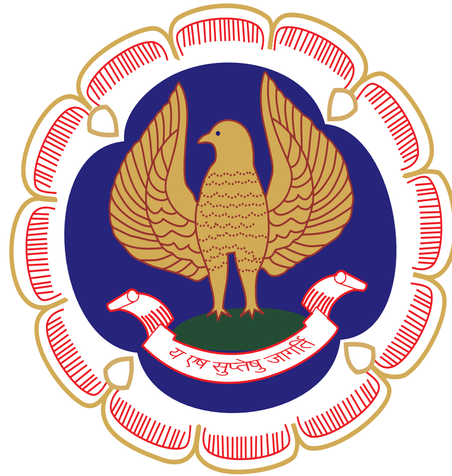
The Institute of Chartered Accountants of India

(Set up by an Act of Parliament)



Issue No. 6 - June 2019

NEWSLETTER

PUNE BRANCH OF WIRC OF ICAI

(Subscribers copy not for sale)

PUNE BRANCH OF WIRC OF ICAI

Forthcoming Programmes

SR. NO.	DATE	SEMINAR NAME	VENUE	TIME	FEES	CPE HRS.
1.	12th & 13th July, 2019	Pune Tax Conference including Budget Analysis	Hotel Sheraton Grand, Bund Garden Hotel, Raja Bahadur Mill Road, Pune	9.00 am To 5.00 pm	Rs. 1900/- Plus GST for Members & Rs. 2200/- Plus GST for Non Members	12 Hrs.
2.	19th To 21st July, 2019	Workshop on IBC for Preparation of IBBI Limited Insolvency Examination	ICAI Bhawan, Bibwewadi, Pune	8.30 am To 4.00 pm	Rs. 1500/- Plus GST	18 Hrs.
3.	1st To 5th August, 2019	5 days Course on Blockchain Technology for Professional Accountants	Under Finalisation	9.30 am To 5.30 pm	Visit icai.org	30 Hrs.
4.	3rd & 4th August, 2019 + 5th August at Chikaldara	National Tax Conference at Amaravati (Incl. Chikaldara RRC 1 Day)	Sant Dnyaneshwar Sanskrutik Bhawan, Amravati	8.30 am To 6.00 pm	Conf. Rs. 3200/- Plus GST with Accommodation & Rs. 2500/- Plus GST without Accommodation Chikaldara Rs. 2000/- Plus GST Travel Pune-AM-Pune Rs. 1700/-	12 Hrs.
5.	8th & 9th August, 2019	National Tax Conference at Shirdi	CA Ramesh Phirodia Auditorium, Hotel St. laurns, Shirdi	9.00 am To 6.00 pm	Conf. Rs. 2800/- Plus GST Accommodation Rs. 1200/- (Triple Sharing Basis)	12 Hrs.
6.	9th & 10th August, 2019	34th Regional Conference of WIRC	Yogi Sabhagruh, Dadar (E), Mumbai	9.00 am To 5.30 pm	Rs. 3953/- (Inclusive GST) upto 15th July, 2019	12 Hrs.

Notes:-

1) Registrations half an hour before program timings mentioned above.

2) For online registrations & detailed programme structure visit www.puneicai.org

3) Spot Registration Fees will be charge 25% extra

Company Law Refresher Course

Dr. CA. Debashis Mitra
Speaker

CA. C. V. Chitale
Speaker

CA. Shreedhar Pathak
Speaker

CS Gaurav Pingle
Speaker

CA. Bipendra Kothari
Speaker

CA. Sanjay Agrawal
Speaker

Dr. CA. D. G. Kurundwadkar
Speaker

CA. Sameer Karyekar
Speaker

CA. Abhay Arolkar
Speaker

Participants

Chairperson's Communique

CA. Ruta Chitale
Chairperson
Pune Branch of WIRC of ICAI

Respected Members,

Our institute shall be celebrating its Platinum Jubilee and we also have number of programs lined up for members as well as students. It has been a glorious past. However now a days the idea of being in practice may sound preposterous for newly qualified CA since the practice is becoming increasingly challenging day by day. The strain and stress on CA's is enormous and the expectations of all the stakeholders from us CA's as well as our Institute are tremendous.

