ALL INDIA FEDERATION OF TAX PRACTITIONERS

(Registered with Registrar of Society, Charity Commissioner & Income Tax Authorities)

Regd. Office : 215, Rewa Chambers, 31, New Marine Lines, Mumbai 400 020.
Tel.: 22006342/43 / 49706343, **Mobile:** 9869722522 (whatsapp only)
E-mail: aiftpho@gmail.com, **Website:** www.aiftponline.org

Taxmann Review Bulletin

A quick review of important Taxes & Laws updates reported on Taxmann.com

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‘Innocent’ until proven ‘Guilty’

Unless unaccounted transactions are liable to tax, no prosecution could be launched: Karnataka High Court

Meenakshi Subramaniam
Former IRS Officer

Once, a man who was sleeping, suddenly got up and saw a tail. He started shouting: "Tiger, tiger." All came, armed with sticks but no tiger was seen. A fox murmured to itself: "That's my tail, they are talking about," and thought: "How foolish this person is – he saw a tail and thought it was a tiger's tail, without seeing me !"

In the same way, prosecution proceedings often precede proper assessment. The Karnataka High Court in a recent case [*Income Tax Department* v. *D.K. Shivakumar* [2021] 126 taxmann.com 131 held that until and unless it is determined that unaccounted transactions unearthed during search were liable for payment of tax, penalty or interest, no prosecution could be launched.

[2021] 126 taxmann.com 131 (Karnataka)

HIGH COURT OF KARNATAKA

Income Tax Department* v. *D.K. Shivakumar

The petitioner herein (the Income-tax Department) filed complaints against the respondent under section 200 Cr.P.C. alleging commission of offences punishable under section 276C(1) of the Income-tax Act, 1961 read with sections 201 and 204 of IPC. It was alleged that during the search action under section 132 in the premises of Eagleton Resort, Bidadi, Bangalore where the respondent was staying for time being, the respondent took out a piece of paper from his wallet and tore it in front of the officers. The officers immediately reassembled the said piece of paper. The investigation of the said piece of paper which was attempted to be destroyed by the respondent contained certain unaccounted loan transactions with several persons/ entities. In continuation of investigation, on the basis of the entries found in the said piece of paper, the officers conducted search/survey in premises of Mr. Shashikanth, Mr. A. Somashekar, M/s. Keizen Digital and others which revealed that the said persons/entities were having unaccounted financial transaction with the respondent. The respondent had advanced huge amount of loan to these persons/ entities. He did not disclose the said unaccounted financial transaction in his returns of income and further, the statements of several persons disclosed that the respondent had received huge amount of interest on the said unaccounted loan, which was not reflected in the books of account or in the returns of income.

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The complaints were filed before the Special Court under sanction accorded by the Principal Director of Income-tax (Investigation), Bengaluru, and the Special Court took cognizance of the offences and issued summons.

After, the Court by impugned orders dated 28-2-2019, allowed the applications and discharged the respondent/ accused, reserving liberty to petitioner/complainant to launch prosecution afresh after estimating the undisclosed income of the assessee/ accused by the jurisdictional assessing officer on the basis of materials produced by the authorized officer for search and such other materials as are available with him.

PETITIONER'S ARGUMENTS

The Court below committed an error in not considering the expression used in section 276C(1) that "wilful attempt to evade tax" and "amount sought to be evaded" did not necessarily mean quantification of the exact amount of the tax evaded; rather the said section provided for prosecution for every act of wilful attempt to evade tax of an amount sought to be evaded. The allegations of attempted evasion of tax were shown by comparing returns of the income submitted by accused and the material disclosed during search and seizure. The accused should have declared the income concealed and should have paid the tax along with returns of income. Hence, the evasion of tax relates to the returns of income filed for the respective years. The quantum of tax sought to be evaded can be relevant only after the accused is found guilty of the offence and at the time of imposing sentence. In order to make out the offence under section 276C(1)' , it was not necessary to pass an assessment order by the jurisdictional Assessing Officer. The evidence gathered during the course of search and seizure action under section 132 were sufficient to establish the existence of the ingredients of the said offence which aspect has been lost sight of by the Special Court.

The quantification of amount of tax evaded is not a necessary ingredient of the offence. The language of section 276C(1) specifically refers to an attempt made to evade the tax, penalty or interest chargeable or imposable or under report is income under the Act. The section is attracted even before the quantification of the tax being evaded. The terms used are "chargeable", "imposable" and not "charged"

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or "imposed". The court below has misinterpreted this provision to mean that unless the quantification of tax liability takes place, the assessee cannot be prosecuted under section 276C(1) by placing reliance of section 276C(1)(*i*) of Act. If the interpretation placed by the Court below is to be accepted, then section 276C(1)(*ii*) would be redundant.

The Court below has erred in holding that the impugned document attempted to be destroyed was not destroyed or obliterated and therefore, the ingredients of sections 201 and 204 of IPC were not made out. The undisputed facts disclose that the respondent made an attempt to destroy the alleged document which would be part of the jurisdictional proceedings under section 132 of Act.

Placing reliance on decision of the Hon'ble Supreme Court in *Radheshyam Kejriwal* v. *State of West Bengal* 2011(266) E.L.T. 294 (SC), it can be said that adjudication proceeding and criminal prosecution can be launched simultaneously; the decision in adjudication proceeding is not necessary before initiating criminal prosecution; both are independent in nature and therefore, non-quantification of the tax does not render the criminal prosecution of the respondent either illegal or vitiated.

Additional Solicitor General of India referred to the principles laid down by the Hon'ble Supreme Court in *P.Jayappan* v. *S.K.Perumal, First Income-Tax Officer, Tuticorin* [1984] **1984 taxmann.com 661 (SC)** and reiterated that there is no provision in law which provides that the prosecution for the offences in question cannot be launched until determination of tax payable by the respondent on the unaccounted cash and transactions unearthed during the search. As the material collected during the search *prima facie* disclose commission of the offence, the criminal court has to judge the case independently on the evidence placed before it and not based on the adjudication made by the adjudicating authorities under the Act.

Further, the learned Additional Solicitor General of India emphasized that the intention of the respondent to evade taxes being manifest by the clinching material collected during the search, the Special Court has committed a grave error in exercising jurisdiction under section 245 of Cr.P.C. Referring to the decision in Parkash Singh Badal case,

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learned Additional Solicitor General of India emphasized that the petitioner/complainant having made out *prima facie* triable cases, the impugned orders discharging the accused is patently illegal and contrary to the principles of law enunciated by the Hon'ble Apex Court as well as by this Court and therefore, the same cannot be allowed to stand.

RESPONDENT'S ARGUMENTS

Countering, learned Senior Counsel for respondent/ accused argued in support of the impugned orders. Referring to the term "tax" as defined in section 2(*43*) of the Income-tax Act, 1961 and "total income" as defined in section 2(*45*) of the Income-tax Act, 1961, in the backdrop of section 4 of the Income-tax Act, it was pointed out that, as per the above provisions, without computing the tax in accordance with the provisions of the Income-tax Act, solely on the basis of equating undisclosed income as tax, the prosecution could not have been launched against the respondent under section 276C of Income-tax Act.

Prior to section 132(5) omission, the authorized officer had jurisdiction to estimate the undisclosed income in a summary manner based on search material calculating the tax, interest, penalty as if it is a regular assessment. From 1-6-2002, it stood omitted.

JUDGMENT

The Karnataka High Court began by saying that it had bestowed careful consideration to the rival submissions.

> "Undisputably, the respondent is sought to be prosecuted under section 276C(1) of the Income-tax Act."

Section 276C(1) reads as under:-

276C(1) If a person wilfully attempts in any manner whatsoever to evade any tax, penalty or interest chargeable or imposable, or under reports his income, under this Act, he shall, without prejudice to any penalty that may be imposable on him under any other provision of this Act, be punishable,—

(*i*) in a case where the amount sought to be evaded or tax on under-reported income exceeds twenty-five hundred thousand rupees, with rigorous imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine;

(*ii*) in any other case, with rigorous imprisonment for a term which shall not be less than three months but which may extend to two years and with fine.

The gist of the offence under section 276C(1) is the wilful attempt to evade tax, penalty or interest chargeable or imposable or under reports of the income. What is made punishable is "attempt to evade tax, penalty or interest" and not the "actual evasion of the tax". The expression "attempt" is nowhere defined under the Act or IPC. In legal parlance, an "attempt" is understood to mean "an act or movement towards commission of a intended crime". It is doing "something in the direction of commission of offence". Viewed in that sense "in order to render the accused/respondent guilty of attempt to evade tax, penalty or interest, it must be shown that he has done some positive act with an intention to evade any tax, penalty or interest" as held by the Hon'ble Supreme Court in *Prem Dass* v. *Income Tax Officer* [1999] 5 SCC 241 that a positive act on the part of the accused is required to be established to bring home the charge against the accused for the offence under section 276C(2) of the Act.

The allegations, that during the search, certain unaccounted loan transaction with the several persons/entities were detected and it was ascertained that the respondent had advanced huge amount of loan to these persons/entities and the said unaccounted financial transactions were not disclosed in his returns of income and that the respondent had received huge amount of interest on the said unaccounted loan, even if accepted as true, do not *prima facie* constitute offences under section 276C(1) of Act.

Tax, penalty or interest could be evaded provided tax or penalty is chargeable or imposable in respect of the above transactions. There is no presumption under law that every unaccounted transaction would lead to imposition of tax, penalty or interest. Therefore, until and unless it is determined that the unaccounted transactions unearthed during search were liable for payment of tax, penalty or interest, no prosecution could be launched on the ground of attempt to evade such tax, penalty or interest. As a result, the very prosecution launched against the respondent being premature and illegal cannot be allowed to continue.

Regarding the question whether the Special Court was justified in discharging the accused under section 245 of Cr.P.C., the Court went on to say, a conjoint reading of the provisions make it abundantly clear that the Special Court has no original jurisdiction to take cognizance of the offences under Chapter XXII of Income-tax Act unless the accused is committed for trial. These provisions therefore lead to the conclusion that a complaint seeking prosecution of the accused for commission of the offences under Chapter XXII of the Act could be initiated only before the jurisdictional Magistrate and not directly before the Special Court. In the instant cases, undisputedly, the complaints were lodged by the authorized officer directly before the Special Court.

The allegations made in the complaints and the material produced in support thereof *prima facie* do not make out the ingredients of the offences under section 276C(1) of Act.

For the above reasons, the judge did not find any justifiable reason to interfere with the impugned orders. As the prosecution initiated against the respondent was bad in law and contrary to the procedure prescribed under the Code of Criminal Procedure and the provisions of the Income-tax Act, the revision petitions, he said "are liable to be dismissed" and accordingly dismissed them.

THE PROSECUTION THAT FAILED

One man said to another "I am going to see a clairvoyant."

The friend said: "Alright."

The first man said: "Aren't you surprised? After all, one doesn't go to a clairvoyant, every day."

The friend said: "My income tax officer is a clairvoyant, because he makes wild guesses about my income each time and prosecutes me. So, I am not new to clairvoyants!"

The Karnataka case has conveyed an important message to income tax department that prosecution is the last stage of an income tax proceeding. Without knowing whether tax is due, a person can't be put in the dock.

It is a leap in the dark. Besides, it goes against the grain of legality.

LESSON NOT LEARNT

The income tax department should have taken a leaf from the *Karti P. Chidambaram* v. *DDIT*

Investigation (Madras High Court) **[2020] 122 taxmann.com 146 / [2021] 431 ITR 261 (Madras),** where a similar plot outwitted the Revenue authorities. It had been alleged there that immovable properties had been sold, but no cash receipts were found.

The Madras Court held that prosecution launched by the Deputy Director for alleged non-disclosure of cash by assessee and his wife was not maintainable and premature one. Merely because the power vested to lodge a complaint by the Deputy Director, the prosecution could not be launched merely on the conferment of such power without any material.

If AO came to the conclusion in a proceedings under section 153 of the Income-tax Act, it was open to the Department to initiate penal action as per law.

Only in the cases where incriminating materials were seized from the possession of the assessee and any statements which incriminate themselves recorded under section 132 (4) of the Income-tax Act or any incriminating evidence collected clinchingly establishes complicity of the accused with the crime, prosecution can be initiated without waiting for the assessment or reassessment proceedings. Otherwise when materials collected are weak and prosecution itself rely them only as corroborative evidence then Department has to wait till the finding recorded by Assessing Officer. When the very complaint itself launched on the basis of the opinion formed by the Deputy Director of Income Tax Department based on some materials according to them it is only helpful for corroboration, prosecution has to fail and the court has to conclude that such prosecution is without any materials. In such view of the matter the Court decided that the complaint filed by the Deputy Director of Income Tax was premature.

