

ASSESSMENT PROVISIONS IN GST- SECTION 61 TO SECTION 64

CA ARPIT HALDIA

Definition of Assessment-Clause 2(11)

2(11): "assessment"

- means determination of tax liability under this Act and
- includes self-assessment, re-assessment, provisional assessment, summary assessment and best judgment assessment;

Gist of Section for Todays Session- Assessment and Audit

- ❑ Section 61-Scrutiny of returns
- ❑ Section 62-Assessment of non-filers of returns
- ❑ Section 63-Assessment of unregistered persons
- ❑ Section 64-Summary assessment in certain special case

SCRUTINY OF RETURNS - SECTION 61-

**Relevant Section-Section 61 of CGST Act, 2017
read with Rule 99 of CGST Rules, 2017**

**ASMT-10- Notice for intimating discrepancies in the
return after scrutiny**

**ASMT-11- Reply to the notice issued under Section
61 intimating discrepancies in the return**

**ASMT-12-Order of acceptance of reply against the
notice issued under section61**

Section 61-Scrutiny of Returns

61. (1) The proper officer may scrutinize the return and related particulars furnished by the registered person to verify the correctness of the return and inform him of the discrepancies noticed, if any, in such manner as may be prescribed and seek his explanation thereto.

Rule 99(1)-Scrutiny of Returns

9. Scrutiny of returns.- (1) Where any return furnished by a registered person is selected for scrutiny, the proper officer shall scrutinize the same in accordance with the provisions of section 61 with reference to the information available with him, and in case of any discrepancy, he shall issue a notice to the said person in FORM GST ASMT-10, informing him of such discrepancy and seeking his explanation thereto within such time, not exceeding thirty days from the date of service of the notice or such further period as may be permitted by him and also, where possible, quantifying the amount of tax, interest and any other amount payable in relation to such discrepancy.

Observations About Section 61

1. Provisions applicable on a registered person
2. Notice can be issued under Section 61 provide return has been filed by the registered person
3. Manner of Scrutiny not Provided under the Act-Whether electronic or Manual
4. Selection of Return for Scrutiny would be for verification of correctness of the return
5. Once a return has been selected for scrutiny, only then proper officer would be able to scrutinize return related particulars for correctness of return
6. Scrutiny of Return to be carried out on the basis of Information available with the proper officer

Meaning of Return-Clause 2(97)

Clause 2(97) defines returns as any return prescribed or otherwise required to be furnished by or under this Act or the rules made thereunder.

In my view, broadly any return furnished under section 39, 44 and 45 of CGST Act, 2017 falls under the definition of return. Statements like GSTR-1 would not fall in the definition of Return.

Minutes to 6th GST Council Meeting- Section 61 was earlier in Model GST Law Section 59 -Why Manual Scrutiny backed by Intelligence was Chosen

The Hon'ble Minister from West Bengal observed that as scrutiny of returns was normally to be done electronically; it was contradictory to provide for scrutiny of returns by officers. He stated that officers would need to do scrutiny only in certain cases.

Hon'ble Ministers from Assam and Tamil Nadu supported the existing provision and stated that officers needed to do scrutiny.

The Hon'ble Chief Minister of Puducherry also supported the provision and observed that while the officer would carry out scrutiny, he would also be backed by the electronic system.

The Secretary to the Council pointed out that the expression used in Section 59(1) was 'may', which implied that officer would not always carry out scrutiny.

Minutes to 6th GST Council Meeting-Deliberation on Mode of Scrutiny-Section 61 was earlier in Model GST Law Section 59

CCT Karnataka further clarified that while the IT system would throw up the suspicious cases requiring scrutiny, the officer would take into account all factors and might issue notice for scrutiny in select cases, as per the requirement. He added that if notice was issued only based on computer analysis, the Courts might strike it down on the ground of lack of application of mind.

The Hon'ble Minister from Tamil Nadu stated that Section 59 was correctly worded and that in the first year, 100% assessment would need to be done as analytics framework would need time to develop.

The CCT, Telangana stated that scrutiny should not be discretionary and it should only be taken up on the basis of the alerts generated by computer.

The Hon'ble Chairperson stated that scrutiny could also arise on account of some intelligence.

Meaning of Correctness

UOI & Ors vs Naresh Chander on 27 August, 2014 has referred to the meaning of correctness as follows:

In its ordinary meaning and substance, 'correctness' is compounded of 'legality' and 'propriety' and that which is legal and proper is 'correct'.

Verification of correctness covers both legality and propriety and therefore for any return and related particulars furnished by the registered person, proceedings initiated under Section 61 can extend to verify legality and propriety of the return and related particulars furnished in the return regarding output tax liability (Tax Rate, GSTR3B Vs GSTR-1 etc.), input tax credit (Section 16, GSTR 3B Vs GSTR-2A, Section 17(5) etc.).

Once a return has been selected for scrutiny, proper officer would scrutinize related particulars for correctness of return

It is apt to note that Provisions of Section 61 refers to the proper officer may scrutinize the return and related particulars in such manner as may be prescribed. Further Rule 99 which lays down the procedure for the purpose of Section 61 starts with “where any return furnished by a registered person is selected for scrutiny, the proper officer shall scrutinize the same in accordance with the provisions of Section 61”.

