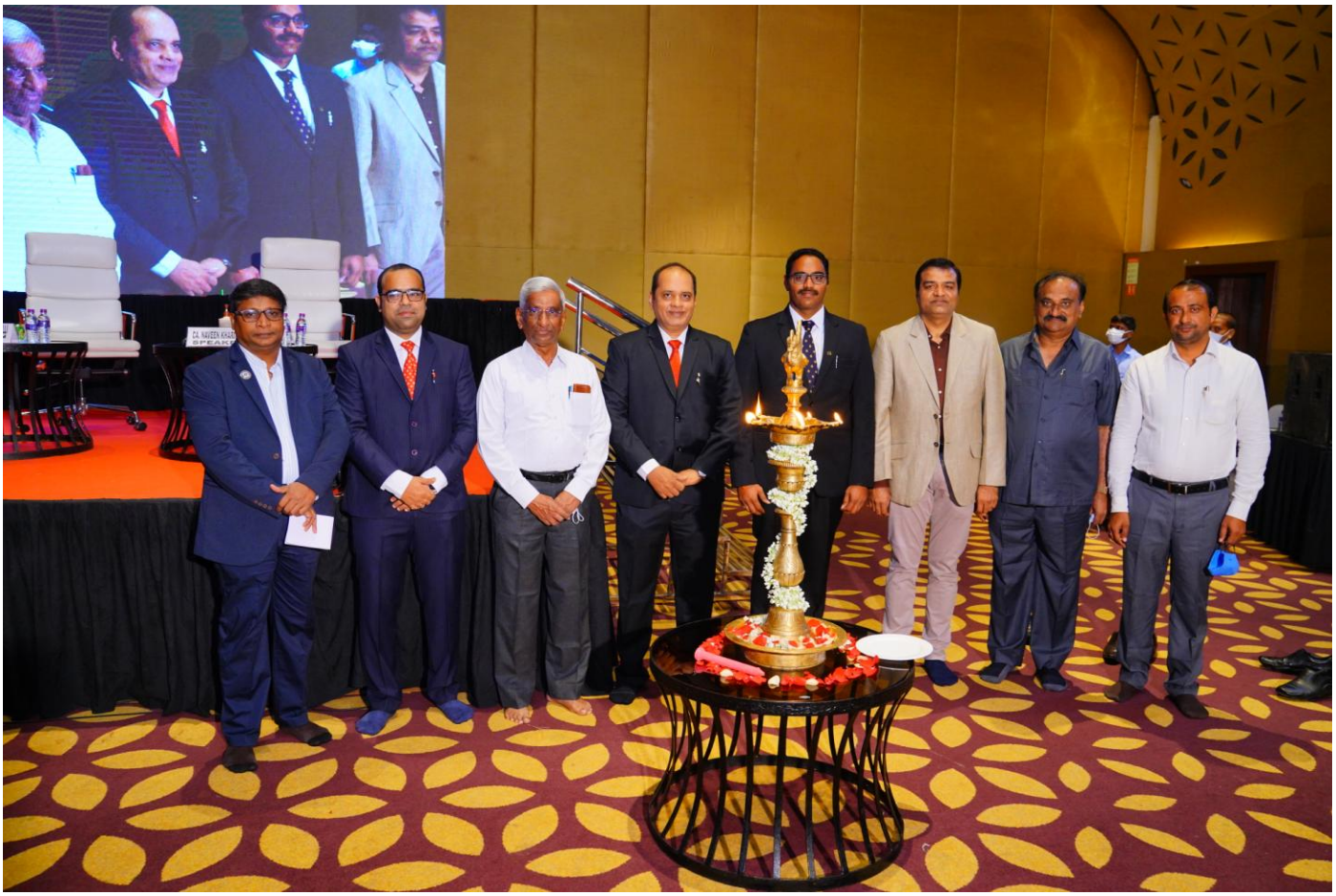
The Institute of Chartered Accountants of India

