

Tri Nagar Keshav Puram CPE Study Circle of NIRC of ICAI

PRECAUTIONS IN ASSESSMENT PROCEEDINGS etc

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OBJECT/SCOPE

To deliberate and discuss the issues and precautions to be taken during assessment proceedings under the Income Tax Act (Act)

To deliberate and discuss the issues and precautions to be taken in filing of appeal before CIT-A

Relevant Provisions in the Act

- Chapter XIV – Sections 142, 143, 144, 145 etc
Assessment Provisions
- Chapter XX – Section 246A to Section 251 –
Appeals before CIT-A

(Inclusive)

Service of Notice u/s 143(2)

- Outer time limit: 6 Months from end of Financial Year in which ROI is filed – As per last amendment by Finance Act, 2008 w.e.f 1 April 2008
- Service of Notice as per section 282 of the Act
- PRECAUTION : Objection as to non service of notice within specified time etc – to be taken before AO during asst. proceedings– as per section 292BB
- Issue No 1: For a return filed on 1 April 2007 (for AY 2007-2008), and notice u/s 143(2) is not issued till 1 April 2008, whether additional 6 months time limit will apply to it or not?

Service of Notice u/s 143(2)

- In some cases, revenue has taken a stand that notice can be issued within further six months
- Seems to be YES as amendment in limitation provisions is generally construed as retrospective (Refer SC in AIR 1994 SC 2623, 2641 and Pithisaria Page No. 388 & 389 Vol 1)
- Issue No 2: Whether amendment of section 292BB applies to notices issued prior to 1 April 2008 or whether same applies only to notices issued after 1 April 2008?
 - Del ITAT in Cebon India held same to be prospective (contrary Ahd ITAT in Varia Pratik)
 - Special Bench of Del ITAT Kuber Group cases
 - P&H High Court in Cebon

Service of Notice u/s 143(2)

- Since amendment seeks to affect a right of assessee to get the notice served , amendment seems to be prospective
- Reasoning: Service of notice u/s 143(2) – is a vested and substantive right of assessee – gives jurisdiction to make asst u/s 143(3) – SC in 3 SCC 202 Page 208)
- Amendment in law affecting vested rights – held to be ordinarily prospective – in 121 ITR 405 (P&H) ; SC in 103 ITR 123, SC in AIR 1994 SC 2623, 2641 etc.

Service of Notice u/s 143(2) – Case Studies

- **DHC Ruling in Silver Streak** (Where assessment is completed u/s 144 after alleged service of notice u/s 142(1)/143(2) by Speed Post) – Held mere service by Speed Post cannot be deemed as service specially when a) assessee has timely objected before AO regarding non service of notice b) revenue failed to prove service by producing relevant material (viz **postal receipt etc**) c) revenue did not take steps to find out whether jurisdictional notice properly served or not
- In cases *where Assessee did not have any chance to participate in asst proceedings which concluded u/s 144 finally – it seems section 292BB will not trigger-* advisable to take objection before CIT(A)

Service of Notice u/s 143(2) – Case Studies

- **DHC in Vins Overseas 212 CTR 554** (In case of asst. u/s 143(3) – where assessee for first time took plea before ITAT regarding belated/non service of jurisdictional notice and assessee never whispered doubt before AO (when it appeared before AO)– HC reversing ITAT order – held service by registered post – presumed to be correct
- Emphasizes **Timely objection** to service of notice is must - **more because of 292BB -Also held by Delhi ITAT in r.k.gupta 122 TTJ 256** that when no notice u/s 143(2) issued – no question of application of 292BB/148 proviso

Service of Notice u/s 143(2) – Case Studies

- **DHC in Rajesh Sharma 214 CTR 547** – Service on employee of co. – not authorized to receive notice – bad in law & where ever service is doubted – **revenue is bound to produce postal receipt and in case wrong address is reflected thereon – service will be bad in law (SLP Dismissed by SC on 9 May 2008)**
- Further refer:
 - **Latest P&HHC in Avtar Singh 219 CTR 588**
 - DHC in Shanker Lal Ved Prakash 300 ITR 243
 - DHC in Yamu Industries 214 CTR 445
 - Latest Luck ITAT in Bedi Entp 114 TTJ 706 & 116 TTJ 239

Service of Notice u/s 143(2) – Case Studies

- Extract from All HC in Choubsons ITA 90/2005 – 6 MAY 2008:

"A notice on a company incorporated within the meaning of the Companies Act can not be served on anybody associated with the company in any manner and any such undue service can not be considered as sufficient service"

Service of Notice u/s 143(2) – Case Studies

- **Snap shot of Various Other rulings**

Precedent	Ratio
DHC Hotline 211 CTR 207	Service on Security Guard Improper, timely objected
DHC in Regency Express 291 ITR 55- <u>also refer Mad HC in Sumitra Menon</u>	Service on Employee – Proper – as No objection before AO
Del ITAT in 98 TTJ 97, 92 ITD 415	Service must be on authorized person as per sec 282
DHC in 216 CTR 142 Nulon – (SC SLP Dismissal) & 171 Taxman 359	Borderline notices issued at limitation end – no presumption for valid service (u/s 143(2))

