

LEGAL AND TECHNICAL ISSUES IN TAX AUDIT

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HISTORY OF TAX AUDIT

- Concept introduced by Finance Act, 1984 by inserting section 44AB
- Tax Audit is a process to verify whether the books of account prepared by the taxpayer are in compliance with the generally accepted accounting principles (GAAP), Income computation and Disclosure Standard (ICDS) and the provisions of the Income-tax Act, 1961.

ASSESSMENT YEAR	THRESHOLD		NO OF CLAUSES
	Business	Profession	
1985-86 TO 2010-11	40 LAKHS	10 LAKHS	32
2011-12 TO 2012-13	60 LAKHS	15 LAKHS	32
2013-14 TO 2015-16	1 CRORE	25 LAKHS	41
2016-17 to 2018-19	1 CRORE	50 LAKHS	41
2019-20	1 CRORE	50 LAKHS	44
2020-21	1/ 5 CRORES	50 LAKHS	44
2021-22 TO 2022-23	1/ 10 CRORES	50 LAKHS	44

Features of Tax Audit

➤ Objective

- Ensures that the taxpayers has maintained proper books of account
- Complied with the provisions of the Income-tax Act.
- A Tax audit can be conducted only by a Chartered Accountant in practice
- Reporting to Income-tax department
- Report provided that particulars furnished are true and correct
- Limit reckoned qua CA
- Proprietor can perform 60 Audits
- Each partner of the Firm can perform 60 Audits
- Audits signed as Proprietor and also as partner not to exceeds 60 per member

APPLICABILITY OF TAX AUDIT

Applicability of Tax Audit

SECTION NO	APPLICABILITY	Threshold Limits
44AB(a)	Assessee's all cash receipt/ payments <= 5% of total receipts/ payments from business	Rs.10 crores (w.e.f. AY 2021-22)
44AB(a)	Assessee is engaged in business	Rs.1 Crore (w.e.f. AY 2013-14)
44AB(b)	Assessee is engaged in profession	Rs.50 lakhs (w.e.f. AY 2016-17)
44AB(c)-i	Any Assessee engaged in plying, hiring or leasing goods carriage	Taxpayer claims that his profits are lower than the deemed profit under section 44AE (w.e.f. AY 2012-13)
44AB(c)-ii	Non-resident assessee engaged in exploration of mineral oil	Taxpayer claims that his profits are lower than the deemed profits under section 44BB (w.e.f. AY 2005-06)
44AB(c)-iii	Foreign Co. engaged in civil construction	Taxpayer claims that his profits are lower than the deemed profits under section 44BBB (w.e.f. AY 2005-06)

Applicability of Tax Audit

SECTION NO	APPLICABILITY	Threshold Limits
44AB(d)	Any Assessee engaged in profession	Taxpayer claims that his profits are lower than the deemed profit under section 44ADA (w.e.f. AY 2018-19)
44AB(e)	Eligible business and profits declared are below the limits prescribed in 44AD	Total income exceeds the maximum amount chargeable to tax (w.e.f. AY 2018-19)
Third proviso to Sec 44AB	Audit under other law	Assessee is required to get accounts audited under any other law, such audit is sufficient compliance of sec 44AB (w.e.f. AY 1985-86)

Illustrations on Applicability of Tax Audit

For example, Mr. A is engaged in the business of trading of readymade garments. He has a turnover of less than Rs. 10 crores during the financial year 2021-22. He made the following transactions during the relevant year:

Particulars	Mode of transaction	
	Cash (Rs. in lakhs)	Bank (Rs. in lakhs)
Receipts		
– Sales	20	480
– Advance from customers	10	20
– Unsecured loan	10	100
Total receipts	40	600
Payments		
– Purchase	15	400
– Rent	<i>Nil</i>	50
– Loan repayment	5	50
Total Payments	20	500

Illustrations on Applicability of Tax Audit

The turnover of Mr A during the financial year 2021-22 is up to Rs. 10 crores. He shall not be liable for tax audit if his cash receipt and payment during the year does not exceed 5% of total receipt or payment, as the case may be.

Computation of percentage of cash receipts & payments:

Particulars	Total (A)	Cash (B)	% in cash (B/A*100)
Receipts	640	40	6.25%
Payments	520	20	3.85%

Though the payment made in cash during the year does not exceed 5% of total payments, the percentage of cash receipts exceeds the limit of 5%. Thus, Mr. A is not entitled to the benefit of the increased threshold limit of Rs. 10 crores for the tax audit. Hence, a tax audit is applicable.