As a welcome step ICAI has launched UDIN. The effect of UDIN is far reaching provided it is being used diligently by all. The stakeholders shall be definitely benefited and ultimately UDIN shall serve the purpose of underlining the sincerity, excellence and diligence of brand CA. As such it becomes the prime duty as well as responsibility of all members to propagate UDIN amongst the society at large. To this end the ICAI has also released a video of how and why UDIN is to be used. Do make time to watch and spread it across your social media groups. It may not be out of place to state that since 1 st July UDIN is mandatory for all financial statements and auditors reports as well.

Another brave step is Self Service Portal (SSP) for making the entire system paperless and online for students and members. Though there are teething troubles, I feel that over time this system shall make the processes robust and user-friendly.

This month we had various programs for students like a week on Concurrent Audit of Banks, industrial visits. For members we had arranged a month long daily session of Yog sadhana on the occasion of 21 st June being International Yoga Day. Technical sessions such as Industrial Policy, Subsidy for MSME, GST week, ROC compliances, unregulated deposits etc. were also organized during the month. We at the branch are always looking forward to organize innovative programs for members and students. Do feel free to contact me or any of the managing committee members if you wish to suggest any session or program for the benefit of all members.

Warm Regards,
CA. Ruta Chitale

Wit and Wisdom of Annual Return under GST

Contributed by :- CA. Ravi Kumar Somani
Email :- ravikumar@hiregange.com

The requirement to file Annual Return stems from the section 44 of the CGST Act which requires every registered person to furnish an annual return for every financial year by December 31st of the subsequent financial year. Although, assesses are filing monthly or quarterly tax returns, Annual Return requires the submission of the details of entire financial year and gives assessees with an opportunity of self-assessment and disclosing the additional liability, if any, and making the payment thereof. It can be inferred from the clarifications furnished in the press release issued by the Government lately, that an Annual Return is intended to disclose the transactions which have been omitted to be disclosed in the periodical returns and it is not just a mere consolidation of details submitted with the Government over a period of time through periodical returns. Hence, errors or omissions committed by the registered person may be rectified through Form GSTR 9. In this article, we shall try to encapsulate certain important and critical aspects which the trade and professionals must take note in the process of filing of the annual returns.

Non declaration in Annual Return could amount to 'suppression'

Explanation 2 to Section 74 defines suppression as "non-declaration of facts or information which a taxable person is ***required to declare in the return,*** statement, report or any other document furnished under this Act or the rules made thereunder, or failure to furnish any information on being asked for, in writing, by the proper officer". The definition of suppression and format of Form GSTR 9 has the excuse to stretch the demands to longer period of 5 years.

Take for example, Form GSTR 9 requires the taxpayer to fill nuisance details like HSN summary of outward supplies, inward supplies, details of inward supplies received from composition dealers etc. Imagine a tax-payer who had been fully compliant and fully open about their disclosures in other parts of the return, but was no so diligent on these parts on the premise that such details don't have any revenue impact either on him or upon government.

Suppose in future a demand arises on an issue on which the taxpayer had made complete disclosure, however, details of HSN summaries and receipt from composition dealers were filled casually. Can revenue authorities claim that the suppression of facts were involved qua the later details and extend the period of demand to longer period in respect of which full disclosure was made? The thrust of the matter is - should the suppression be counted so wide so as to make even the miniscule irrelevant details as prejudice to even those information which the taxpayer had diligently declared to the revenue? In defence, there is a need to have an intent to evade or positive wrong doing but these arguments would be appreciated only in the higher appellate levels. If it were to be so, there is need to take care of all the relevant fields in the annual return even if they are of nuisance value.

Inability of disclosing the contentious stands taken by taxpayer:

In the normal course of business, the taxpayers are confronted with tax positions which are unclear in terms of taxability, eligibility of Input tax credit, availability of the exemption etc. The taxpayer has the option to go to the advance ruling authority for them to have a concrete binding

view on the tax position. However, the keeping in mind the status quo of advance ruling, the tax-payer may opt to take a stand on the positive tax position [as to not paying a tax or availing exemption] and be prepared for litigation in the future.

