a gap. The monetary gifts received *outside India* by a non-resident from a resident fell outside the Indian tax net.

3. The Finance (No. 2) Act, 2019: Deeming Offshore Gifts as Indian Income

To address this gap, the Finance (No. 2) Act, 2019 inserted section 9(1)(viii), effective from assessment year 2020–21, providing that:

'Income arising outside India, being any sum of money paid by a person resident in India to a non-resident or a foreign company on or after 5 July 2019, shall be deemed to accrue or arise in India.'

The provision makes three points explicit:

1. It applies only to monetary gifts.
2. It covers gifts received outside India.
3. The deeming fiction overrides the general principle that income arises where it is received or accrues.

This marked a significant shift, ensuring that offshore monetary gifts by residents could no longer be used as a mechanism for transferring funds outside the tax net.

4. Extension to RNORs: The Finance Act, 2023

The Finance Act, 2023 extended this deeming fiction to cover RNOR recipients as well. The amended clause now reads:

(viii) *income arising outside India, being any sum of money referred to in section 2(24) (xviia), paid by a person resident in India*

(a) on or after 5 July 2019 to a ***non-resident****; or*
(b) on or after 1 April 2023 to a ***person not ordinarily resident in India****.*

The accompanying Memorandum made the intent clear i.e. anti-abuse provisions were being expanded because RNORs, too, had begun receiving gifts from residents without being taxed.

Let's understand the "RNOR Blind Spot"

A returning Indian professional qualifies as RNOR in the year of return. His resident father gifts him ₹1 crore outside India from his Singapore bank account. Before April 2023, such a gift was outside the tax net because:

- the gift was received *outside India*, and
- RNORs were not covered by section 9(1)(viii).

After the 2023 amendment, the same gift becomes fully taxable, illustrating why RNORs must be conscious of their transitional tax status.

5. Scope of the Deeming Fiction – Only "Money", Not "Property"

Although section 56(2)(x) covers both monetary gifts and property, section 9(1)(viii) refers only to:

"any sum of money"
referred to in section 2(24)(xviia).

Therefore:

- Gifts of property situated outside India (foreign immovable property, foreign jewellery, shares of foreign companies not deriving value from India) are *not* covered.
- Only monetary gifts are covered when received abroad by a non-resident or RNOR.

Further, section 9(1)(i) says that –

"all income accruing or arising, whether directly or indirectly, through or from any ***business connection in India****, or through or from any* ***property in India****, or through or from any* ***asset or source of income in India****, or through the transfer of a* ***capital asset situate in India****."*

Accordingly, taxability under section 9(1)(i) is confined to income having a nexus with India, namely a business connection in India, property or assets or sources located in India, or the transfer of a capital asset situated in India.

Let's explore the "Airport Gift" Problem

Ms. Rita travels to the U.S. to visit his paternal uncle, who is a non-resident. Before leaving India, she withdraws ₹20 lakh from her Indian bank account and hands over the amount to her uncle on landing in New York.

Many taxpayers assume that if money is *handed over outside India*, it ceases to be taxable in India. However, after the insertion of section 9(1)(viii), the place of physical handover is irrelevant. The moment a resident gifts money to a non-resident, the amount (beyond ₹50,000 unless covered by the "relative" exemption) is deemed to accrue in India. Here the gift is taxable because the **payer is a resident** and the exception for relatives does not cover "uncle-nephew" relationships (as uncle is the recipient). The airport setting changes nothing, the tax follows the residency of the donor, not the location of the airport lounge.

The Case of Shares of a Foreign Company

A resident transfers shares of a Hong Kong company to his NRI brother. If the Hong Kong company does not derive substantial value from assets located in India, then the gift is outside the tax net, as section 56(2)(x) read with section 9(1)(viii) and Section 5(2) does not cover such a transfer. This is in contrast to gifts of shares of Indian companies or foreign companies with significant underlying Indian assets, which remain taxable.

These distinctions in above examples have significant implications for cross-border estate planning strategies.

6. Gifts Received *Inside India* by a Non-Resident

A crucial interpretational point relates to the tax treatment of gifts received **in India** by a non-resident. In such cases, the deeming fiction in section 9(1)(viii) serves no additional function, since the income is already chargeable under section 5(2)(a):

A non-resident is taxable on income received or deemed to be received in India.

Accordingly:

- If a non-resident receives money in India, the receipt is taxable under section 56(2)(x).
- If a non-resident receives immovable property situated in India, the taxability is automatic.
- If a non-resident receives movable property located in India, the situs of the asset triggers taxability.

Even constructive or deemed receipt triggers the tax charge.

Thus, the distinction is:

Location of Receipt	Taxability	Basis
Inside India	Always taxable (subject to exemptions)	Section 5(2)(a)
Outside India	Taxable only if donor is a resident and gift is "money"	Section 9(1)(viii)

This dual framework ensures a complete coverage of gifts received by non-residents, both within and outside India.

The "Return Gift" Made in India

An NRI son returns to India for a short visit and receives a monetary gift from his resident mother, transferred directly into his Indian NRO account.

Even though the son is an NRI, the gift is received in India. Under section 5, income received in India is taxable unless specifically exempt. Fortunately, a gift from a relative is exempt under section 56(2)(x). However, had the gift been received from a friend or distant acquaintance while physically present in India, the income would be taxable in India, despite his NRI status

7. Scope of "Immovable Property" Under Section 56(2)(x)

The term "immovable property" in section 56(2)(x) is restricted to:

"land or building or both."

Unlike section 269UA(d), it does not extend to:

- rights in land or building,
- tenancy rights,
- booking rights,
- development rights.

Judicial pronouncements have confirmed this narrower interpretation:

- *DCIT v. Tejinder Singh, [2012] 19 taxmann.com 4/50 SOT 391 (Kol.)*: tenancy rights not covered.
- *Yasin Moosa Godil, [2012] 20 taxmann.com 424 (Ahd. - Trib.)*: booking rights not covered.

Thus, if a donor transfers **rights** but not the **property itself**, section 56(2)(x) may not apply.

A useful illustration arises where an NRI receives tenancy rights in a commercial shop from a family friend without consideration. Although such rights may carry substantial economic value, they do not constitute "land or building or both". Since section 56(2)(x) does not extend to *rights in immovable property*, no tax is triggered on this transfer. This position aligns with the decisions in *Tejinder Singh(supra)* and *Yasin Moosa Godil(supra)*, where tenancy and booking rights were held to fall outside the scope of the provision.

8. Only Capital Assets Are Covered

CBDT Circular No. 1/2011 and the Explanatory Memorandum to the Finance Bill, 2010 clarify that section 56(2)(vii) applies only to capital assets. Section 56(2)(x) was inserted with effect from 1 April 2017 substituting, inter alia, section 56(2)(vii), and it adopts the same exhaustive definition of 'property' as 'the following capital asset of the assessee' which earlier applied under section 56(2)(vii). Having regard to this wording, as well as the legislative history and explanatory materials for the erstwhile clause (vii), it can be inferred that the scope of section 56(2)(x) is confined to the specified assets only where they constitute capital assets in the hands of the recipient, and does not extend to items held as stock-in-trade or otherwise falling outside section 2(14).

Judicial decisions:

- Ram Prasad Meen, 119 taxmann.com 217 (Jaipur - Trib.) [03-09-2020] – rural agricultural land (not a capital asset) outside scope.
- Trilok Chand, IT Appeal No. 449 (JP) of 2018, dated 26-5-2020] – stock-in-trade excluded.
- Satendra Koushik [2019] 106 taxmann.com 244 (Jaipur - Trib.) – land held as stock-in-trade outside scope.

Thus, if the property received does not constitute a capital asset in the hands of the recipient, section 56(2)(x) does not apply.

Consider a situation where an NRI receives rural agricultural land as a gift from a non-relative. Though the asset is immovable property, rural agricultural land is excluded from the definition of "capital asset" under section 2(14). Since section 56(2)(x) applies only to property that is a capital asset in the hands of the recipient, the provision does not get triggered. This view finds support in *Ram Prasad Meena (supra)*, where rural agricultural land was held to be outside the scope of section 56(2)(x).

