

Evidence & Proceedings under Income Tax Act

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DIRECT TAXES REFRESHER COURSE 2013

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Synopsis -I

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- Introduction
- Evidence-meaning
- Types of evidence
- Forms of evidence
- Indian Evidence Act ('IEA')
- Rules of Evidence
- Burden of Proof
- Burden of Proof and Onus of Proof
- Applicability of 'IEA' to tax proceedings
- Golden Rules of Evidence & Natural Justice

Synopsis - II

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- **Various Tax Proceedings**
 - Accounting Entries, Method , Books, Statements & Report
 - Cash Credits, Gifts, Loans, etc.
 - Share Capital
 - Income and Exempt Income
 - Expenditure and Purchases
 - Search, Seizure & Survey Proceedings
 - Penalty proceedings
 - Prosecution proceedings
- **Tax Avoidance**
- **Statement on Oath**
- **Nature of Affidavit**
- **Additional Evidence**

Evidence - I

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- “ ‘An evidence’ includes all statements made by witnesses concerning the fact under inquiry. These statements are oral evidences. Documents produced before the Court are also evidences and is known as Documentary evidence. However a statement or a confession of the concerned person or an affidavit strictly are not an evidence. ”
- “Evidences are required to establish facts in issue; to prove the facts asserted or disprove the facts stated by the other party.”

Evidence -II

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•**Philpson:** ” *Evidence means the testimony whether oral, documentary or real, which may be legally received in order to prove or disprove some fact in dispute*” .

•**Taylor:** “*All the legal means exclusive of mere argument which tend to prove or disprove any fact the truth of which is submitted to judicial investigation*”

Evidence - III

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• **Wigmore:** *”Any knowable fact or group of facts, not a legal or a logical principle, considered with a view to its being offered before a legal tribunal for the purpose of producing a persuasion, positive or negative, on the part of the tribunal, as to the truth of a proposition, not of law, or of logic, on which the determination of the tribunal is to be asked”*

• **Thayer:** *”Any matter of fact which is furnished to a legal tribunal otherwise than by reasoning, or a reference to what is noticed without proof, as the basis of an inference to some other matter of fact”*

Evidence - IV

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- Facts furnished to the authorities
- To lead the basis for inference
- To prove or disprove other matter of fact
- Not involving legal or logical principal or reasoning
- Oral or documentary testimony
- To facilitate judicial investigation
- Legal means used in dispute
 - ✓ In judicial investigation
- Includes third party statements
- To prove the asserted facts
- To disprove the alleged facts

Types of Evidence

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- Oral - statement of witness
- Documentary
- Courts presumptions - conclusive and rebuttable.
- Surrounding circumstances
- Information available in public domain .
- An admission of fact - where contents are proved.

Documentary Evidence

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- A document means;
 - any matter expressed (written)
 - on any substance
 - in letters; figures or marks.
- Documentary evidences are;
 - either primary (original) evidences or
 - secondary (copies) evidences.

Forms of Evidence

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- Following are relevant but not sufficient evidence:
 - ✓ Books of Accounts
 - ✓ Public records
 - ✓ Published maps or charts
 - ✓ Official gazette
 - ✓ Statement of law
 - ✓ Certain judgments of Courts
 - ✓ Expert Opinions
 - ✓ Opinion on handwriting
 - ✓ Customs and usage
 - ✓ Character and past history

Indian Evidence Act ('IEA')

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- Introduced w.e.f. 01.09.1872
- Applicable to whole of India
 - ✓ Except J&K
- Applicable to all judicial Court proceedings
 - ✓ Courts, Judges & Magistrates
 - ✓ Persons authorized to take evidence
 - ✓ Not applicable to Arbitration proceedings
- To prove or disprove the facts in issue

Indian Evidence Act ('IEA')

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- Evidence means and includes:
 - ✓ Oral & documentary evidence
 - ✓ Statements relating to matters of fact
 - ✓ Matters under inquiry by Court
 - ✓ Permitted or required by the Court
 - ✓ Position as regards Confession & Affidavits
 - ✓ Presumption by Court- rebuttable & conclusive

Rules of Evidence

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- Person in possession is deemed to be owner unless proved otherwise
- The parties act in certain relationship, the relationship is presumed to exist unless disproved
- Admitted facts are not to be proved
- An admission of fact is an useful piece of evidence and the person making such admission is required to prove the contents of his admission. It is not a final proof of evidence and can be rebutted by the person making it by showing the circumstances in which it was made.