Service of Notice u/s 143(2) – Case Studies

- Snap shot of Various Other rulings

Precedent	Ratio
<p>DHC in Vishnu & Co ITA 470/2008- <i>Also see latest SC SLP dismissal in <u>AVI OIL 317 ITR PART 1- ITAT Ruling at 18 SOT 219</u> - AFFIXTURE- AGRA 3RD MEMBER ARUN LAL</i></p>	<p>Notice issued on last day of limitation – taken to assessee’s premises after working hours – Inspector affixed the same held not proper service</p>
<p>DHC in Eshaan Holdings <u>(Jind Cooperative – P&H High Court)</u></p> <p>Also refer latest Mad HC in P.L.Gandhi Non issuance of 143(2) in specified time- renders asst void</p>	<p>Proof for service of notice must be on record (onus revenue) and Revenue bound to take cognizance of new address in subsequent returns for correct service of notice</p>

Service of Notice u/s 143(2) – Case Studies

▪ Snap shot of Various Other rulings

Precedent	Ratio
Del ITAT 17 DTR 127 AMARJEET KAUR	Service within time specified u/s 143(2) must-affidavit filed before AO
P&HHC in Sat Narain 183 Taxman 401 Luck ITAT 121 TTJ 701	Identity of Person recd the notice & Service on assessee personally not legal mandate
For ex-parte assessment u/s 144 for failure to response to 142 notice	Mandatory to Prove 142 service refer: Gau ITAT TM 93 ITD 100 DHC 266 ITR 476/ 84 ITD 33

Service of Notice u/s 143(2) – Case Studies

▪ Snap shot of Various Other rulings

Precedent	Ratio
DHC Mani Kakkar 1203/2008	Incorrect Service of jurisdictional notice will be fatal to assessment
DHC Cross Investments ITA 111/2009	
DHC Mayawati 222 CTR 117	Notice Service at address occupied by assessee in official capacity - valid

Notice and Assessment on non existing entity

▪ Snap shot of Various Other rulings

Precedent	Ratio
DHC Suresh Kumar Mittal applied SC 65 ITR 207	NOTICE ON NON EXISTENT FIRM BAD IN LAW
DHC Vived Marketing (similar ratio in Impsat 91 ITD 354; Century Enka 303 ITR 1 AT/Pampasar 15 SOT 331)	Assessment order on hitherto dissolved & struck off company (Section 560)- bad assessment to be quashed

Jurisdictional Objection

- ROI filed with ITO New Delhi , Notice u/s 143(2) by ITO Mumbai
- Unless Jurisdiction transferred as per section 127, objection as to issuance of notice by ITO Mumbai as per section 124(2) in one month from service of notice
- Refer Useful guidance in : P&HHC in 220 ITR 446, Chd ITAT in Gurdev Singh 86 TTJ 861 , DHC in Anil Kohsla and Anjali Dua 219 CTR 183
- In between transfer to Correct AO ? Whether valid?
- Latest Bang ITAT (AO's finding hitting at Jurisdiction) and Mumbai ITAT 32 SOT 473 rulings¹⁶

Preliminary Issues

- *Whether CBDT Instruction relating to Scrutiny selection if violated – fate of assessment? Bad in law latest Bilaspur ITAT in 30 SOT 41 (URO)/118 TTJ 263*
- *APHC in Dedhia 270 ITR 572*

New Claims during asst. proceedings

- SC in Goetze 284 ITR 323 held unless revised return filed as per section 139 – merely by letter no fresh claim can be made (therefore return to be prepared cautiously) latest applied by P&HHC in 212 CTR 502
- However, CBDT Circular No 14 of 11/4/1955 – Duty of AO to give claims admissible to assessee
- Article 265 of Indian Constitution – No tax except by authority of law;
- Principle that there is no estoppel against the statute (SC in 161 ITR 159, SC in 160 ITR 920); remained unconsidered in aforesaid SC ruling

New Claims during asst. proceedings

- Latest Mum ITAT in Chicago Pneumatic 15 SOT 252– as SC ruling in Goetze only affected assessee's right to make new claims – the same do not affect AO's duty u/art 265 and CBDT Circular (supra) – hence when AO apprised by assessee for left out legally admissible claims – duty to give them (Also refer interesting Kol ITAT in 112 TTJ 229)
- Appellate authorities (viz CIT-A & ITAT) power to admit new claims unaffected by Goetze (SC) – refer DHC in Jai Prabolic 6 DTR 233 & Del ITAT in 15 SOT 1 & Similarly, relief available in 264 remains unaffected (refer Guj HC in S R Koshti and Cal HC in 146 Taxman 335 & 197 CTR 339)

Confrontation and Cross Examination during asst. proceedings

- Many times AO gathers information at the back of assessee, during asst. proceedings, eg in form of information u/s 133(6), statement of creditor recorded u/s 131 etc. – Whether mandatory on part of assessee to confront back material and in case, assessee learns from verbal discussion with AO's office regarding back material – a specific request in writing may be filed (as a precaution)

Confrontation and Cross Examination during asst. proceedings

- Yes Mandatory : Latest DHC in Jindal Vegetable (6 Nov 2008 in ITA 428 of 2007) and Raj HC in 174 Taxman 440, Guj HC in Laxman Bhai Patel (22/7/2008 ITR No. 41/1997), SC in 125 ITR 713 etc
- Even if assessee requests for confrontation of back material and AO do not provide so, said back material will become unreliable and consequential addition will be not tenable at law (apart from above, refer DHC in 172 Taxman 64, SC in 26 ITR 775, SC in 176 ITR 169 ETC)

Furnishing of Evidence during asst proceedings

- Maximum evidence must be led before 1st court of hearing (here AO) as at subsequent stages, right of assessee to file additional evidence, gets restricted (in terms of rule 46A before CIT-A and Rule 29 of ITAT Rules before ITAT)
- Detail/Information requisitioned by AO – preferably – to be submitted in writing as oral information leaves no evidence of its submission
- Wherever possible, cross referencing to preceding/last submission, may be incorporated in succeeding/next submission (so as to have proper trail)