9. Gifts by Non-Residents to RNORs and RNORs to Non-Resident – Not Covered

Section 9(1)(viii) applies only where the donor is a resident. Thus, if a non-resident gives a monetary gift abroad to an RNOR, the deeming fiction does not apply. However, if the RNOR receives the gift in India, section 5(2) triggers taxability. Similarly, where the RNOR is the donor and the non-resident is the donee, the deeming fiction under section 9(1)(viii) may not apply; taxability arises only if the gift is received in India pursuant to section 5(2).

Example:

A non-resident gifts USD 20,000 to an RNOR child. If the amount is received in the child's overseas bank account, section 9(1)(viii) does not apply and the amount is not taxable. If the same amount is credited to the child's Indian bank account, it becomes income received in India and is taxable under section 5(2), subject to the "relative" exception in section 56(2)(x).

10. Source of Funds is Irrelevant

The deeming fiction applies regardless of whether:

- The resident uses Indian-sourced income, or
- Foreign-sourced income.

The only determinants are:

- Donor's residence, and
- Recipient's residential status, and
- Location of receipt.

11. Interaction with Section 56(2)(x)

- **Preservation of Statutory Exemptions**

  Even where the deeming fiction under section 9(1)(viii) is attracted, thereby treating a gift of money received outside India from a resident as income accruing in India, the computation must still proceed strictly in accordance with section 56(2)(x). The deeming provision merely determines the situs of accrual; it does not override the substantive exemptions embedded in section 56(2)(x). Consequently, gifts received from specified relatives continue to enjoy full exemption; non-relative gifts up to ₹50,000 remain outside the tax net; and transfers on occasions such as marriage, inheritance, will, or transfers to or from certain trusts retain statutory protection. The legislative scheme therefore maintains the architecture of exemptions even while enlarging the jurisdictional reach of the charging provision.

- **Interplay Between Section 56(2)(x) and Sections 68 / 69A**

  The interaction of section 56(2)(x) with sections 68 and 69A has been the subject of extensive judicial consideration, and recent decisions provide useful clarity on the respective domains of these provisions.

  In *Ritu Jain* (ITAT Delhi, 2022), modest cash gifts received from siblings during a medical emergency were held to be genuine, supported by affidavits, bank trails, and a coherent factual narrative. The Tribunal accordingly deleted the addition under section 69A. A similar approach was adopted in *Manwani* (ITAT Mumbai, ITA No. 2733/Mum/2025), where gifts aggregating ₹89 lakh from close family members were accepted as exempt under the proviso to section 56(2)(x). The attempted addition under section 68 failed because the identity, creditworthiness, and genuineness of the donors stood clearly demonstrated.

  Conversely, in *Mrs. Deepa Bhatia v. ACIT* [2012] 20 taxmann.com 315 (Delhi) and *Smt. Veena Bhatia v. ACIT* [2012] 22 taxmann.com 150 (Delhi), documentation alone was deemed insufficient. In both cases, the donors had no demonstrated financial capacity, nor was there any plausible relationship or occasion to justify a gratuitous transfer. The additions were therefore upheld as unexplained money under section 68 or section 69A.

  Recent decisions such as *P.R. Ganapathy v. DCIT* [2022] 143 taxmann.com 122 (Madras) and *Nanesh Finance Corporation v. ACIT* (ITA No. 465/Hyd/2021, 26-10-2022) further highlight that implausible donor profiles, contradictory statements, and afterthought explanations vitiate the claim of a "gift". Where the assessee fails to discharge the burden of establishing genuineness, tax must follow under section 68 / 69A read with section 115BBE.

Taken together, the doctrinal framework is now reasonably settled: section 56(2)(x) governs the taxability of genuine gifts, whereas sections 68 and 69A apply when the assessee is unable to establish identity, creditworthiness, or genuineness. The provisions thus operate in distinct lanes, depending on the factual quality of the transaction.

- **Interaction with GAAR**

  Section 56(2)(x) is a specific anti-abuse rule (SAAR) aimed at taxing receipts without or for inadequate consideration. GAAR, however, sits at a higher plane as a general anti-avoidance code under section 95, designed to recharacterize arrangements lacking commercial substance. The Telangana High Court's ruling in *Ayodhya Rami Reddy Alla v. PCIT* (2024) 163 taxmann.com 277 highlights that GAAR may apply even where a SAAR exists, provided the statutory mischief remains unaddressed.

  Although the case concerned bonus-stripping rather than gratuitous transfers, the reasoning has wider implications. The existence of section 56(2)(x) does not, by itself, immunize a gift transaction from GAAR scrutiny. Where a purported "gift" is merely the outer form of a tax-avoidance arrangement devoid of commercial substance, GAAR may step in to rewrite the transaction. The two provisions therefore operate cumulatively rather than exclusively.

- **Interplay with the Benami Transactions (Prohibition) Act, 1988**

  Section 56(2)(x) and the Benami Act address different, though sometimes overlapping, policy concerns. While section 56(2)(x) focuses on taxing gratuitous transfers, the Benami Act targets the concealment of beneficial ownership behind a proxy holder. A transaction labelled as a "gift" may therefore attract both regimes.

  A fully disclosed gift may still be treated as benami if the donee is a mere name-lender, lacks financial independence, or plays no economic role in the transaction. Conversely, even where a transfer is genuine and not benami, the tax consequences under section 56(2)(x) may follow if the statutory thresholds are crossed. Compliance with one statute is thus not a defence under the other. Both provisions operate concurrently: one ensures that gratuitous transfers are taxed; the other ensures that transfers are not used to obscure ownership or launder unaccounted funds. This dual statutory design reflects an overarching legislative intent to tax unearned accretions and simultaneously prevent the layering of assets through sham conduits.

12. Treaty Interaction

Where the recipient is resident in a jurisdiction with which India has a subsisting tax treaty, the taxability of sums deemed to accrue in India under section 9(1)(viii) must be examined in light of the relevant DTAA. In most treaties, such receipts may fall under the residuary "Other Income" article (commonly Article 22 or Article 23). Where the treaty allocates exclusive taxing rights to the State of residence, or otherwise provides a more favourable outcome, the treaty prevails over the domestic deeming fiction by virtue of section 90(2) of the Act.

13. Practical Considerations in NRI Gift Planning

In practice, several issues need careful handling:

Documenting the Gift

- Gift deed,
- Bank remittance proofs,
- Explanation of relationship (for exemptions),
- Donor's financial statements (to establish creditworthiness),
- If required, FEMA compliance documentation.

14. FEMA Considerations

While the article focuses on taxation, gifts from residents to NRIs must also comply with the Foreign Exchange Management (Remittance of Assets) Regulations, 2016 and other sector-specific FEMA regulations.

15. Avoidance of Circular Money Movement

Courts have repeatedly struck down arrangements where:

- money first flows into the donor's account from a third person, and
- is immediately transferred to the donee.

However, if the relationship exemption applies and the flow is transparent (as in *Mehul Jadhavji Shah, ITAT Mumbai, ITA No. 191/Mum/2019*), courts may accept the transaction.

16. Conclusion

The taxability of gifts received by non-residents and RNORs now hinges on a combination of statutory provisions:

- Section 56(2)(x) defines the tax base.
- Section 5 determines taxability based on situs of receipt.
- Section 9(1)(viii) plugs the earlier gap relating to offshore receipts of monetary gifts from residents.
- Judicial interpretation shapes the meaning of "property," "immovable property," and "capital asset."
- DTAAs may override domestic law where applicable.

With these changes, cross-border gifting structures require far greater attention to residential status, nature of the asset, situs of receipt, and treaty positions. Taxpayers and practitioners must now approach gift transactions-as part of broader estate planning and wealth migration with a deeper awareness of these multi-layered rules to avoid unintended tax exposure.


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OECD 2025 UPDATE TO THE MODEL TAX CONVENTION RELATING TO CROSS-BORDER REMOTE WORK

Background

The Organisation for Economic Co-operation and Development ("OECD") recently on 18th November 2025 published its 11th update to the Model Tax Convention, marking a substantive refresh to the commentary since its last update in 2017. The most notable update is in relation to the changes to Article 5 (Permanent Establishment), which provides clarifications to address the constitution of fixed place of business in the context of cross-border working from home or remote work.