EVIDENCE LACKED TEETH

In Karnataka case, the Revenue was skating on thin ice. Because the evidence was too weak. In *Thanjai Murasu* v. *Income Tax Officer* **[2001] 247 ITR 465 / [2003] 133 Taxman 139 (Madras)** the Court while quashing the complaint lodged under section 276C of Income-tax Act, has held that the complaint was not on discovery of certain facts unearthed during a raid. It was held that the complaint is not maintainable.

FOUR ASPECTS

The Karnataka case throws up four important issues, for analysis:

1. Documents Treatment

The assessee, upon seeing the income tax raid party tore the paper, that he had taken from wallet, which was joined up the officials. This brings us to the question whether loose papers, known as dumb documents are evidence.

But, first it has to be seen whether tearing of papers in front of income tax officials is in the right spirit of things. Two interesting cases come to mind. Sunil Jallan, a trader did an unprecedented thing during an income tax raid. He swallowed a paper, right during the operation. Lalitkumar Talluga, a lawyer whose house was being raided burned a briefcase, containing loose papers.

In Karnataka case, the act of the assessee in tearing the paper in front of tax team is certainly not praiseworthy but it is defended that the loose paper has no legal recognition.

It is also said that the predominant judicial view is that no arbitrary addition to the income can be made by the Assessing Officer based on loose papers containing scribbling, rough/vague notings in the absence of any corroborative material.

In *S.K. Gupta* v. *DCIT* [1999] 63 TTJ 532 (Delhi - Trib.) case, loose sheet and torn papers were found during raid relating to purchase/sale of property. Entries made thereon related to some futuristic planning. There was no evidence to show that there was any undisclosed investment or any sale of any property.

In *S.P. Goyal* v. *Dy. CIT* [2002] 77 TTJ 1 (Mumbai) (TM) / [2002] 82 ITD 85 (Mumbai) (TM), dumb documents were not regarded as evidence because the assessee may claim that it was only a planning, not supported by actual facts.

In ***Ashwini Kumar* v. *ITO*** [1991] 39 ITD 183 (Delhi) / [1992] 42 TTJ 644 (Delhi) it was held that in the case of dumb document, revenue should collect necessary evidence to prove that the figures represent incomes earned by the assessee.

Besides, entries in loose papers/sheets are irrelevant and not admissible under Section 34 of the Evidence Act.

There should be additional material like promissory notes, bank entries, sales bills, corresponding transaction in parties books, property deeds which support the loose papers found.

In the Karnataka case, if there was a loan agreement, the torn paper alleged to contain loans advanced and interest secured would have gained in value as evidence, against the assessee.

2. Prosecution, First ?

The view in favour of Department, which hold that prosecution can well be done, without waiting for the assessment process is that Prosecution proceedings are separate and distinct from assessment/reassessment proceedings. There is no requirement in the Act that assessment proceedings should be completed before launching of prosecution. One of the functions of the Investigation Wing of the Income-tax Department is to take deterrent action against large tax evaders. Prosecution being the most potent weapon in the fight against the tax evasion, it is required that prosecution should be filed at the earliest. The proposition that prosecution can be launched without waiting for assessment to be completed is upheld by the Hon'ble Supreme Court in the case of *P. Jayappan* v. *ITO* [1984] 19 Taxman 1/149 ITR 696 (SC) where it was said that the two types of proceedings could run simultaneously and that one need not wait for the other.

The pendency of the reassessment proceedings under the Act cannot act as a bar to the institution of the criminal proceedings and postponement or adjournment of a proceedings for unduly long period on the ground that another proceedings having a bearing on the decision was not proper.

The views in favour of Department, which hold that prosecution can well be done, without waiting for the assessment process are:

In *Kalluri Krishan Pushkar* v. *Dy. CIT* 236 Taxman 27 (AP & T) (HC), the court held that, existence of other mode of recovery cannot act as a bar to the initiation of prosecution proceedings. In that particular case the prosecution was initiated u/s 276C, for non-payment of admitted tax and interest.

In *CIT* v. *Bhupen Champak Lal Dalal & Anr* [2001] 116 Taxman 746 / 248 ITR 830 (SC), the

Supreme Court held:

> "The prosecution in criminal law and proceedings arising under the Act are undoubtedly independent proceedings and, therefore, there is no impediment in law for the criminal proceeding to proceed even during the pendency of the proceedings under the Act."

3. Wilful Positive Act

A joke about positive act, which if done under section 276C(1) attracts prosecution can be recounted, here. A taxpayer once tore up paper in presence of search party. The raid officials evoked section 276C(1), which says that Wilful attempt to evade any tax, penalty or interest chargeable or imposable under the Act under section 276C is a positive act on the part of the accused, which is required to be proved to bring home the charge against the accused. They said a positive act had been committed by assessee, by tearing the paper. The assessee retorted: "No. How can it be a positive act, when I tore up the paper. It's a negative thing to do and can be only a negative act !"

In *Rohit Kumar Nemchand Pipariya* v. *Dy. Director Income Tax* [2021] 123 taxmann.com 130 (Madras) / 277 Taxman 549 (Madras) wilful act to evade tax was held to be committed under section 276C(1) as he did not fully deduct TDS on sale of shares, where capital gains had accrued and also omitted to show full capital gains.

But, in *Assistant Commissioner* v. *Yerra Nagabhushanam* [1997] 93 Taxman 550 / 226 ITR 843 (Andhra Pradesh), the AP High Court held that in the instant case, there was no wilful attempt to evade the tax on the part of the assessee and it was due to the mistake committed by the accountant working under the assessee.

4. Hierarchical Puzzle

The Revenue, in anxiety to book the assessee, forgot who can launch prosecution. It forgot that complaint cannot be maintainable by the Deputy Director of Income Tax Department as he is not a court or forum or authority to whom appeal would lie from any decision or action of the Income Tax Office.

Every Income Tax search proceeding is also held to be a judicial proceeding and for any offence committed before such authority, the complaint can be lodged only following the procedure under section 195 Cr.P.C. The Assessing Officer is deemed to be a judicial

authority. Within the meaning of Sections 193 and 196 of I.P.C. as held in *Bapitha Lila* v. *Union of India* (2016) 9 SCC 647 case.

FORGOTTEN FACT

Though the Revenue tries, in some cases, to prosecute without assessment, clause 276C conveys, at first sight, that for awarding of punishment under section, assessment has to be completed and the quantum of tax determined. Punishment is linked with the quantum of tax. Under the section, graded punishment had been provided depending upon the quantum of tax. If the quantum of tax exceeds Rs. 1 lakh, punishment will be rigorous imprisonment for a minimum term of seven years and fine and, in any other case, punishment will be rigorous imprisonment for a minimum term of three years and fine. It shows that for awarding of punishment, assessment has to be completed and the quantum of tax determined.

SUMMING UP REMARKS

The most surprising thing in the case is that the Department plunged into prosecute the assessee, on basis of his tearing up a paper, during search proceedings. He had not obliterated or destroyed piece of paper, as it was recovered and set right by the Department, as evidence.

But, such weak evidence could not stand up.

Premature prosecution can only embarrass the Department, it should be understood. Deputing wrong officers to handle sensitive cases, without considering whether they are permitted to make orders is also a constant faux pas.

"No Tax, without Assessment." The Karnataka case has brought this issue before tax authorities.

Here's ending on a light note,

In Mars, a tax spokesperson raised his shoulders and preened: "We are faster than everybody in the universe. The moment assessment is completed, we launch prosecution."

An inhabitant, who had recently returned from Earth said: "Don't fly too high. In India, the Income-tax Officer completes prosecution first, then turns his attention to assessment."

●●●

Redemption of credit card reward point is a taxable income: US Court

Editorial Team

Internal Revenue Service (IRS) has a long standing policy of not taxing credit card rewards. The rationale behind this is that the rewards itself act as a discount on the property or services being purchased by the consumer. However, in an interesting ruling in the case of *Konstantin Anikeev and Nadezhda Anikeev v. Commissioner of Internal Revenue* [2021] 127 taxmann.com 612 (TC- US), the United States Tax Court held that the redemption of credit card reward points, which are earned from buying 'cash equivalents', shall be liable to tax. The Court held that reward received in connection with the purchase of gift card constitutes rebate. However, buying money order and reloading cash into debit cards is nothing other than cash transfers. Thus, reward received in connection with the direct purchase of these items did not constitute rebates and were includible as taxable income in the hands of card holder.

FACTS

During 2013 and 2014 American Express offered a rewards program wherein cash reward was paid to the credit card users who made eligible purchases on their American Express cards. The reward that a card user could claim was based on a percentage of the user's eligible purchases. There was no limit on the amount of reward a card user could earn in a Year.

Mr. Anikeev had two American Express credit cards (Amex Cards). Using Amex cards, he purchased Visa Gift Cards from the local grocery stores and pharmacies. He then used the gift cards to purchase money orders. He deposited the money orders into his bank account and the money so credited was used to pay the Amex credit card bills. Most of his spent from the Amex cards consisted of purchases of Visa gift cards.

Upon payment of monthly Amex card bills, Mr. Anikeev received the rewards of 1% or 5% of the total purchases. Both the cards were closed in 2014. On closure, he redeemed the rewards standing to his credit which American Express paid to him by cheque as a credit balance refund. He redeemed $ 36,200 in 2013 and $ 277,275 in 2014. He didn't report any income from such rewards program in his tax return.

IRS CONTENTIONS

IRS proposed to tax Mr. Anikeev's rewards points because he did not earn them by acquiring goods or service. The IRS' position was that rewards generated without

purchasing goods or services are taxable. Thus, rewards generated by purchase of gift cards and then the purchases of money orders, without the purchase of any goods or services, should be taxable.

CARD-HOLDER'S CONTENTIONS

Mr. Anikeevs took the position that the rewards generated by purchase of Visa gift cards are not taxable. He asserted that the manner in which something is purchased is not an accession to wealth. Further, he explained that the Visa gift card is a product that has a Universal Product Code and the ultimate use of the Visa gift cards should not matter.

UNITED STATES TAX COURT'S RULING

The US tax court held that rebate provided to taxpayers on the purchase of property and services do not constitute income of the taxpayer. The Visa gift card provides a consumer service embodied in a simple plastic card for convenience. It is a product and thus, reward received by Mr. Anikeev constitutes rebates excludible from taxable income.

However, the money order and reloading cash into debit cards is nothing other than cash transfers. Thus, reward received in connection with the direct purchase of these items did not constitute rebates and were includible as taxable income in the hands of Mr. Anikeev.

IMPLICATION UNDER INDIAN INCOME-TAX ACT

This ruling will have implications under the Income-tax Act as well. Various online shopping websites, credit card companies, and e-wallet companies offer lucrative reward schemes. These rewards are awarded either by way of 'Instant Discounts' or 'Cash Backs' or 'Reward Points'.

Any monetary benefit received by a person by way of gifts or cash backs from a non-relative might be subject to income-tax under the head 'Income from Other Sources' or 'Profits and Gains from Business or Profession', as the case may be.

Before we evaluate the taxability of such benefit schemes, it would be imperative to first take cognizance of the provision of Section 56(2)(x) of the Income-tax Act. This provision provides for levy of tax if any sum of money is received without consideration. This tax, popularly known as 'gift tax', is levied only if the aggregate value of such sum exceeds Rs 50,000 during the financial

year. If the benefits are not given in the form of cashbacks but in form of accessories (*i.e.*, free earphones, power banks, etc.), this provision shall not be applicable. However, market value of freebies can be taxable if goods are purchased for the purpose of business or profession as all benefits, arising in the course of business or profession, are taxable under section 28(iv) whether they are convertible into money or not.
In other words, the provision of gift tax can be invoked only if any monetary benefit is received by way of credit in the bank account, e-wallets or credit card. In case of gifts received in kind, no amount is credited to the user's account, hence the provision of gift tax shall not be applicable.

The above ruling may open a pandura's box of tax assessments and re-assessments in India. Rewards in form of cashback or credit card points used for payment of credit card bills or to buy covered goods (jewellery, drawings, etc.) could be held taxable in India if the total amount of benefit exceeds Rs 50,000 during a financial year.

Goods & Services Tax

No GST Liability on Land Owner Under JDA

S.V.S. Raghavendra Rao
Advocate & Tax Consultant

In general, Construction of Apartments will be executed by the builder but not by the land owner under Joint Development Agreement (JDA). The Government has issued a Notification No. 03/2019-Central Tax (Rate) dt. 29th March 2019 under GST Act which speaks about construction services including Joint Development Agreements.