Rules of Evidence

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- A person making declaration is estopped from denying the truth stated in the declaration, generally.
- A person cannot be asked to lead evidence against himself
- Statement of third parties cannot be used against the concerned person unless an opportunity is given to disprove the alleged facts and cross examine such party.
- A statement of third party cannot be blindly used by the Court without inquiry and production of proofs in support of such statement.

Rules of Evidence

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- Surrounding circumstances can also provide valuable evidence where proved.
- Information available in public domain can also be treated as evidence.
- Preponderance of probability can be an evidence
- Good faith is to be proved by the person in a position of confidence
- Written Agreement where statutorily required cannot be substituted by oral Agreement

Burden of Proof

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- The person asserting the facts must prove the facts with evidence.
- Burden of proof is cast on him.
- The burden of proof lies on the person who will fail if no evidence at all were given
- The law can under a statute shift the burden of proof.
- The person in knowledge of the facts is the one who is burdened with proving it
- S.106 of IEA & third party knowledge

Burden of Proof and Onus of Proof

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- Duty of proving a fact
- Used interchangeably
- Carries definite meaning
- Burden is fixed
- Onus is ambulatory
- Extent of onus can shift & re-shift
- Degree of proof required

Applicability of 'IEA' to tax proceedings

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- Rules of Evidence and Indian Evidence Act (IEA) are applicable to proceedings in the Courts before the judges and the Magistrates. They apply to judicial proceedings
- The AO is conducting quasi – judicial proceedings and is not a Court. However u/s. 131 and a few other provisions the Civil Procedure Code is made applicable to the IT proceedings.
- The CIT(A) and the ITAT also are quasi-judicial authorities and not the Courts.

Applicability of 'IEA' to tax proceedings

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- The Rule of Evidence and the provisions of the IEA do not apply strictly apply to the proceedings under the IT Act.
- The proceedings however are to be concluded based on evidence only.
- Rules appealing to common sense in any case have to be applied in leading evidences in support of the case and in relying thereon to adjudicate the case

Applicability of 'IEA' to tax proceedings

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- Rules in the IEA are broadly common sense rules which affirm the logic rather than defy the same.
- IT Act being the law of taxation, a statute, shall also be governed by Rules of Evidence though not by the strictest application of the IEA.

Golden Rules of Evidence & Natural Justice

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- **First** ; what is apparent is believed to be true.
- **Second** ; what is believed to be true can be proved with evidence to be false.
- **Third** ; the person seeking to counter the apparent truth has to lead evidences.
- **Fourth** ; law can shift the burden of proof on the assessee to prove that apparent is real.
- **Fifth** ; evidence gathered behind the back of the assessee cannot be used unless an opportunity of rebutting same is given
- **Sixth** ; the rules of Natural Justice shall apply in admission of the evidence ; an opportunity of hearing and cross examination : a must.
- **Seventh**; evidences not produced can be produced before the appellate authorities on a written application.
- **Eighth** ; statement made on oath is binding but not conclusive

Accounting Entries, Method of accounting, Books of account, Financial Statements and Audit Report

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- Material evidences
 - ✓ Primary and secondary books of accounts
 - ✓ Stock records
 - ✓ Supporting evidences
 - ✓ Primary and supporting evidences
 - ✓ Audit Report
 - ✓ Standards on Auditing
- Best sources of evidence for quantifying profit
- Reliable and admissible unless rejected
- AO to lead evidences of defects
- Not conclusive but valuable

Accounting Entries, Method of accounting, Books of account, Financial Statements and Audit Report

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- Burden of proof on assessee and AO
- Presumptive income cases and evidences
- Certain assessee's and s.44AA
- Onus when discharged
- Proof of entries u/s. 279B
- Falsification of books of accounts u/s. 277A
- Presumption of books of accounts u/s. 292C
- Books of accounts in electronic form
 - ✓ Evidence under Information Technology Act

Income and Exempt Income

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- **Material Evidences**

- ✓ Nature of transactions
- ✓ Proof of transaction receipt
- ✓ Identity of payer
- ✓ Bank Statements
- ✓ Confirmation of payer
- ✓ Third party proofs
- ✓ Audit Report

- **Primary onus on assessee**

- **Onus on AO to inquire before rejection of claim**

- ✓ To inquire
- ✓ To give opportunity of hearing
- ✓ To permit cross examination
- ✓ To bring new evidence