Furnishing of Evidence during asst proceedings

- Factum of details having been submitted with AO, at the time of hearing, needs to be brought on record, either by way of appropriate recording in order sheet or by way of filing in “daK” of AO, this will help in appeal to contend that relevant information was submitted during asst. as otherwise at appeal, same may be characterized as additional evidence
- If books of accounts are produced for verification, either the same may be got recorded in order sheet or a letter for the same containing information as to production of books, may be filed

Importance of Written Submissions

- Vital Points to be addressed by written submissions (eg note on allowability of deduction u/s 80IB(10) etc)
- Wherever possible, alternate claims, without prejudice, may be made (eg development of web portal – Istly revenue expense u/s 37 and if treated capital, depreciation u/s 32 as intangible asset may be allowed etc.)
- Try to keep a window open : by stating (illustrative) “should your goodself require any other information, please give us an opportunity of hearing” (for effective redressal at appellate stage etc) ,

Importance of Written Submissions

- Supposedly an AO asks for some information, out of which assessee is not able to collect certain information and hence not able to submit before AO, appropriate note indicating aforesaid difficulty needs to be incorporated in written submissions (eg “as your assessee has made best efforts to collect loan confirmations from following _____ and same has not been received as yet, same shall be furnished as soon as the same is obtained from them, however identity details regarding same are herewith furnished” etc) - this will help to build case at appellate stage....

Details that may be asked for in Asst. Proceedings

- It is practically seen that many times AO asks for details which are either irrelevant to subject asst proceedings and/or not in the possession/control of assessee concerned and/or same are highly voluminous (thousands of vouchers for an expense of Rs. 50 Crores in a big co. etc) – How to address this situation
- To the extent possible, assessee should adopt a **cooperative and positive attitude** and where it becomes impossible for assessee to provide details requisitioned, case may be explained in **positive manner**, so as to avoid adverse consequences (if any) and possible litigation

Details that may be asked for in Asst. Proceedings

- Illustrative case study: AO asks a assessable Foreign Co. (say XYZ UK) during its Indian asst to furnish detail of sales made in India by another group co. (say XYZ USA)
- Illustrative reply:
 - Plead that since the information requisitioned by your goodself is neither in the control of your assessee, nor the same is in possession of your assessee, accordingly, your goodself is requested to please immune the assessee from furnishing the same"

Details that may be asked for in Asst. Proceedings

- Illustrative case study: “Prove genuineness of Share Application Money recd from XYZ Ltd and furnish its copy of account, annual report , it bank account copy and produce its director who agreed to advance such share application money”
- Illustrative reply:
 - First try to be cooperative and positive (may give maximum evidence in possession of assessee like share application form, return of allotment as submitted with ROC, company status from MCA web portal, factum of money recd through banking channel

Details that may be asked for in Asst. Proceedings

- (copy of own bank statement and relevant cheque no., identification of shareholder by providing PAN No., address and other available details of shareholder, etc)
- In case of incapability to furnish information as to annual report/bank statement of shareholder, state "as regards annual report and bank statement of shareholder, we respectfully submit that shareholder is a separate legal entity and the assessee does not have access to the information desired by your goodself"

Details that may be asked for in Asst. Proceedings

- Case Laws on proposition that only information which is relevant to assessee's assessment can be asked by AO and no addition can be made for non-supply/want of said irrelevant information:
 - Del ITAT in 103 ITD 271 InderPal Ahuja
 - Guj HC in 198 ITR 69
 - Cal HC in 97 ITR 55
 - Cal HC in 30 ITR 535
 - CIT vs Bombay Trust Corp 6 ITR 445 (Kanga and Palkivala Page 1733 vol 2)

Assessee's Right to Inspection of Records and Taking Certified Copy

- Flowing from CBDT Circular No. 17 (XL-36) dated 28 June 1965 (Also specifies fees to be deposited)
- Recognized in Memo Circular to Section 138 when same was inserted in the Act: Dealing with disclosure of information concerning assessee to third parties - Clarified that assessee's right to take its own documents remained unaffected and will be permissible for AO to supply them...
- SC in 26 ITR 1 Surajmall case....

Taxing authorities to ignore Legal format of transaction

- *Refer SC ruling in 72 ITR 603:*

HELD: "It is now well settled that taxing authorities are not entitled in determining whether a receipt is liable to be taxed to ignore the legal character of the transaction which is the source of the receipt and to proceed on what they regard as substance"

Similar SC ruling in Ishikawajima case..

Consequences of Notice being invalid (section 143(2)/148/153A) etc

- *SC in 82 ITR 821: Held*

If the notice is invalid for any reason the entire proceedings taken by him would become invalid/void for want of Jurisdiction

Similar ration in All HC in 131 ITR 480

Prayer to invoke section 131 by assessee

- It is practically seen that sometimes AO seeks presence of lender, creditor etc from assessee, so as to satisfy on creditworthiness, genuineness etc and assessee is not able to enforce the same: After providing complete address of said lender, assessee may request in its right, u/s 68 of the Act, to AO to issue summons u/s 131 as recognized/held in:
 - SC in 1 SCC 68 Page 71
 - Cal HC 263 ITR 692
 - All HC 49 ITR 650 & 561
 - All HC in 171 ITR 694 etc

AIR Based Query and Resultant Asst.