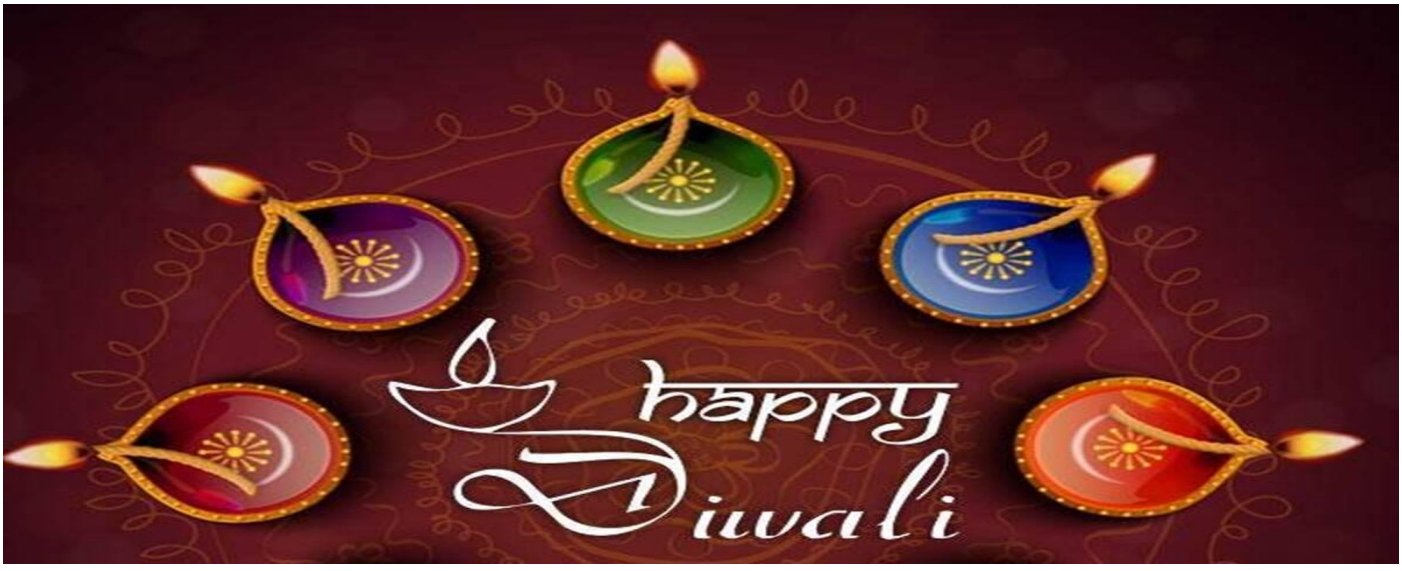
(Setup by an Act of Parliament)

Hyderabad Branch of SIRC

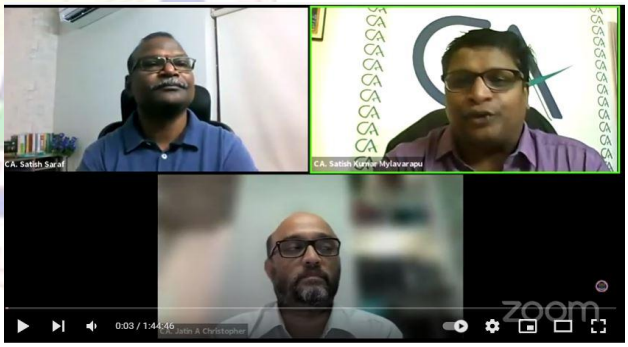
E-Newsletter

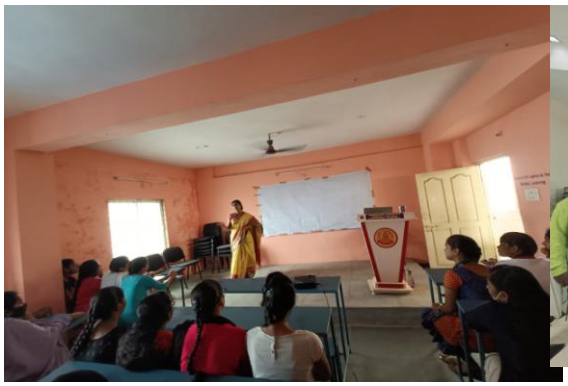
www.hydicai.org | Volume : 13 / issues: 4 / November, 2021 | hyderabad@icai.org