Therefore, proper office has to first select the return for scrutiny and then only he can extend his verification to the related particulars like GSTR-1. He cannot issue notice under section 61 for verification of related particulars i.e. GSTR-1 is a return related particulars.

Meaning of Information Available

Division bench of Kerala High Court in **United Mercantile Co. Ltd. v. Commissioner of Income Tax Kerala** observed that a detail becomes available to the Income Tax Officer when it is in the papers filed before him.

Information available also includes information relating to true and correct state of law

Information available also includes information relating to facts of the case

Rule 99(2)- Discrepancy found acceptable by Taxpayer

(2) The registered person *may accept the discrepancy* mentioned in the notice issued under sub-rule (1), and pay the tax, interest and any other amount arising from such discrepancy and inform the same or furnish an explanation for the discrepancy in FORM GST ASMT-11 to the proper officer.

Section 61(2)-Explanation by Registered person found acceptable

(2) In case the explanation is found acceptable, the registered person shall be informed accordingly and no further action shall be taken in this regard.

Rule 99(3)- Explanation found acceptable

(3) Where the explanation furnished by the registered person or the information submitted under sub-rule (2) is found to be acceptable, the proper officer shall inform him accordingly in FORM GST ASMT-12.

Section 61(3)-Explanation not found acceptable

(3) In case no satisfactory explanation is furnished within a period of thirty days of being informed by the proper officer or such further period as may be permitted by him or where the registered person, after accepting the discrepancies, fails to take the corrective measure in his return for the month in which the discrepancy is accepted, the proper officer may initiate appropriate action including those under section 65 or section 66 or section 67, or proceed to determine the tax and other dues under section 73 or section 74.

Whether a lesser time than 30 Days can be given for reply of notice under section 61

Section 61(3) provides in case no satisfactory explanation is furnished within a period of thirty days of being informed by the proper officer or such further period as may be permitted by him. Therefore, Provision says that reply to the notice has to be furnished within thirty days or within such time as may be permitted and if the reply is not furnished, proper officer may initiate the action. The words being used are ***“within a period of thirty days of being informed by the proper officer or such further period as may be permitted by him”*** whereas Rule 99 provides that FORM GST ASMT-10, ***“informing him of such discrepancy and seeking his explanation thereto within such time, not exceeding thirty days from the date of service of the notice or such further period as may be permitted by him.”***

Whether a lesser time than 30 Days can be given for reply of notice under section 61

Therefore, whereas Section 61(3) provides a fixed initial time limit of Thirty days but Rule 99(1) provides for a time period not exceeding Thirty Days which may mean that rule authorizes an initial time period of lesser than thirty days and might or might not be extended further. The rule goes beyond the provision of CGST Act, 2017 therefore in my view, if any time limit is given for responding within a time period less than thirty days, then such time limit would be beyond the provisions of the act.

Whether option provided under Section 61 for the taxpayer to take corrective measure in his return for the month in which the discrepancy is accepted is really available to the taxpayer

Section 61(3) provides that registered person can accept discrepancy mentioned in the notice and pay tax, interest and any other amount arising from such discrepancy and take the corrective measure in his return for the month in which discrepancy is accepted.

Therefore, on one hand Section 61 requires the tax payer to take corrective measure in his return for the month in which discrepancy is accepted but on the other hand Section 39(9) restricts rectification of omission or incorrect particulars discovered as a result of scrutiny, audit, inspection or enforcement activity by the tax authorities. Therefore, by virtue of Section 39(9), such corrective action as provided in Section 61(3) is debarred.

Therefore, an argument can be taken that proceedings under Section 61(3) are void since there is no machinery to implement the provision of section in case taxpayer admits the mistake since every proceeding initiated in Section 61 then would lead to proceedings under Section 65/66/67 or determination under Section 73/74. This is not coming out of the section since the section provides a mechanism to the taxpayer to correct the mistake before initiation of any proceedings under Section 65/66/67 or determination under Section 73/74.

Section 61 does not allow proper office to asses and create demand against registered person. This only allows scrutiny of return for further action being taken.

The question now arises is whether Section 61 allows proper officer to assess and raise demand against the registered person or only allows him to scrutinize the return and take appropriate action under section 65 or section 66 or section 67 of the Central Goods and Service Tax Act, 2017 or Determination of tax and other dues under section 73 or section 74.

It would be apt to highlight provisions under Section 62 and 63 grants power to the assessing officer to assess and upload the summary of demand in DRC-07.

However, procedure under Section 61 only allows proper officer to issue Notice of discrepancy in ASMT-10, submission of reply by registered person in ASMT-11 and if reply found acceptable then information being sent to the registered person in ASMT-12. However, if reply is not found acceptable by proper officer and he has to initiate appropriate action under section 65 or section 66 or section 67 of the Central Goods and Service Tax Act, 2017 or Determination of tax and other dues under section 73 or section 74.