Under this notification, a proviso deals with supply of construction services and payment of tax between the land owner and the builder under Joint Development Agreements. The proviso reads as follows-

Provided also that where a registered person(land owner-promoter) who transfers development right or FSI (including additional FSI) to a promoter (developer- promoter) against consideration, wholly or partly, in the form of construction of apartments, - (i) the developer-promoter shall pay tax on supply of construction of apartments to the land owner- promoter, and (ii) such land owner - promoter shall be eligible for credit of taxes charged from him by the developer promoter towards the supply of construction of apartments by developer-promoter to him, provided the land owner- promoter further supplies such apartments to his buyers before issuance of completion certificate or first occupation, whichever is earlier, and pays tax on the same which is not less than the amount of tax charged from him on construction of such apartments by the developer- promoter.

Explanation. -

(i) "developer- promoter" is a promoter who constructs or converts a building into apartments or develops a plot for sale".

In such a way, the Developer has to pay GST on total value of construction, as and when he sells them to both the buyer and the land owner.

As per Sec 2(zk) of The Real Estate Regulation and Development Act, 2016, "promoter" means,— (i) a person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons and includes his assignees.

PROVISION TO LEVY TAX UNDER GST:

As per Schedule II(5)(b), construction of a complex,

building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier.

In that manner, a builder or developer will construct the property for the purpose of sale under JDA. The builder will take the total responsibility of construction as well as marketing. The Builder is responsible for planning, designing, getting approvals from various Departments, financing and payment of taxes. Eventually the land owner doesn't have any role to play in JDA except to take proportionate build up area equivalent to his land value. The judicial pronouncements has expressed the same opinion.

LAND OWNER IS A CONSUMER - SUPREME COURT JUDGMENT

The Hon'ble Supreme Court of India in the case of ***Bunga Daniel Babu* v. *Sri Vasudeva Constructions*** **[Civil Appeal No. 944 of 2016, dated 22-7-2016]** opinioned that:

On a studied scrutiny of the aforesaid clauses, it is clear as day that the appellant is neither a partner nor a co-adventurer. He has no say or control over the construction. He does not participate in the business. He is only entitled to, as per the MOU, a certain constructed area. The extent of area, as has been held in Faqir Chand Gulati (supra) does not make a difference. Therefore, the irresistible conclusion is that the appellant is a consumer under the Act.

TDR is an Immovable property

Bombay High Court in the case of ***Sadoday Builders (P.) Ltd.* v. *Jt. Charity Commissioner*** **[Writ Petition No. 4543 of 2010, dated 23-6-2011]** held that- "*immovable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth. "FSI/TDR being a benefit arising from the land, consequently must be held to be immovable property and an Agreement for use of TDR consequently can be specifically enforced, unless it is established that compensation in money would be an adequate relief."*

BUILDER IS CONTRACTOR UNDER JDA:

Construction of buildings/ apartments as undertaken by the builder is a works contract. The works contract is an indivisible contract involving supply of goods and labour.

Hon'ble Supreme Court in the case of ***Larsen & Toubro Ltd.* v. *State of Karnataka*** [2013] 38 taxmann.com 98/[2014] 303 ELT 3 (SC) held that *the activities of sale of under construction of flats etc., by way of entering into agreement of sale is indeed a work contract subject to tax. Hon'ble Apex Court has also stated that such activity of builder/developer would be classifiable as work contract.*

Therefore it is clear that the construction of apartments for sale will be considered as services provided by the Builder as prescribed under Schedule II(5)(*b*). So the provision of levy under GST is only on Construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer. But not on the build up or developed area.

And as per Sec. 31(6), in a case where the supply of services ceases under a contract before the completion of the supply, the invoice shall be issued at the time when the supply ceases and such invoice shall be issued to the extent of the supply made before such cessation.

Thereby, GST is applicable as soon as the tax invoice is raised by the builder against the supply of construction services. And once the invoice is raised by the builder on the buyer and handed over the constructed area, the activity of construction, intended for sale to a buyer as specified in Schedule II(*v*)(*b*) will get terminated.

Accordingly, if the builder handed over the share of land owner's apartment on payment of related GST, that property becomes Immovable property in the hands of the buyer cum Land owner as specified under Item No. 5 - Land and Building of Schedule III of CGST Act.

So it may be concluded that as per the Supreme Court Judgment, the Land Owner is neither a partner nor a co-adventurer, in circumstances where his Land had been given to a Builder cum promoter for construction of Apartments under JDA. And the levy of GST is only on construction of building prescribed under Schedule II(5)(*b*). Therefore no liability shall arise on resale of Constructed Immovable property by the Land owner.

43rd GST Council Meeting: Sectoral Analysis

(Including relaxations & measures recommended due to COVID-19)

Taxmann's
'Indirect Tax Research & Advisory' Team

MAINTENANCE REPAIR & OVERHAUL ('MRO') SECTOR

- **GST rate** on MRO services in respect of ships/vessels recommended to be **reduced** from 18% to 5%

- **Place of Supply** ('POS') of B2B MRO services recommended to be changed to **location of the service recipient**

TAXMANN's Comments

Foreign ships/vessels arriving in India go for MRO services during the intervening period (*i.e.* between arrival and departure). The place of supply of the impugned services is[1] the place where the MRO services are performed (*i.e.* India). Therefore, currently, these services provided by MRO units to foreign shipping companies are exigible to GST.

Recommendation to change POS would make the impugned services as export of services[2]. The change in POS would enable the Indian MRO units to compete better with the foreign MROs.

We may note that the change in POS would also impact the Indian shipping companies those receiving services from Foreign MROs outside India. In such cases, reverse charge liability would arise.

Last year similar changes were implemented[3] for MRO services in respect of Aircraft, Aircrafts engines, etc.

- **Clarification**/Clarificatory amendments is recommended in relation to levy of **IGST on the repair value** of the goods that are **re-imported** after repairs

TAXMANN's Comments:

The Division bench of Hon'ble Delhi Tribunal last year in case of *Interglobe Aviation Ltd*[4] held that the expression 'Duties of Customs' would not include' IGST within its scope. Given this, it was held that IGST under the Customs Tarif Act would not be levied on aircrafts re-imported after repairs.

The clarification/clarificatory amendment 'may be' to settle the issues like the highlighted one.

Retrospective applicability of the clarification/clarificatory amendment would need to be analysed once the fine print of the clarification/amendment is released/notified.

EDUCATION SECTOR

- Clarification would be issued to provide that services provided by way of examination including

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entrance examination, where the **fee** is charged for such examinations, by National Board of Examination (NBE), or similar **Central or State Educational Boards**, and input services relating thereto are **exempt** from GST

TAXMANN's Comments:

Services of an Educational Institution for conducting entrance exams is exempt[5] from GST. Further, input services procured by the Educational institution relating to admission and conduct of examination are also exempt from GST.

Vide Notification No. 14/2018-Central Tax (Rate), dated 26-7-2018, an *Explanation* was inserted in the above Exemption Notification to provide that 'Central and State Educational Boards' shall be treated as Educational Institution for the limited purpose of providing services by way of conduct of examination to the students.

Therefore, it can be said that entrance fees charged by the Central/State Educational Boards for conducting exams is exempt from GST.

However, it was observed recently that National Board of Examination started charging GST on fees for medical entrance exams (such as NEET -PG, DNB courses, etc.).

It seems that Govt. would issue clarification to provide that no GST would be applicable on such entrance fees.

REAL ESTATE SECTOR

- Amendment is recommended to provide that landowner could utilize the input tax credit of GST charged to them by the developer in respect of such apartments that are subsequently sold by the land promotor and on which GST is paid

- Developer promotor shall be allowed to pay GST relating to such apartments any time before or at the time of issuance of the completion certificate

TAXMANN's Comments

Under the Joint Development arrangements the developer is liable to pay GST on the units given by him to the landowner in lieu of TDR/FSI on the date of issuance of completion certificate/first occupation ('the specified date')[6].

However, in respect of further sale of the said units by the landowner, GST is paid as per the normal time of supply

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provisions (*i.e.* which is much before the specified date).

The timing gap of GST liability on the developer and landowner has created credit blockage issues for the landowner as GST is charged by the developer on the specified date but the landowner is liable to pay GST much before the specified date.

In the above backdrop, in order to remove this anomaly in the law, amendment has been recommended to provide that developer may pay GST before the specified date.

Further, to avoid any ambiguity on the utilization of ITC by the developer, explicit provision would be made in the relevant notifications in this regard.

ROAD & HIGHWAYS SECTOR

- Clarification would be issued to provide that GST is payable on annuity payments received as deferred payments for the construction of the road. The benefit of the exemption is for such annuities which are paid for the service by way of access to a road or a bridge.

TAXMANN's Comments

The GST Council in its 22nd meeting recommended exemption on annuity paid by NHAI and State authorities/ State owned corporations to the Concessionaires for construction of public roads. However, the Notification[7] which was issued in this regard notified that 'services by way of access to a road or a bridge on payment of annuity' shall be exempt from GST.

One can see that what was proposed by the GST Council is different than what was actually notified by the Government. This created confusion amongst the contractors in the Industry on the applicability of above exemption on the deferred annuity (*i.e.* annuity received for construction of roads during O&M period) from NHAI/PWDs etc.

Notably, the Rajasthan AAAR held[8] that where annuity payment for construction received during the O&M period, the same would be exempt from GST in view of the GST Council decision.

The clarification would impact all Contractors/Concessionaires who are claiming exemption of deferred Annuity for construction services. It would be a clarification, thus would have a retrospective effect.

OTHER INDUSTRIES/SECTORS/ SUPPLIERS/RECIPIENTS

Irrigation Products Industry

- GST rate of 12% to apply on parts of sprinklers/drip irrigation systems falling under tariff heading 8424 (nozzle/laterals) to apply even if these goods are sold separately

TAXMANN's Comments

Initially, all goods falling under HSN 8424, namely, Mechanical appliances (whether or not hand-operated) for projecting, dispersing or spraying liquids or powders etc., were placed under 18% slab.

Subsequently, the items namely, Nozzles for drip irrigation equipment or nozzles for sprinkler was placed[9] under 12% GST slab.

Further, later on, the GST Council recommended 12% GST rate on micro irrigation system, namely, sprinklers, drip irrigation system, including laterals. Accordingly, entry 195B covering 'Sprinklers; drip irrigation system including laterals' on which GST rate is 12% [10] was notified.

The drafting of entry created confusions on the field level on the question that whether the sprinklers should be read as complete sprinklers irrigation system or will it only exempt sprinklers which is the part of sprinklers irrigation system. In this regard, clarification was issued that it would be read as 'sprinklers irrigation system'. Accordingly, sprinkler system consisting of nozzles, lateral and other components would attract 12% GST rate.

The another point which is not clear and creating confusions on the field level is that whether the above entry be applied in the cases where the complete system is not sold but separate parts of sprinklers irrigation system is sold.

In this regard, Rajasthan AAR held[11] that if individual rubber parts of Sprinkler irrigation system/drip irrigation system are supplied separately, *viz.*, Rubber Ring/Gasket/Seal, Rubber Foot Batten Washer and Rubber Gromment, they will not be covered under Entry No. 195B.

It is recommended to provide clarification/clarificatory amendment that GST rate of 12% shall be applicable on the parts of Sprinklers/drip irrigation system even if these goods are sold separately. Clarification would avoid confusions between the

taxpayer and the department, and thus a welcome step.

CATERERS SERVING EDUCATIONAL INSTITUTION

- Supply by way of serving of food, including mid-day meals under any midday meals scheme sponsored by the Government, to an educational institution including Anganwadi, is exempt from the GST irrespective of the fact that such supplies are made from the funds received as government grants or corporate donations.

ROPE-WAY CONTRACTORS

- Clarification would be issued to provide that services supplied to a Government Entity by way of construction of a rope-way attract GST at the rate of 18%.

GOVERNMENT UNDERTAKINGS/PSUs

- Clarification would be issued to provide that services supplied by the Government to its undertaking/PSU by way of guaranteeing loans taken by such entity from banks and financial institution is exempt from GST.

MILLING SECTOR

- Clarification would be issued to provide that supply of service by way of milling of wheat/paddy into flour (fortified with minerals etc. by millers or otherwise)/ rice to Government/local authority etc. for distribution of such flour or rice under PDS is exempt from GST where the value of goods in such composite supply does not exceed 25% of the total value of supply.