Illustrations on Applicability of Tax Audit

Analysis of the applicability of tax audit under different scenarios in the case of professionals:

Case	Gross Receipts	Profit	Whether tax audit applicable?	Reason
Case 1	40 Lakhs	25 Lakhs	No	The gross receipt is less than Rs. 50 lakhs, and presumptive profit under Section 44ADA is more than 50% of the gross receipts.
Case 2	40 Lakhs	10 Lakhs	Yes	The presumptive profit under Section 44ADA is lower than 50% of total gross receipts and total income exceeds the maximum exemption limit.
Case 3	40 Lakhs	2 Lakhs	No	The total income is less than the maximum exemption limit.
Case 4	70 Lakhs	50 Lakhs	Yes	Gross receipts exceed Rs. 50 lakhs.
Case 5	70 Lakhs	15 Lakhs	Yes	Gross receipts exceed Rs. 50 lakhs.
Case 6	7 Crores	2 Crores	Yes	Gross receipts exceed Rs. 50 lakhs. The limit of 10 Crores only applies in the case of business.

Computation of Turnover/Gross receipts for shares and securities

Intra-day: Speculative business

- The aggregate of both positive and negative differences is to be considered as the turnover

Shares (1)	Units (2)	Buying Rate (3)	Selling Rate (4)	Total sell (5= 4 x 2)	Total Buy (6= 3 x 2)	Gross Profit (7=5-6)	Turnover (8= 5-6)
TCS	500	3000	3400	15,00,000	17,00,000	2,00,000	2,00,000
IRCTC	1000	650	700	7,00,000	6,50,000	50,000	50,000
JSW	200	700	600	1,20,000	1,40,000	-20,000	*20,000
Turnover						2,30,000	2,70,000

*Ignore negative sign i.e. absolute values should be considered

Computation of Turnover/Gross receipts for shares and securities

F&O: Non-speculative business

- As per Guidance Note on Tax Audit issued by the ICAI, the turnover in case of futures and options is computed in following manner if assessee opts for offering income u/s 44AD
 - a) The total of favorable and unfavorable differences shall be taken as turnover (absolute values).
 - b) Premium received on sale of options is also included in turnover.
 - c) In respect of any reverse trades entered, the difference thereon, should also form part of the turnover.
- If there is loss in case of F&O transactions, in that case tax audit will not be applicable if the income is below exemption limit[Sec. 44AD(4)]
- However what about Salaried Class ????

Issue of Interest and Remuneration in case of Profession

➤ Recent Bombay High Court Judgment Dated 9th March 2022

Perizad Zorabhai Irani vs. PCIT & Ors. (6 NYPCTR 300)

- Assessee carrying on business as well as profession
- Income from profession consists of remuneration from firm exceeding 50 lacs
- Remuneration from firm can't be called as Gross Receipts. Hence no requirement of Getting the Books Audited

Issue of Interest and Remuneration in case of Profession

- Old ITAT Kolkata Judgement – Sagar Dutta Vs DCIT , Usha A Narayanan vs. DCIT
- Income from profession in the form of Remuneration of a Chartered Accountant exceeds 50 lacs
- Remuneration was considered at par with Gross Receipts and hence tax audit applicable

Applicability of 44AD in case of Remuneration from business

- Anandkumar Vs ACIT Madras High Court 388 of 2019
- Applicability of s. 44AD vis-a-vis remuneration received from business
- Remuneration cannot be called as turnover for applicability of Sec. 44AD
- **Takeaway from the Discussion**
- Uncertainty about Treating Remuneration as Gross Receipts for determining Tax Audit Limits
- Certainty that Remuneration cant be Gross Receipts for
44AD OR 44ADA

Liability to tax audit - Special cases

- A trust/association/institution carrying on activities on the object of the Trust may enjoy exemptions as the case may be under sections 10(21) or 10(23A) or 10(23B) or section 10(23BB) or section 10(23C) or section 11 –If they are carrying on business activities and the Business Turnover exceeds the prescribed limits then Tax Audit Provisions very much applicable .
- A co-operative society carrying on business may enjoy deduction under section 80P but if the Turnover is exceeding the prescribed limit then the Tax Audit is very much mandatory .