Section -62-Assessment of Non-Filers of Return

Overview of Applicable Section, Rules and Forms

- ▶ **Relevant Section-: Section 62 read with Section 46 of CGST Act, 2017**
- ▶ **Applicable Rule- Rule 100 and Rule 142 of CGST Rules 2017**
- ▶ **Applicable Forms:**
- ▶ **GSTR-3A:** Notice to return defaulter u/s 46 for not filing return-**To be issued Electronically**
- ▶ **ASMT-13:** Assessment order under Section 62
- ▶ **DRC-07:** Summary of the order-**To be uploaded electronically**
- ▶ **DRC-08:** Summary of Rectification /Withdrawal Order-**To be uploaded electronically**

Text of Section 62(1)-Assessment of Non-Filers of Returns

Notwithstanding anything to the contrary contained in section 73 or section 74, where a registered person fails to furnish the return under section 39 or section 45, even after the service of a notice under section 46, the proper officer may proceed to assess the tax liability of the said person to the best of his judgement taking into account all the relevant material which is available or which he has gathered and issue an assessment order within a period of five years from the date specified under section 44 for furnishing of the annual return for the financial year to which the tax not paid relates.

Text of Rule 100(1)-Assessment in Certain Cases

The **order of assessment** made under **sub-section (1) of section 62** shall be issued in **FORM GST ASMT-13** and a **summary thereof shall be uploaded electronically in FORM GST DRC-07.**

Text of Section 46-Notice to Return Defaulters

Where a registered person fails to furnish a return under section 39 or section 44 or section 45, a notice shall be issued requiring him to furnish such return within fifteen days in such form and manner as may be prescribed.

Text of Rule 68-Notice to non-filers of returns

A notice in FORM GSTR-3A shall be issued, electronically, to a registered person who fails to furnish return under section 39 or section 44 or section 45 or section 52.

Applicability of Section 62

- ▶ Proceedings can be initiated only against a registered person.
- ▶ Provisions of Section 62 are applicable wherein a registered person fails to furnish return under Section 39 and 45 of the CGST Act, 2017 even after service of notice under Section 46 of CGST Act, 2017.
- ▶ Section 39 of CGST Act, 2017 pertains to Furnishing of returns from GSTR-3/3B, GSTR-4, GSTR-5, GSTR-6 and GSTR-7. Section 45 of CGST Act, 2017 pertains to Final Return in Form GSTR-10.
- ▶ Therefore, proceedings under Section 62 of CGST Act, 2017 cannot be initiated against a registered person for failure to file GSTR-1, since GSTR-1 is a statement under section 37 of CGST Act, 2017. Similarly, for non-filing of Annual Return/TCS Return proceedings cannot be initiated under Section 62 against the registered person, since Annual Return is filed under Section 44 and Return for Tax Collected at Source is filed under Section 52 of CGST Act, 2017.

Section 62 creates an overriding impact over provisions of Section 73 and 74 of CGST Act, 2017

- ▶ The provisions of Section 62 override provisions of section 73 and 74 only to the extent they are contrary to the provisions of Section 62.

Notice for non-filing of return under section 46 of CGST Act, 2017 to be issued before initiation proceedings under Section 62

- ▶ Proper officer can initiate proceedings under Section 62 only in cases wherein notice for non-filing of returns has been given under section 46 of CGST Act, 2017 and registered person fails to furnish returns even after the issue of notice.
- ▶ Notice for non-filing of return has to be issued **electronically** under Form GSTR-3A. Without issue of notice for non-filing of return under Section 46 of CGST Act, 2017, no assessment under section 62 can be completed by the proper officer.

Assessment of Liability to best of judgement of Proper officer and taking into account all the relevant material which is available or which he has gathered

- ▶ Proper officer may proceed to assess tax liability of the said person to the best of his judgement taking into account all the relevant material which is available or which he has gathered. The assessment of the liability can only be to best of the judgement only after taking into account all the relevant material which is available or which he has gathered.

Meaning of Information Available or Gathered

- ▶ Division bench of Kerala High Court in **United Mercantile Co. Ltd. v. Commissioner of Income Tax Kerala** observed that a detail becomes available to the Income Tax Officer when it is in the papers filed before him.
- ▶ The word “Gathered” has been defined in Merriam Webster Dictionary as to “collect” or “amass”.

Time Limit for passing the order

- ▶ Proper officer has to issue an assessment order under GSTR ASMT-13 within a period of five years from the date specified under section 44 for furnishing of the annual return for the financial year to which the tax not paid relates. Summary of the order issued under ASMT-13 has to be uploaded **electronically in FORM DRC-07.**

Withdrawal of order passed under Section 62 of CGST Act, 2017

- ▶ If a registered person furnishes a valid return within thirty days of service of assessment order under sub-section (1), said assessment order shall be deemed to have been withdrawn but liability for payment of interest under sub-section (1) of section 50 or for payment of late fee under section 47 shall continue.
Withdrawal of order shall be made in Form DRC-08 and shall be electronically uploaded by the proper officer.

No Separate Notice under Section 62 required to be given

- If notice under section 46 of CGST Act, 2017 has served electronically under Form GSTR-3A upon the registered person for non-filing of return under section 39 or Section 45, and registered person does not files return in pursuance of the said notice, Section 62 does not mandate any further service of notice. In such cases, Section 62 read with Rule 100 empowers the proper officer to issue Assessment order under FORM GST ASMT-13 and a summary thereof to be uploaded electronically in FORM GST DRC-07.