Relaxations on Account of COVID-19 & Other Measures

Taxmann's
'Indirect Tax Research & Advisory' Team

EXEMPTION ON IMPORT OF COVID-19 RELIEF MATERIALS

- IGST exemption has been recommended where notified[12] Covid relief items are imported 'on payment basis' for donating to the Govt. or on the recommendation of State authority to any relief agency.
- All exemptions including the newly proposed exemption would be available up to 31-8-2020

Watch our video presentation on exemptions notified on import of Covid Relief items:

https://www.youtube.com/watch?v=K-qdcT-Ei8E&t=65s

- In view of Black fungus cases, the above exemptions would also be extended on the import of 'Amphotericin B'
- Group of Ministers has been constituted[13] to see individual items on which relaxations need to be provided

COMPLIANCES: DUE DATES, TAX PAYMENT, LATE FEE AND INTEREST

A. FORM GSTR -3B

Turnover in PFY	Tax Period	Due date of tax payment and return filing	Relaxation in Interest		No Late Fees till
			Tax paid	Interest	
More than Rs. 5 Crore	Mar-21	20-Apr-21	Till 5- May-21	9%	5-May-21
			After 5-May-21	18%	
	Apr-21	20-May-21	Till 4- Jun-21	9%	4-June-21
			After 4-Jun-21	18%	
	May-21	20-June-21	Till 5-July-21	9%	05-July-21
			After 5-July-21	18%	
Upto Rs. 5 Crore (not opting for QRMP scheme)	Mar-21	20-Apr-21	Till 5-May-21	Nil	19-June-21
			6-May-21 to 19-June-21	9%	
			After 19-June-21	18%	
	Apr-21	20-May-21	Till 4-Jun-21	Nil	04-July-21

Turnover in PFY	Tax Period	Due date of tax payment and return filing		Relaxation in Interest		No Late Fees till
				Tax paid	Interest	
				05-Jun-21 to 4-July-21	9%	
				After 4-July-21	18%	
	May-21	20-June-21		Till 5-July-21	Nil	20-July-21
				6-July-21 to 20-July-21	9%	
				After 20-July-21	18%	
Upto Rs. 5 Crore (opting for QRMP scheme[14])	Jan-Mar 21	**Return Due date:** 22-Apr-21				21-June-21
		Tax payment				
		Jan-21	25-Feb-21	-	-	
		Feb-21	25-Mar-21	-	-	
		Mar-21	22-Apr-21	Till 7-May-21	Nil	
				8-May-21 to 21-June-21	9%	
(Specified States-I)[15]	Apr-June 21	**Return Due date:** 22-Jul- 21		After 21-June-21	18%	NA
		Tax Payment				
		Apr-21	25-May-21	Till 9-June-21	Nil	
				10-Jun-21 to 9-July-21	9%	
				After 9-July-21	18%	
		May-21	25-Jun-21	Till 10-July-21	Nil	
				11-July-21 to 25-July-21	9%	
				25-July-21	18%	
		Jun-21	22-Jul-21	-	-	

Turnover in PFY	Tax Period	Due date of tax payment and return filing		Relaxation in Interest		No Late Fees till
				Tax paid	Interest	
Upto Rs. 5 Crore (opting for QRMP scheme) (Specified States-II)[16]	Jan-Mar 21	Return Due date: 24-Apr-21				23-June-21
		Tax payment				
		Jan-21	25-Feb-21	-	-	
		Feb-21	25-Mar-21	-	-	
		Mar-21	24-Apr-21	Till 9-May-21	Nil	
				10-May-21 to 23-June-21	9%	
				After 23-June-21	18%	
	Apr-June 21	Return Due date: 24-July-21				NA
		Tax payment				
		Apr-21	25-May-21	Till 9-Jun-21	Nil	
				10-Jun-21 to 9-July-21	9%	
		May-21	25-Jun-21	After 9-July-21	18%	
				Till 10-July-21	Nil	
				11-July-21 to 25-July-21	9%	
				25-July-21	18%	
		Jun-21	24-Jul-21	-	-	

B. FORM CMP-08

Particulars	Quarter	Due date	Relaxation in Interest[17]	
Form CMP-08 for the statement of Quarterly Payment of Tax	Jan-Mar-21	18-Apr-21	Till 3-May-21	Nil
			4-May-21 to 17-June-21	9%
			After 18-June-21	18%

C. FORM GSTR-1/IFF Facility

Particulars	Month	Due date	Extended Due Date
Monthly Scheme (GSTR-1)	May 2021	11-June-21	26-June-21
QRMP Scheme (IFF)	May 2021	13-June-21	28-June-21

D. FORM GSTR-1/IFF Facility

Particulars	Period/Month/ Quarter	Original Due date	Extended Due Date
Form ITC-04 (Declaration by for goods dispatched to a job worker or received from a job worker	Jan-March 21	25-Apr-21	30-June-21
Form GSTR-4 (Annual Return for Composition Dealers)	FY 2020-21	30-Apr-21	31-July-21

OTHER MEASURES

Relaxation of Rule 36(4) of the CGST Rules, 2017

- It has been proposed that in respect of the period of April, May, and June 2021, the condition of availing ITC imposed by Rule 36(4)[18] of the CGST Rules, 2017 would apply cumulatively in June 2021

Extension of the time limit under section 168A of the CGST Act

- Extension in the time limit has been recommended for the completion of any action to be made by any authority or person up to June 30, 2021, which falls due during the period from April 15, 2021, to June 29, 2021. However, it is clarified that in few cases, the time limits extended[19] by the Hon'ble Supreme Court shall apply

Filing of returns through EVC

- The filing of GST returns by the Companies using the Electronic Verification Code (EVC) facility has been recommended to extend till August 31, 2021.

Simplification of the filing of the Annual return

- The Council has decided to simplify compliance of Annual Return for Financial Year 2020-21. The taxpayers would be able to self-certify the reconciliation statement in FORM GSTR-9C instead

of getting it certified by chartered accountants. This change will apply for Annual Return for FY 2020-21. The filing of annual return in FORM GSTR-9/9A for FY 2020-21 to be optional for taxpayers having aggregate annual turnover up to Rs. 2 Crore. The reconciliation statement in FORM GSTR-9C for the FY 2020-21 will be required to be filed by taxpayers with an annual aggregate turnover above Rs. 5 Crore.

Retrospective Amendment for payment of interest

- The recommendation has been made to notify the retrospective amendment in Section 50 of the CGST Act with effect from July 01, 2017, so that the interest on the delay in payment of tax could be imposed only on the amount of tax which is required to be paid by the taxpayer on a cash basis.

GSTR 3B and GSTR 1 would be default Returns filing system

- The recommendation has been made to make amendments in the provisions of the CGST Act so as to make the current system of GSTR-1or GSTR-3B return filing the default return filing system.

Introduction of the Amnesty Scheme for the period from July 2017 to April 2021

- To provide relief to taxpayers regarding late fees for pending returns, it has been proposed to introduce an amnesty scheme. The Late fee for non-furnishing of the **Form GSTR-3B** for the period from July 2017 to April 2021 by the taxpayers has been capped in the below manner, provided that the form is filed during the period 1-6-2021 to 31-8-2021:

Particulars	Maximum late fees
Taxpayers not having any tax liability during the period	Rs. 500 (Rs. 250 each for CGST and SGST)
Other Taxpayers	Rs. 1000 (Rs. 500 each for CGST and SGST)

Rationalization of Late Fees for prospective tax periods

- It has been proposed that the late fees for delay in

furnishing of the returns by the taxpayers would be rationalized. Now, the late fees would be capped for the prospective tax periods in accordance with the turnover or tax liability of the taxpayer in the following manner

Form/ Return	Outward Tax Liability	Aggregate Annual Taxpayer in the preceding year	Maximum Amount of late fees per return
GSTR-1/ GSTR 3B	Nil	-	Rs. 500 (Rs. 250 each for CGST and SGST)
	Other cases	Upto Rs. 1.5 Cr	Rs. 2000 (Rs. 1000 each for CGST & SGST)
		Between Rs. 1.5 Cr to Rs. 5 Cr	Rs. 5000 (Rs. 2500 each for CGST & SGST)
		More than Rs. 5 Cr	Rs. 10000 (Rs. 5000 each for CGST & SGST)
GSTR - 4	Nil	-	Rs. 500 (Rs. 250 each for CGST and SGST)
	Other Cases	-	Rs. 2000 (Rs. 1000 each for CGST and SGST)
GSTR - 7	-	-	Rs. 50 per day (Rs. 1000 each for CGST and SGST) and a maximum upto Rs. 2000 (Rs. 1000 each for CGST and SGST)

1. Section 13(3)(*a*) of the IGST Act, 2017
2. Provided other conditions of Export of Services are satisfied
3. Notification No. 02/2020. Integrated Tax-dated 26 March 2020
4. *Interglobe Aviation Ltd*. v *Commissioner of Customs* [2020] 121 taxmann.com 70 (New Delhi - CESTAT)

5. Sl. No. 66 of Notification No. 12/2017-Central Tax (Rate), dated 28-06-2017
6. Notification No. 6/2019-Integrated Tax (Rate), dated 29 March 2019 (similar notification exists in CGST & respective SGST laws)
7. Notification No. 32/2017-Central Tax (Rate), dated 13-10-2017
8. Nagaur Mukundgarh Highways (P.) Ltd., *In re* [2019] 103 taxmann.com 212 (AAAR-RAJASTHAN)
9. Entry No. '195A' with effect from 22-9-2017
10. Entry No. 195B of Notification No. 01/2017 dated 28-6-2017
11. Laxmi Rubber Industries, *In re* [2019] 105 taxmann.com 293 (AAR- RAJASTHAN)
12. Ad hoc Exemption Order No. 4/2021-Customs dated May 03, 2021
13. F.No. S-31011/12/2021-DIR(NC)-DOR, dated May 29, 2021
14. The registered person under the QRMP Scheme would be required to pay the tax due in each of the first two months of the quarter by depositing the due amount in Form GST PMT-06. The amount shall be deposited by the 25th day of next month.
15. Chhattisgarh, Madhya Pradesh, Gujarat, Maharashtra, Karnataka, Goa, Kerala, Tamil Nadu, Telangana or Andhra Pradesh or the Union Territories of Daman and Diu and Dadra and Nagar Haveli, Puducherry, Andaman and Nicobar Islands and Lakshadweep
16. Himachal Pradesh, Punjab, Uttarakhand, Haryana, Rajasthan, Uttar Pradesh, Bihar, Sikkim, Arunachal Pradesh, Nagaland, Manipur, Mizoram, Tripura, Meghalaya, Assam, West Bengal, Jharkhand or Odisha or the Union territories of Jammu and Kashmir, Ladakh, Chandigarh and Delhi
17. Notification No. 8/2021-Central Tax, dated 1st May, 2021 read with Notification No. 13/2017-Central Tax, Dated 28th June, 2017
18. Rule 36(4) of the CGST Rules, 2017 provides that ITC claim in respect of invoices which are not uploaded by vendors in their Form GSTR 1 or through Invoice Furnishing Facility ('IFF') will be allowed maximum up to 5% of the invoices furnished by the vendors in their Form GSTR 1/through IFF Facility.
19. The Hon'ble Supreme Court has already extended *vide* order dated April 27, 2021 the period of limitation till further orders for the actions to be taken in the judicial or quasi-judicial proceedings by the litigants, whether the limitation period is prescribed under a general or special law

Corporate Laws

Can Charitable Institutions receive donations from NRE/NRO/NRI Account held by NRIs? Applicability of FCRA

Naresh Kumar Kabra
CA

With the surge in compliances in recent years in the taxation and other aspects of Charitable Institutions, countless doubts have been raised which are questioning all the past unconventional practices followed by such Charitable Institutions. ***One of such practices being acceptance of donations from NRE/NRO/NRI accounts in an account other than FCRA Account.***

Through this article, an attempt has been made to bring the discussions in the most lucid style with immense clarity.

In order to solve this riddle, we shall go through the following key points:

1. Foreign Contribution Regulation Act, 2010 (hereinafter called as 'FCRA') – Basic Requirements.

2. FCRA – Regulation over various NRIs

3. Applicability of FCRA on Persons of Indian Origin

1. FCRA– BASIC REQUIREMENTS

Understanding the following basic requirements under FCRA will help to develop more clarity on the issue under consideration:

FCRA is the law which regulates acceptance and utilization of foreign contribution and hospitality by certain Individuals, associations or companies.

A. Question: What is the criteria where compulsory registration under FCRA is required?

Compulsory Registration in order to receive Foreign Contribution

As per section 11 of FCRA, 2010

- Person having a definite cultural, economic, educational, religious or social programme shall accept foreign contribution only after obtaining a certificate of registration or granted prior permission

- If the person has been found guilty of violation of any of the provisions of this Act, then, unutilised or unreceived amount of foreign contribution shall not be utilised or received, as the case may be, without the prior approval of the Central Government.

Answer:

Charitable Institutions can receive foreign contributions

only after getting FCRA registration or prior permission from Central Government.

B. Question: What is the new compliance of opening of designated bank account with SBI?

Section 17 of FCRA Act states that Foreign Contributions can be received only in FCRA designated Bank account in the New Delhi Main Branch (NDMB) of the State Bank of India, 11 Sansad Marg, New Delhi-110001.

Answer:

Charitable Institutions can receive foreign contributions only in designated FCRA Account, open with SBI Account at the specified branch at New Delhi.

2. FCRA – REGULATION OVER VARIOUS NRIs

What constitute foreign contribution?