Constitution of fixed place of business or Permanent Establishment ("PE") as per Article 5

The business income of a foreign enterprise is taxable in the source country if it has a PE in that country. A PE is defined to mean a fixed place of business through which the enterprise's business is carried on. A fixed place PE requires the physical presence of the enterprise in the source country and is generally tested based on two criteria -

(i) **Degree of permanence** – the foreign enterprise must have some continuity of presence in the place of business. The OECD Commentary on Article 5 suggests a threshold of six months of presence as a measure of degree of permanence.

(ii) **Right of disposal** - the foreign enterprise should have the right to use the premises for its business activities, not merely access it intermittently or incidentally.

Even if these conditions are met, no PE is constituted if the activities carried out are preparatory or auxiliary in nature.

Concept of home offices and impact on PE exposure

- In a case where the employee of a foreign enterprise carried on work from his home office in another country, a question arises whether the home office constitutes a PE of the foreign enterprise in that country.

- The 2017 OECD commentary offered limited guidance on the PE characterization of home offices. Para 18 and 19 of the commentary (which are now deleted) acknowledged that a home office does not automatically constitute a PE and the same needs to be evaluated based on facts and circumstances of each case. Further, it explained that a PE may be constituted only where (i) the use of the home office is regular, not intermittent; (ii) the foreign enterprise effectively requires the employee to use such home office by not providing office space, and (iii) the home office is "at the disposal" of the employer.
- The concept of work from home/remote work became a mandate during the COVID-19 pandemic. In response, the OECD provided updated guidance on the tax implications of remote work arrangements in January 2021 which suggested that a home office used by a remote worker **should not** constitute a PE because of the extra-ordinary nature of the use which is a result of public health measure and not actually triggered by an enterprise's requirement. This suggestion was based on the understanding that the activity of the respective employee would either lack the necessary degree of permanency or continuity to be considered "fixed" or because the business would have no access or control over that employee's home office. In addition, as long as the employer provided an office which in normal circumstances is available to its employees, the fixed place of business risk was considered to be reduced.
- Post the COVID pandemic, it is a fact that companies provide flexibility for employees to work from 'anywhere', which at times may extend beyond the home country, thereby creating a potential PE exposure for the foreign enterprise in the country from which the employees render service. The OECD, acknowledging the need to provide greater clarity, has now updated the commentary on Article 5.

The new 2025 guidance

- The 2025 update provides detailed guidance on constitution of PE where an individual who works for a foreign enterprise from his home or another place such as a second home, a holiday rental, the home of a friend or relative etc (referred to as "other relevant place") - such premises are neither the premises of the enterprise nor of its customer, supplier or associated enterprise.
- New guidance has been inserted in paragraphs 44.1-44.21 of the Article 5 whereby it is clarified that if the carrying on of business activities of an enterprise at working from home or other relevant place is intermittent or incidental, that place will not be considered a place of business of the enterprise. However, continuous use over an extended period may indicate otherwise.
- As a welcome move, the OECD commentary has brought out a two-fold test as follows -

(a) First - a safe harbour threshold, whereby the home or other relevant place would not be considered a PE if the individual worked from that home or relevant place **for less than 50 per cent of their total working time for that enterprise**

over the course of any twelve-month period commencing or ending in the fiscal year concerned.

(b) Second - If the 50 per cent threshold is fulfilled, PE is not automatically constituted and needs to be analysed based on whether there is **any commercial reason** for the individual's presence in the other country such as facilitating business with local customers or suppliers or any other parties in that country. The logic is that in such a case where physical presence is important for the enterprise, if the home office is not available, the enterprise might use alternatives such as a rented office. It is also clarified that short occasional client visits or an engagement that is minor in the context of the overall business relationship with that client do not establish a commercial reason. There must be a clear link between the individual's presence at a location and the enterprise's business activities through that location. Further, the mere presence of customers and suppliers in that same country as the home office should not lead to the automatic conclusion that there is a commercial reason. A commercial reason does not exist if the enterprise enables the individual to work from the Home Office solely to obtain or retain their services, or to reduce costs.

Some of the examples of commercial reasons for business activities in the other country are-

- Holding meetings with the customers of the enterprise
- Building a new customer base or identifying business opportunities
- Identifying new suppliers, managing supplier relationships, or undertaking, monitoring or managing supplier contracts
- Interacting with customers or suppliers in real time or near real time in different time zone(s) (e.g. call center, virtual IT support, or medical services)
- Accessing business-relevant expertise
- Collaborating with other businesses
- Performing services for customers in the other country that require their physical presence (e.g., training or repairs at the customer's premises)
- Interacting with employees or other personnel of the enterprise or its associated enterprises.

In the absence of other facts and circumstances that would suggest otherwise, an enterprise would not have a fixed place of business if the 'commercial reason' test is not satisfied. An exception provided to this is where an individual, such as a consultant, is the only or primary person carrying out the business activities of the enterprise, in which case the home office would generally constitute a PE. The update also gives several examples that further clarify the above guidance.

In summary, the updated commentary focuses on the following tests for constituting a PE – (i) whether the activities are intermittent, and if they are not, (ii) whether the employer has a commercial reason for the activities to be undertaken in the other Contracting State.

India's reservations and recent jurisprudence on PE

- India does not agree with the conditions, including time threshold and commercial reason, detailed in the Commentary and considers that in such a case, individual's home can be considered as being at the disposal of the enterprise, and constituting a PE of the enterprise.
- It would also be pertinent to note the following decisions of the Supreme Court ("SC") in the context of PE –

– *Hyatt International Southwest Asia Ltd*[1] - In this case, the taxpayer, a Dubai based company, entered into an agreement with Indian hotel to provide strategic planning and 'know-how' to ensure that hotel was developed and operated efficiently. The SC held that since the taxpayer exercised pervasive and enforceable control over hotel's strategic, operational, and financial dimensions, the hotel premises constituted a PE in India. A PE was held to be constituted by looking at 'economic substance' over 'legal form', even though the presence of employees did not exceed threshold and there was no exclusive space at the disposal of the taxpayer.

– *Formula One World Championship Ltd*[2] - The SC held that the circuit constituted PE of the taxpayer in India. The SC held that the question of PE had to be examined keeping in mind the duration of event, which was for limited days, and since the taxpayer had full access of the circuit for entire duration through its personnel, the same constituted its PE in India.

- As India is a non-member, the OECD convention and commentary are not binding (at best, persuasive) in India. Through its reservations, India has clearly asserted its right to tax income arising out of business operations carried out in India. Further, the evolving jurisprudence on the PE landscape also seem to place more reliance on economic substance of operations carried on in India.

Key takeaways

- A key takeaway from the update is that the 'disposal test' criterion in the context of home office to constitute a PE seems to be done away with, since most homes are not accessible to other employees of the enterprise and are under greater degree of control of the individual, making it challenging to determine whether the activities conducted there are sufficient to constitute a fixed place of business for that enterprise.
- It is interesting to note that the new guidance only addresses the qualification of home offices as a fixed place PE but does not offer any detailed guidance on the application of "preparatory or auxiliary" exclusions other than stating that

1 [2025] 176 taxmann.com 783 (SC)
2 [2017] 80 taxmann.com 347 (SC)

preparatory or auxiliary activities do not create a PE and does not deal with dependent agent PE ("DAPE") considerations at all.

- The OECD model convention does not have 'Service PE' clause but this is there in several Indian DTAAs. Hence in the Indian context, one must also bear in mind service PE implications, i.e. whether the foreign enterprise can be seen as rendering service through presence of employees in the source country.
- Companies operating in India or having employees working from home offices in India must bear in mind India's reservations against the safe harbour threshold and other conditions in the commentary as well as the recent Indian jurisprudence cited above while analysing their PE exposure and in framing their employee related policies.
- Lastly, companies must also have clear written contracts with employees to demonstrate 'no commercial reasons' test. They must audit their practices including tracking the cross-border home-office patterns and durations, calibrate contracting authority and client-facing activity to avoid any PE triggers.