3CD [PART –B]

- **Clause 8a: Whether the assessee has opted for taxation under section 115BA/ 115BAA/ 115BAB/ 115BAC/ 115BAD?**
 - Section 115BA, 115BAA, 115BAB, 115BAC and 115BAD provide option to the assessee to pay tax at special rates and forego certain deductions
 - Tax auditor has to mention whether the assessee has opted for taxation under any of the aforesaid sections and in case answer is yes, then he has to select the appropriate section.
 - Tax auditor is advised to examine the previous year Income Tax return to verify the option which has been exercised by the assessee.
 - Option once which has been exercised for any previous year, it cannot be subsequently withdrawn for the same or any other previous year.
 - For the purpose of reporting under clause 8a, the tax auditor should verify whether the relevant form being 10-IB, 10-IC, 10-ID, 10-IE and 10- IF furnished under section 115BA, 115BAA, 115BAB, 115BAC and 115BAD respectively for availing new tax regime is already filed by the assessee. In case, the assessee has not filed the relevant form, written representation from the assessee should be obtained

PRE REQUISITES FOR OPTING OPTIONAL TAX REGIME

- In case one wishes to avail the benefits of reduced tax slab rates under the new tax regime in place of existing tax slabs, one has to forgo various tax deductions and exemptions available under old tax regime.
- The option needs to be exercised before filing the return of Income
- Case Law: SUMINTER INDIA ORGANICS (P) LTD. vs. DEPUTY COMMISSIONER OF INCOME TAX (2022) 36 NYPTTJ 921 (Mumbai)
- In this Judgement the Mumbai Tribunal allowed exercising the option till 31st March 2021 even post filing the due date for filing the returns of Income as a part of relaxations during covid period .

3CD [PART –B]

Clause 10

10. (a) Nature of business or profession. (if more than one business or profession is carried on during the previous year, nature of every business or profession)

(b) If there is any change in the nature of business or profession, the particulars of such change

Note: Business added/discontinued during the previous year with respect to the preceding year of the previous year.

- To Correspond to Annexure – I of form 3CD
- Permanent Discontinuance to be stated
- Temporary suspension not to be reported
- Materiality to be seen for determination of change
- Also refer CBDT circular No. 04/2007 dt. 15/06/2007

3CD [PART –B]

Clause 12

Whether the profit or loss account includes any profits and gains assessable on presumptive basis, if yes, indicate the amount and the relevant section (44AD, 44AE, 44AF, 44B, 44BB, 44BBA, 44BBB, Chapter XII-G, First Schedule or any other relevant section)

The amount of profit that relates to a business subject to the presumptive scheme of taxation must be reported here. In case of multiple businesses, only the amount of profit that relates to the businesses subject to the presumptive scheme of taxation will be reported section-wise

3CD [PART-B]

CLAUSE 16 – Amounts not credited to P&L

a) Item falling within scope of Sec 28 but not credited to P&L need to be reported under this clause

For eg Interest on Capital and Remuneration received

- Only the items need to be credited to P&L account and not done need to be reported here.
- **Income credited to Capital account i.e. House property income, interest income not to be reported under this clause.**

3CD [PART-B]

CLAUSE 16 – Amounts not credited to P&L

- (c) Escalation claims accepted during the previous year;
- Escalation claims would normally arise pursuant to a contract (including contracts entered into in earlier years), if so permitted by the contract.
 - Only those claims to which the other party has signified unconditional acceptance could constitute accepted claims.
 - Mere making of claims by the assessee or claims under negotiations or claims which are sub-judice cannot constitute claims accepted.
 - If Reported will be construed as Income for the year

3CD [PART-B]

CLAUSE 16 – Amounts not credited to P&L

(e) Capital receipt not credited to P&L

- Under sub-clause (e), capital receipt, if any, which has not been credited to the profit and loss account has to be stated.
- The tax auditor may record various judicial decisions on which he has relied in his working papers.
- The following is an illustrative list of capital receipts which, if not credited to the profit and loss account, are to be stated under this sub clause.
 - i. Capital subsidy received in the form of Government grants which are in the nature of promoters' contribution i.e., they are given with reference to the total investment of the undertaking or by way of contribution to its total capital outlay. E.g. Capital Investment Subsidy Scheme.
 - ii. Compensation for surrendering certain rights.
 - iii. Profit on sale of fixed assets/investments to the extent not credited to the profit and loss account.