- Guidelines from CBDT on Scrutiny on basis of AIR based Information available in Press Release dated 26 Oct 2006, Inst No. 6/1-Aug-2006 and Inst No. 7/16 Aug 2007
- Instruction No. 225/26/2006 – IT-A – II (APT) dated 25 March 2007 (Selection of cases for scrutiny on the basis of data in AIR Returns and subsequent asst proceedings):
 - Scrutiny to be limited to the aspect disclosed in AIR Data however on basis of approval of Add/Jt CIT – cases may be taken for wider scrutiny

Sec 142A – Issues and Concerns

- Inserted by Finance No 2 Act of 2004 w.e.f 15 April 1972 to overrule SC ruling in Amya Bala Paul case, giving power to refer the valuation of investment to DVO
 - *For the purposes of making an asst.*
 - *Where estimate is required to be made*
 - AO may refer the valuation of invest referred in sec 69/69A/69B to DVO
 - Before using DVO report, AO bound to confront it to assessee
 - *Final Discretion lies with AO to use or not to use DVO report (AO not bound to accept DVO report)*

Sec 142A – Issues and Concerns

- Whether provision can be applied first time by ITAT in pending appeals where reference to DVO made by AO before Oct 2004 when Finance Act 2004 came in operation Held Yes :
 - Del ITAT in 93 TTJ 425
 - Asr ITAT in 109 TTJ 568
 - Luck TM ITAT in 104 ITD 126

Sec 142A – Issues and Concerns

- Whether reopening allowed on basis on DVO report where previously 143(1)/intimation is issued? Held:
 - Yes in 107 TTJ 779 Pune ITAT, Luck ITAT Dinesh Dua &
 - No in 22 SOT 156 Del ITAT, Jp ITAT in 9 DTR 459
 - Ref BHC in 216 CTR 217 & TM Ahd ITAT in 113 ITD 255 For Principles laid

Sec 142A – Issues and Concerns

- Whether addition u/s 69/69B for understatement of purchase consideration of property, can be made only on basis of DVO report collected u/s 142A? Answer seems to be NO:
 - Refer Del ITAT in 102 TTJ 964 Fav, 89 ITD 586
 - Ref Jaipur ITAT in 111 TTJ 531 Fav
 - Deeming Fiction of section 69/69B requiring factum of investment may not be discharged by solitary reference to DVO report u/s 142A (Refer Pithisaria Commentary Page 3211/Vol 2) Also see Ralkt ITAT in 98 TTJ 518
 - Adv Del ITAT in Haneamp 101 ITD 19

Sec 142A – Issues and Concerns

- Whether addition for excessive construction cost as estimated by DVO u/s 142A, can be made even when assessee has maintained audited books recording cost of construction with reference to vouchers etc.? Answer seems to be no:
 - Refer Luck ITAT TM in Rohtas Projects 104 TTJ 1, Jd ITAT in 97 TTJ 426 etc

Books of Accounts, GP Rate etc

- Whether Stock register must u/s 2(12A) read with sec 44AA or mere non maintenance of stock register and/or fall in GP rate without any thing more is sufficient to reject books?
 - Held No 25 SOT 19 URO Jd , 25 SOT 59 Jd URO (other defects required), Bang ITAT in 104 TTJ 1030, 3 SOT 803, Del TAT in 15 SOT 353, Jd ITAT in 113 TTJ 274, Asr ITAT in 307 ITR 172 AT, Jd ITAT in 107 TTJ 114
 - Cal HC in 279 ITR 457, Raj HC in 207 CTR 19
 - Adv in Mum ITAT in 24 SOT 556
 - Further depends upon *line of business whether manufacturing involving numerous raw materials or simple trading etc*

Books of Accounts, GP Rate etc

- *Books / Method of accounting cannot be rejected light heartedly/casually Refer SC in 216 CTR 345, 299 ITR 1, Del ITAT in 15 SOT 353*
- *Audited books free from qualification needs to be ordinarily taken as correct unless strong reasons for doubt are there (eg trading outside the books detected etc) – CBDT Circular No 3/16-1-1942 & 18/28-4-1955 (revenue cannot lecture how accounts should be kept)*
- *Fall in GP rate – Explain with reference to specific sale/purchase instance, market /economy conditions, increase in purchase price, increase in gross sales etc*

Books of Accounts, GP Rate etc

- Principles for Closing Stock Valuation (Cost or Market Price whichever is less) Refer:
- SC in Chainrup Sampatram 24 ITR 481 (misconception any profit can arise out of valuation of stock) applied latest by Guj HC in 217 CTR 254
- SC in Hindustan Zinc 291 ITR 391 (no local market of the commodity and valuation at foreign price)
- Mad HC in 56 ITR 360 & 60 ITR 531 (Obsolete stock valuation) Latest DHC in Hotline and Reliance Electronics at 12 DTR 311 & 13 DTR 143
- Principles laid by SC in 240 ITR 355

Bad Debt u/s 36(1)(vii)

- Post amendment of 1989, w.e.f 1 April 1989, only requirement u/s 36(1)(vii) is debt must be written off in the books and as per sec 36(2)(i) same must have been taken into a/c in computing the income of the assessee:
- Refer DHC in Morgan 292 ITR 339, Autometers 292 ITR 345, Global Capital 201 Taxation 210, Sawhney Exports 304 ITR 93, Nilopher I Singh 14 DTR 108, DCM 167 Taxman 160
- HPHC in Suresh Gaggal 11 DTR 345
- MPHC in Nai Dunia 295 ITR 346, Mum ITAT SB Oman 100 ITD 285
- BHC in Omparkash Salecha & Star Chemicals 11 DTR 311
- Mad HC in Brilliant Tutorials 292 ITR 399
- Adv – Guj HC in Dhall Entp 295 ITR 481, Mad HC in South India Surgical 287 ITR 62