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ANALYSIS OF PROVISIONS OF RE-ASSESSMENT CONTAINED IN INCOME TAX ACT, 2025

Income Tax Act, 2025 has already become an statute and will come in force on 01.04.2026. Accordingly, assessment of income earned w.e.f. 01.04.2026 will be taxed as per provisions of above Act. Broadly there is no change in the provisions governing assessment and taxation of income and provisions contained in the Income Tax Act, 2025 (hereinafter called "the new Act") are the same as are contained presently in the Income Tax Act, 1961(hereinafter called "the old Act").

An important change contained in the new Act is in regard to assessment of income on the basis of 'tax year' instead 'assessment year'. As per the provisions of old Act income of a financial year is chargeable to tax in the Assessment year which is the financial year following the year of which income is assessable. For example, income of F.Y.2024-25 is assessable in the A.Y.2025-26, which is the following financial year. Now, as per the new Act the concept of tax year has been introduced which means the same financial year for which income is assessable. For example, income of F.Y.2026-27 will be assessable in the T.Y.2026-27, meaning thereby same financial year for which income is assessable.

Under the provisions of old Act an assessee is required to file return of income in term of section 139 of the Act by the due dates specified therein which dates falls within the relevant assessment year. Provisions corresponding to provisions of section 139 are contained in section 263 of the new Act and due dates specified for filing returns of income are the dates falling in the financial year succeeding the relevant tax year. For example, due dates for filing returns for T.Y.2026-27 will be dates following in F.Y.2027-28. It may be stated that due dates for filing returns of income are the same in the new Act as are under the Old Act.

Presently, assessment is to be made by the Assessing Officer in terms of sections 143 and 144 of the Income Tax Act. Corresponding provisions of new Act are sections 270 and 271. These provisions are also broadly the same as are presently contained in section 143 and 144 of the Act.

Section 147 of the old Act provides for reassessment of escaped income subject to the conditions provided in sections 148 to 153 of the old Act. Corresponding provisions contained in the new Act are sections 279 to 286. Provisions contained in each of the sections of new Act are being discussed hereinafter and reference to provisions of old Act is also been made for better understanding of new provisions.

Section 279 of the new Act which is corresponding to section 147 of the old Act reads as under: -

(1) If, in the case of an assessee, any income chargeable to tax has escaped assessment for any tax year (herein and in sections 280 to 286 referred to as the relevant tax year), the Assessing Officer may, subject to the provisions of sections 280 to 286, assess or reassess such income or recompute the loss or the depreciation allowance or any other allowance or deduction for the relevant tax year.

(2) For the purposes of assessment or reassessment or recomputation under sub-section (1), the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, irrespective of the fact that the provisions of section 281 have not been complied with.

On comparison of above section with section 147 of old Act it is noticed that in this section reference has been made to tax year instead of reference to assessment year in section 147. It is for the reasons that the basis for assessment has been changed under the new law from assessment year to tax year. Further, provision contained in sub-section (2) presently is contained by way of Explanation to section 147 of the old Act. Apart from above changes reference has been made to section 280 to 286 which sections govern the conditions for initiating and completing reassessment proceedings.

Section 279 is the section which empowers the Assessing Officer to assess or reassess such income which has escaped assessment. Sub-section (2) specifically provides that in case the Assessing Officer comes to know of any escaped income during the course of proceedings, he can assess same also irrespective of the fact that notice for reassessment was not issued with respect to the same. Proceedings for reassessment in terms of section 279 are subject to conditions and time limits provided in sections 280 to 286 of the Act.

Section 280 of the new Act, which is corresponding to section 148 of the old Act provides for issuance of notice to the assessee for making assessment or reassessment for escaped income. The section provides that the aforesaid notice shall be accompanied by a copy of order passed u/s 281(3) of the new Act. Order referred to in section 281(3) is the order which the Assessing Officer is required to pass for initiating reassessment proceeding after providing an opportunity to the assessee and considering reply given by him, which provisions are presently contained in section 148A of the old Act. Present section 148 contains 3 Provisos and 3 sub-sections. In section 280 of the Act there is no Proviso and it contains 6 sub-sections. Sub-sections (1) to (4) contain similar provisions as are presently contained in section 148 of the Act. There are, however, certain changes in provisions contained in sub-sections (5) and (6) of section 280 of the new Act, which sub-sections are reproduced hereunder: -

"(5) No notice under this section shall be issued without prior approval of the specified authority, where the Assessing Officer has received-

(a) information under the scheme notified under section 260; or

(b) directions from the Approving Panel under section 274(6); or

(c) any finding or direction contained in an order passed by any authority, Tribunal or court in any proceeding under this Act by way of appeal, reference or revision or by a Court in any proceeding under any other law.

(6) For the purposes of this section and section 281, the information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment means-

(a) any information in the case of the assessee for the relevant tax year as per the risk management strategy formulated by the Board from time to time;

(b) any audit objection to the effect that the assessment in the case of the assessee for the relevant tax year has not been made as per this Act;

(c) any information received under an agreement referred to in section 159 of this Act;

(d) any information made available to the Assessing Officer under the scheme notified under section 260;

(e) any information which requires action in consequence of the order of a Tribunal or a Court;

(f) any information in the case of the assessee emanating from the survey conducted under section 253, other than under sub-section (4) of the said section;

(g) any directions in the case of the assessee given by the Approving Panel under section 274(6);

(h) any finding or direction contained in an order passed by any authority, Tribunal or court in any proceeding under this Act by way of appeal, reference or revision, or by a Court in any proceeding under any other law."

It is stated in regard to above sub-sections that scope of term 'information' provided in sub-section (6) has been enlarged by specifically including items (g) and (h) and correspondingly it has also been provided in sub-section (5) that in case of re-assessment on the basis of information referred to in above mentioned two items, notice u/s 280 shall not be issued without prior approval of the specified authority.

Information referred to in clauses (a) to (f) of sub-section (6) are same as in the existing section 148 of the Act and same refers to information based on risk management strategy, audit objection, information received u/s 159 (corresponding to sections 90 and 90A of the old Act), information received under the scheme notified u/s 260 (corresponding to section 135A of the old Act), information consequence of the order of Tribunal or a Court and information emanating from the survey conducted u/s 253 (corresponding to section 133A of the old Act). In regard to enlargement of scope of information by inserting clauses (g) and (h) it is stated that any direction in the case of the assessee given by the Approving Panel u/s 274(6) and any finding or direction contained in an order passed by any Authority, Tribunal, or Court shall also be considered to be information for the purpose of issuing notice for reassessment u/s 280 of the Act. It may be stated that Section 274 provides for reference by the Assessing Officer to the Pr. Commissioner or Commissioner in regard to impermissible avoidance arrangement, which matter is further referred to the Approving Panel by the Pr. Commissioner or the Commissioner for taking decision in the matter and order is passed by the Approving Panel under sub-section (6) of section 274 of the Act, which section corresponds to Section 144BA of the old Act, issuing directions to the Assessing Officer in respect of that particular assessment year and also for any earlier year. Pursuant to such directions the Assessing Officer is required to reassess income of any earlier year. Similarly, an assessment is required to be reopened for reassessment pursuant to directions contained in an order of Tribunal or the Court. These two items have been specifically included in the definition of information so as to avoid any litigation in this regard, otherwise it was possible to contend that notice u/s 280 can be issued in respect of information defined in the aforesaid section and therefore, no notice could be issued in respect of above two items. Further, sub-section (5) provides that no notice shall be issued in case where information is on the basis of scheme notified u/s 260 (corresponding to Section 135A of the old Act) and in the cases of information referred to in clauses (g) and (h) of sub-section (6). Under the existing provisions the aforesaid condition of issuing notice with prior approval was only with respect to notice issued on the basis of information received under the scheme notified under section 135A since items (g) and (h) were not included in the scope of information defined in this section.