Treatment given to such Capital Receipts vis a vis Books of Accounts and Income Tax Return need to be checked

3CD [PART-B]

CLAUSE 17

Where any land or building or both is transferred during the previous year for a consideration less than value adopted or assessed or assessable by any authority of the State Government referred to in section 43CA or 50C, please furnish: details of property, consideration received or accrued and value adopted or assessed or assessable

Details of property	Consideration received or accrued	Value adopted or assessed or assessable	Whether provisions of second proviso to sec. 43CA(1) or fourth proviso to sec. 56(2)(x) applicable? (Yes/ No)

- *If the sale consideration of an immovable property is less than the stamp duty value of such property, the stamp duty value shall be deemed to be the sale consideration for the purpose of computing capital gains thereon where such property is held as a capital asset and where the property is held as stock-in-trade, the stamp duty value shall be taken as income/sale value to be considered under the business head of income.*
- *Auditor would have to apply professional judgment as to what constitutes land or building for eg whether leasehold right / development rights / TDR / FSI etc would fall under this provisions or not, would require to be evaluated based on facts & circumstances of transactions*
- *Shree Laxmi Estate vs ITO – ITAT Mumbai - (2020) 204 TTJ (Mumbai) 351 : (2019) 178 ITD 98 (Mumbai) : (2020) 196 DTR_Trib (Mumbai)(Trib) 83*

AUDIT POINTS APPLICABLE FOR FY 2021-22

- Variations allowed during audit period:-

PERIOD	% APPLICABLE FOR VARIATION
1 st April 2021 to 30 th June 2021	20
1 st July 2021 to 31 st March 2022	10

- Higher variation of 20% is allowed subject to following conditions:-
 - ✓ Transfer of residential unit takes place during the period of 12th November, 2020 to 30th June, 2021
 - ✓ The scheme is applicable only from first sale of builder
 - ✓ Consideration received or accruing does not exceed 2 crore rupees

3CD [PART-B]

CLAUSE 20

- (a) Any sum paid to an employee as bonus or commission for services rendered, where such sum was otherwise payable to him as profits or dividend

The assessee would be allowed a deduction in respect of a payment made to an employee in the nature of a bonus or commission only if such bonus or commission was available exclusively to such employee in relation to the services rendered by him. However, deduction shall not be allowed in the case of distribution of dividends indirectly in the name of bonus/commission.

3CD [PART-B]

CLAUSE 20

(b) Details of contribution received from employees for various funds as referred to in section 36(1)(va)

Sr. No.	Nature of fund	Sum received from employees	Due date for payment	Actual amount paid	Actual date of payment to concerned authorities

This clause permits deduction of the following if it is credited by the assessee to the account of the employees in the relevant statutory fund on or before the due date. Here, due date is not the due date for filing income tax return but the date by which an assessee is required as employer to credit the employee's contributions to the employee's account in the relevant fund under any Act such as:

- 1. Provident Fund (PF)*
- 2. Employees' State Insurance (ESI)*
- 3. Superannuation fund*
- 4. Any Other Fund for the Welfare of Employees*

Further, any grace period allowed under the relevant statute may be taken into consideration while determining the due date

Disallowance of employee's contribution to PF

- CIT vs Aimil Ltd. & ORS 321 ITR 508 (Del HC) (2009)
- CIT vs Ghatge Patil Transports Ltd. 368 ITR 749 (Bom HC) (2014)
- Held that in case of employee's contribution also the deduction u/s 36(1) will be available so long as the employer deposits the employee's share in provident fund contribution till the limits prescribed u/s 43B.

Discussion on Employees Contribution to Provident Fund

- A new Explanation to S. 36(1)(va) is being added , to clarify that the provisions of section 43B shall not apply and shall be deemed to have never applied for the purposes of determining the 'Due date'.
- Further, a new Explanation 5 to S. 43B is being added , to clarify that the provisions of section 43B shall not apply and shall be deemed to have never applied to any sum received by employer from his employee as contributions to the employee's account in any of the employees welfare funds as referred in section 2(24)(x).
- The said Amendment applies to AY 2021-22 and subsequent AYs.

3CD [PART-B]

CLAUSE 21

(d) Disallowance/deemed income under section 40A(3)

- If both of these two conditions are satisfied, then the provisions of this section will be applicable.

1. The assessee incurs any expenditure exceeding Rs.10000/- which is allowable for computing income under the head business or profession.
2. The assessee has made payment or aggregate of payments in a day exceeding Rs.10000/- in cash.

- If the above two conditions are satisfied, then whole of the expenditure shall be disallowed under this section.

- In case where payment is made to the transporters for plying, hiring or leasing goods carriages, then amount of Rs.10000/- shall be increased to Rs.35000/ in the above two conditions.