Litmus test to be passed by the order passed by the proper officer to the best of his Judgement

- ▶ The section does not give an unfettered power to the assessing officer and the guess work involved in the order of best judgement has to be made on the basis of material available on record and information gathered by the assessing officer.

Assessing Authority must not act dishonestly or vindictively or capriciously

Privy Council in **Commissioner of Income-tax v. Laxminarayan Badridas** considered the meaning of "to the best of his judgement" wherein it observed:

"He (the assessing authority) **must not act dishonestly, or vindictively or capriciously because he must exercise judgment in the matter.** He must make what he honestly believes to be a fair estimate of the proper figure of assessment, and for this purpose he must, their Lordships think, be able to take into consideration local knowledge and repute in regard to the assessee's circumstances, and his own knowledge of previous returns by and assessments of the assessee, and all other matters which he thinks will assist him in arriving at a fair and proper estimate; and **though there must necessarily be guess-work in the matter, it must be honest guess-work. In that sense, too, the assessment must be to some extent arbitrary.**"

Assessing officer needs to consider all relevant material on record

Division Bench of the Calcutta High Court in **Jagadish Prosad Pannalal v. Member, Board of Revenue, West Bengal AIR 1951 Cal 154, 55 CWN 244**, confirmed the assessment made by the sales tax authorities, as in making the best judgment assessment the said authorities considered all the available materials and applied their mind and tried their best to come to a correct conclusion.

Further Division Bench of the **Patna High Court in Doma Sahu Kishun Lal Sao v. State of Bihar AIR 1952 Pat 357, 1953 (1) BLJR 196** refused to interfere with the best judgment assessment of a Sales Tax Officer as he took every relevant material into consideration, namely, the situation of the shop, the rush of the customers and the stock in the shop and also the estimate made by the Assistant Commissioners in the previous quarters.

Judgement should have reasonable nexus to the available material and circumstances of the case

Apex Court in the matter of **State Of Kerala vs C. Velukutty on 2 December, 1965** held that limits of the power are implicit in the expression "best of his judgment". Judgment is a faculty to decide matters with wisdom truly and legally. Judgment does not depend upon the arbitrary caprice of a judge, but on settled and invariable principles of justice. Though there is an element of guess- work in a "best judgment assessment", it shall not be a wild one, but shall have a reasonable nexus to the available material and the circumstances of each case.

Hon'ble Apex in the said matter set aside the order by Assessing Officer holding that in this case there was no material before the assessing authority relevant to the assessment and the impugned assessments were arbitrarily made by applying a ratio between disclosed and concealed turnover in one shop to another shop of the assessee. It was only a capricious surmise unsupported by any relevant material. The High Court, therefore, rightly set aside the orders of the Tribunal.

Judgement should have reasonable nexus to the available material and circumstances of the case

Apex Court in the matter of **Raghubar Mandal Harinder Mandal v. State of Bihar 1957 AIR 810, 1958 SCR 37**

“No doubt it is true that when the returns and the books of account are rejected, the assessing officer must make an estimate, and to that extent he must make a guess: but the estimate must be related to some evidence or material and it must be something more than mere suspicion.”

Similar ratio was laid down by the Apex Court in the matter of **Brij Bhushan Lal Parduman Kumar vs Commissioner Of Income Tax 1979 AIR 209, 1979 SCR (2) 16.**

Figures does not have to be proved to the exact amount determined

In the case of **Lake Palace Hotels and Motels Pvt. Ltd vs Commissioner Of Income-Tax (1195) 213 ITR 735**, it was held that in a best judgment assessment guess-work is necessary and it is not required that the figure has to be proved to the exact amount determined by the taxing authorities.

Basis of Computation to be disclosed in the order

In the matter of **Ganga Prasad Sharma vs Commissioner of Income-Tax on 12 March, 1980** Equivalent citations: 1981 127 ITR 27 MP it was held that

Neither the ITO nor the Commissioner has referred to any material for applying the flat rate of 15 per cent, while estimating net profits. It was now well settled that while making a best judgment assessment, though there must necessarily be guess-work in the matter, it must not be arbitrary. In the instant case, the basis on which the computation is made is not disclosed in the order. Learned counsel for the department was unable, to support the impugned order.

If the estimate is bonafide and on rationale basis, it cannot be disturbed by the Court even though it might not be the most appropriate

In the matter of **Sangrur Vanaspati Mills Ltd. vs Commissioner Of Income-Tax on 7 July, 2005** Equivalent citations: (2007) 211 CTR P H 439, 2006 283 ITR 267 P H, Punjab and Haryana High Court held that

The best judgment assessment must have some reasonable nexus to the available material and circumstances of each case. If the estimate made by the Assessing Officer is a bona fide estimate and is based on rational basis, it cannot be disturbed even when the court may think that it is not the most appropriate basis.