Deemed Dividend u/s 2(22)(e)

- Will not apply to normal business transactions like trade advance, trade debtors etc – Relevant citations – DHC in Ambassdor Travels 173 Taxman 407, BHC in Paradise Multimedia , Chd ITAT in 106 TTJ 250, Del ITAT in Sunil Sethi 26 SOT 95, Mum ITAT in 19 SOT 213, 11 SOT 302 and Del ITAT in 79 ITD 547, 87 TTJ 1086, Luck ITAT in 94 ITD 496 ADVERSE ON FACTS IN 99 TTJ 1159
- For applying sec 2(22)(e)- person concerned must be shareholder – Mum ITAT SB in Bhaumik Colour – Fav Del ITAT in Ankitech and Nulcon, & Raj HC in 217 CTR 527, & Mum ITAT in 95 TTJ 201

Certain Propositions on sec 50C – Deemed Full Value of Consideration

- Deeming fiction of section 50C will not apply in hands of purchaser for section 69/69B, for computing unexplained investment etc that is limitedly applicable for seller's taxation under the head capital gains/ section 48 11 DTR 624 Chd ITAT
- Deeming fiction of section 50C will not apply to computing fair market value on 1/4/1981 u/s 55 etc: 26 SOT 35 URO Kol ITAT
- Deeming fiction of section 50C is applicable to property deal where sale deed is registered and not Power Of Attorney based deals 110 ITD 525- amended...fin act 09
- Deeming fiction of section 50C (valuation report of DVO there under) cannot be applied mechanically ignoring practical considerations effecting market value of property like presence of Public Dustbin Near subject property 110 TTJ 297 Del ITAT
- Section 50C not applicable to Stock In trade – Inderlok

Certain Propositions on sec 50C – Deemed Full Value of Consideration

- Issue No 1 Whether section 50C will be applicable on sale of depreciable assets say factory land and building covered by section 50 of the Act, given the fact that, as per corresponding section 43(6) dealing with WDV computation, we are to reduce from block “money’s payable for asset sold”?
- Issue No. 2 : Whether section 50C can be made applicable to deemed capital gains as stipulated under section 45(3) : introduction of self owned building by partner in partnership firm as its capital or for that matter to section 45(4) etc?
- Issue No 3: When Assessee objects to Stamp Duty Valuation as per sec 50C(2), is AO bound to refer the matter to DVO that whether word “may” can be read as shall? – Seems to Yes as per Mad HC in K.R.Palaniswamy

JCIT Intervention u/s 144A

- Sec 144A empowers JCIT on its own, on application of AO, on assessee's application to call for and examine records of pending asst. to issue directions to enable completion of asst.
- No direction prejudicial to assessee can be given without hearing assessee (direction as to lines of investigation – not deemed to be prejudicial)
- Can JCIT decline to interfere stating assessee has approached belatedly when little time is left in asst.? Answer seems to be NO – as law requires mere pendency of asst.

JCIT Intervention u/s 144A

- Instruction No. 2 of 2006 dated 27 April 2006: Monitoring of scrutiny cases by range heads shall be done in accordance with section 144A
- However, In Inst. No. 1 OF 2007 dated 16 March 2007 – aforesaid Inst. No 2/2006 will not restrict inherent powers of Range Heads to administratively supervise work of subordinate officers – Practically creating problems for assessee's in terms of harassment etc.
- May be resorted by assessee in exceptional cases where circumstances warrant(to resolve dead lock)

CONSISTENCY IN TAX ASST.

- Where in earlier asst. (s) u/s 143(3) a view has been already taken by AO in assessee's case (for example : in year 1 assessee was allowed deduction u/s 80IB(10) , in year 2 subsequent AO on same facts, disallowed the deduction stating conditions do not stand fulfilled) Seems to be impermissible (albeit res judicata do not apply to tax proceedings, however where facts flowing in different years are same, no different stand should be taken) Refer :
 - SC in J.K.Charitable Trust (7 Nov 2008)
 - DHC in Bhartesh Jain (Oct 2008) ;
 - SC in 193 ITR 321; DHC in 245 ITR 492; 300 ITR 75, DEL ITAT(TM) IN 113 ITD 624

Noting in Order Sheet

- Order sheet is record of discussion which took place between AO and assessee/its AR
- In case, assessee do not agree with noting in order sheet, either a request may be made to AO for modifying the same or one may sign with brief noting (however it is debated at times whether AR/assessee can make his own notings on order sheet?)

Adjournment

- AO has power to grant adjournment (Kanga Palkivala Page 1758 – Vol 2)
- Application for adjournment should be preferably filed in writing stating reasons for the same, on or before the date of hearing
- In case AO declines to grant an adjournment, what should be done? Stating Grounds for adjournment, written application may be filed with DAK office of AO and in case, same is not accepted by staff of AO, same may be sent through REGTD POST

Adjournment

- Many times, it is seen that AO is not available/absent on the appointed day etc, assessee should file a letter in DAK of AO, so as to avoid penal consequence u/s 271(1)(b)....