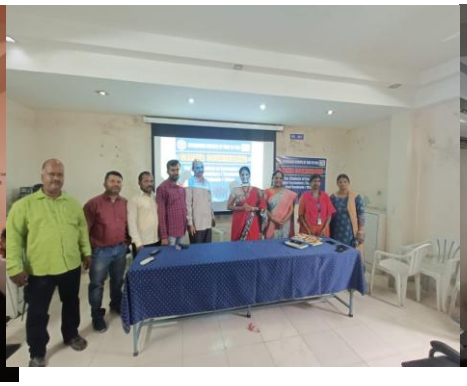


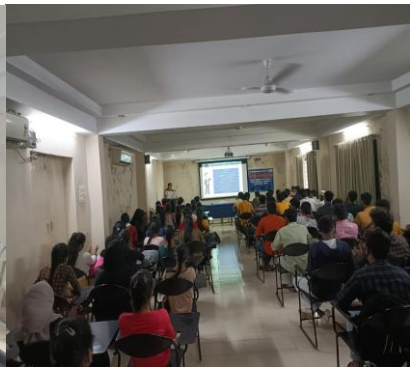


Resource Persons at Virtual CPE Meetings of Hyderabad Branch of SIRC of ICAI









Chairman Writes

Dear Professional Colleagues,

We take this opportunity to wish each one of you a Happy Diwali.

CA. Machar Rao Meenavalli
Chairman

The month of November is expected to be a busy month, as many of us will be busy with various reports and returns under the statute. Let us all gear up our resources to meet these time bound assignments and ensure that the same is completed within the timelines. We also urge the members to be cautious, as the threat of Covid-19 is still looming.

Hyderabad Branch of SIRC has planned series of programmes on various topics in the month of November and the details of the same are also published elsewhere in the newsletter. We request all the members to participate and make the programmes a success.

During the month of October 2021, we conducted various programmes at the branch which were well received by the members. I thank the members for their continued support which has encouraged us to do such programmes.

ICAI has announced the schedule of forthcoming December Exam Schedule and the details regarding the same are also hosted in the website www.icai.org. ICAI has also given extension for old syllabus students wherein the students can attempt exams in old syllabus for the forthcoming exams. We at Hyderabad branch are always supportive of student cause and in this connection we have extended the timings of students reading room for the benefit of students. Team Hyderabad Branch conveys its best wishes to all the students appearing in December 2021 exams.

Let me also emphasis that our profession will require our best efforts so that we keep the flag of our Alma mater Fly High. I also urge all our professional brethren to make all efforts in giving our best to the profession.

Signing off with a quote:

"Start by doing what's necessary, then what's possible; and suddenly you are doing the impossible" – Saint Francis

Yours Sincerely,

CA. Machar Rao Meenavalli
Chairman.hyd@icai.in

Virtual CPE Programmes for the month of November, 2021

Day & Date	Timings	Topic	Resource Person	CPE	Free	Venue
Saturday 06th Nov, 21	5PM to 7PM	Value of Supply & Time of Supply of Goods & Services	CA. V S Sudhir	2Hrs	Free	Online Platform
Second Saturday 13th Nov, 21	5PM to 7PM	Input Tax Credit, Blocked Credits, Reversal & Relavance of GSTR-2A & GSTR-2B	CA. Raghavender K	2Hrs	Free	Online Platform
Saturday 20th Nov, 21	5PM to 7PM	Other important topics in CGST & IGST	CA. Venkat Prasad P	2Hrs	Free	Online Platform
Saturday 27th Nov, 21	5PM to 7PM	Records & all topics relating to Registration	CA. Suresh Choudhary	2Hrs	Free	Online Platform

Principles for Show Cause Notice

CA Satish Saraf &
CA Venkat Prasad. P

The principles to be followed in issuing a show cause notice are neither provided in any statute nor one can find all the principles at one place. Particularly in fiscal laws, whoever issue show cause notices, are following any principles for issuing show cause notices, especially when issued by the executive is a big question in the minds of every one is, to protect the interest of revenue or otherwise? In many cases because of non-adhering by the executive has to certain principles, business community & practitioners will try to extrapolate the short comings in the show cause notice and try to come out of the situation. This has been addressed by non-other than Hon'ble apex court of the country, way back in 2010, but even today the situation has not changed to better.