Summary of Rule 6DD

- Following are some Exceptions to Section 40A(3)

The payment has been made for the purchase of:

- (i)** agricultural or forest produce, or
- (ii)** produce of animal husbandries like livestock, meat, skins, and hides or dairy or poultry farming, or
- (iii)** fish or fish products, or
- (iv)** the products of horticulture or apiculture, to the cultivator, grower, or producer of such articles, product, or products,
- (v)** Payment is made for purchasing the products manufactured or processed without the aid of power in a cottage industry, to the producer of such products,
- (vi)** When the payment is made in a village or town, to a person who is carrying on business or is residing in a village or town which does not have such facilities of the bank as on date of such payment

Section 40A(3) Judgement in favour of Assessee

- Cash Expenditure incurred was for purchase of land and the same was reimbursed to the Assessee . Since the expenditure was not debited to Profit and Loss A/C No Disallowance required Rainbow Promoters Pvt Ltd Vs ACIT 95 ITR 232 Delhi Tribunal
- Cash Payments were made for purchase of land held as stock in trade Plots purchased during the year are forming part of closing stock no disallowance warranted u/s 40A(3) Vikrant Happy Homes Pvt Ltd vs DCIT 36 NYPTTJ 51 Pune Tribunal
- Where payment is made by any person to his agent, who is required to make any payment in cash for goods or services(Buying Air Tickets in this case) on behalf of such person, then cash payments in excess of prescribed limit cannot be disallowed under s. 40A(3) Ahmed World Travels and Cargo Vs ACIT 36 NYPTTJ 866 Chennai Tribunal

3CD [PART-B]

CLAUSE 21

(e) Provision for payment of gratuity not allowable under section 40A(7)

The deduction under this section is allowed in relation to a provision created for payment of contribution to an approved gratuity fund only if such sum is actually payable during the year.

(f) Any sum paid by the assessee as an employer not allowable under section 40A(9)

Any payment incurred by an employer towards setting up of any fund, trust, Company, AOP, BOI, Society, etc will not be allowed as a deduction subject to certain exceptions.

(g) Particulars of any liability of a contingent nature

Only the expenses which are debited to P&L account but those are contingent in nature are to be reported under this clause.

(i) Amount inadmissible under the proviso to section 36(1)(iii)

Where the assessee borrows a loan for business purposes, the interest thereon would normally be allowed as a deduction. However, if such loan was used to acquire an asset, the interest shall not be allowed for the period between the date of borrowing of the loan to the date on which the asset was put to use.

CLAUSE 21(h)

Amount of deduction inadmissible in terms of section 14A in respect of the expenditure incurred in relation to income which does not form part of the total income

SECTION 14A: CLARIFICATION IN RESPECT OF DISALLOWANCE IN ABSENCE OF ANY EXEMPT INCOME

INTENTION OF THE STATUTE

- No deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income that does not form part of the total income as per the provisions of the Act (exempt income).
- Over the years, disputes have arisen in respect of the issue whether disallowance under section 14A of the Act can be made in cases where no exempt income has accrued, arisen or received by the assessee during an assessment year.
- CBDT issued Circular No. 5/2014, dated 11/02/2014, clarifying that Rule 8D read with section 14A of the Act provides for disallowance of the expenditure even where tax payer in a particular year has not earned any exempt income.

SECTION 14A: CLARIFICATION IN RESPECT OF DISALLOWANCE IN ABSENCE OF ANY EXEMPT INCOME

COURT JUDGEMENTS

However, Honorable Supreme Court have taken a view that if there is no exempt income during a year, no disallowance under section 14A of the Act can be made for that year. Such an interpretation is not in line with the intention of the legislature.

- South Indian Bank Ltd. Vs. Commissioner of Income Tax [322 CTR (SC) 465 : (2021) 205 DTR (SC) 337]
- Commissioner of Income Tax Vs. Sociedade Defomento Industrial (P) Ltd [4 NYPCTR 715 (Bom)]
- Additional Commissioner Of Income Tax Vs. DCM Ltd. [36 NYPTTJ 5 (Del)]

SECTION 14A: CLARIFICATION IN RESPECT OF DISALLOWANCE IN ABSENCE OF ANY EXEMPT INCOME

CLARIFICATION

- Insertion of an Explanation to section 14A of the Act to clarify that the provisions of this section shall apply and shall be deemed to have always applied in a case where exempt income has not accrued or arisen or has not been received during the previous year relevant to an assessment year and the expenditure has been incurred during the said previous year in relation to such exempt income.
- This amendment is effective from 1st April, 2022

3CD [PART-B]

Clause 22

Amount of interest inadmissible under section 23 of the Micro, Small and Medium Enterprises Development Act, 2006.

The MSME act prescribes an amount of interest that would not be allowed as a deduction in the computation of taxable income of the assessee.