In the event of losing the litigation over tax position, the demand of tax by revenue would succeed. However, the tenure/stretch of such crystalized demand, be it 3 years or 5 years would depend upon the corroborative evidence produced by the taxpayer as to his bona fide.

How can a taxpayer corroborate his bona fide and full disclosure while filing annual return? Under the erstwhile law, Form ER-1/ ER-3 and ST-3 had embedded option of providing remarks in the returns. The remarks column was often used by the taxpayers for disclosing the controversial tax positions taken by them. This taxpayer used to get the benefit of such disclosure in the form reduced demand [of shorter period] from the judicial forums. See Shrishti Packaging Pvt. Ltd. vs CCEx 2007 (213) E.L.T. 419 (Tri. - Mumbai).

In the annual return format in Form GSTR 9, there is no facility to add any comments by the taxpayer, accordingly, the taxpayer is not in a position to disclose any particular stand taken by him on a litigation prone issue. However, it has also been seen that returns having no facility to disclose something has been led to believe that the taxpayer was not at all liable to disclose such thing and the Courts have invariably extended the benefit of bona fide to the taxpayers, See CCEx vs Pushp Enterprises 2011 (22) S.T.R. 299 (Tri. - Del.) Tax compliant assessees have in the past sent a voluntary disclosure letter to the jurisdictional officer as a method of keeping good documentation to protect themselves.

Declaration of passing on the benefit – excessive delegated?

At the footer of the annual return, the form requires the taxpayer to make declaration that “in case of any reduction in output tax liability the benefit thereof has been/will be passed on to the recipient of supply”. The declaration stems from the mandate of Section 171 of the CGST Act – Anti Profiteering clause, which stipulates that the benefit of reduction in output tax shall be passed on by commensurate rate of reduction in prices.

Section 44 of the CGST Act mandates the taxpayer to file annual return which is a part of Chapter IX – returns. On the contrary, Section 171 although enforces upon the taxpayer to pass on the benefit of anti-profiteering, the declaration that benefit has been passed on, is completely out of context. Vide Section 171 (2) and (3), the Parliament has delegated the power to monitor the anti-profiteering provisions to the National Anti-Profiteering Authority (NAPA). On the basis of above, it is plainly clear that the Parliament has clearly divided the jurisdiction to monitor the Act to Central Government and to monitor anti profiteering to NAPA. That being the case, the Central Government in disguise of Annual return, cannot seek a declaration that the benefit of anti-profiteering has been/ will be passed on.

Given that all assessees will file Form GSTR 9, meaning thereby, they are affirming to the fact that they will/ have already passed on anti-profiteering benefits. Effectively, therefore, GSTR 9 is eliminating the possibility to challenge the constitutional validity of anti-profiteering clause. Further, since NAPA's order are not challengeable before any forum, through this declaration it effectively means the NAPA orders are final and binding since the taxpayers have effectively waived off their right to challenge NAPA's order vide the above declaration.

It brings out that if the declaration of anti-profiteering, so worded is interpreted in above terms, it plainly suffers from the vice of excessive delegation. The Central Government in its limited wits, cannot incorporate some matters which it doesn't have the power to do so. In Alstom India Ltd. vs Union of India 2014-TIOL-223-HC-AHM-EXIM, the Gujarat High Court had struck down a similar declaration incorporated in the form of claiming Duty Drawback, when the DGFT hadn't had jurisdiction make substantive law relating to such declaration.

It would therefore be interesting as to what extent such declaration is used/ misused by the revenue in the anti-profiteering challenges before High Courts and the Supreme Court.

Relevant Date for increasing the timelines related to annual return

Under GST Law, there are few provisions which fix the higher threshold from the due date of furnishing annual return, such as Section 36 of the CGST stipulates that records shall be maintained till the expiry of 72 months from the due date of annual return, similarly Section 73 and 74 of the CGST Act count the limitation period of issuing order for recovery of tax from the due date of furnishing the annual return.

The original due date for furnishing annual return is envisaged under Section 44 as 31st December of the subsequent financial year. However, for financial year 2017-18, the date has been extended to 30th June 2019. Does it mean that the threshold under Section 36, 73 and 74 also gets extended?