Justice G. S. Singhvi & Justice Asok Kumar Ganguly of Supreme Court of India in the case of Oryx Fisheries Private Limited vs Union of India & Ors on 29 October, 2010, have referred the Judgement of the same court in the case of Kranti Associates Private Limited Vs. Masood Ahmed Khan & Ors on 8 September, 2010, which was also delivered by the same judges. In Kranti Associates case these two judges have reviewed more than 30 previous judgements of Supreme Court, other courts and including English cases and codified the principles for issue of Show Cause Notice. Therefore, I want everyone to enlighten themselves by knowing, understanding the judgements (supra).

Principles for Show Cause Notice:

The following are the "Principles" laid down by the Apex Court in the judgements supra for issue of Show Cause Notice by any authority such as Judicial, quasi-Judicial & Administrative.

A. In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.
B. A quasi-judicial authority must record reasons in support of its conclusions.
C. Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.
D. Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.
E. Reasons reassure that discretion has been exercised by the decision maker on relevant grounds and by disregarding extraneous considerations.
F. Reasons have virtually become as indispensable a component of a decision making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.
G. Reasons facilitate the process of judicial review by superior Courts.
H. The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the life blood of judicial decision making justifying the principle that reason is the soul of justice.

I. Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.

J. Insistence on reason is a requirement for both judicial accountability and transparency.

K. If a Judge or a quasi-judicial authority is not candid enough about his/her decision making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.

L. Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or `rubber-stamp reasons' is not to be equated with a valid decision making process.

M. It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision making not only makes the judges and decision makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in Defence of Judicial Candor (1987) 100 Harward Law Review 731-737).

N. Since the requirement to record reasons emanates from the broad doctrine of fairness in decision making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. See (1994) 19 EHRR 553, at 562 para 29 and Anya vs. University of Oxford, 2001 EWCA Civ 405, wherein the Court referred to Article 6 of European Convention of Human Rights which requires, "adequate and intelligent reasons must be given for judicial decisions".

O. In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of "Due Process".

Apart from the above principles, the authority / office issuing show cause notice must follow the principles of natural justice which are enshrined in the jurisprudence, towards the delivery of justice.

(For queries/feedback: ss@ssnc.in, venkataprasad@hiregange.com)

Survey, Search and Seizure Update

CA. Hari Agarwal &

CA. Vivek Agarwal

1. ***Where assessee filed an application under section 132B for release of jewellery seized during search conducted upon her under section 132 and revenue failed to pass an order on same within stipulated period of 120 days from date on which last authorization for search was executed, entire seized jewellery was to be released to assessee***

Kamlesh Gupta v. Union of India

[2021] 130 taxmann.com 494 (Delhi)

Section 132B of the Income-tax Act, 1961 - Search and seizure - Retained assets, application of (Release of seized assets) - Assessment years 2018-19 and 2015-16 - During course of search and seizure operation under section 132 conducted upon assessee, jewellery and cash of certain amount was seized - Assessee filed an application under section 132B for release of seized jewellery - No action was taken by revenue on said application filed by assessee within stipulated period of 120 days from date on which last authorisation for search was executed under section 132 - Whether provisions of section 132B got triggered, once period of 120 days from date of last of authorisation for search under section 132 expired - Held, yes - Whether, therefore, entire seized jewellery was to be released to assessee - Held, yes [Paras 4 and 4.5] [In favour of assessee]