Section 281 of the new Act, which is corresponding to Section 148A of the old Act provides for the procedure to be followed by the Assessing Officer before issuing the notice u/s 280 of the Act. Sub-sections (1) to (3) provides that the Assessing Officer shall issue a notice to the assessee accompanied by the information in his possession which suggests that income has escaped assessment providing him an opportunity to show cause why notice for reassessment should not be issued u/s 280 of the Act. The assessee may submit his reply and the Assessing Officer after taking into consideration the material available with him and reply submitted by the assessee shall pass an order with prior approval of the Specified Authority determining whether or not it is a fit case to issue notice u/s 280 of the Act. Sub-section (4) provides that provisions of this section shall not be applicable where income chargeable to tax has escaped assessment in the cases where information is received under the scheme notified u/s 260 (corresponding to section 135A of the old Act), directions of Approving Panel u/s 274(6) or any finding or direction contained in the order of Tribunal or Court. As per existing section 148A of the Act procedure provided therein is not applicable only in case of information received under the scheme notified u/s 135A of the Act. Now, since the scope of information has been enlarged with reference to above mentioned two items, procedure provided in section 281 has also been made inapplicable in respect thereof.

On the basis of above amendments made in Sections 280 and 281 of the new Act it can be stated that in the cases of reassessment based on directions of Approving Panel and directions contained in order of tribunal or court, earlier the Assessing Officer was required to follow the procedure provided in Section 148A of the old Act before issuing notice u/s 148 of the Act. Now, this procedure has been done away in regard to above items also and the

Assessing Officer is empowered to issue notice u/s 280 (corresponding to section 148 of the old Act) without following the procedure provided in Section 281 of the new Act

Section 282 of the new Act provides time limits for issuing notices under Sections 280 and 281 of the Act and the section reads as under: -

1. No notice under section 280 shall be issued for the relevant tax year,-

   (a) if four years and three months have elapsed from the end of the relevant tax year, unless the case falls under clause (b);

   (b) if four years and three months, but not more than six years and three months, have elapsed from the end of the relevant tax year, unless the Assessing Officer has in his possession books of account or other documents or evidence related to any asset or expenditure or transaction or entry which shows that the income chargeable to tax, which has escaped assessment, amounts to or is likely to amount to fifty lakh rupees or more.

2. No notice to show cause under section 281 shall be issued for the relevant tax year,-

   (a) if four years have elapsed from the end of the relevant tax year, unless the case falls under clause (b);

   (b) if four years, but not more than six years, have elapsed from the end of the relevant tax year, unless the income chargeable to tax which has escaped assessment, as per the information with the Assessing Officer, amounts to or is likely to amount to fifty lakh rupees or more.

3. No notice under section 280 or 281 shall be issued within one year from the end of any tax year."

As per sub-section (2) of above Section, notice u/s 281 providing an opportunity to an assessee to show cause why notice u/s 280 should not be issued on the basis of information available with the Assessing Officer can be issued before end of four years from the relevant tax year if escaped income is likely to be less than Rs.50 lacs and within a period of 6 years if it is likely to be Rs.50 lacs or more. Under the existing provisions of section 149 of the Act limits provided are 3 years and 5 years respectively from end of the assessment year. Change in the number of years from 3 to 4 and 5 to 6 has no impact and time limit continues to be same since now the basis of assessment has been changed to tax year from the assessment year. It can be understood with example that if the tax year is 2026-27 the assessment year for the same would have been 2027-28. Period of three years from the end of the assessment year will be 31.03.2031 and same will be the date ending four years from end of the tax year. Accordingly, there is no change in the time limit provided for issuing notice u/s 281 of the Act. Time limits provided for issuing notice u/s 280 is 3 months later than the time limits provided for issuing notice u/s 281 of the Act which is the time limit provided in the present law for issuing notice u/s 148 of the Act. Further, in order to apply the extended time limit of 6 years there is also a condition that the Assessing Officer should have in his possession books of accounts or other documents or evidence related to any asset or expenditure or transaction or entry which shows that income chargeable to tax has escaped assessment.

This is the same condition which is presently provided in section 149 of the Act. Sub-section (3) has further been inserted in section 282 of the new Act which provides that no notice under section 280 / 281 shall be issued within 1 year from the end of any tax year. This is a new condition provided in section 282 of the new Act and same was not there in section 149 of the old Act. It may, however, be stated in this regard this condition is for the reason that in the following year the assessee is required to file return of income for the tax year and if need be the Assessing Officer can also issue notice to the assessee u/s 268(1) (corresponding to section 142(1) of the old Act) for filing of return till the end of the following financial year and therefore, there is no need to resort the provisions of reassessment till then. Though, specific provision was not there in the present law but the courts have taken a view that till the time is available for filing return in the normal course and assessment can be completed as per normal provisions of the Act reassessment proceedings cannot be initiated.

Section 283 of the new Act is corresponding to section 150 of the old Act. The present Section 150 provides for initiating proceedings for reassessment for the purposes of making an assessment or reassessment in consequence of or to give effect to any finding or direction contained in an order passed by any authority in any proceedings under this Act by way of appeal, reference, or revision or by a court in any proceeding under any other law. In case, reassessment proceedings are initiated in above case time limit provided in section 149 of the old Act is not applicable subject, however, to the condition that reassessment proceedings would have been within the time limit if would have been initiated at the time when the order which was subject matter of appeal, reference or revision, as the case may be, was passed. The present provisions of Section 150 have been retained as it is in Section 283 of the new Act. There is, however, a further addition in the scope thereof that case of reassessment based on directions issued by Approving Panel u/s 274(6) of the new Act has been included and accordingly, time limit for reassessment providing in section 282 of 4 years and 6 years will not be applicable in case of directions of Approving Panel also apart from the fact that time limit will not be applicable in case of order of tribunal or court in appeal, reference or revision.

Section 284 of the new Act is corresponding to section 151 of the old Act and it provides that "Specified Authority" for the purposes of Section 280 and 281 shall be Additional Commissioner or the Additional Director or the Joint Commissioner or the Joint Director. Specified Authority for this purpose also continues to be same as presently provided in Section 151 of the old Act. It may, however, be stated that prior to 01.09.2024 Specified Authority for the purpose of Sections 148 and 148A were Pr. Commissioner or Principal Director or Commissioner or Director if assessment was being reopened within 3 years and Pr. Chief Commissioner or Principal Director General or Chief Commissioner or Director General in case reopening was beyond 3 years from the end of the assessment year.

Section 285 of the new Act which is corresponding to Section 152 of the old Act provides that if an assessee is able to show that he had been assessed on an amount not lower than what he would be rightly liable to be assessed even if the alleged escaped income is taken into account, reassessment proceedings will not be proceeded with. These provisions continue to be same as in the existing law.

Section 286 provides for time limits for completion of assessment in different circumstances, including time limit for completion of assessment where reassessment proceedings have been taken up in terms of Section 279 of the new Act. This section is corresponding to Section 153 of the old Act. As at present, assessment in case of proceedings initiated u/s 279 of the new Act for reassessment has to be completed within 1 year from the end of the financial year in which notice u/s 280 has been served. Notice u/s 280 can be served within 4 years and 3 months or 6 years and 3 months depending upon quantum of likely escaped income from end of the tax year. It has been seen in the past that notices are generally issued by the department towards end of the time limits. Since time limit will be expiring by 30th June of the relevant financial year, the period of one year from end of the financial year in which notice is issued will provide period of 21 months to the Assessing Officer to complete the assessment. In view of the policy of the government to get the assessments finalised on an early date, providing period of 21 months to the Assessing Officer for completing the assessment is unwarranted. The law should have provided period of 12 months for completing the assessment from the end of the month in which notice is issued u/s 280 of the Act.

In conclusion, it is stated that though the provisions broadly continue to be same there are minor changes which have been discussed hereinabove. Further, it may be stated that broad principles for reassessment will continue to be same and therefore, case law developed with reference to old provisions may be applicable in certain matters. It is hoped that newly inserted provisions, will avoid litigation as emphasis has been to make the provisions clear and unambiguous under the new Act.

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APPROVAL UNDER SECTION 153D OF THE INCOME-TAX ACT, 1961 IN SEARCH AND SEIZURE CASES

1. Fiscal laws in India, cast dual responsibility on administers of law. Indian Constitution mandates that the State shall collect only the correct amount of tax due to the State. Under the Income-tax Act, 1961 the Assessing Officers have the responsibility to adjudicate and collect the proper amount of tax. In exercise of their power, mandated under the Act, they have wide powers, which at times, may be exceeded by them, to collect higher revenue. To be fair to the tax payer checks and balances have been put in the statute itself. There are many instances of such checks and balances e.g. authority of the Assessing Officer to reopen the assessment, levy of penalty, framing assessments in certain cases etc.