Asst, Stay and Attachment

- During asst proceedings, it is seen that many times AO provisionally attach assessee's properties u/s 281B (To be resorted sparingly and not in routine manner and current bank accounts etc should not be attached – BHC in Gandhi Trading and also refer DHC in VLS Finance)
- CBDT Instruction No. 8 of 2/9/2004 : Attachment where demand exceeding Rs 5 lacs is likely to be created in metro cities
- On fears expressed by Trade Associations, CBDT in Inst No 8 of 5/9/2004: allayed fears and stated power to be exercised exceptionally, where there is reasonable likelihood of non recovery of resultant demand

Asst, Stay and Attachment

- Immediately after asst., where huge additions are made, the problem which comes is stay of subject demand and recovery pressure
- Practical experience : Stay not granted easily u/s 220(6) (at best installment granted)
- Advisable to submit Stay Petition duly highlighting Prima Facie case and Financial Hardship (since no penalty can be levied u/s 221 till stay petition is pending) – 264 Possible against rejection of Stay Petition by AO

Asst, Stay and Attachment

- DHC in Valvoline 217 CTR 292 and Soul recently held stay must be granted in routine manner where asst is made more than twice of returned income (In Valvoline case, DHC imposed Rs 15000 costs on revenue for unnecessarily forcing litigation on assessee)
- Another related problem which is faced is suo motto adjustment of demand created against refund due u/s 245 : Landmark DHC in Glaxo Sithkline 290 ITR 35 case (power discretionary, prior hearing must, satisfaction on AO's part that demand will not be paid except by adjustment, spirit of CBDT Circular No 530/1991 will apply to sec 245 also)

SOME COMMON TAX ISSUES IN ASST

- SHARE CAPITAL AND SECTION 68: LATEST SC RULING IN LOVELY EXPORTS PVT LTD. 216 CTR 195 : Whether share application money can be treated as undisclosed income of the assessee? If the share application money is received from alleged bogus shareholders, whose names are given to AO, then department is free to proceed to reopen their individual asst. in accordance with law, but it cannot be regarded as undisclosed income of the assessee."

SOME COMMON TAX ISSUES IN ASST

- In case of inflated stock to avail higher credit facility, whether addition of difference in stock value can be made as undisclosed investment ?
- Hypothecation, bank never vouched the quantity declared and/or mere value inflated (no quantity declared), physical control always with assessee, books audited, no trading outside the books detected – factors fav to assessee- may be highlighted to AO
- Mad HC in 241 ITR 363,158 Taxman 363, 236 ITR 340, J&K HC in 201 CTR 178

SOME COMMON TAX ISSUES IN ASST

- Genuineness of Purchase/Job Work/Commission Expenses:
 - Produce relevant bills/invoices/agreement etc
 - Furnish Address details of Payee
 - Highlight banking payment mode (if any)
 - Furnish Account Confirmation/Affidavit from Payee
 - In case available, highlight payment of tax by payee, by furnishing its ROI etc
 - Preceding Year allowance (if any)
 - Match the expense with fav rising impact on turnover/yield etc.(if any) etc.

SOME COMMON TAX ISSUES IN ASST

- Many times AO seeks assessee's explanation on source of bank deposits, genuineness of expenses, genuineness of creditors etc and on getting assessee's reply thereto, straightway proceeds to disallow/made addition thereof: Whether Permissible Held No
 - Cal HC in 276 ITR 87
 - Del ITAT in Atlas Cycle ITA 1863/Del/2006

SOME COMMON TAX ISSUES IN ASST

Whether tax (self assessment tax voluntarily paid) with return u/s 139 – is refundable, if 143(2)/143(3) held bad in law? No SC Shelly Products 261 ITR 367 (unless wrong tax paid – can be taken care of u/s 154 rectification /264-revision/ 239 Refund application etc)

- What about voluntarily tax paid in pursuant to 148/153A return?

SOME COMMON TAX ISSUES IN ASST

How far refund can be given on basis of return filed after 139(4) time limit – whether possible only for years open u/s 148/147 or beyond that also?

- CBDT Circular u/s 119
- Section 239
- Kar High Court in 208 CTR 337

Tax Asst and Help Of Ombudsman

- In areas of asst. where Ombudsman help may be resorted (in appropriate case/at appropriate juncture)(relevant guidelines available at http://www.incometaxindia.gov.in/archive/TheIncomeTaxOmbudsmanGuidelines2006_08122006.pdf):
 - Non ack of letters/documents sent to department
 - Lack of Transparency in selection of case for scrutiny and non communication of reasons thereof
 - Non updating of Demand Registers etc
 - Delay in disposal of rectification applications/giving effect to appeal effect orders
 - Unwarranted Rude Behavior

Remedy Post Asst - Assessee

- Appeal before CIT-A u/s 246A (against appellable orders as specified u/s 246A and 248)
- Revision before CIT u/s 264 (against order passed by authority subordinate to CIT)
- Rectification before AO u/s 154 (for correction of mistake apparent from record)
- Asst Order to be carefully read so as to choose appropriate remedy
- Nature of Appellate Proceedings:
 - Not an inherent right, only when specified statutorily , however right to be construed in reasonable and practical manner (SC in 194 ITR 645)
 - Right to Withdrawal of appeal not there – SC in 66 ITR 443
 - Appellate proceedings are not adversary proceedings (like civil suit) refer Del ITAT in ONGC

Appeal before CIT-A: Snapshot

Particulars	Appeal Before CIT-A
Relevant Provisions	Sec 246A to Sec 251
Time Limit	30 days (delay condonable)
Prescribed Form	Form No 35(Rule 45)
Fees Payable	250,500,1000 (as the case may be)
Filed with CIT-A	Stated In Demand Notice
Documents to be annexed (IN DUPLICATE)	SOF, GOA, Demand Notice, Impugned order etc

Appeal before CIT-A: Check List

- Whether appeal lies
- Whether appeal is called for – do not file frivolous appeals (against penalty – appeal may be filed even if asst not appealed)
- Whether authority passing the order had jurisdiction to pass the order
- Whether impugned order was passed within limitation
- Whether any claim has been missed – fresh plea
- Who has to sign the appeal – Sec 140
- Time within which appeal is to be filed
- Application for Stay before CIT-A and/or AO
- Appropriate Filing Fees
- Carefully Drafted Grounds of Appeal and Statement of Facts