SECTION 23 OF MSME ACT, 2006

- Section 23 of the MSME Act lays down that an interest payable or paid by the buyer, under or in accordance with the provisions of this Act, shall not for the purposes of the computation of income under the Income-tax Act, 1961 be allowed as a deduction.
- Where a buyer fails to make payment of the amount to the supplier, the buyer shall, notwithstanding anything contained in any agreement between the buyer and the supplier or any law for the time being in force, be liable to pay compound interest with monthly rests to the supplier on that amount from the appointed date or, as the case may be, from the date immediately following the date agreed upon, at three times of the bank rate notified by the Reserve Bank.
- As per section 16 of the MSME Act, the payment of interest on delayed payment is in the nature of penalty or it is penal interest.
- Therefore the payment of interest on delayed payment to MSME is regarded as a penal in nature then the said expenditure is otherwise not allowable under section 37 of the Income Tax Act, 1961.

3CD [PART-B]

Clause 23

Particulars of payments made to persons specified under section 40A(2)(b)

This section basically disallows expenditure incurred by way of payment to specified persons (relatives) if the assessing officer finds them to be excessive in nature.

Only items debited to P&L account need to be reported

PERSONS SPECIFIED U/S 40A(2)(b)

CATEGORY OF TAXPAYER	SPECIFIED PERSONS
1. Individual	<ul style="list-style-type: none">a. Any relative (Husband, wife, brother/ sister, linear ascendant/ descendant)b. Any person in whose business or profession , the individual himself or his relative has substantial interest (20% of shareholding/ profit share)
2. Company/ Firm/ AOP/ HUF	<ul style="list-style-type: none">a. Any Director of the Company, Partner of the firm, or member of the association, or family or any relative of such director, partner or member;b. Any Person in whose business or profession the assessee or director or partner or member of the assessee or any relative of such person has a substantial interest

3CD [PART-B]

Clause 26

(A) Pre-existed on the first day of the previous year but was not allowed in the assessment of any preceding previous year and was

- (a) paid during the previous year;
- (b) not paid during the previous year;

(B) Was incurred during the previous year and was paid on or before the due date for furnishing the return of income of the previous year under section 139(1);

(b) not paid on or before the aforesaid date (State whether sales tax, customs duty, excise duty, or any other indirect tax, levy, cess, impost, etc., is passed through the profit and loss account.)

Purpose of s.43B – to avoid delayed payment of tax, cess, duty or fees, etc.

PF & 43B PAYMENTS

- Due date for filing Tax Audit Report & due date for filing Income Tax Returns are different from AY 2020-21.
- Payments happening after the due date for filing tax audit report & reported in audit reports are getting added in assessment u/s 143(1)(a).
- Recourse available is to file appeal against order u/s 143(1)(a).
- Case Law: Ketan Brothers Diamondz Exports vs. Assistant Commissioner Of Income Tax (2022) 36 NYPTTJ 694 (Mumbai)
- Another option is to revise the tax audit report ???? Although there is no apparent mistake in the Tax Audit Report

3CD [PART-B]

Clause 28

Whether during the previous year the assessee has received any property, being share of a company not being a company in which the public are substantially interested, without consideration or for inadequate consideration as referred to in section 56(2)(viiia), if yes, please furnish the details of the same.

Any gift or property received without consideration or inadequate consideration from closely held company within the meaning of sec 56(2)(viiia) during the year from any person other than relatives (More than Rs. 50000), if yes, we are required to furnish detail thereon.

3CD [PART-B]

Clause 29

Whether during the previous year the assessee received any consideration for issue of shares which exceeds the fair market value of the shares as referred to in section 56(2)(viib), if yes, please furnish the details of the same.

In case of un-listed companies premium can be considered as income in case the price charged at the time of issue of share is more than face value (that is at premium) and is also higher than fair market value. In such case , excess of issue price above the fair market value will be considered as income of issuing price.

3CD [PART-B]

Clause 29A

**(a) Whether any amount is to be including in income chargeable under the head 'income from other sources' as referred to in clause (ix) of sub-section (2) of section 56?
(Yes/No)**

(b) If yes, please furnish the following details:

(i) Nature of income (ii) Amount thereof

Advances received in relation to the transfer of a capital asset are shown as income from other sources where the advances are forfeited and the capital asset is not ultimately transferred.

3CD [PART-B]

Clause 29B

**(a) Whether any amount is to be including in income chargeable under the head 'income from other sources' as referred to in clause (x) of sub-section (2) of section 56?
(Yes/No)**

(b) If yes, please furnish the following details:

(i) Nature of income (ii) Amount thereof

Income from other sources in the form of gifts/deemed gifts received which are taxable under section 56(2)(x).