As per clause (*h*) to section 2(1) of FCRA, 2021, foreign contribution includes the donation, delivery or transfer made by any ***"foreign source".***

Important matter of consideration:

Question: Whether "NRI" can be considered as "Foreign source or not"?

As per clause (*j*) to section 2(1) of FCRA, 2010, "foreign source" includes in its sub-clause (*x*) a **citizen of a *foreign country,*** *and do not include NRI having Indian Citizenship.*

The three important terms are the deciding factors

(*i*) Foreign Contribution
(*ii*) Foreign Source (*iii*) Citizen of Foreign Country

Answer:

If a person of Indian origin holds a foreign passport, then only the person shall fall within the ambit of foreign source and the donations received from such person will be regulated, as per the provisions prescribed under FCRA.

Therefore, citizenship is very important aspect, in terms of applicability of FCRA provisions.

3. APPLICABILITY OF FCRA ON PERSONS OF INDIAN ORIGIN

Question: Will Donations or any funds given to any Charitable Institution in India, by person having Indian Origin, excluded from the provisions of FCRA 2010?

Answer:

These are the following kinds of Non-Resident Indians who can open NRE/NRO/NRI accounts –

Particulars	NRIs	NRIs-PIO Card-holders	NRIs-OCI Cardhold-ers
Citizen-ship	Indi-an	Not Indian	Not Indian
Can open NRE/NRO/ NRI account	Yes	Yes	Yes
Foreign Source as per FCRA	No	Yes	Yes
Can re-ceive con-tribution without FCRA reg-istration or prior Per-mission	Yes	No	No

In view of the above, if **NRI is holding Indian Citizenship** then only, any contribution received from such individual will not be regulated by the provisions of FCRA, 2010.

Out of the FAQs, posted by MHA on official website of FCRA on 16.11.2021, following two FAQs are relevant for the issue under discussion:

Ques. Whether donation given by Non-Resident Indians (NRIs) is treated as 'foreign contribution'?

Ans. Contributions made by a citizen of India living in another country (*i.e.*, Non-Resident Indian), from his personal savings, through the normal banking channels, cannot be treated as foreign contribution. *However, while accepting any donations from such NRI, it is advisable to obtain his passport details to ascertain that he/she is actually an Indian citizen.*

Ques. Whether donation given by an individual of Indian origin and having foreign nationality is treated as 'foreign contribution'?

Ans. Yes. Donation from an Indian origin person who has acquired foreign citizenship is treated as foreign contribution. This will also apply to PIO/ OCI cardholders. They are foreigners. However, this will not apply to 'Non-resident Indians', who still hold Indian citizenship as they are not foreigners.

Opinion –

It is too important to note that NRE account can be opened by NRI, PIO cardholder and OCI cardholder. This issue, therefore becomes more critical for the Charitable Institutions, in terms of applicability of FCRA

provisions, when any category of Indian Origin Person (NRI/ PIO/OCI) transfers funds in form of donation to Charitable Institutions.

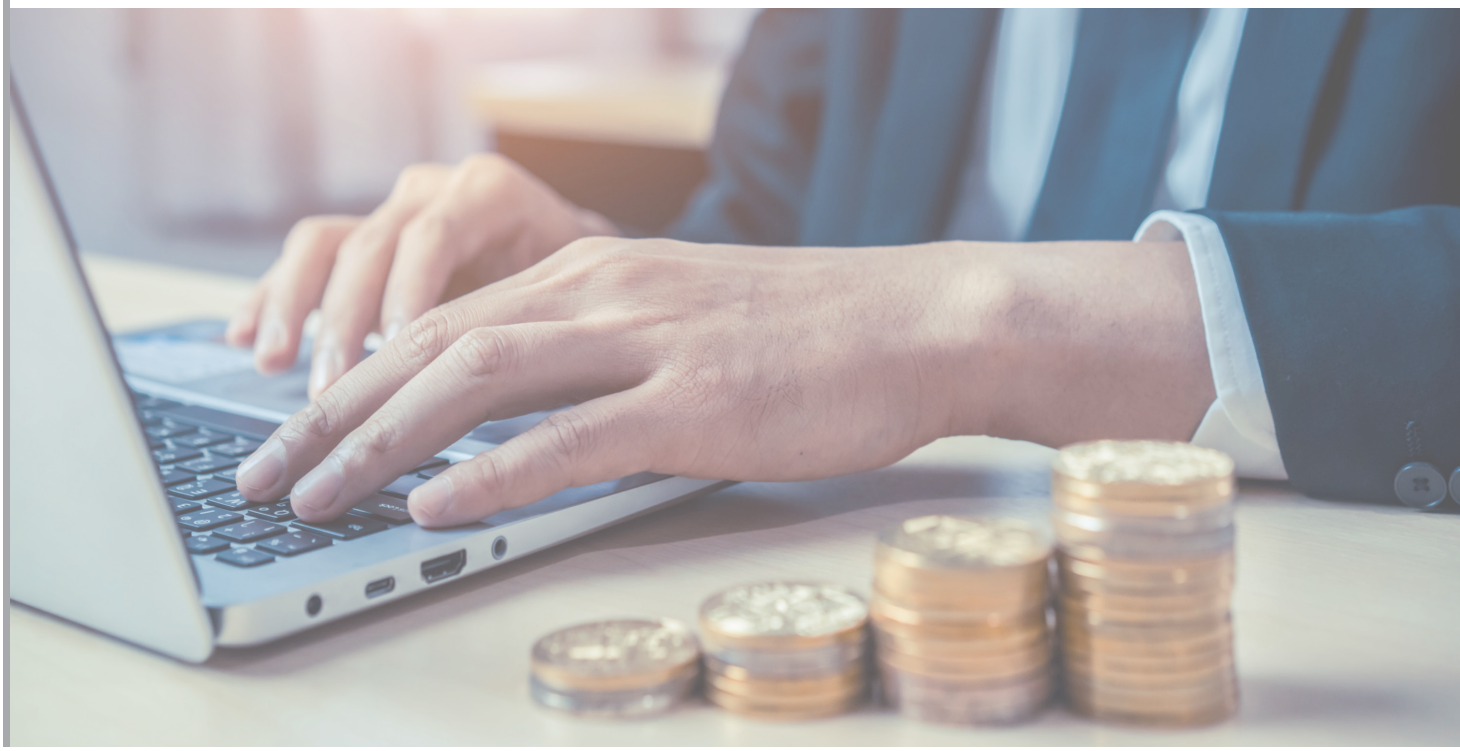
In view of the above, it is advisable to take a copy of the passport of donor while receiving donations from any category of Indian Origin residing outside India to establish his/her Indian Citizenship. Because, when we say Non-Resident Indian, it postulates an Indian residing overseas and one can assume that FCRA law will be applicable.

The important twist is here is to understand that donation given by a NRI holding Indian Citizenship will fall outside the scope of foreign source and provisions of FCRA will be not applicable. While, in case of PIO and OCI, the situation will be totally different and opposite.

Formulation of Dividend Distribution Policy

(Under the Regulation 43A of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015)

Prof. R. Balakrishnan
FCS, FCWA



DIVIDEND

1. As per sub-section (35) of section 2 of the Companies Act, 2013, dividend means the profit of a company, which is not retained in the business and is distributed among the shareholders of the company in proportion to the amount paid-up on the shares held by them.

PROVISIONS IN THE COMPANIES ACT, 2013 RELATING TO DIVIDEND

2. The Companies Act, 2013, spells out in its various sections as to what is dividend, payment of dividend, procedure of payment and other related details. The following are the relevant section along with matters dealt in those sections.

S. No.	Relevant section	Matter dealt with
(i)	2(35)	Definition of dividend
(ii)	51	Payment of dividend to be in proportion to amount paid up
(iii)	91	Declaration of book closure/Record date and publication of notice of record date/book closure
(iv)	123	Payment of dividend - sources - conditions - transfer of profits to reserve etc.
(v)	123(5)	Dividend shall be paid to registered shareholders and beneficial owners under CSDL/NSDL Opening of a separate bank account for making payment of dividend and deposit the amount of dividend into the account within a period of 5 days of its declaration
(vi)	126(6)	Restriction on payment of dividend on equity shares on failure to comply with Deposits
(vii)	124	Unpaid dividend to be transferred to special dividend account.
(viii)	126	Right of dividend, etc. — When to be kept in abeyance.
(ix)	127	Payment of dividend must be made within 30 days of its declaration and penalty for failure to pay dividend within prescribed time limit.

It may be noted that in the Companies Act, 2013, elaborate provisions are there relating to dividend distribution, yet, there is no specific requirement to have a dividend policy in place as such

The market regulators i.e. the Security Exchange Board of India has specified for the top 1000 listed companies, to have the dividend distribution policy in place and for the rest of the listed companies it is not mandatory but the companies can formulate such policy voluntarily and make the disclosure in their annual report and also disclose the same on their website.

We shall go over the relevant regulation on this and the compliance required.

SECRETARIAL STANDARD ON DIVIDEND

3. The "Secretarial Standard on Dividend" (SS-3), formulated by the Institute of Company Secretaries of India (ICSI) and issued by the Council of the ICSI, as back as 2018, which also spells out the applicable provisions and the procedural aspects. The adherence to SS-3 is not yet made mandatory but it is recommendatory.

DIVIDEND DISTRIBUTION POLICY – A BRIEF

4. Dividend distribution policy establishes the principles to ascertain amounts that can be distributed the company to its equity shareholders as dividend by the company as well as enable the company strike balance between pay-out and retained earnings, in order to address future needs of the company.

REGULATION ON DIVIDEND DISTRIBUTION POLICY

5. Regulation 43A of the Security Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 (LODR) mandates the top 1000 listed companies based on market capitalization (calculated as on March 31 of every financial year) is required to formulate a dividend distribution policy.

The regulation further states that the dividend distribution policy is also required to be displayed on the website of the company and the web-link to be provided in the annual report of the company.

PARAMETERS FOR FORMULATING THE DIVIDEND DISTRIBUTION POLICY

6. The Regulation also further states that the following

parameters to be included while formulating the dividend distribution policy.

(a) Circumstances under which the shareholders of the listed companies may or may not expect the dividend

(b) Financial parameters that shall be considered while declaring dividend

(c) Internal and external factors that shall be considered for declaration of dividend

(d) Policy as to how the retained earnings shall be utilized by the company

(e) Parameters that shall be adopted with regard to various classes of shares

ADDITIONAL PARAMETERS / CHANGE IN PARAMETERS

7. The above Regulation states further that if the listed company propose to declare dividend on the basis of parameters in addition to the one stated above or the company proposes to change such additional parameters or the dividend distribution policy contained in any of the parameters, then the company is required to disclose such changes along with the rationale behind the same in their annual report and as well as on the company's website.

DIVIDEND DISTRIBUTION POLICY BY OTHER LISTED COMPANIES

8. The other listed companies (not mandated for dividend distribution policy) may also voluntarily formulate the dividend distribution policy and may disclose their dividend distribution policies on their websites and provide a web-link in their annual reports.

ACTION CALLED FOR FROM THE COMPANY

9. The following actions would be called for from the company's side.

Formulation of policy on Dividend Distribution Policy

9.1. The Company is required to formulate a policy on "Dividend Distribution Policy "pursuant to Regulation 43A of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015.

The Policy is required to spell out the purpose of the code, definitions, the policy details, data base maintenance, responding to market rumours,

disclosure/dissemination of Price Sensitive Information with special reference to Analysts, Research Personnel, Institutional Investors and such other details along with fine and penalty in case violation of policy and other required details.

The role of the company secretary

9.2 The company secretary plays a pivotal role in every aspects of the company since the company secretary has to ensure the required compliance and adhere the procedural issues within the company. The company secretary could assist the board in formulating the dividend distribution policy by providing the historical data of dividend payouts, market sentiments/expectations, rates of dividend declared by other competitors in the similarly industry and such other relevant details. The company secretary also could put forward a note to the board on legal aspects e associated and accordingly a suitable dividend policy may be brought out.

The role of the Board

9.3 The board, in its meeting would be reviewing the dividend distribution policy periodically as and when required in order to ensure that it meets with the provisions of the relevant applicable legislation and needs of the company and remains effective. The board has the right to change/ amend the policy as may be expedient taking into account the law for the time being in force.

SUGGESTED (DRAFT) DIVIDEND DISTRIBUTION POLICY

10. Given below is an illustrative draft Dividend Distribution Policy and the companies could formulate their own policies with required modifications/ changes.

DIVIDEND DISTRIBUTION POLICY (SUGGESTED DRAFT)

(Pursuant to Regulation 43A of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015.

I. Introduction

……..name of the company ……. the dividend distribution policy based on the belief that our shareholders should decide how best to utilise their funds retained in the company that is surplus to the medium term cash requirements of the business. Therefore, the company's dividend distribution policy is to return to the shareholders that cash, which in the opinion of the board, is in excess to the medium term cash requirements.