2. **Penalty u/s 271AAA cannot be levied where the assessee has not failed to specify the manner of deriving undisclosed income per se in the absence of any question directed towards the assessee/deponent of the statement in this regard.**

BASANT KUMAR JAIN VS DEPUTY COMMISSIONER OF INCOME TAX

(2021) 63 CCH 0082 RaipurTrib

3. **Reassessment-Validity-Reopening based on information gathered during course of statement recorded under section 132(4) from searched person by investigation wing-search assessment was required to be made u/s 153A/153C but not u/s 147.**

Samanthapudi Lavanya v. Asstt. CIT

[2021] 127 taxmann.com 188 (Visakhapatnam - Trib.)

Facts:

AO reopened assessment under section 147 in assessee's case on the basis of concealment of income estimated by DDIT (Inv.) in the appraisal report and made the additions on the basis of joint receipt which was found and seized during the course of search and the statement was recorded under section 132(4) on 10-4-2014 from M. Vijaya Kumar, Managing Director of Navya Constructions who was under the search. Assessee contended that assessments was to be made under section 153C, but not under section 147.

Held:

There was no dispute that joint receipt was seized during the course of search as mentioned by AO in the assessment order as well as in remand report and assessment was made under section 147 on the basis of statement recorded under section 132(4), appraisal report and the joint receipt. All of them were directly related to the information found from the searched person consequent to the search under section 132. No fresh information was collected by AO or no information had come to the notice of AO in normal course, other than the information collected during the course of search from searched person. Therefore, as provided under sections 153A and 153C, search assessments was required to be made under section 153A or section 153C, but not under section 147.

4. Search and seizure-Addition to income-Loose papers found during search not supported by corroborative evidence.

ACIT v. Ganpati Developers

ITA No. 1348/JP/2018

Facts:

AO, on the basis of a paper (loose sheet) found in possession of B.D. Mundra, one of the partners in assessee firm during the course of search proceedings on Mundra Group, made addition on account of receipt of on-money towards sale of land. Assessee contended that the paper was a rough working and had no link with the actual sale.

Held:

AO had not been able to adduce or bring on record any corroborative evidence to show that higher consideration was actually received by assessee outside the books of account to match with the figures of difference appearing in loose sheet. In fact, he did not even cross check with the partners Anil Mundra and Others regarding the same to establish any difference in their version given at the time of search. Even in the course of search proceedings, nothing was brought on record so as to establish any agreements to sell evidencing any cash or unaccounted consideration passing hands between buyers and assessee. If AO was convinced that assessee had suppressed the sales, he should have taxed the profit on the same because if the rate of Rs. 3,550 per square feet was true, then expenses would also be equally reducible and he had nowhere worked out that there were bogus expenses claimed against the actual sales shown. AO never made out a case under section 69C against buyers or referred the same to their respective AO. The absence of above two steps showed that AO made addition causally and without actually going into the depth of the issue and reaching conclusive findings through proper examination of evidences of persons. Therefore, addition made by AO based on the loose paper found during search without bringing on record other corroborative evidence could not be sustained.

5. ***No explanation is needed from assessee if gold found during search was below 500 grams per married woman: ITAT***

Where gold seized during search proceeding was below limit prescribed by CBDT in Instruction No. 1916, dated 11-5-1994, department ought not to have seized such gold and addition under section 69A made in hands of assessee treating said gold as unexplained was to be deleted.

Ankit Manubhai Kachadiya v. Deputy Commissioner of Income-tax Central Circle-2, Surat

[2021] 131 taxmann.com 304 (Surat-Trib.)