Expenditure and Purchases

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•Material Evidences

- ✓ Bills
- ✓ Confirmation
- ✓ Bank Statements
- ✓ Nexus of utilization/consumption
- ✓ Need for expenditure
- ✓ Consistent GP Rate
- ✓ TDS/Service Tax
- ✓ Stock Records
- ✓ Statements & Affidavits
- ✓ Previous purchases
- ✓ Independent inquiry to be conducted by AO
- ✓ Inquiry with customers
- ✓ Cross examination

Expenditure and Purchases

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- Primary onus on assessee
- Onus on AO to inquire before rejection of claim
 - ✓ To inquire
 - ✓ To give opportunity of hearing
 - ✓ To permit cross examination
 - ✓ To bring new evidence
- Implication of s.114 of IEA for non-production
- Implication on production
- Onus when discharged

Cash Credits, Gifts, Loans, etc.

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•Material Evidences

- ✓ Confirmation, Bank Statements, IT Records & PAN
- ✓ Service of summons
- ✓ Proof of source
- ✓ Statement on Oath or Affidavit
- ✓ Proof of refund and re-investment
- ✓ Receipt & discharge
- ✓ Statement of Affairs

•Primary onus on assessee to establish

- ✓ Identity of the payer
- ✓ Genuineness of transaction
- ✓ Credit worthiness of the payer

Cash Credits, Gifts, Loans, etc.

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- Burden does not extend to source of source
- Shifting of burden to AO
- Request for issue of summons to AO u/s. 131
- Power of AO to enforce attendance
- S.106 of IEA & third party knowledge
- Onus when discharged

Share Capital

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- Listed companies
- Unlisted companies
 - ✓ Onus to prove source of source of the shareholder
 - ✓ Effect of failure to prove on company
 - ✓ Same evidences as in cash credits
- Onus when discharged

Unexplained Investment, Money, Expenditure, etc.

s.69, 69A, 69B & 69C

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- Not recorded in the books of accounts
- Burden of proof on AO to establish
 - ✓ Investment by assessee
 - ✓ Quantum of investment
 - ✓ Proof of investment
 - ✓ Year of investment
 - ✓ Opportunity to 'A' & furnishing copies of material for rebuttal
- Shifting of onus to assessee
- Assessee to lead evidence for disowning evidence
- Relevance of Valuation Report
- Possession, joint investment, benami, etc.
- Presumption by Court u/s. 110 of IEA

Search, Seizure & Survey proceedings

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- Restraint order to be a deemed seizure
- Prohibitory order to be not a seizure
- Statement u/s. 132(4) to be used in evidence
- Presumption as to ownership & possession or control
- No presumption as to undisclosed income
- Presumption as to evidence as to s. 278D
- Implication of s.110 of IEA right to rebut

Penalty proceedings

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- Presumption as to :
 - ✓ Concealment of income
 - ✓ Furnishing of inaccurate particulars
 - ✓ Guilty mind
 - ✓ Mens rea
 - ✓ Reasonable cause
- Presumption in search cases
- Assessee to rebut presumption
 - ✓ By leading evidence

Prosecution proceedings

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- Presumption as to culpable mental state
- Willful failure to furnish return
- Willful attempt to evade tax
- Falsification of books of accounts or documents
- Abatement of false return

Tax Avoidance

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- No presumption as to tax avoidance
- Burden on AO to prove
- Leakage of revenue
- Statement of avoidance
- Connivance of parties
- Proof of avoidance
- Motive behind avoidance
- To prove material gathered
- To give opportunity of hearing
- Onus when discharged

Importance of Affidavit

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- An Affidavit is not an evidence under IEA
- It is a relevant piece of information under IT Act
- AO is required to examine the facts stated
- AO cannot ignore the facts stated on oath
- Contradiction of facts required independent examination
- Failure to examine may result in acceptance of facts

Statement on Oath

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- Admission a Valuable piece of Evidence
- Importance of correct facts
- Time of Admission
- Undue influence-onus
- Plain confession
- Prima facie documents
- Retraction After admission
- Not even where no evidence
- Relevance of circumstances

Statement on Oath

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- Shifting stand not helpful
- Onus of both the parties
- Examination of assessee's case
- Material gathered in an illegal search
- Onus when discharged
- Implication of s.115 of IEA

Additional Evidence

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- Evidence before AO
- Fresh evidence before appellate authorities
- Reasonable cause & Rule 46A
- Rule 29 of ITAT Rules, 1963
- Application in writing for admission
- Satisfaction of appellate authorities
- Inherent powers of appellate authorities
- Onus when discharged

THANK YOU