The board of directors of the company, has adopted the Dividend Distribution Policy and procedures with respect to Dividends declared/ recommended by the company in accordance with the provisions of Regulation 43A of the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("Listing Regulations") as amended from time to time.

II. Authority

This policy has been adopted by the board of the company at its Meeting held on ……..month / date/ year…….. The Policy shall also be displayed in the annual report and also on the website of the company.

III. Purpose

The purpose of this policy is to return to the shareholders that cash, which in the opinion of the board, is in excess to the medium term cash requirements and facilitate the process of dividend recommendation or declaration and its pay-out by the company which would ensure a regular dividend income for the shareholders and long term capital appreciation for all stakeholders of the company.

IV. Forms of dividend

1	Interim dividend	The interim dividend may be declared by the board one or more times in the financial year as may be deemed fit.
2	Final dividend	The final dividend is paid once for the financial year after the annual accounts are prepared. The board of directors of the company has the power to recommend the payment of final dividend to the shareholders for their approval at the annual general meeting of the company. The declaration of final dividend shall be included in the ordinary business items that are required to be transacted at the Annual General Meeting.
3	Special dividend	The board may declare/recommend special dividend as and when it deems fit.

V. Dividend Distribution Policy

The company had been having a consistent dividend policy that balances the objective of appropriately rewarding shareholders through dividends and to support the future growth.

(a) The Dividend Distribution Policy establishes the principles to ascertain amounts that can be distributed to equity shareholders as dividend by the company as well as enable the company strike balance between pay-out and retained earnings, in order to address future needs of the company.

(b) The Dividend Distribution Policy shall come into force for accounting periods beginning from ……date / month / year…….

(c) Dividend would continue to be declared on per share basis on the Equity Shares of the company having face value Rs……(amount0…… each. The company currently has no other class of shares and therefore, dividend declared will be distributed amongst all shareholders, based on their shareholding on the record date.

(d) Dividends is generally recommended by the board once a year, after the announcement of the full year results and before the annual general meeting of the shareholders, as may be permitted by the Companies Act, 2013.

(e) The board may also declare interim dividends from time to time as permitted by the Companies Act, 2013.

(f) In determining the future cash requirements of the business, the board includes the following internal and external factors in its review:

Internal factors		External factors	
(i)	Working capital to support growth	(i)	Macro-economic and fiscal environment
(ii)	Capital investment to expand capacity and to maintain existing facilities	(ii)	Applicable taxes including tax on dividend
(iii)	Cash flow position of the Company	(iii)	Economic environment coupled with Industry outlook for the future years
(iv)	Accumulated reserves	(iv)	Cost of external financing
(v)	Potential for acquisitions	(v)	Changes in the Government policies, industry specific rulings & regulatory provisions

Internal factors		External factors	
(vi)	Possibility of contingent liabilities crystallizing	(vi)	Inflation rate
(vii)	Possible funding requirements	(vii)	Business cycles
(viii)	Contingency planning		
(ix)	Ratio of debt to equity (at net debt and gross debt level).		

(g) Apartment from the above, the board may declare/recommend special dividend additionally, as and when it deems fit.

(h) Board may also decide not to declare dividend or may recommend a lower dividend for a given financial year, after considering the prospective opportunities and threats in the event of certain circumstances such as financial and regulatory environment. In such cases, the board would provide the rationale behind such decision and the same would be disclosed in the annual report of the company.

(i) Retained earnings of the company may be used in any of the permitted ways as per the provisions of the Companies Act, 2013 including declaration of (final) dividend.

(j) The annual report of the company will be having the disclosure on information on dividend paid in the last 5 years.

VI. Disclosure/Dissemination

(i) This policy on Dividend Distribution Policy should be uploaded on the website of the company.

(ii) The annual report should contain reference to this policy and a web-link shall be provided therein.

VII. Policy review

This policy shall be reviewed from time to time so that the policy remains compliant with applicable legal requirements. The Company Secretary will keep the policy updated as per applicable statutory guidelines. Any changes or revisions to the policy will be communicated to shareholders in a timely manner.

VIII. Amendment

The board of directors shall have power to amend any of the provisions of this policy, substitute any of the provisions with a new provision or replace this policy entirely with a new policy according to subsequent modification(s)/amendment(s) to Companies Act, 2013/SEBI Regulations.

DISCLOSURES IN THE BOARD REPORT

11. In the board report, the company could declare under the heading "Policies of the company" – stating that the company has posted the "Dividend Distribution Policy" on its website at URL……. (amongst other policies).

ON COMPANY'S WEBSITE

11.1 The company is required to upload the dividend distribution policy under the heading "Investor information" under "Policies & other disclosures" amongst other policies.

SECRETARIAL AUDIT REPORT ISSUED BY THE PRACTICING COMPANY SECRETARY

11.2 The secretarial audit report issued by the practicing company secretary pursuant to section 204(1) of the Companies Act, 2013 and rule No.9 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 would also state that the practicing company secretary has examined the compliance with the applicable clauses of SEBI (Listing Obligations and Disclosure Requirements) Regulations 2015 and would certify that upon review the company has complied with the provisions of the regulations amongst other Act/Rules/Regulations, guidelines issued by the regulators.

CONCLUSION

12. Having a dividend distribution policy, the shareholders would get to know the type of dividend, method, amount and the frequency hence it become important from the shareholders point of view. Further, the dividend distribution policy provides information to investors and encourages the company's management to bring discipline. Dividend distribution policy also influences the market price and value.

The companies should formulate a sound dividend policy in the best interest of the shareholders of the company so that they get rewarded by way of receiving dividend irrespective of earning are up or down. To achieve this, the companies may have to formulate a stable dividend policy having regard to various factors such as type of business, debt obligations, earnings stability, shareholder expectations and other related aspects.

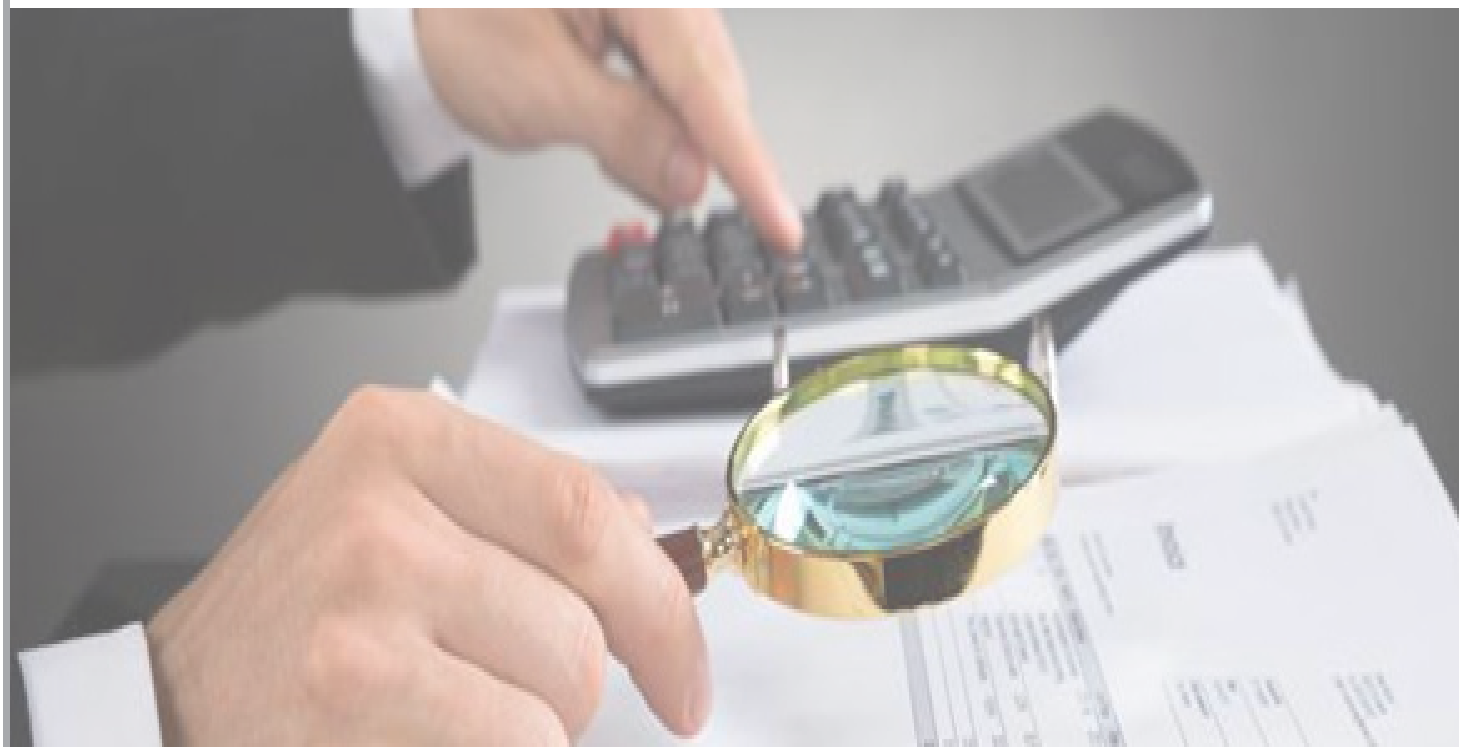
By having a sound dividend policy, the investors trust would be built and new investors would be attracted for investment in the companies.

Accounts & Audit

Wirecard collapse, Ernst & Young audit failure and Investigative Journalism of Dan McCrum

A Case of Misplaced Auditor's Professional Skepticism Disclosure Requirements) Regulations, 2015)

Dr. T. P. Ghosh
Professor - Institute of
Management Technology, Dubai



Analyzing collapse of Wirecard AG, a global payment service company, in June 2020 because of accounting fraud including fraudulent bank balance of € 1.9 billion, continuous eleven years of clean audit report by Ernst and Young despite serious allegations raised by Financial Times through 'House of Wirecard series' as early as in 2015, this paper highlights lack of "professional skepticism" in audit while it is traditionally believed that "professional skepticism lies at the heart of a quality audit". This paper also critically examines recent changes brought by the International Audit and Assurance Standards Board in ISA 220, ISQM 1 and ISQM 2 linking possible reasons for misplaced professional skepticism in the Wirecard audit failure.

1. COLLAPSE OF WIRECARD

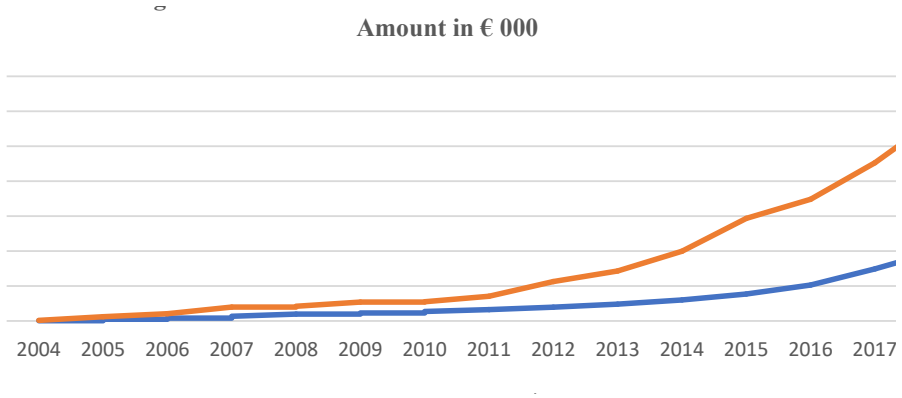
Wirecard AG, a DAX 30 company, collapsed because of creative accounting. The company and its auditor Ernst and Young (EY) earlier denied all allegations of falsified transactions and overvalued goodwill during 2015-2018. A special audit report of KPMG states inadequacy of evidence supplied by the company to justify transactions. Finally, its auditor EY could not find € 1.9 billions of cash. Wirecard AG, a $ 28.14 billion market cap company, finally declared insolvency on 25 June 2020. EY ignored a series of news report on fraudulent accounting transactions which indicated poor application of "professional skepticism".

Although collapse of German payment service company Wirecard is often dubbed as 'Enron of Germany' but EY had knowledge of incriminating press reports on creative accounting at Wirecard which it evaluated applying "professional skepticism" in 2018 as key audit matters but surprisingly could not smell the foul play. Encountered with unreconciling cash of € 1.9 billion it had to finally give up its "true and fair" view over a decade in 2019 and immediately thereafter Wirecard AG applied for insolvency. International Audit and Assurance Standards Board (IAASB) proclaims that

"professional skepticism" lies at the heart of audit. Coincidentally in 2019, IAASB released a suite of proposed standards fostering an appropriately independent and skeptical mindset of the auditor which are since been finalized. Audit failure at Wirecard despite alarming fraud signals raised serious questions about the gap between the theory and practice of audit. Possibly it is time to think about Brydon recommendations at the backdrop of collapse of Carillion in the UK that there is a need for building up separate audit profession segregating from the accounting profession.