Appeal before CIT-A: Check List

- Carefully Drafted Grounds of Appeal and Statement of Facts: Some Practical Hints:
 - Grounds of Appeal and Statement of Facts must be separate and should not be cluttered
 - Grounds of Appeal must be a) specific b) to the point c) **not argumentative** d) advisable to take general ground at first e) comprehensive to include all grievances f) separate and independent grounds for different issues g) in proper sequence h) without prejudice (alternate prayers)
 - At the end of Grounds, appellant should crave leave for variation/modification, addition of grounds etc
 - Statement of Facts should highlight the facts of the case and should **not amount to written submissions**

Appeal before CIT-A: Illustrative Grounds

- General Ground:

“That on the facts and in circumstances of the case and in law, the learned AO erred in assessing income at Rs_____ as against returned income of _____” or

“That on the facts and in the circumstances of the case and in law, the assessment order passed by ACIT Circle _____ (hereinafter referred to as Assessing Officer) is bad in law and void ab initio.”

Appeal before CIT-A: Illustrative Grounds

- Specific Grounds:

“That on the facts and in circumstances of the case and in law, the learned AO erred in assuming jurisdiction to frame asst u/s 147 without serving the mandatory notice u/s 148, ignoring the objection of assessee” or

“That on the facts and in the circumstances of the case and in law, the learned AO erred in making addition of Rs _____ in reassessment order, when no addition has been made on reopening ground”

Appeal before CIT-A: Illustrative Grounds

- Specific Grounds:

“That on the facts and in circumstances of the case and in law, the learned AO erred in making addition of Rs _____ on unconnected issue of share capital, by making roving and fishing enquiries” or

“That on the facts and in the circumstances of the case and in law, the learned AO erred in making addition of Rs _____ on account of unexplained share capital, without appreciating the cited SC ruling in Lovely Exports case”

Appeal before CIT-A: Payment of Tax Demand

- Principles for condonation: Refer SC in 167 ITR 471 (Pragmatic and Justice Oriented approach required)
- As per section 249(4): Payment of tax as per ROI must and/or advance tax payable (where no ROI) – Proviso empowering CIT-A to grant immunity in second case (Latest BHC holding interest of 234A, 234B, 234C are not “tax” – hence not required to be predeposited – Manoj Beriwal)
- For connotation of “order against which assessee denies its liability to be assessed under the Act” refer:
 - SC in 160 ITR 961 DHC in 66 ITR 319 ETC

Appeal before CIT-A: Power of Stay

- Stay of Demand by CIT-A: Independent-Inherent Powers advisable with CIT-A to stay the recovery of pending demand- to file the application with appeal documents – Refer :
 - DHC in Nokia 292 ITR 22
 - All HC in 212 ITR 451
 - All HC in 208 ITR 461
 - All HC in 212 ITR 451
 - Gau HC in 239 ITR 871

Appeal before CIT-A: Enhancement

- CIT- A has co-terminus/plenary/widely casted powers – which includes power of enhancement (Sec 251(1) and (2) and Explanation to section 251(2)) (scope not limited to appeal)
- Related Precedents:
 - SC in Kanpur Coal Syndicate 53 ITR 225
 - SC in Rai Bahadur 66 ITR 443 (enhancement limited to subject matter of consideration before AO)
 - SC in Sharron ji Palloni 44 ITR 891 (cannot discover new source of income)
 - SC in Nirbheram Duleram 224 ITR 610 (Adv)
 - DHC FB in Sardari Lal 251 ITR 864 (enhancement – no discovery of new source – powers available u/s 148/263 may become redundant)
 - Latest Cochin Bench of ITAT in 23 SOT Part 3

Appeal before CIT-A: Additional Ground

- In case some vital ground is missed in original grounds of appeal, without delay, advisable to take said ground, by filing application in writing (duplicate) (may be forwarded by CIT-A for comments by AO), placing reliance on (highlighting the importance of ground vis a vis facts):
 - SC in Jute Corporation 187 ITR 688
 - BHC FB in 199 ITR 351
 - Raj HC in 263 ITR 317
 - BHC in 262 ITR 385
 - Refer Section 250(5) Omission not willful/unreasonable
 - Different from Fresh Claim – which means claim not pressed before AO whereas additional ground is ground not taken in original grounds
 - Eg Jurisdictional and Limitation Grounds

Appeal before CIT-A: Fresh Claim

- Since appellate proceedings before CIT-A are continuation of asst proceedings, an assessee can make a claim for first time before CIT-A, if relevant facts (if any) are on record. That is, purely legal pleas based on statutory provisions (notice issued u/s 158BD is bad in law in view of SC ruling in Manish Maheshwari), can always be taken, provided ground is there.
- Refer latest Kol ITAT ruling in Van OOrd (supra) – in original asst assessee did not contended no PE under DTAA and in subsequent 148 proceedings, also assessee did not contended – for first time before CIT-A raised fresh plea as non existence of PE- CIT-A – ITAT held permissible : relying on Art 265, Duty of AO to bring correct position before ignorant assessee, there is no estoppel against the statute etc.
- Refer SC in 53 ITR 235 & P&HHC in 163 ITR 484
- Guj HC in 203 ITR 933 & Cal HC in 70 ITR 45