Period of 30 Days provided in Section 62 to file the returns cannot be extended

Bridge Hygiene Services Private Limited V The State Tax Officer, COURT JS Fusion Industries Private Limited V The State Tax Officer 1, Mangomeadows Agricultural Pleasure Land (P) Ltd. V The State Tax Officer SGST

Date :September 23, 2019

"In my view, the statutory prescription of 30 days from the date of receipt of the assessment order passed under sub section (1) of Section 62 has to be strictly construed against an assessee and in favour of the revenue, since this is a provision in a taxing statute that enables an assessee to get an order passed against him on best judgment basis set aside. The provision must be interpreted in the same manner as an exemption provision in a taxing statute. This Court may not be justified in granting an extension of the period contemplated under sub section (2) of Section 62, so as to enable the assessee to file a return beyond the said period for the purposes of getting the benefit of withdrawal of an assessment order passed on best judgment basis under Section 62(1) of the GST Act."

Section 63-Assessment of Unregistered Persons

Relevant Section, Rules and Forms

- ▶ Relevant Section-: Section 63 of CGST Act, 2017
- ▶ Applicable Rule- Rule 100 of CGST Rules 2017
- ▶ Applicable Forms:

ASMT-14: Show Cause Notice for assessment under section 63 (No Mode Prescribed)

DRC-01- Summary of Show Cause Notice-to be served electronically

ASMT-15: Assessment order under section 63 (No Mode Prescribed)

DRC-07: Summary of the order-To be uploaded electronically

Section 63-Bare Provision

Notwithstanding anything to the contrary contained in section 73 or section 74, where a taxable person fails to obtain registration even though liable to do so or whose registration has been cancelled under sub-section (2) of section 29 but who was liable to pay tax, the proper officer may proceed to assess the tax liability of such taxable person to the best of his judgment for the relevant tax periods and issue an assessment order within a period of five years from the date specified under section 44 for furnishing of the annual return for the financial year to which the tax not paid relates:

Provided that no such assessment order shall be passed without giving the person an opportunity of being heard.

Rule 100(2)-Bare Provision of Rule

The proper officer shall issue a notice to a taxable person in accordance with the provisions of section 63 in FORM GST ASMT-14 containing the grounds on which the assessment is proposed to be made on best judgment basis and shall also serve a summary thereof electronically in FORM GST DRC-01, and after allowing a time of fifteen days to such person to furnish his reply, if any, pass an order in FORM GST ASMT-15 and summary thereof shall be uploaded electronically in FORM GST DRC-07

Applicability of Section

Section uses the word “Taxable Persons”. Taxable Persons has been defined under provisions of CGST Act as a person who is registered or liable to be registered under the provisions of Section 22 or Section 24 of CGST Act, 2017.

Scenarios for the Applicability of Section –Part I

- ▶ Taxable person fails to obtain registration even though liable to do so.
- ▶ Taxable person whose registration has been cancelled under sub-section (2) of section 29 but who was liable to pay tax-Registration can be cancelled by Proper Officer in the circumstances as mentioned in Section 29(1) or Section 29(2) of CGST Act, 2017. Section 29(1) provides cancellation of registration either on the application of the registered person or on own motion by the proper officer. Section 29(1) provides for cancellation of registration under following scenarios:
 - ▶ the business has been discontinued, transferred fully for any reason including death of the proprietor, amalgamated with other legal entity, demerged or otherwise disposed of; or
 - ▶ there is any change in the constitution of the business; or
 - ▶ taxable person, other than the person registered under sub-section (3) of section 25, is no longer liable to be registered under section 22 or section 24.

Scenarios for the Applicability of Section –Part II

Why Section 63 does not covers scenarios provided under Section 29(1)

Section 63 does not cover situations wherein registration is cancelled under Section 29(1) of CGST Act, 2017 since under all the situations given therein, person is no longer liable to pay tax in future period and for the period prior the date of cancellation, liability is covered by the provisions of Section 29(3) which provides that cancellation of registration under this section shall not affect liability of person to pay tax and other dues under this Act or to discharge any obligation under this Act or rules made thereunder for any period prior to date of cancellation whether or not such tax and other dues are determined before or after date of cancellation.

Scenarios for the Applicability of Section –Part III

Scenarios Provided in Section 29(2)-Section 29(2) provides power to the proper office to cancel the registration of a person from such date including any retrospective date, as he may deem fit.

- ▶ Registered person has contravened such provisions of the Act or the rules made thereunder as may be prescribed: - Rule 21 provides that registration granted to a person is liable to be cancelled If he does not conduct any business from the declared place of business; or issues invoice or bill without supply of goods or services in violation of the provisions of this Act, or the rules made thereunder; or violates the provisions of section 171 of the Act or the rules made thereunder
- ▶ Person paying tax under section 10 has not furnished returns for three consecutive tax periods; or
- ▶ Any registered person, other than a person specified in clause (b), has not furnished returns for a continuous period of six months; or
- ▶ Any person who has taken voluntary registration under sub-section (3) of section 25 has not commenced business within six months from the date of registration; or
- ▶ Registration has been obtained by means of fraud, wilful misstatement or suppression of facts.

Section 62 creates an overriding impact over provisions of Section 73 and 74 of CGST Act, 2017

► Section 62 creates an overriding impact over anything contrary contained in provisions of Section 73 and 74 of CGST Act, 2017.