DCIT v/s Rajan Pai

180 TTJ (Bang) 714, 48 ITR 170

- Issue of bonus shares was never considered as gift by a company to its shareholders and never subjected to gift tax in the hands of the company.
- When there is an issue of bonus shares there is a detriment suffered by the recipient shareholder through the depression in the value of the shares held by him.
- Bonus shares do not result in recipient getting a property without consideration or for inadequate consideration.

**Kumar Pappu Singh vs DCIT
198 TTJ 310 Vishakhapatnam
ACIT vs Venkanna Chaudhari
203 TTJ 891 Vishakhapatnam**

- Issue of right shares by closely held company exclusively to one shareholder at price below book value.
- Surrender of rights of the close relatives in favor of another close relative is covered by exemption u/s 56(2)(vii)(c). Therefore, the section has no application.

ACIT v/s Subodh Menon

198 TTJ 79 ITAT Mumbai

- Based on existing shareholding the assessee was offered shares.
- Assessee accepted part offer of the shares.
- Addition was made for the difference between alleged fair market value and the subscribed value of shares.

Tribunal held:

- It is only when a higher than a proportionate allotment of fresh shares issued by the company is received by a shareholder the provisions of Sec. 56(2)(vii) get attracted.
- Further the tribunal held that this being an anti abuse provision will not have an applicability in a bona fide business transaction.

Applicability of Sec. 56 in case of family settlement

Shri Govind Kumar Khemka v/s ACIT Delhi Tribunal ITA No. 2963/ Del 2019

- Family settlement was executed for distribution of different properties between the assessee and his brothers which was having no commercial purpose.
- As per the settlement the assessee contributes 20cr from his own sources or borrowed funds as a part of the family settlement to balance the settlement between the brothers.
- No commercial transaction and there is no colorable device no justification to tax the income.

CASH CREDITS UNDER SECTION 68 OF THE ACT

REQUIREMENTS TO BE FULFILLED

- Section 68 of the Act talks about unexplained credits.
- The onus of satisfactorily explaining such credits remains on the person in whose books such sum is credited.
- Further, the provision of source of source of the sum credited is applicable only in case of closely held company issuing shares/ shares at premium.
- Documents required:
 - ✓ Identity of the person
 - ✓ Genuineness of the transaction
 - ✓ Creditworthiness of a person
 - ✓ Source of source (Amended in Finance Act, 2022)

CASH CREDITS UNDER SECTION 68 OF THE ACT

- Recent amendment as per Finance Budget 2022 provided that the nature and source of any sum, whether in form of loan or borrowing, or any other liability credited in the books of an assessee shall be treated as explained only if the source of funds is also explained in the hands of the creditor or entry provider.
- However, this additional onus of proof of satisfactorily explaining the source is in the hands of the creditor.
- This provision would not apply if the creditor is a well regulated entity, i.e., it is a Venture Capital Fund, Venture Capital Company registered with SEBI.
- W.e.f. 1st April, 2023 this provision will accordingly apply in relation to the assessment year 2023-24 and subsequent assessment years.

3CD [PART-B]

Clause 31(a) & (b) – 269SS

- Taking a loan or advance or specified sum exceeding Rs. 20,000
- Otherwise than by way of an account payee cheque or bank draft or use of a bank account through ECS would attract a penalty equal to the amount borrowed
- Details of all loans or specified sums taken exceeding Rs. 20,000 are provided herein
- Specified sum - any sum of money receivable, whether as advance or otherwise, in relation to transfer of an immovable property, whether or not the transfer takes place

3CD [PART-B]

Clause 31(ba), (bb), (bc) & (bd) – 269ST

- Section 269ST says that a person is not allowed to receive more than Rs. 2 lakh from either:
 - (i) From a person in a day (in total);
 - (ii) In respect of single transaction; or
 - (iii) In respect of transactions relating to a single event/occasion;
- If such amount is paid through any mode other than an account payee cheque / bank draft or use of ECS through a bank account
- The reporting of non-compliance with this section will be made in this clause

3CD [PART-B]

Clause 31(c), (d) & (e) – 269T

- Repayment of a loan or any amount in relation to purchase of an immovable property (specified sums) exceeding Rs. 20,000
- Otherwise than by way of an account payee cheque or bank draft or use of a bank account through ECS would attract a penalty equal to the amount borrowed
- Details of all repayments of loans or specified sums paid exceeding Rs. 20,000 during the year are provided herein