Vide removal of difficulty order 01/2018 and 03/2018, vide the powers of Section 172, an explanation has been added before Section 44 to stipulate that “for the period FY 2017-18, it is hereby declared that annual return shall be furnished on or before 30th June 2019 which may be extended by the Government considering the complexity and the volume coupled with the errors faced on the portal”. A close reading of the removal of difficulty order, it appears that due date of furnishing annual return has not been extended, since such power continues to remain with the Parliament. It is only as an exception that the government has agreed to admit the annual return before 30th June 2019. The due date of furnishing annual return still remains 31st December 2018, accordingly, the threshold for Section 36, 73 and 74 still relies on 31st December 2018 as due date.

Legal Sanctity of lapsing credit through annual return

Table 8H of Form GSTR 9 derives a computation based on the figures of ITC appearing in Form GSTR 2A and the actual ITC availed by the taxpayer during the permissible time period. Table 8H says that ITC appearing in Form GSTR 2A in excess of the ITC availed by the taxpayer shall lapse.

Although the CGST Act or Rules do not incorporate any provision calling for lapse of the credit, however it appears that the objective behind such field is to stop the possible camouflage by the taxpayers. Once the figures are explicitly brought out under this field, the taxpayers won't be able to fit such ITC in the figures in the ITC availed figures of Form GSTR 3B filed in the next FY and onwards.

Although the field serves the objective of the government in to restricting the possible camouflage however such lapse of ITC might not have the sanctity of the law. Further arriving at the figures on the basis of GSTR 2A is highly irrational in as much as GSTR 2A is highly un-reliable capture of ITC details.

Unknown ramifications of inter se differences between GSTR 1, GSTR 3B, auto populated GSTR 9 and the GSTR 9 actually filed

With more data and varied amount of data, the government at the end of the exercise of GSTR 9, will have at least four set of figures available with them. While GSTR 1 is based on invoice wise items, GSTR 3B is the consolidated figures punched long back, GSTR 9 more or less replica of figures of books of accounts, it is inconceivable as to how the government is going to use such data.

The taxpayers are already facing with the hassle of reconciling GSTR 1 with GSTR 3B and books of accounts, at the end of the exercise GSTR 9 instead of being a consolidation of all these data, may end up being another data which may be formed as basis of seeking demands by the revenue.

The erstwhile VAT laws had the facility to accommodate corrections in the monthly/ quarterly filed returns through annual return. Therefore, for the purpose of assessment, only the annual return formed the basis of comparing the short and excess tax payable by the taxpayers. However, this is far from truth when it comes to annual return under GST. GSTR 9 could be the most dangerous where the revenue starts raising demands based on the mere comparison of GSTR 9 with GSTR 1 and GSTR 3B.

Conclusion:

Above discussion makes it very clear that the preparation and filing of annual return cannot be taken casually by the taxpayers and they have to be diligent to ensure that all disclosures required to be made in the Annual Return or additionally, have correctly been made. Once the taxpayer discloses all the information correctly to the best of his knowledge and belief, it could always act as risk mitigating factor against proceeding by the department. There should be proper back up of information and documentations to establish the basis of disclosure made, so that these could be submitted before the authorities in the event required by them.

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Forced Merger in the history of India – Classic example of Limited Liability of a Company

Contributed by :- CS Dhaval Gusani
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The Supreme Court recently set aside an order of compulsory and forced merger between 63 Moons Technologies Ltd. (Formerly known as Financial Technologies India Ltd - FTIL) and its subsidiary National Spot Exchange of India Ltd (NSEL). It was the first time in history that the Government invoked Section 396, for non-government companies, which provides merger in the public interest. The Apex court ruling discusses constitutional principles and nuances of corporate laws to come to a finding that merger order was not in 'public interest'.