Assessment of tax Liability to best of judgement of Proper officer

Proper officer may proceed to assess tax liability of the said person to the best of his judgement for the relevant tax periods.

There is one clear distinction between the provisions of Section 62 and 63. Section 62 which provides for assessment of non-filers of return provides that proper officer may proceed to assess tax liability of the said person to the best of his judgement taking into account *all the relevant material which is available or which he has gathered*. Therefore, proper officer has to take into account all the relevant material which is available on record or he has gathered. However, provision of section 63 does not provide for taking into consideration of material on record or material which he has gathered but to the best of his judgement.

Whether provisions of Section 63 give an unfettered power to proper officer to assess the person to an estimate which is a pure guess work

The first reason for not referring to the documents on record or material gathered would be that since the person is an unregistered person and would not be filing any returns or statements therefore, there would be little material on record and would have been gathered. But even then, provisions of section 63 cannot give an unfettered right to the proper officer to assess the person to an estimate which is a pure guess work.

Issue of Notice for assessment under Section 63

Proviso to Section 63 provides that no assessment order under this section shall be passed without giving the person an opportunity of being heard.

Therefore, Rule 100 provides that proper officer shall issue a notice to a taxable person in accordance with the provisions of section 63 in FORM GST ASMT-14 containing the grounds on which the assessment is proposed to be made on best judgment basis and shall also serve a summary thereof **electronically in FORM GST DRC-01.**

Time period for replying to the Notice Served in ASMT-14

The person on whom notice has been served in ASMT-14 should be allowed a time of fifteen days to furnish reply to such notice.

Time Limit for passing the order

Proper officer has to issue an assessment order under GSTR ASMT-15 within a period of five years from the date specified under section 44 for furnishing of the annual return for the financial year to which the tax not paid relates. Summary of the order issued under ASMT-15 has to be uploaded **electronically in FORM DRC-07**.

Whether provisions of Section 63, gives an unfettered power to assess the person to an estimate which is a pure guess work

Kerala High Court in the matter of K.M. Alikoya And Co. vs The State Of Kerala on 10 February, 1961 Equivalent citations: 1961 12 STC 567 Ker

Now the proposition of law is well settled that taxing authorities when making best judgment assessment should discharge their duty judiciously, and that rule is not confined to assessments of income-tax alone. It is of wider application because it arises from officers discharging a quasi-judicial function when making such an assessment. Therefore, it governs all best judgment assessments.

Whether provisions of Section 63, gives an unfettered power to assess the person to an estimate which is a pure guess work

Raghubar Mandal Harihar Mandal v. State of Bihar [1957] 8 S.T.C. 770 where the Supreme Court dealing with Section 10(2)(b) of the Bihar Sales Tax Act, 1944, has observed as follows:-

In making an assessment under Section 10(2)(b) the Sales Tax Officer is not fettered by technical rules of evidence and pleadings and he is entitled to act on material which may not be accepted as evidence in a Court of law ; but he is not entitled to make a pure guess and make an assessment without reference to any evidence or any material at all. There must be something more than bare suspicion to support the assessment. When the returns and the books of account are rejected, the assessing officer must make an estimate and to that extent he must make a guess ; but the estimate must be related to some evidence or material and it must be something more than mere suspicion. He must make what he honestly believes to be a fair estimate of the proper figure of assessment and for this purpose he must take into consideration such materials as the assessing officer has before him, including the assessee's circumstances, knowledge of previous returns and all other matters which the assessing officer thinks will assist him in arriving at a fair and proper estimate.

Whether provisions of Section 63, gives an unfettered power to assess the person to an estimate which is a pure guess work

Joharmal Murlidhar And Co. vs Agricultural Income-Tax ... on 4 August, 1970
Equivalent citations: AIR 1970 SC 1980, 1971 79 ITR 6 SC, (1970) 3 SCC 331

Prima facie the order appears to be an arbitrary one. The assessing officer had not given any reasons for his conclusion. Even a best judgment assessment has to be made on some rational basis. The High Court refused to accept the contention of the assessee that the impugned assessments were made arbitrarily on the ground that the assessee had failed to take proper steps under the Act by appealing against the impugned order. That is undoubtedly a good ground for refusing to give the relief to the assessee but all the same, taking into consideration, the amounts involved and the simple nature of the proof required to be adduced by the assessee, we direct as follows:

The assessing officer shall issue a fresh notice to the assessee calling assessment orders for the relevant assessment years. The assessee shall produce those orders within a month of the receipt of the notice. If he produces those orders, the impugned assessment orders shall stand cancelled and the assessing officer shall assess the assessee afresh. If the assessee fails to produce those orders, the impugned assessment orders shall stand and further steps may be taken on the basis of those orders.

Whether provisions of Section 63, gives an unfettered power to assess the person to an estimate which is a pure guess work

Anderson v. Commissioners of Inland Revenue ((1933) 18 Tax Cas. 320) referred by Karnataka High Court in the matter of Rangappa Pandurang Kamath vs State Of Mysore on 15 February, 1962 Equivalent citations: 1962 13 STC 714 Kar

"It may be they did find in fact that the books were badly kept, or that the profit and loss account had not been accurately made out; but, if that is what they meant as a reason for refusing to look at what was undoubtedly evidence, they should have said so. There might then have been no difficulty whatever in sustaining their conclusion, which would have been to some such effect as this : 'The books and accounts you produce are not satisfactory for one reason or another. That being so, we cannot regard them as proving your profits.'"