Section 269SS Judgements in favour of Assessee

- Cash Loan from Partner would not attract the provisions of Section 269 SS Surendra Engineering Corporation Vs JCIT 180 ITD 708 Mum
- Cash Loans obtained from sister concerns and Cash was needed for urgent payment to labourers PCIT Vs Akash Infra Com Projects Pvt Ltd 6 NYPCTR 734 Orissa High Court judgement dated 30th June 2022
- Cash was deposited in Assessee's Bank A/C by his friend for obtaining Demand Draft in favour of Excise Department .Since the nexus was proved it was considered out of the purview of Section 269SS and 269T Sunil Kumar Vs Addnl CIT 33NYPTTJ 26 Jaipur Tribunal

Section 269T Judgements in favour of Assessee

- Repayment of Loan by wife to husband .Since transactions in the nature of Gifts its outside the purview of Section 269T Savita S Gangadshetti vs JCIT 34 NYP TTJ 107 Bangalore ITAT
- No penalty u/s 271 E in the absence of Regular Assessment Vijayaben G Zalavadia Vs JCIT 36 NYPTTJ 682 Ahmadabad Tribunal

Reporting in Clause 44

- Clause First introduced vide Notification dated 20th July 2018
Made Applicable one month thereafter
- Vide Circular No 06/2018 Dated 17th August 2018 the clause was kept in abeyance till 31st March 2019
- Again deferred Vide Circular No 09/2019 dated 14.05.2019 till 31st March 2020
- Again deferred Vide Circular No 10/ 2020 dated 24.04.2020 till 31st March 2021
- Again deferred vide Circular NO 05/2021 dated 25.03.2021till 31st March 2022

Reporting in Clause 44

- In view of the prevailing situation due to COVID-19 pandemic across the country, it has been decided by the Board that the reporting under clause 30C and Clause 44 of the Tax Audit Report shall be kept in abeyance till 31st March, 2022.”
- The wording created a confusion whether the abeyance is for Financial Year 2021-22
- Or Its to be reported in Tax Audits reports issued after 31st March 2022
- Considering the wording for earlier Notifications its clear that Reporting is must for the Financial Year 2021-22
- In fact any tax report issued after 1.04.2022 even for earlier years Reporting in Clause 44 is mandatory
- Two options available Reporting or Disclaimer of opinion
- What's the view of ICAI ???
- Lets wait for the Revised Guidance Note by the Direct Tax Committee of ICAI to be issued on 20th August 2022

3CD [PART-B]

Clause 44:

Breakup of expenditure of entities registered or not registered under the GST

SI No	Total amount of Expenditure incurred during the year	Expenditure in respect of entities registered under GST				Expenditure related to entities not registered under GST
		Relating to goods or services exempt from GST (3)	Relating to entities falling under composition scheme (4)	Relating to other registered Entities (5)	Total payment to registered entities (6)	
(1)	(2)					(7)

Ensure that total of column (6) & (7) tallies with amount mentioned in column (2)

3CD [PART-B]

Clause 44:

Breakup of expenditure of entities registered or not registered under the GST

Total amount of Expenditure incurred during the year	Expenditure in respect of entities registered under GST				Expenditure related to entities not registered under GST
(2)	Relating to goods or services exempt from GST (3)	Relating to entities falling under composition scheme (4)	Relating to other registered Entities (5)	Total payment to registered entities (6)	(7)

It is advised to obtain the Management representation letter from the Assessee for the break up of the expenditure.

Can we vouch the accuracy of the figures???

Disclaimer of Opinion

Possible Illustrative disclaimers :

- We have been informed by the assessee that the information required under this clause has not been maintained by it in absence of any disclosure requirements under the GST Act.
- It is not possible for us to determine the breakup of total expenditure of entities registered or not under the GST as necessary information is not maintained by the assessee in its books of accounts.
- Further, the standard accounting software used by the assessee is not configured to generate any report in respect of such historical data in absence of any prevailing statutory requirements regarding the requisite information in this clause.
- In view of above, we are unable to verify and report the desired information in this clause.
- In the absence of the proper system of assessee, we are unable to comment and give the details as required in Clause 44.

Discussion on Disclaimer of opinion

- Now, the most important part which may be noted is that clause 44 doesn't have the appropriate place to make the above "Disclaimer".
- The place provided in numerous private software is for working purposes and it doesn't get uploaded at the income tax portal.
- So, putting it in the software in clause 44 will be of no use if not placed properly.
- The best place to make the disclosure & disclaimer would be in Form No. 3CA or Form No. 3CB wherein the disclosure could be done by the professional so as to make the proper reporting.
- Whether it would be professional negligence, permissible or not permissible as per ICAI rules is the next big question.
- Whether non reporting or disclaimer would involve disciplinary action is what one needs to look into.
- Lets Wait for the Revised Guidance Note which will be released shortly on 20th August 2022

THANK YOU..!!!