2. Search on the assessee is one of the actions on the assessee to find out whether the assessee has made proper disclosure of his income. It is a harsh step and taken in a miniscule number of cases. In such cases it is absolutely essential that the action of the Assessing Officer, results in proper assessment of income. The law requires that in such cases, assessment framed by an officer below the rank of Joint Commissioner of Income tax should be with the prior approval of the Joint Commissioner of Income Tax.

3. Section 153D was inserted in the Income-tax Act, 1961 by the Finance Act, 2007 w.e.f. 1st June, 2007 mandating that no order of assessment or reassessment shall be passed by an Assessing Officer below the rank of Joint Commissioner, in certain cases where Search has been conducted under section 132 or requisition is made under section 132A. This section has undergone amendments from time to time. The text of Section 153D at the time of introduction read as under:

153D. *No order of assessment or reassessment shall be passed by an Assessing Officer below the rank of Joint Commissioner in respect of each assessment year referred to in clause (b) of section 153A or the assessment year referred to in clause (b) of sub-section (1) of section 153B , except with the prior approval of the Joint Commissioner.*

At the relevant point of time assessment of income in case of search or requisition was governed by section 153A to setion 153D of the Act.

3.1. The statutory provision has been amended from time to time, in view of amendment to the provisions relating to assessment in cases where search and seizure have been conducted or requisition has been made. The present amended provision reads as under:

153D. *No order of assessment or reassessment shall be passed by an Assessing Officer below the rank of Joint Commissioner in respect of each assessment year referred to in clause (b) of sub-section (1) of section 153A or the assessment year referred to in clause (b) of sub-section (1) of section 153B, except with the prior approval of the Joint Commissioner:*

Provided *that nothing contained in this section shall apply where the assessment or reassessment order, as the case may be, is required to be passed by the Assessing Officer with the prior approval of the Principal Commissioner or Commissioner under sub-section (12) of section 144BA.*

3.2. The Memorandum explaining the provisions of the Finance Bill 2007, in relation to the proposed section 153D reads as follows:

Assessment of search cases-Orders of assessment and reassessment to be approved by the Joint Commissioner

Under the existing provisions of making assessment and reassessment in cases where search has been conducted under section 132 or requisition is made under section 132A, no approval for assessment is required.

It is proposed to insert a new section 153D to provide that no order of assessment or reassessment shall be passed by an Assessing Officer below the rank of Joint Commissioner except with the previous approval of the Joint Commissioner. Such provision is proposed to be made applicable to orders of assessment or reassessment passed under clause (b) of section 153A in respect of each assessment year falling within six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted under section 132 or requisition is made under section 132A. It is further proposed to make the provision applicable to orders of assessment passed under clause (b) of section 153B in respect of the assessment year relevant to the previous year in which search is conducted under section 132 or requisition is made under section 132A. The provisions of the said new section shall be applicable in case of a person referred to in section 153A and also in case of other person referred to in section 153C.

This amendment will take effect from 1st June, 2007. [Clause 41]

3.3. The provisions of section 153D, as introduced by the Finance Act, 2007 were explained in Circular No. 3 0f 2008 issued on 12.03.2008 and reads as follows:

50. Assessment of search cases-Orders of assessment and reassessment to be approved by the Joint Commissioner.

1. *The existing provisions of making assessment and reassessment in cases where search has been conducted under section 132 or requisition is made under section 132A, does not provide for any approval for such assessment.*
2. *A new section 153D has been inserted to provide that no order of assessment or reassessment shall be passed by an Assessing Officer below the rank of Joint Commissioner except with the previous approval of the Joint Commissioner. Such provision has been made applicable to orders of assessment or reassessment passed under clause (b) of section 153A in respect of each assessment year falling within six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted under section 132 or requisition is made under section 132A. The provision has also been made applicable to orders of assessment passed under clause (b) of section 153B in respect of the assessment year relevant to the previous year in which search is conducted under section 132 or requisitioned is made under section 132A.*
3. *Applicability - These amendments will take effect from the 1st day of June, 2007.*
4. The rationale of seeking prior approval under Section 153D of the Act, is to provide an in-built protection to the tax payer against arbitrary or unjust exercise of power by the Assessing Officer in search assessment cases. The section dispels any doubt whether the provision is optional. The legislative intent is absolutely clear. Section 153D is mandatory and absence of prior approval is fatal to the assessment framed. It could be argued that a valid approval under section 153D grants jurisdiction to the Assessing Officer to frame assessment. An assessment order in absence of a valid approval shall be invalid.
5. The CBDT, keeps issuing instructions and guidelines to the officials for proper administration of the Act. Directorate of Income Tax issued a Manual of Office Procedure in 2003, in relation to search and seizure assessments. In Volume II, under chapter 3 dealing with Assessment Procedure (Search and Seizure), para 9 at page 45 deals with Assessment Procedure. The said para reads as under:

9. Approval for assessment: An assessment order under Chapter XIV-B can be passed only with the previous approval of the range JCIT/ADDL.CIT. (For the period from 30-6-1995 to 31-12-1996 the approving authority was the CIT.) The Assessing Officer should submit the draft assessment order for such approval well in time. The submission of the draft order must be docketed in the order-sheet and a copy of the draft order and covering letter filed in the relevant miscellaneous records folder. Due opportunity of being heard should be given to the assessee by the supervisory officer giving approval to the proposed block assessment, at least one month before the time barring date. Finally, once such approval is granted, it must be in writing and filed in the relevant folder indicated above after making a due entry in the order-sheet. The assessment order can be passed only after the receipt of such approval. The fact that such approval has *been obtained should also be mentioned in the body of the assessment order itself.*

6. Specific instructions have been issued for granting approval to the JCIT/Addl. CIT. A bare reading of the instructions mentioned above clearly conveys that:

(i) Draft assessment order should be submitted by the Assessing Officer, well in time.

(ii) Submission of draft assessment order must be docketed in the order sheet.

(iii) Copy of draft assessment order and covering letter must be filed in the miscellaneous record folder.

(iv) Supervisory Officer must give an opportunity of being heard to the assessee, at least one month before the time barring date.

(v) The approval granted must be in writing, filed in miscellaneous records folder and due entry in order sheet.

(vi) Assessment order can be passed only after receipt of approval.

(vii) Factum of obtaining approval must be mentioned in the body of the assessment order.

7. Despite issuing instructions for obtaining approval, the manner and format in which approval has to be granted have not been specified. The absence thereof, has often led to prolonged litigation. A number of issues have been dealt with by the Courts and the different Benches of Tribunal. The important one are cited hereunder.

8. Issues dealt with by High Courts.

i) Approval is a pre-requisite - Order passed by the Assessing Officer without approval of Joint Commissioner was held to be bad in law.

An assessment order under S. 153C can be passed by Income Tax Officer only after obtaining prior approval under S. 153D of Joint Commissioner in as much as compliance of S. 153D requirement is absolute therefore order passed by the Assessing Officer without approval of Joint Commissioner was held to be bad in law. (AY. 2007-08)

PCIT v. Sunrise Finlease (P.) Ltd. (2018) 252 Taxman 407/ 171 DTR 237/ 305 CTR 421(Guj.) (HC)

> ***Assistant Commissioner of Income-Tax V Serajuddin And Co. (2023) 454 ITR 312 (Orissa) – SLP dismissed in Assistant Commissioner of Income-Tax V Serajuddin And Co. (2024) 463 ITR 698(SC)***

ii) Approval is to be granted for each assessment year separately -

Careful and conjoint reading of section 153A(1) and section 153D leave no room for doubt that approval with respect to "each assessment year" is to be obtained by the Assessing Officer before passing the assessment order under section 153A.

Principal Commissioner of Income-Tax and another v Subodh Agarwal (2023) 450 ITR 526(All.)

iii) Validity of Approval - Application of Mind – Approval granted to a large number of cases – On a single day

It was humanly impossible for the approving authority to pursue and apply his independent mind to appraise the material on one day in respect of a large number of assessee.