Background of the Case

FTIL is a listed company holding 99.99% shareholding of the NSEL. NSEL provided an electronic platform for trading of commodities between buyers and sellers. In July 2013, 13,000 persons who traded on the platform of NSEL claimed to have been duped by other trading members, who defaulted in payment of obligations amounting to approximately Rs. 5600 crores! The transactions on the NSEL were to result in actual deliveries of commodities but it was found that there were no commodities or there were inadequate commodities in the warehouses of NSEL for effecting such deliveries. As a result, over 13,000 investors, with claims of over Rs. 5600 crores, neither received the commodities nor the amounts due to them from the defaulters or from the settlement guarantee fund created by NSEL. Reacting to this crisis, Forward Market Commission **(FMC)** ordered Forensic Audit, Inspection of books of accounts etc. of NSEL and suggested merger between NSEL and its holding company i.e. FTIL so that FTIL resources can be used to pay off the liabilities of NSEL.

Section 396 of the Companies Act, 1956

Section 396 empowers the Government to order compulsory amalgamation of two or more companies where it is satisfied that it is essential in the 'public interest' to do so. The Bombay High Court and the Supreme Court in particular analyzed in great detail as to whether it was 'essential' and in the 'public interest' to merge the two companies.

Findings of the Bombay High Court

The Petitioner contended that the shareholders or creditors of FTIL were deprived of opportunity of appeal under Section **396(3A)** and therefore there is a breach of procedure prescribed in Section **396(4).** Accordingly, the impugned order is ultra virus. They also contended that the merger between a loss making wholly owned subsidiary (NSEL) with its profit making holding company (FTIL) would lead to the diminution of economic value of shares. But the Bombay High Court rejected both the arguments and held that if the Central Government by consolidating the businesses of NSEL and FTIL aims to restore confidence in commodity exchanges, the High Court sees no reason to upset such a decision or hold that such a decision is not in public interest. Bombay H.C. concluded that the action by the C.G. was in furtherance of the legitimate aim, namely, 'public interest' and the means adopted by the C.G. are quite suited to achieve public interest.

Findings of the Supreme Court

However, when the order of the Bombay High Court was considered by the Hon'ble Supreme Court, it viewed it differently. The Supreme Court findings qua 396 were as follows:

▪ First, the Central Government has to be satisfy that it is **essential in the "public interest"** to do so and if yes, then various **pre-requisites contained in Section 396 must first be satisfied** before the said section can operate like a proposed draft order has first been sent to each of the companies concerned for their suggestions or objections and the C.G. must first consider it before passing the final order. Supreme Court observed that C.G. has neither considered the suggestions from stake holders nor modified its order in the light of the suggestions received. Thus the C.G. had failed to follow the requirements of 396(4) (b) in its true letter and spirit.

▪ Another condition precedent to passing of an order under this Section is that every member or creditor of each of the companies before amalgamation shall have, as nearly as may be, the same interest in or rights against the company resulting from the amalgamation as he had in the erstwhile company either as a member or a creditor, and if this is not so, such member or creditor shall be entitled to compensation.

▪ The immediate reason for amalgamation is that NSEL seems financially and physically incapable of making any recovery from defaulting members. The main concern of FMC was that the investors duped should get their monies. Supreme Court held that this concern of FMC has been largely redressed as on date of passing of the final order without even amalgamation. As on today, decrees/awards worth Rs 3,365 crore have been obtained against the defaulters, with Rs 835.88 crores crystallised by the committee set up by the High Court even without using the financial resources of FTIL as an amalgamated company. What is, therefore, important to note is that what was emergent and essential in 2013-2014, has been largely redressed in 2016, by the time the amalgamation order was passed.

▪ Supreme Court was of the opinion that if a company with low net worth (NSEL) is amalgamated with a company with high net worth (FTIL), both the shareholders and the creditors of FTIL will be directly impacted as the economic value of the shares will fall and the creditors of FTIL may have to wait for a long time once the company is amalgamated with the negative net worth company. In short, the creditors of FTIL will be put on par with the creditors of NSEL, which will result in the creditors of FTIL either being paid back their debts much later in point of time, or not at all.

Conclusion

The **'Corporate Veil',** is the basic doctrine of corporate law. A classic judgment decided by UK court in 1897 in ***Salomon VS A Salomon & Co Ltd*** held that a company is a separate legal entity distinct from its members. This case has held its importance till date and almost every country following this **'Separate Legal Entity distinct from its Members'** principle including India. Although, this corporate veil may be lifted but only where a company has been constituted with the sole intention of acting as a façade to perpetrate a fraud.