Section 69A of the Income-tax Act, 1961 - Unexplained moneys (Jewellery) - Assessment year 2013-14 - During course of search at premises of assessee, gold jewellery and ornaments were found - As assessee had not submitted any details in this regard, said jewellery was treated as 'unexplained jewellery' by Assessing Officer under section 69A - Gold seized was only 636.790 grams embedded with diamonds of 7.95 carats, and in assessee's family there were three married ladies, who may hold gold up to 1500 grams, which need not to be explained by assessee, as per CBDT Instruction No. 1916, dated 11-5-1994 - Whether since gold seized was below limit prescribed by CBDT, no addition was warranted in hands of assessee - Held, yes [Para 5] [In favour of assessee]

Circulars and Notifications: CBDT Instruction No. 1916, dated 11-5-1994

Appreciating 'burden of proof' in GST

CA Jatin Christopher

Introduction

Taxpayers are mortally afraid of any 'Government letter', especially relating taxation. Taxpayer's response to letters from Tax Officer is met with fear and any occasion for personal interaction perceived with great trepidation. Law, GST too, provides great safeguards against 'administrative highhandedness' but when fear and trepidation blinds taxpayers eyes, no tax professional can alleviate these emotions, except by a first-hand experience of success when supervisory authorities strike down notices that are not in accordance with law.

Procedure established by law

Passion to protect interests of revenue does not permit bypassing 'procedure' established by law. Every proceeding in GST law is laid down in a specific section containing substantive administrative powers. Every substantive section assisted by rule of procedure. Every rule appended with a 'form' that acts as a guide to the administrate and information to taxpayer.

Tax administrators cannot espouse the cause of revenue collection beyond the passion shared by Legislature. Legislature in its wisdom has chosen that this law be implemented on 'self-assessment' basis and expressed that in no uncertain terms in section 59 of Central GST Act. Suspicion, howsoever, compelling does not authorize tax administration to encroach upon section 59 of Central GST.

"You have not paid GST correctly" is not a statement of fact but a matter of opinion. If tax administration holds this opinion, it is imperative to choose any of the following provisions to lawfully intervene and impeach the self-assessment carried out by taxpayer:

a) Where there are any 'discrepancies' in any 'returns' filed by taxpayer, section 61 authorizes jurisdictional Proper Officer to issue ASMT10;
b) Where general verification of 'correctness of' compliances are to be carried out, section 65 authorizes Proper Officer of Audit Commissionerate in case taxpayer is mapped to Central administration and of State Audit wing in case taxpayer is mapped to State administration, to issue ADT1 and commence their review but only of 'registered persons'; and
c) Where specific intelligence is gathered, Proper Officer holding INS1 issued by Joint Commissioner (Centre or State) to inspect that specific area identified and initiate proceedings against 'any person'.

Tax administrators, especially in State formations, accustomed to exercising 'reassessment' powers tend to launch into a 'roving enquiry'. And unless taxpayer objects to such administrative overreach beyond the specific provision of law being attempted or proceedings undertaken without reference of any specific

provisions of law, taxpayer will have given legitimacy to an otherwise illegitimate proceeding. See section 160(2) of Central GST Act which **entrusts taxpayer with the power to protect their rights, by raising objections at the earliest opportunity and refrain from entertain illegitimate notices**.

Rule of Law

It is as old as modern civilization which basically requires that 'law' must be knowable and only that which is published and made known must be 'enforced'. We have a Constitution and every authority operates under the Constitution. And laws made must conform to the law-making framework laid down in the Constitution, to be legitimate.

Law-making is by Legislature and not by the Government. Administration of law is left with the Executive Government. Judiciary oversees that the laws are administered according to the law laid down by Legislature. This is Rule of Law prevailing in our society. Therefore, no one is authority to travel beyond the boundaries of law laid down by Legislature and if there is any incidental leakage of revenue, wisdom of Legislature prevails over passion of tax administration.

Burden of Proof

One whose claim would fail, if no evidence were provided – is the person who bears burden of proof. In other words, if one were to make an assertion, that person bears the burden to produce proof that makes the assertion believable. Degree of proof depends on nature of assertion. Existence of a person can be proved by producing that person before a Court. Date of birth of that person cannot be proved in the same way but by producing something else that establishes the truth about assertion concerning date of birth.

Section 155 of Central GST Act states that burden on taxpayer is limited to proving "eligibility" to input tax credit and by implication, burden of proof regarding 'taxability of any transaction' remains on Revenue. And so does the burden regarding classification, time of supply, place of supply, valuation and all other aspects that are necessary to foist any demand of tax.