Lord Sands added :

"If the Commissioners had said that they thought the accounts were 'fictitious' or 'cooked', then that would have justified their disregarding these accounts, and, in those circumstances, we might not have been justified in scrutinising the grounds upon which they were proceeding and in considering whether they were supported by evidence which would satisfy a court of law."

Lord Morison observed :

"In this case, the Commissioners have not made a statement to the effect that they were not satisfied with the statement of the profits which the appellant delivered to them.

CA Arpit Haldia

Assessment in Certain Cases-Section 64

CA Arpit Haldia

Relevant Section, Rule and Forms

- Relevant Section-Section 64
- Relevant Rule-Rule 100
- Relevant Form
 - ❖ ASMT-16-Assessment order under section 64 (No Mode Prescribed)
 - ❖ DRC-07- Summary of the order-To be uploaded electronically
 - ❖ ASMT-17-Application for withdrawal of assessment order issued under section 64 (No Mode Prescribed)
 - ❖ ASMT-18 -Acceptance or Rejection of application filed under section 64 (2) (No Mode Prescribed)

Section 64(1)-Bare Provision of the Act

The proper officer may, on any evidence showing a tax liability of a person coming to his notice, with the previous permission of Additional Commissioner or Joint Commissioner, proceed to assess the tax liability of such person to protect the interest of revenue and issue an assessment order, if he has sufficient grounds to believe that any delay in doing so may adversely affect the interest of revenue.

Rule 100(3)-Bare Provision of Rule

The order of assessment under sub-section (1) of section 64 shall be issued in ***FORM GST ASMT-16*** and a summary of the order shall be ***uploaded electronically in FORM GST DRC-07.***

No Requirement to Issue Notice for the purpose of making assessment under section 64

Assessment under section 64 has to be completed without issue of notice. The assessing officer has to fulfil following conditions before moving ahead and completing assessment under this section-

- Evidence showing tax liability of a person should have come to his notice.
- There should be previous approval from the Additional Commissioner or Joint Commissioner before proceeding to assess the liability of a person under section 64.
- The assessment should protect the interest of revenue.
- The proper officer should have sufficient grounds to believe that any delay in doing so may adversely affect the interest of revenue.

Meaning of the Word “Evidence”

The word “evidence” has not been defined under the Act. Hon’ble Apex Court in the matter of Kalyan Kumar Gogoi Vs Ashutosh Agnihotri observed that

The word 'evidence' is used in common parlance in three different senses : (a) as equivalent to relevant (b) as equivalent to proof and (c) as equivalent to the material, on the basis of which courts come to a conclusion about the existence or non-existence of disputed facts. In the definition of the word "evidence" given in Section 3 of the Evidence Act one finds only oral and documentary evidence. The idea of best evidence is implicit in the Evidence Act. Evidence under the Act, consists of statements made by a witness or contained in a document. If it is a case of oral evidence, the Act requires that only that person who has actually perceived something by that sense, by which it is capable of perception, should make the statement about it and no one else. If it is documentary evidence, the Evidence Act requires that ordinarily the original should be produced, because a copy may contain omissions or mistakes of a deliberate or accidental nature. These principles are expressed in Sections 60 and 64 of the Evidence Act.

Therefore, there should be either oral or documentary evidence as defined under section 3 of Indian Evidence Act, 1872 about the tax liability of the person coming to the notice of the proper officer. Hearsay Evidence would not be sufficient for the purpose of invoking provisions of this section.

Evidence should show tax liability of person

The evidence should establish tax liability of the person. Any evidence which does not establish any liability of the person would not be relevant under the section for the purpose of invoking proceedings under the section. Therefore, a greater liability has been casted under the law before invoking proceedings under the section.

Evidence should have come to his notice

Hon'ble Apex Court in the matter of **Ram Niwas (Dead) Through Lrs vs Smt. Bano & Ors on 1 August, 2000** although concerning to the matter of Transfer of Property Act but applicable in the given case as well held that the word notice is of wider import than the word knowledge. **A person may not have actual knowledge of a fact but he may have notice of it.**

Therefore, the evidence that a particular person is having a tax liability should have come to the notice of the proper officer. One important issue is also that the law does not contemplates that such evidence should be on record. It would be sufficient that the proper should have notice about the same.

Proceedings to be initiated with previous permission

- Proper officer has to be take previous permission of Additional Commissioner or Joint Commissioner before proceedings to the assess the tax liability of any person under this section.
- The meaning of the word “permission” has been defined by Hon’ble Apex Court in the matter of **Dhanrajamal Gobindram vs Shamji Kalidas And Co. on 27 February, 1961** Equivalent citations: **AIR 1961 SC 1285, (1962) 64 BOMLR 169, 1961 3 SCR 1029** as follows:

"permission" shows that he is granted leave to act in a particular way. But the word "permission" is a word of wide import. "Permission" in this section means only leave to do some act which but for the leave would be illegal.