Established in 1999 Wirecard engaged in providing electronic payment and risk management services, plus solutions focused on mobile payments, e-commerce, digitization, and financial technologies. From a small start-up of Munich, Wirecard grew into a global payment service company under the leadership of Markus Braun over just 20 years and built a web of subsidiaries across the globe.From just eight subsidiaries in 2005, Wirecard achieved market penetration with fifty-three wholly owned subsidiaries and one 60% subsidiary (See Annexure 1) by 2018. Its high value of acquisitions raised questions in 2008 which was effectively suppressed by Ernst and Young (EY) special audit. Since then EY as appointed as external auditor for eleven years till the company collapsed out of fraud.

Wirecard achieved phenomenal organic and inorganic growth in revenue and total assets over 2004-18: its revenue grew from meagre € 6827 K in 2004 to € 2016200 K in 2018 (a compounded annual growth of 50.12%), and total assets grew from just € 16163 K in 2004 to € 5849000 K in 2018 (a compounded annual growth of 52.02%) [see Figure 1]. Wirecard shares were listed on the Frankfurt Stock Exchange in 2006 and, since 24 September 2018, Wirecard shares were included in the DAX 30 index, which represents the 30 largest blue-chip German companies. On 23 August 2018, Wirecard achieved peak market capitalization of $ 28.14 billion which was even higher than Deutsche Bank. However, the auditor EY could not keep track with space of unusual acquisition with high component of goodwill and customer relationship asset.

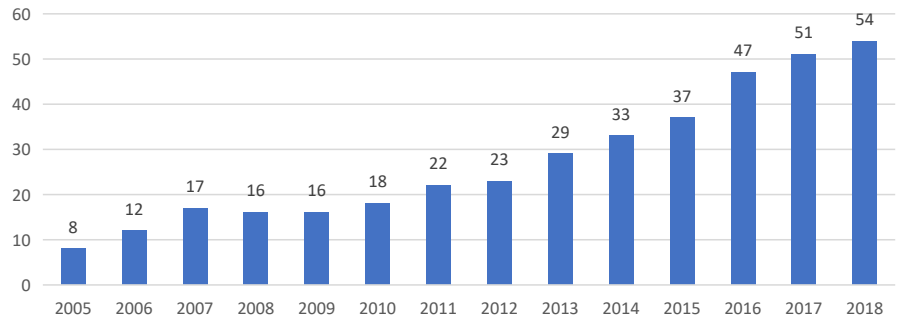


Data Source: Annual Reports of Wirecard 2005-2018

No one knows what were true revenue and assets of Wirecard – apparently revenues are created with many defunct companies using Dubai based Al Alam Solutions (See Paragraph 4). The Munich prosecutor's office said in a statement it had questioned the chief executive of Card systems Middle East FZ-LLC and arrested him on suspicion of conspiracy to commit fraud, attempted fraud and aiding and abetting other crimes. Reportedly, most of fraudulent transactions of Wirecard were originated at Wirecard subsidiary Cardsystems and third party vendor Al Alam Solutions.

By early 2019, Dan McCrum of Financial Times unveiled the secret of fake revenue in 'referring deals' [1]. Wirecard expanded business mainly through wholly owned subsidiaries except a 60% subsidiary in Chennai, India (Figure 2). Its acquisition price was disproportionately skewed towards payment of goodwill and customer relationships. Over the years, both goodwill and customer relationship asset grew with business acquisition. Journey of Wirecard during 2005-2021 is summarized in Annexure 2.

Figure 2 : No. of consolidated subsidiaries



The Financial Times published its 'House of Wirecard series' on FT Alphaville as early as in 2015 raising questions about inconsistencies in Wirecard's accounts (See Paragraph 2). The FT pointed out that there appears to be a € 250 m hole in the Group's balance sheet which escaped attention of independent directors, auditors as well as regulators. Corporate governance at Wirecard remained only in long texts in the company's annual report. Fake business, fake clients, fake customer relationship, paper goodwill and creative revenue at Wirecard once again demonstrate the art of creative accounting. Wirecard in a bid suppress the wrongdoing responded with letters from Schillings, a UK law firm specializing in 'reputation management'. In July 2018, Wirecard's lawyers in London, Herbert Smith, accused Dan McCrum (journalist of FT) of intending to publish information about Wirecard as part of a short selling strategy. See Paragraph 7 :Dan McCrum Honoured – the Financial Times journalist Dan McCrum has been awarded with prestigious **2020 Helmut Schmidt Journalism Prize** in Germany for his work uncovering one of the biggest accounting frauds in European corporate history. On the other hand, the independent auditor EY has been facing class action suits from shareholders and reportedly Soft Bank of Japan, major lender to Wirecard plans to sue EY.

J Capital Research [https://www.jcapitalresearch.com], a US and Hong Kong registered independent research group also reported that Wirecard's operations dotted across Asia are far smaller than it claims and also questioned amount of goodwill payment on various acquisitions. J Capital Research was the first among various stock researchers to give a short sell call on Wirecard [2] which was dubbed as sponsored report at the behest of Financial Times.

2. HOUSE OF WIRECARD

J Capital Research published its first report on Wirecard in November 2015 with a recommendation to short the stock. The research report *inter alia* pointed out that:

1. It attempted to use Wirecard in many parts of the world and have found it virtually impossible outside of Germany to fund the prepaid cards or use Wirecard in payment for anything. It found very few executives in the payments industry who know of Wirecard or call it a competitor; Worldpay or

Paypal, which seem to be the most directly comparable business, never mention Wirecard.

2. Having found little evidence that Wirecard has any volume of business, it visited five of the subsidiaries in South East Asia. Only one of the premises had a reasonably credible presence, and even that one appeared much smaller than Wirecard disclosures would suggest. At two of the listed locations there were unrelated companies with similar names.

3. There is buildup of intangible assets and goodwill associated with various acquisitions. But there is little evidence of new technologies in Wirecard disclosures about core business that differentiate the company with its new acquisitions, or to differentiate Wirecard from its competitors.

4. Singapore headquartered Trans Infotech was a then loss-making business which Wirecard acquired in 2012, describing it as "one of the leading payment service providers in Vietnam, Cambodia and Laos". Trans Infotech had only 20 employees and thus had no capacity for providing services which would require at least 100 employees.

5. Evidence based on visit to offices of Wirecard subsidiaries in Hanoi and Ho Chi Minh revealed that they were located in office parks rather than a mixed retail/office facility like some of their competitors. While competitors had visible call centers and employees talking with customers, Trans Infotech had almost nothing.

6. At a new Trans Infotech Office in Ho Chi Minh City, Vietnam there were only 5 peoples working in an office with space for 50. It was working as a seller of point of sale (POS) machines used to process card transactions in shops under contract for a Chinese manufacturer.

7. In Cambodia and Laos no office was found on the address provided in the contact page.

   As per leasing agents no office had been leased in the previous decade to Wirecard, Trans Infotech or its Cambodian subsidiary. Also, no corporate filings for Trans Infotech or Campingnet, its subsidiary, at the Ministry of Commerce could be tracked.

Wirecard replied that "Trans Infotech employs 79 staff, is headquartered in Singapore and has offices in Hanoi and Ho Chi Minh City, [Vietnam]." Sales to Laos are run from Singapore.

While Wirecard regularly says in its filings that Trans Infotech "ranks among the leading providers in the payment services sector for banks in Vietnam, Cambodia and Laos", it is highly questionable that it can do this without teams of Laotian and Cambodian speakers based in either country.

8. In Malaysia, Wirecard purchased two businesses, merged and renamed as Systems@Work and Korvac. The office was located in a building where fewer than 10% of occupants had their offices unlocked during business hours. The new office, in a plush building downtown, had capacity for 50 employees, but J Capital Research found fewer than a dozen were working. Also, there was no presence of Systems@Work in other listed addresses.

9. In Indonesia, there were around 100 employees as against 200-300 employees reported by Wirecard.

Although Prima Vista operated a reasonable POS business with post-sales service and had an online payments-processing presence, it had low volume and undifferentiated technology.

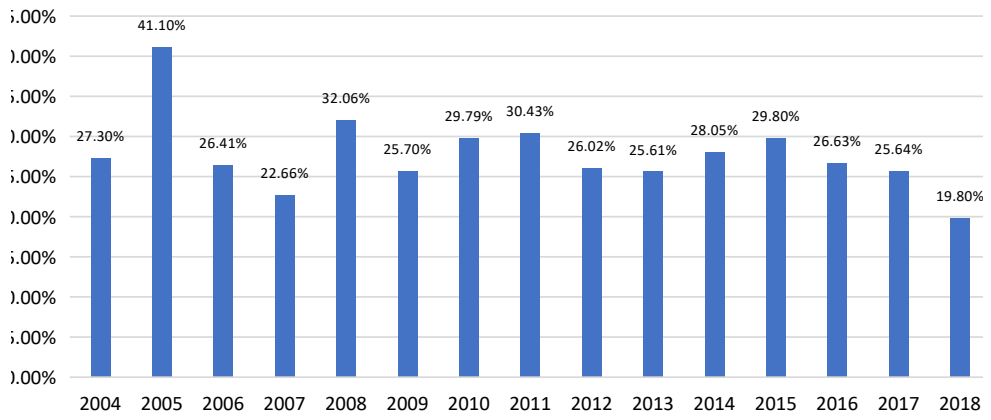
Wirecard attributed € 160 m of the value to the customer relationships and thus its "the balance sheet is bloated with phantom assets". Wirecard's goodwill and intangibles ballooned to a nearly combined 50% of revenue by 2014.

Wirecard responded that it employed 901 staff at our subsidiaries in Asia: Singapore, Indonesia, Malaysia and Vietnam (excluding employees who will join with the successful completion of the most recent acquisition in India).[2]

Although Wirecard refuted all these charges, the rising goodwill and customer relationship assets in the Balance sheet of the company should have raised "professional skepticism" of the independent auditor requiring to re-verify the valuation based on reality check. Findings of J Capital Research could neither raise "professional skepticism" of EY in 2015 audit nor could raise alert at the regulatory level. No enquiry even found to

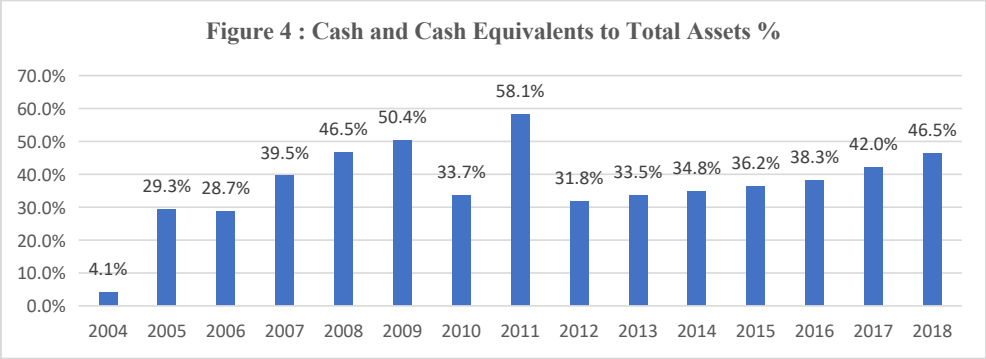
be appropriate at any regulatory level or out good corporate governance measure despite J Capital Research questioned deceptive scale of South Asian operations compared to acquisition price. This was a strong signal to check dubious revenue.Had there been action from EY, misuse of €500 million capital raised from shareholders could have been averted.
See in Figure 3 that over 25% assets of Wirecard was in the form goodwill and customer relationship.

Figure 3 Wirecard Goodwill & Customer Relationship to Total Assets % 2004-2018



Data Source: Annual Reports of Wirecard AG 2004-2018

Wirecard's Balance Sheets also report high level of cash and cash equivalents which remained unchecked over the years (See Figure 4). The Balance Sheets of Wirecard had two major assets - (*i*) Goodwill and customer relationship asset in the range of 19.8%-41.1% with average of 27.8% and (*ii*) Cash and Cash Equivalents which were in the range of 31.3% -88.6% with average of 64.7% and its asset turnover ratio was continuously declining since 2011. The auditor had to have "professional skepticism" regarding impairment of goodwill and amortization of customer relationship asset. Wirecard used 20 years of amortization period for fragile customer relationship asset which by any means was on the higher side. In addition, there was a continuous flow external research doubting reality of Asian business of the company.



Singapore police opened inquiries in the first week of February 2019 following a series of investigative reports in the Financial Times alleging fraud and creative accounting reporting. It also cited the preliminary findings of an investigation by law firm Rajah & Tann that found evidence of series offences of forgery and false accounting.Singapore police also raided the premises of Wirecard on 8 February 2019.