Penchant to operate in fear and trepidation makes taxpayer forfeit these safeguards in law and proceed to accept 'burden to prove innocence'. Supreme Court has held in AIR 1988 SC 1384 decision that provisions of Evidence Act are essentially Common Law principles to ensure delivery of justice and for this reason are applicable in taxation matters too.

Another interesting aspect to consider is where both Parties enter evidence, the question of who had the burden to prove, becomes academic and this was brought out by Supreme Court in AIR 1960 SC 100. Therefore, one who DOES NOT have this burden must refrain from tendering evidence, whether in fear or uncontrollable enthusiasm. Coupled with the doctrine of acquiescence in section 160(2) of Central GST, taxpayer is left with no excuse but to resist illegitimate exercise of authority.

Few pointers on law of evidence

Courts (as well as tax administration) are permitted in section 56 of Evidence Act, to 'take notice' without having to either plead or lead evidence on matters relating to 'existing state' of law, literature, science, etc. And in relation to GST, even if notice does not contain any averment that 'other income' appearing in P&L is arising out of 'taxable supply' made by taxpayer, Court can take 'judicial notice' of the subsistence of contractual relations as the plausible explanation for the income received.

Section 58 does not permit raising disputed about certain assertions in the notice, it those assertions were left undisputed in reply to notice. Section 101 requires person who makes any assertion, bear the burden of bringing home evidence in support of that assertion. Evidence covers two aspects, namely, pleading the assertion and adducing evidence to support or dispute the assertion. Where taxpayer omits to dispute any assertion (in the notice) and proceeds with rebuttal, then the onus to substantiate the rebuttal shifts to taxpayer in section 102.

Matters which are in the special knowledge of taxpayer, cannot be left to Revenue to prove but by taxpayer to prove. For example, information contained in accounts and records or in electronic records, they are within the special knowledge of taxpayer and Revenue cannot be expected to bear burden of proof due to section 106.

All actions by tax authorities carried out in their official capacity are presumed to be *bona fide* as in section 114 *illustration (e)*. In relation to GST, roving enquiries on routine matters such as (i) 2A < 3B (ii) 1 ≠ 3B (ii) RCM for 2017-21 remaining unpaid (iii) unpaid interest on belated 3B (iv) RCM on inward supplies from unregistered persons up to 13 Oct 2017 and (v) tax liability of earlier months discharged out of credits availed in later months.

Matters to be brought out by Revenue in any Notice

From these learnings, following is a list of matters that Revenue is required to both allege and substantiate in any notice before attempting to fasten any liability to tax in GST:

a. Description of (alleged) transaction;

b. Coverage (of transaction) within definition of 'supply';

c. Object of supply – whether goods or services – and its basis;

d. Transaction falling outside exclusions from supply;

e. HSN code under applicable tariff notification;

f. HSN falling outside available exemption notification;

g. Time of supply, per facts of transaction;

h. Place of supply, per facts relating to Parties involved;

i. Taxable value, where "price is the 'sole consideration' for supply";

j. Imputed value, where price is NOT the sole consideration;

k. Applicability of 'cum-tax' treatment of demand.

Conspicuous in its absence is the aspect relating to 'allowability' of input tax credit. In earlier tax regime, where any demand for tax is made, credit that is otherwise admissible must be allowed and demand made only for 'net tax'. This was endorsed in a catena of decisions as early as 77 ELT 511 and came to be addressed in Circular 962/5/2012-CX dated 28 Mar 2021. In GST, however, taxpayer is the one responsible to claim input tax credit through GSTR3B and credit claimed in a given 'tax period' and taxpayer is the one responsible to apply such credit to settle outstanding liability (in present demand).

Conclusion

Taxpayers must be mindful not to forfeit their safeguards in the law and expose themselves to the perils of 'shifting of' burden to prove if assertions by revenue are not disputed right at the beginning of any proceedings. Notices in GST are expected to be aplenty, but taxpayers must look for which ones are based on an opinion and which ones based on facts.