The judgment of Supreme Court has far-reaching implications. If Section 396 is permitted to be used in this case, it would circumvent the long established legal fiction and permit a claimant to seek recovery of dues from the members of the holding company. It is difficult to see how such action could be said to be 'essential' or in 'public interest' when it tantamounts to bringing down two entities instead of liquidating the one which has no hope of restructuring or survival.

In a capitalist economy, the principles of limited liability of corporate entity separate from the holding company constitute the very foundation of corporate growth. The shareholders and creditors of a listed holding company cannot be mulcted to satisfy debts of a subsidiary company.

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Direct & Indirect Tax Refresher Course

CA. C. V. Chitale
Speaker

CA. Krupa Gandhi
Speaker

CA. Rajendra Agiwal
Speaker

CA. Sharad Vaze
Speaker

CA. Neelesh Khandelwal
Speaker

CA. Kishor Phadke
Speaker

CA. Yogesh Thar
Speaker

CA. Anil Sathe
Speaker

CA. Pritam Mahure
Speaker

CA. Sagar Shah
Speaker

CA. Manish Gadia
Speaker

CA. Sachin Shinde
Speaker

Participants

Seminar on "Use of Tally in GST Reporting"

CA. Vandana Dodhia
Speaker

Felicitation of CA. Vandana Dodhia, Speaker by CA. Ruta Chitale, Chairperson - Pune ICAI

Participants

Lecture Meet on "GST on Real Estate Sector"

CA. Pritam Mahure
Speaker

Participants

Seminar on "Issues in SFT"

CA. Sharad Shah
Speaker

CA. Bhuvanesh Kankani
Speaker

Participants

Seminar on "IND AS" (a different perspective to members)

From L to R :-
CA. C. V. Chitale - CCM, CA. Sameer Ladda, Secretary - Pune ICAI, CA. Ruta Chitale, Chairperson - Pune ICAI, CA. Vidhyadhar Kulkarni - Speaker, CA. Dr. S. B. Zaware - Speaker, CA. Kashinath Pathare, Treasurer - Pune ICAI

CA. Vidhyadhar Kulkarni
Speaker

CA. Dr. S. B. Zaware
Speaker

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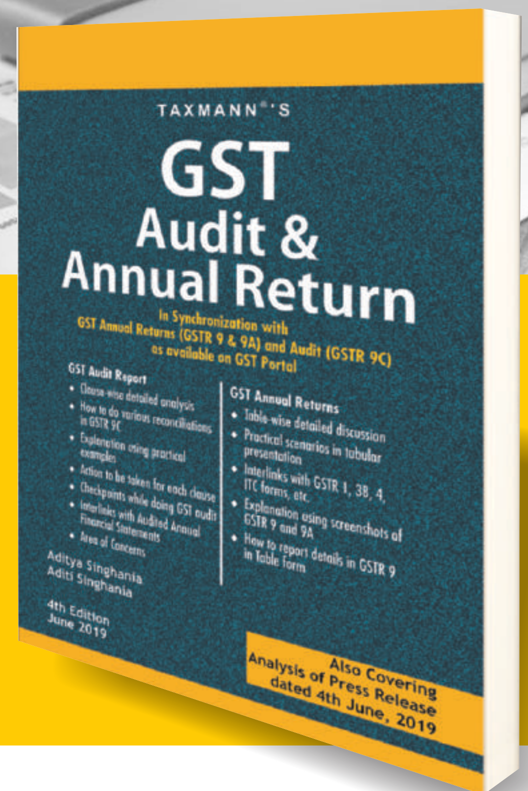

Aditya Singhania/
Aditi Singhania

In Synchronization with GST Annual Returns (GSTR 9 & 9A) and Audit (GSTR 9C) as available on GST Portal

With

Analysis of Press Release dated 4th June 2019

Also Available

- **GST Audit Manual**
  Incorporating Notifications issued on 31-12-2018 & New GST Audit & Return Forms
  Vivek Laddha/Pooja Patwari/Shailendra Saxena

- **GST Audit**
  How to Meet Your Obligations
  S.S. Gupta

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