Therefore, it is mandated in the law that a permission has to be taken and that too prior to proceeding to assess the person under section 64 of CGST Act, 2017. The permission has to be taken prior to proceeding to assess the person under this section.

Power to be exercised to protect the interest of revenue if he has sufficient grounds to believe that any in doing so may adversely affect the interest of revenue-

The power to assess person without issue of notice is a very extreme power. The power is to be exercised to protect the interest of revenue. The power is to be exercised on similar grounds as power is to be exercised under Section 83. As in case of Section 83, recovery of the due amount of tax is to be made without completing assessment and in the given case as well, assessment is to be completed without issue of notice. Therefore, in both cases principle of natural justice is not required to be followed.

For the exercise of power of provisional attachment of properties belonging to the assessee, Hon'ble Bombay High Court in the matter *Gandhi Trading vs. Assistant Commissioner of Income Tax (1999) 239 ITR 337 (Bom.)* observed that One thing is clear that this power should be exercised by the Assessing Officer only if there is a reasonable apprehension that the assessee may thwart the ultimate collection of the demand that is likely to be raised on completion of the assessment. The power of attachment under this Section is in the nature of attachment before judgment under the Code of Civil Procedure. It is a drastic power. It should, therefore, be exercised with extreme care and caution. It should not be exercised unless there is sufficient material on record to justify the satisfaction that the assessee is about to dispose of the whole or any part of his property with a view to thwart the ultimate collection of the demand.

Power to exercised to protect the interest of revenue if he has sufficient grounds to believe that any in doing so may adversely affect the interest of revenue-

- Similar care and caution should be exercised before exercising power under the provisions of Section 64. In a nutshell, power under this section should only be exercised wherein proper officer has sufficient grounds to believe that interest of revenue would be adversely affected either by taxpayer not being available or will dispose of the whole or any part of his property and the revenue would not be able to recover the amount but for the action under this section.

Proviso to Section 64(1)-Bare Provision

Provided that where the *taxable person* to whom the liability pertains is not *ascertainable* and *such liability pertains to supply of goods*, the *person in charge of such goods* shall be *deemed to be the taxable person liable to be assessed and liable to pay tax and any other amount due under this section.*

Analysis of Proviso to Section 64(1)

There might be cases wherein proper officer has evidence regarding a tax liability of person but the taxable person is not ascertainable. In such cases, Proviso to Section 64(1) provides that in cases wherein the taxable person to whom the liability pertains is not ascertainable and the liability pertains to supply of goods, the person in charge of the goods shall be deemed to be the taxable person liable to be assessed. The person in charge should be liable to pay tax and other amount due under the provisions of section 64.

Taxable person should not be ascertainable.

Meaning of Word “ascertained”- Law Dictionary.org has defined the term ascertained as “To fix; to render certain or definite; to estimate and determine; to clear of doubt or obscurity”. The term ascertained can also be described as to find out or learn for certainty and to make sure. Therefore, the question now arises that whether provisions is applicable in cases wherein taxable person upon whom liability has to be casted is identifiable but he not traceable or in cases wherein such person upon whom the liability is casted is not identifiable.

In my view, the provision are applicable wherein identity of the taxable person or the person upon whom the liability is to be fixed is not known, therefore liability in such cases can be fixed upon the person in charge of such goods. But in cases, details of taxable person are on record, then in such cases liability cannot be fixed upon the person in charge of such goods.

Applicable only in cases wherein liability pertains to supply of goods

The provisions of above section can be invoked only in cases wherein liability pertains to supply of goods. It cannot be invoked in other cases like Claim of Input Tax Credit on the basis of Fake or Bogus Invoice etc.

Section 64(2)-Bare Provision

On an application made by the taxable person within thirty days from the date of receipt of order passed under sub-section (1) or on his own motion, if the Additional Commissioner or Joint Commissioner considers that such order is erroneous, he may withdraw such order and *follow the procedure laid down in section 73 or section 74.*

Rule 100(4)-Bare Provision

The person referred to in sub-section (2) of section 64 may file an *application for withdrawal* of the assessment order in **FORM GST ASMT-17.**

Rule 100(5)-Bare Provision

The order of withdrawal or, as the case may be, rejection of the application under subsection (2) of section 64 shall be issued in **FORM GST ASMT-18.**

Withdrawal of Order passed under Section 64(1)

The order passed under Section 64(1) can be withdrawn by Additional Commissioner or Joint Commissioner on an application made by the taxable person or on his own motion, if he considers the order to be erroneous. The application for withdrawal of the order has to be made by the taxable person within thirty days from the date of receipt of order in GST ASMT-17. However, it seems that the state does not prescribes time limit for the withdrawal of order by the Additional Commissioner or Joint Commissioner.

The Withdrawal Order or as the case may be rejection of application under sub-section (2) shall be issued in GST ASMT-18.

Meaning of Word “Erroneous”

Meaning of Erroneous-M/S. The Malabar Industrial Co. vs Commissioner Of Income-Tax, ... on 10 February, 2000

An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind. When an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the revenue unless the view taken by the Income-tax Officer is unsustainable in law.