Appeal before CIT-A: Additional Evidence

- Section 250(4) – Gives CIT-A plenary powers to make any enquiry as it thinks fit
- Rule 46A(1) restricts right of assessee to produce additional evidence in 4 circumstances as:
 - AO refused to admit the evidence which ought to have been admitted ..1
 - Appellant prevented by sufficient cause from producing evidence desired by AO..2
 - Appellant was prevented by sufficient cause from producing evidence relevant to grounds..3
 - AO did not provided appellant sufficient opportunity to present its case...4
- However, right of CIT-A to requisition any evidence necessary for disposal of appeal is protected u/rule 46A(4)

Appeal before CIT-A: Additional Evidence

- In 2 & 3 above, assessee is required to show sufficient cause. Eg loan confirmations or statement of third party having bearing on present asst. procured after asst is completed could be treated as falling under said category, ex-parte asst can also be sufficient cause, in case there is no deliberate default on assessee's part (refer Kol ITAT in 95 ITR 183, 207 ITR 979)
- For 1 & 4 above, reference may be drawn to submissions made in asst. seeking opportunity – not provided by AO.
- When assessee suo motto produces additional evidence, same must be confronted to AO and before admitting the same, an order in writing is required from CIT-A

Appeal before CIT-A: Additional Evidence

- However, when CIT-A seeks some evidence from appellant to effectively dispose of the appeal in its right u/section 250(4) read with rule 46A(4): divergent views on whether still confrontation to AO is required:
- BHC in 231 ITR 1 (held not required) & DHC in 296 ITR 106 (held required)
- However, one thing is settled, when an evidence goes to the root of the matter and is necessary for effective disposal of the appeal, same must be admitted – refer:
- Kol ITAT in 254 ITR 65 (AT) – DETAILED ;Del ITAT in Bonanza Stock Brokers – ITA 1002/2006 ;Patna ITAT (TM) in 63 ITD 1
- Caution: Assessee to submit add. evidence at its own, must make an application in writing stating relevant part of rule 46A(1) which is applicable – and ensure that same has been sent to AO for its comments

Appeal before CIT-A: Further Precautions etc

- Written submissions preferably be filed before CIT-A
- Written reply be preferred to query asked instead of instant answer
- Paper Book containing pleadings and evidences placed before AO , be filed
- Adjournment before CIT-A must be explained with reasons
- CIT-A No power to dismiss appeal in default (albeit may decide ex-parte)
- CIT-A No power to set aside the order or restore the issue

Appeal before CIT-A: Case Studies

- Case Study : If a P&L account is submitted to AO, in which only receipt side addition is made, without examining allowability of expenses, can CIT-A touch expenses and verify and call for vouchers of expenses?
- Seems to be No
- *Whether before enhancement, CIT-A is required to issue notice to assessee, stating grounds on which enhancement is proposed to be made? Yes (Refer Del ITAT in Honda Siel etc)*

Appeal before CIT-A: Case Studies

- Case Study : In a reopening on bogus share application money, AO makes the addition thereof without calling for particulars of other share application money received in subject year (which was not covered in reopening ground), can CIT-A call for and examine details of hitherto unexamined and make addition thereof?
- *Seems to be No (because AO himself cannot directly call for other details without having any specific information thereof as section 148 uses "which comes to his notice".....and because of enhancement limitation as AO did not apply mind on other share application money)*

Appeal before CIT-A: Case Studies

- Case Study : Where AO has disallowed the expense solely on 'X' reason, can CIT-A substitute the said reason with another reason thereby totally changing case complexion, without calling for/giving specific opportunity. If CIT-A so does, what shall be the fate of the same?
- Seems to be NO and ITAT may set aside the issue to file of CIT-A (*also refer Del ITAT in Silicon Graphics*)

Appeal before CIT-A: Case Studies

- Case Study : Whether before CIT-A in appeal against 148 order, for first time, new claim can be made, never made in original and reassessment proceedings? Held Yes by Kol ITAT in Van OOrd case distinguishing Sun Engg. SC ruling not restricts CIT-A powers

Appeal before CIT-A: Case Studies

- Case Study : Whether in appeal before CIT-A against penalty order, for first time, jurisdictional validity of assessment proceedings can be challenged, which has since attained finality being approved on merits by ITAT?
- Held Yes by Del ITAT in Tide Water and Dhiraj Suri etc
- Also even if no appeal against quantum proceedings, appeal against penalty possible.

Appeal before CIT-A: Some Practical CBDT Instructions

- CBDT Circular No 1/24-4-1950: **Order copy not obtained:** Time taken in obtaining copy of asst order from AO's office, by making an application there for, will be excluded in computing time limitation of 30 days from date of service of demand notice (eg appeal against ex-parte order u/s 144 – order passing known at the time of receipt of penalty notice u/s 274 – certified copy of asst order on specific application) Also See Section 268

Appeal before CIT-A: Some Practical CBDT Instructions

- CBDT Instruction No. 20/2003 dt 23/12/2003: CIT-A for order u/s 250/251 and CIT for order u/s 263/80G/264 – must **issue order within 15 days of last hearing – BHC in ITAT context in Shivsagar Veg case** – order must be passed within 3 months of final hearing
- It may be analyzed to see whether **early hearing application** in writing is required to be filed for getting the case fixed on early basis, as matter may be covered in favor of assessee by SC/HC ruling vis a vis Recovery Pressure etc

Appeal before CIT-A: Some Issues

- In case additional evidence is furnished and no specific sub rule (rule 46A) is quoted thereunder and after seeking remand report, CIT-A admits the evidence, whether same is invalid? Held No by Asr ITAT in 28 SOT reasoning technicality must not come in the way of justice

Thank You

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