Principal Commissioner of Income-Tax and another v Subodh Agarwal (2023) 450 ITR 526(All.)

Principal Commissioner of Income-Tax and another v Siddarth Gupta (2023) 450 ITR 534(All.)

iv) Validity of Approval - Application of Mind - Casual and Mechanical Approval – Approval without application of mind is bad in law.

Approval granted in a casual and mechanical manner and without application of mind is bad in law.

PCIT v. Shreelekha Damani (Smt.) (2019) 307 CTR 218/ 174 DTR 86 (Bom.) (HC)

Assistant Commissioner of Income-Tax V Serajuddin And Co. (2023) 454 ITR 312 (Orissa) – SLP dismissed in Assistant Commissioner of Income-Tax V Serajuddin And Co. (2024) 463 ITR 698(SC)

Principal Commissioner of Income-Tax V Anuj Bansal (2024) 466 ITR 251(Delhi) – SLP dismissed in Principal Commissioner of Income-Tax V Anuj Bansal (2024) 466 ITR 254(SC)

v) Approval granted without application of mind – No substantial question of law arises and defect is Not curable under section 292B -

Tribunal's finding that there was no application of mind, is a finding of fact and therefore no substantial question of law arises. The High Court further held that it was not an exercise dealing with an immaterial matter which could be corrected by taking recourse to section 292B of the Act.

Principal Commissioner of Income-Tax V Anuj Bansal (2024) 466 ITR 251(Delhi) – SLP dismissed in Principal Commissioner of Income-Tax V Anuj Bansal (2024) 466 ITR 254(SC)

vi) Validity of Approval - Question of validity of approval goes to the root of the matter and could have been raised at any time.

The question of validity of approval goes to the root of the matter and could have been raised at any time.

PCIT v. Shreelekha Damani (Smt.) (2019) 307 CTR 218/ 174 DTR 86 (Bom.) (HC)

vii) No mention of approval sought / granted – In assessment order – Assessment order was silent on issue of approval from JCIT/ Addl. CIT

Assessment order was silent on issue of approval from JCIT / Addl. CIT. Tribunal held that approval was granted Mechanically without application of mind. High Court upheld Tribunal's order.

Assistant Commissioner of Income-Tax V Serajuddin And Co. (2023) 454 ITR 312 (Orissa) – SLP dismissed in Assistant Commissioner of Income-Tax V Serajuddin And Co. (2024) 463 ITR 698(SC)

viii) Approval challenged in Writ before High Court – Writ not admitted The writ petition was filed against an order of the Commissioner (Appeals) contending that sanction granted under section 153D of the Income-Tax Act, 1961 by virtue of a single request in almost 35 cases including that of the assessee. High Court dismissed the writ petition holding that the assessee had an alternative and effective remedy by way of an appeal before the Income-tax Appellate Tribunal. SLP of assessee was also dismissed. (A.Y.2009-10)

Tirupati Buildings and Offices Pvt. Ltd. v PCIT (2023) 452 ITR 282 (Delhi)(HC). Affirmed in Tirupati Buildings and Offices Pvt. Ltd. v PCIT (2023) 452 ITR 284 (SC)

9. Orders by Income Tax Appellate Tribunal

Over the years, numerous orders have been passed by various benches of ITAT. Various issues have been decided therein. These are summarised hereunder:

(i) Documents submitted along with draft assessment order:

When search is conducted on an assessee, evidences are collected which may indicate undisclosed income. The Investigation Wing prepares an Appraisal Report and forwards the same to the Assessing Officer, suggesting the issues to be examined during assessment proceedings. The Assessing Officer during course of assessment collects further evidences and often also examines other persons to find out the undisclosed income. The Assessing Officer also issues notices to the assessee seeking clarification and replies. All these documents along with seized material are to be forwarded to the Approving Authority, who in turn is required to examine them and come to conclusion whether the draft assessment order is made on the basis of documents on record. Non forwarding of entire record would be fatal as the Approving Authority, without examining the entire record, can not be said to aware of all facts.

(ii) Approval granted in Mechanical manner of Rubber stamping, without application of mind:

If the draft assessment order is approved without going through the entire record and simply approving the draft assessment order and not indicating that he has perused the record and draft assessment order, the same may amount to granting approval in mechanical manner without application of mind.

(iii) Consolidated approval – Separate approval for each assessment:

Search often leads to assessment or reassessment of many assesses, who were searched, assessment for a number of years is framed, which determine the escaped income in different years. Invariably in such cases approval is sought for all the assesses at the fag end when assessment is getting time barred. A consolidated approval for a number of assesses for different years through a common approval is held to be bad in law, holding that separate approval ought to have been granted for each assessment.

(iv) Non recording of fact of seeking approval in the Order Sheet.

If the Order Sheet of assessment proceeding does not indicate that the draft assessment order was forwarded to the Approving Authority, the assessee may take a stand that in absence of compliance of instructions issued by CBDT, the approval granted being in contravention of instructions is bad in law and also that the Approving Authority has granted the approval without going through the record and the approval has been granted in a mechanical manner.

(v) Not affording opportunity of hearing to the assessee.

The Manual of Office Procedures, referred herein earlier, directs that an opportunity should be granted to the Assessee before the approving authority grants approval. Assessee should ask granting such opportunity. If opportunity is not granted, the order could be challenged on the ground of not following instructions.

Before parting away - Very recently, on 21.11.2025, the ITAT Allahabad Bench has passed a very detailed order running to 189 pages, on the issue, in the case Jyoti Mediservices Pvt. Ltd. V DCIT. Crux of the order is:

The primary issue revolves around the validity of the approval granted under Section 153D of the Income Tax Act, which mandates prior approval from the Joint Commissioner before passing assessment or reassessment orders in cases of search or requisition.

Key points

1. **Approval under Section 153D**: The order discusses whether the approval granted by the Joint/Addl. Commissioner of Income Tax (JCIT/Addl. CIT) under Section 153D was valid and whether it was granted after due application of mind. The appellants argue that the approval was given mechanically without proper examination of the draft assessment orders and relevant materials.

2. **Legal Precedents**: Multiple case laws and judgments from various High Courts and the Supreme Court, emphasizing that approval under Section 153D must not be a mechanical exercise were cited. Thrust of argument was that the approval must reflect the application of independent mind and due diligence by the approving authority. Failure to meet these requirements renders the approval invalid.

3. **CBDT Guidelines**: Guidelines issued by the Central Board of Direct Taxes (CBDT) in its Manual of Office Procedure, which outline the process for granting approval under Section 153D was referred to and relied upon. These guidelines stress the importance of submitting draft assessment orders well in advance, documenting the approval process, and ensuring the approving authority applies their mind to the materials and reasoning provided.

4. **Tribunal Observations**: The Income Tax Appellate Tribunal (ITAT) has previously quashed assessment orders where approvals under Section 153D were found to be mechanical or lacking application of mind. The Tribunal emphasized that the approving authority must independently verify the draft assessment orders and ensure compliance with legal and procedural requirements.

5. **Court Decisions**: Several High Court and Supreme Court judgments that support the principle that approval under Section 153D must be a thoughtful and non-mechanical process were relied upon. These judgments highlight the importance of protecting taxpayers from arbitrary or unjust assessments.

6. **Case-Specific Details:** Detailed account of the approval process in the specific cases under appeal, including communications between the Assessing Officer and the JCIT/Addl. CIT have been taken note of. The appellants argued that the approvals were granted in haste, without sufficient time for proper examination of the materials.

7. **Conclusion**: The order concludes that approval under Section 153D must involve due application of mind and cannot be a mere formality. If the approval is found to be mechanical or lacking proper consideration, it is invalid and can lead to the annulment of the assessment orders.

The list of cases decided by ITAT is large, only the issues emerging have been highlighted in this write up.

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TIMELINES FOR COMPLETION OF ASSESSMENT FOR CASES UNDER THE DRP ROUTE

The Indian Judiciary is currently dealing with an extremely interesting and nuanced tax issue on the timelines available for completion of the assessment in cases where the taxpayers have adopted for resolution of disputes under the Dispute Resolution Panel ('DRP') route.

Section 153 of the Income-tax Act, 1961 ('the Act') prescribes the timelines for completion of assessments, including timelines for completion of assessments in case of remand by Appellate Authorities. Section 153(3), inter alia, provides a time limit of 12 months (after April 1, 2019; earlier 9 months) for issuance of assessment orders pursuant to a remand by the Income-tax Appellate Tribunal.

Section 144C of the Act prescribes the procedure to be followed where an eligible assessee (Non-resident taxpayer or resident taxpayer with a transfer pricing adjustment) opts to resolve disputes through the DRP [instead of filing appeal before the Commissioner of Income-tax(Appeals)].

Section 144C of the Act, prescribes for issuance of a draft assessment order ('DAO') with proposed variations in case of an eligible assessee. The eligible assessee would have the option to opt for the DRP route by filing of objections within 30 days of receipt of the DAO:

a) Where the eligible assessee does not file its objections within 30 days or where the eligible assessee accepts the adjustments - The Assessing Officer ('AO') is required to issue the final assessment order ('FAO') within a period of one month (from the end of the month of acceptance by assessee or lapse of the 30 day window) under section 144C(4) ***notwithstanding anything contrary contained in section 153 of the Act.***

b) Where the eligible assessee opts to file objections before the DRP - The DRP is required to issue its directions within nine months (from the end of the month of receipt of the DAO) as per section 144C(12) of the Act. Thereafter, the AO is required to issue the FAO within a period of one month (from the end of the month of receipt of DRP directions) as per section 144C(12) ***notwithstanding anything contrary contained in section 153 of the Act.***

The crux of the controversy involves a question as to whether the time provided for the DRP proceedings under section 144C of the Act must fit within the timelines prescribed for completion of assessment under section 153 or whether the time provided for DRP proceedings under section 144C is additionally available over and above the timelines prescribed under section 153 of the Act.

The Madras High Court in the case of Roca Bathroom Products [[2022] 445 ITR 537 (Madras)] had adjudicated the issue in favour of the taxpayer. The Madras High Court held that the timelines provided for the DRP proceedings under section 144C of the Act do not override the timelines provided under section 153 of the Act and the assessment would have to be completed within the timelines provided under section 153 of the Act. The department has filed a special leave petition ('SLP') before the Supreme Court, which SLP is yet to be disposed-off.

The Bombay High Court in the case of Shelf Drilling [2023] 457 ITR 161 (Bom.)] following the decision of the Madras High Court in the case of Roca Bathroom Products adjudicated the issue in favour of the taxpayer. The Supreme Court had adjudicated the department's SLP [(SLP (Civil) Nos. 20569-20572 of 2023)] and has delivered a split-verdict. The Supreme Court has directed the matter be referred to the Chief Justice of India for constitution of a larger bench ***to reconsider the issues afresh.***

In this article, we have discussed the facts of the case and the Supreme Court's ruling in the Shelf Drilling Case.

Facts of the Case

- The taxpayer is a foreign company engaged in the business of shallow water drilling for clients engaged in the business of oil and gas industry.
- The taxpayer had filed its return of income, which was selected for scrutiny assessment proceedings under section 143(3) of the Act. The AO passed an order under section 143(3) read with section 144C(13) of the Act on October 30, 2017.
- The taxpayer preferred an appeal an appeal against the FAO before the Income-tax Appellate Tribunal ('ITAT'), which remanded the matter to the AO for fresh adjudication *vide* order dated October 04, 2019.
- Pursuant to such remand, the Assessing Officer passed a DAO on September 29, 2021, after considering the submissions of the taxpayer.
- The taxpayer filed objections before the DRP under section 144C(2) of the Act, on October 27, 2021, and simultaneously filed a writ petition before the Bombay High Court, against the DAO dated September 28, 2021.

In the writ petition, the taxpayer contended that no FAO could be passed now as the period of limitation has expired on September 30, 2021 under section 153(3) of the Act read with the provisions of Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 ('TOLA') and notifications issued thereunder.

- The Bombay High Court, relying on the Madras High Court's ruling in the case of Roca Bathroom Products, held the matter in favour of the taxpayer. Aggrieved by this decision, the Revenue preferred a Special Leave Petition before the Supreme Court.

Supreme Court's Ruling

Verdict in favour of the taxpayer - Justice Nagarathna, J's judgment

Justice Nagarathna, J opined that the DRP proceedings under section 144C of the Act must be completed within the timelines prescribed under section 153 of the Act for completion of assessment proceedings. In reaching the above conclusion, Justice Nagarathna J made the following key observations:

- Section 143 of the Act as well as section 144C of the Act deal with the passing of assessment orders depending on the category to which the assessee belongs; if the assessee is an eligible assessee section 144C(1) would apply, and in all other cases section 143(3) of the Act would apply.
- Non-obstante clause contained in section 144C(1) must be read in the context of the entire Act. The said ***non-obstante clause overrides section 153 to allow for issuance of a DAO in case of an eligible assessee and not issuance of a FAO***.
- The non-obstante clauses in sections 144C(4) and 144C(13) of the Act expressly refers to section 153 of the Act as regards the period of limitation prescribed therein. This would imply that the time-limit of one-month for issuance of the FAO under section 144C(4) / section 144C(13) of the Act would apply irrespective of the limitation period stipulated in section 153 of the Act.
- Section 144C and section 153 of the Act need to be read harmoniously. Even when the Assessing Officer has to follow the procedure prescribed under Section 144C of the Act, ***the same has to be commenced and concluded within the timelines prescribed under section 153 of the Act.***
- Whether revenue has adequate time to deliver on the statutory obligations under the DRP mechanism cannot have a bearing on the interpretation of the Act. If statute grants a beneficial option to the taxpayer, exercising such option should not result in being placed at a disadvantage of extended timelines for open litigations.

Verdict in favour of the department - Justice S C Sharma's judgment

Justice S C Sharma opined that the timelines provided under section 144C of the Act ***for issuance of the FAO is in addition*** to the overall limitation period provided under section 153 of the Act for completion of the assessment proceedings. In reaching the above conclusion, Justice S C Sharma made the following key observations:

- Section 144C is a special code for eligible assessees with clear non-obstante provisions in select sub-sections;

- Timelines contained in ***section 153 applies only to the issuance of DAO under section 144C(1) of the Act***. Timelines under section 144C(4)/(13) for issuance of the FAO are independent and additional to those prescribed under section 153.
- The proceedings before the DRP are initiated at the option of the taxpayer and hence, the time spent before DRP cannot be considered as delay at the end of Revenue.
- Explanation 1 to section 153 which provides for exclusion of certain periods for completion of assessment applies for certain situations where the AOs quasi-judicial role is eclipsed and is revested subsequently. In case of DRP, AO's executory role is not eclipsed and hence such provisions have no relevance in DRP proceedings.
- Narrow reading of timelines under section 153 of the Act defeats Parliament's intent of creating DRP mechanism and does not provide the Revenue has sufficient time and opportunity to assess income.
- Upholding taxpayer's contention would lead to catastrophic consequences with potential loss of INR 1.3 lakh crores to the Revenue.

Way forward

The split verdict of the Supreme Court in the Shelf Drilling Case would have no binding value either on the taxpayers or on the department. As on date, the larger bench of the Supreme Court is yet to be constituted and the matter is not yet listed for hearing.

From a practical perspective, various Benches of the tribunals are are currently adjourning the matters given the pendency of both the cases at the Supreme Court.

The stakeholders are keenly awaiting the Supreme Court's verdict with considerable interest. The Department in the Shelf Drilling case has contended before the Supreme Court that a ruling in favour of taxpayers would lead to a potential revenue loss of INR 1.3 lakh crores.

The Supreme Court's judgment in the above cases is expected to finally resolve the longstanding debate on the interaction between sections 153 and 144C of the Act, i.e., whether the limitation prescribed under section 153 of the Act, applies only to the DAO or extends to the FAO as well. The ruling is anticipated to bring much needed clarity on limitation principles in International Tax and TP cases and to help unlock the significant backlog of matters pending before various appellate forums on this issue.