Financial Times published internal company spreadsheets along with related correspondence between senior members of Wirecard's finance team indicating a concerted effort to fraudulently inflate sales and profits at Wirecard businesses in Dubai and Ireland, as well as to potentially mislead EY [3]. Still the independent external auditor could smell fraud (after all an auditor is not a blood hound) while signing audit report of 2018.

3. 2018 AUDIT REPORT OF EY

Accounting treatment of matters on the basis of findings from investigations which were performed due to the allegations of whistleblower in Singapore was considered as key audit matter. Allegations were related to impairment of intangible assets and existence of revenue as well as the existence and recoverability of receivables. The various allegations resulted in detailed information requirements across several entities with some cases different accounting system. Due to the significance of potential effects on the consolidated financial statements and the complexity and time required for the clarification of this matter, this was deemed to be a key audit matter.

EY observed that –

- We examined the processes established by the management of the

companies Wirecard Group to prepare the facts relating to the allegations.

- We compared the insights obtained therefrom with the elaborations provided to us by independent third parties as well as those of the internal compliance department.

- On this basis, we performed extended audit procedures on similar matters. We also examined transactions and related assessment of matters in discussion with officers of the companies concerned, suppliers, customers, and the lawyers who have been involved, also including our own forensic experts.

- Our audit procedures did not lead to any reservations regarding the accounting treatment of matters on the basis of findings from investigation, which were performed in response to allegations of a whistleblower in Singapore. [Wirecard AG Annual Report 2018].

Similarly, EY did not raise any doubt regarding business acquisition including purchase price and valuation of goodwill and acquired customer relationship.

EY observed that '***We exercise professional judgment and maintain professional skepticism throughout the audit***'. And the EY expressed that consolidated financial statements give a **true and fair view** of the assets, liabilities, and financial position of the Group as at 31 December 2018, and its financial performance for reporting year from 1 January 2018 to 31 December 2018. Shortly, thereafter Wirecard collapsed like 'house of card'. It appears that the 'watch dog' auditor seldom barks.

Professional skepticism is defined as a '**an attitude that includes a questioning mind, being alert to conditions which may indicate possible misstatement due to error or fraud, and a critical assessment of audit evidence**' [Paragraph 13(l) of ISA 200; (6)]. EY trusted Wirecard officers who were architects of fake transactions and corroborated from third parties who were in the ring of the accounting fraud at Wirecard. Being failed to apply 'professional skepticism' they could only claim that **"There are clear indications that this was an elaborate and sophisticated fraud involving multiple parties around the world in different institutions with a deliberate aim of deception"**[7]. They have also reportedly admitted that

Wirecard was involved in a fraud with multiple parties around the world in different institutions.If that is so why an engagement partner from globally famed EY could not sense despite eleven years of audit engagement.
It is now a case of subjective assessment whether EY applied "professional skepticism" in audit of Wirecard during 2015-2018. See Paragraph 6 regarding deficiency of EY audit stated in the leaked Wambach report.

4. AL ALAM SOLUTIONS, DUBAI

While EY signed 2018 audit report on 24 April 2019, Financial Times released its findings based on inquiries of 'third party acquirer' Al Alam Solutions based in Dubai which as per documents contributed half of Wirecard's worldwide profit in 2016 [3]. Financial Times observed that -

- Al Alam was purportedly the spider at the heart of an international web, processing vast sums for 34 of Wirecard's most important and lucrative clients in the US, Europe, Middle East, Russia and Japan.
- Visit of Financial Times team of Al Alam's Dubai office revealed that this was a threadbare operation with six to seven employees.
- Visa and Mastercard did not have any record of a relationship with Al Alam.
- As per internal financial reports from 2016 and 2017 of Wirecard AG about € 350 m of payments from 34 key clients as passing through Al Alam, on behalf of Wirecard, each month during the period. Much of the payment processing attributed to these 34 clients could not have taken place.
- 15 of the 34 clients said to Financial Times that they had never heard of Al Alam of whic honly four said they used Wirecard for payment processing. Six did not respond to requests for comment or declined to discuss the matter, and five of the other purported clients could not be traced or contacted. The remaining eight clients appeared to have shut down completely at the time they were appearing in Wirecard's books.
- In early 2017, Al Alam documented to have been processing around € 46 m of payments every 30 days on behalf of Wirecard for an Irish prepaid card business called Cymix Prepaid. Whereas as per Irish corporate records,

Cymix was liquidated in 2012.

- According to Wirecard financial reports, US payments processor CC Bill, sent Al Alam € 24 m of dollar, yen and euro payments each month to transact. However, CCBill's chief operating officer denied to have any connection to Al Alam.

- Al Alam records showed transactions with Gaming Network Solutions, a Philippines-based gambling business while the company confirmed that it stopped business since 30 June 2016.

- Other defunct entities which appeared to have business with Wirecard AG include Bank de Binary, a financial firm which closed in March 2017 following regulatory pressure; Molotok, a former Russian competitor to Ebay; and Piku, a shuttered coupon business from Japan.

Following the FT's latest disclosures [3], Wirecard had faced growing pressure from investors and corporate governance advocates for special audit to clear up the matter and to demonstrate that it meets appropriate governance standard which resulted in engagement of KPMG to conduct special auditor in October 2019 with unrestricted access to information at all levels of the group.

5. KPMG SPECIAL AUDIT

The independent investigation by KPMG released in April 2020 states that Wirecard did not provide sufficient documentation to address all allegations of irregularities that had been made.Some essential documents had arrived at the last minute, while many never arrived. Included among this information were the original bank records showing € 1 billion in payments.

While Wirecard AG made misleading announcement stating that "Wirecard AG in the early hours of today, April 28 2020, received the special audit report by the auditing company KPMG. Incriminating evidence for the public allegations of balance sheet forgery has not been identified. With respect to all four areas of the audit – Third Party Acquiring business (TPA), Merchant Cash Advance (MCA)/Digital Lending as well as the business activities in India and Singapore – No significant findings have been made, which would require an adjustment of the annual accounts 2016-2018". But the Wirecard management could no longer conceal its criminal misdeed of creating fake business.

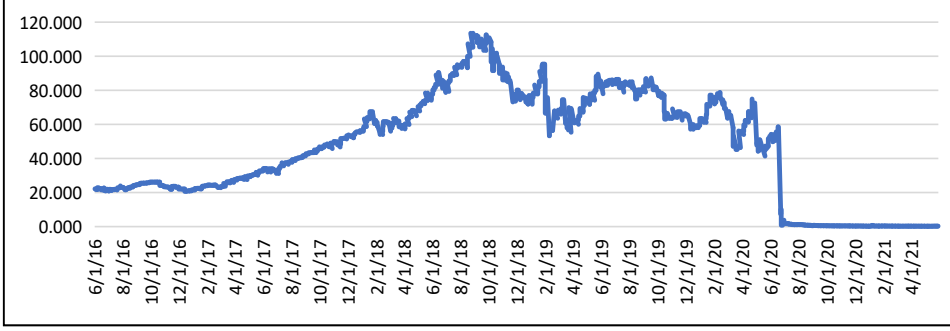
6. WIRECARD SCANDAL DISCOVERED

The Wirecard scandal finally came to light when the company was forced to postpone publishing its 2019 financial results for the fourth time as its external auditor EY could not find € 1.9 billion of cash that was meant to be held in accounts looked after by a trustee on behalf of Wirecard and payment processing partners in some countries. The money was said to be held in two Philippine banks, BDO Unibank Inc and Bank of the Philippine Islands (BPI). The Central Bank of Philippine asserted that $2.1 billion (€1.9 billion) belonging to Wirecard AG had not entered the country's financial system. On 25 June 2020, Wirecard AG filed application for insolvency owing creditors more than $ 4 billion. Wirecard Bank was kept outside the scope of insolvency proceedings. And stock price of Wirecard AG crashed on 26 June 2020 (see Figure 5).

Wirecard's former chief executive Markus Braun has been rearrested in Munich as German prosecutors dug deeper into allegations of fraud [13]

Wirecard's former finance head, Burkhard Ley, and Stephan von Erffa, former head of accounting were also arrested (as revealed by Financial Times). Jan Marsalek, former chief operating officer, has likely escaped to Russia. [13]

Figure 5 : Wirecard Share Price Chart 2016-May 2021



Data Source : https://finance.yahoo.com

EY partners who signed off Wirecard's accounts are already under criminal investigation over potential violations of rules on carrying out professional duties. A team of auditors from Rödl & Partner led by Martin Wambach, the parliamentary special investigator, assessed 90 gigabytes of EY data that included internal working papers and 40,000 emails.In the report Wambach found that the 2014 to 2016 audits suffered from serious shortcomings:

- EY failed to spot fraud risk indicators, did not fully implement professional guidelines and, on key questions, relied on verbal assurances from executives.
- In an addendum to that report, which focuses solely on the 2018 audit, Wambach argued that the data available at Wirecard, and used by EY in its work, was not sufficiently detailed to check individual transactions that were purportedly processed by the Asian outsourcing partners.
- EY should have checked the electronic payment systems of Senjo and Al Alam, two of Wirecard's supposed partners. A consistent and complete audit of the payment systems of the TPAs Senjo and Al Alam did not occur during the 2018 audit.
- The existence and amount of revenue seems to have been verified only indirectly through balance checks by the TPA and the trustee. Many inconsistencies in these documents could have warned EY. [8]

7. DAN McCRUM HONOURED

Dan McCrum, investigative reporter at the Financial Times, has won the coveted 2020 Helmut Schmidt Journalism Prize in Germany for his work uncovering one of the biggest accounting frauds in European corporate history. This is the first time the prize has gone to a business journalist outside Germany. [9]

Dan McCrum is Capital Markets editors at the Financial Times.

Uwe Vorkoetter, journalist and member of the awards jury, remarked:

"McCrum spent six years researching the Wirecard case. From his initial doubts about

the company's integrity to the collapse of this tissue of lies that had made it into the DAX30 circle. McCrum has had to overcome many obstacles; he has been investigated on suspicion of market manipulation, lawyers have been hired to intimidate him, his email account has been hacked, he has taken great personal risks overall. It is for these reasons that the jury decided to award him this prize despite him not meeting the criteria, and with that, the jury is setting an example with a strong message. A signal of self-criticism with regard to German business journalism, which did not follow the Wirecard case with the same rigour, clarity, and consistency as McCrum did. Therefore, we extend our wholehearted congratulations to Dan McCrum."[7]

8. PROFESSIONAL SKEPTICISM BY AUDITORS

Professional Skepticism and Quality Management (QM)

Source: IAASB;
https://www.ifac.org/system/files/publications/files/IAASB-Professional-Skepticism-Focus-Feb-2019.pdf

With focus on "Professional skepticism at the heart of audit", the IAASB revised ISA 220 *Quality Management for an Audit of Financial Statements* [10], ISQM 1 Quality management for Firms that performs audit or reviews Financial Statements, or Other Assurance or related Service Engagements [11] and ISQM 2 Engagement Quality Reviews [12].

ISA 220 emphasized that –

(i) achieving objectives of International Standards of Audit (ISAs) and compliance with law and regulations in conduct of audit involve exercising professional skepticism.

(ii) the engagement team is required to plan and perform audit with professional skepticism and to exercise professional judgment.

(iii) the engagement partner is responsible for enticing engagement team members to apply professional skepticism throughout the audit.

Paragraph A34 of ISA 220 illustrates impediments to application of professional skepticism which *inter alia* includes –

a. Lack of co-operation or undue pressures imposed by management which may negatively affect the engagement team's ability to resolve complex or contentious issues;

b. Insufficient understanding of the entity and its environment, its system of internal control and the applicable financial reporting framework which may constrain the ability of the engagement team to make appropriate judgment and informed questioning of management's assertions;

c. Difficulties in obtaining access to records, facilities, certain employees, customers, vendors or others which may cause bias in selection of sources of audit evidence that are more easily accessible.

Paragraph A35 of ISA 220 states the impact of *conscious and unconscious bias* of auditors which would affect application of professional judgment including design and performance of audit procedures or evaluation of audit evidence. Despite having information about disconnect between the Asian business profile and revenue generation reported by Wirecard, EY sensed no fraud in key audit matters – most likely explanation of this discordant behaviour can only be explained by *conscious and unconscious bias of auditors* that impaired professional skepticism. Examples of unconscious bias that impedes exercise of professional skepticism and thereby affect reasonableness of professional judgment include –

- **Availability bias** - tendency to attach more weight on events or experiences that immediately come to mind or are readily available than those which are not;

- **Confirmation bias** - tendency to place more weight on

information that corroborates on existing belief than information that contradicts or cast doubt on that belief;

In effect, prolonged association of EY with Wirecard could be reason on developing confirmation bias and the auditor did not wish to accept the contrary evidence. Confirmation bias deteriorates professional skepticism to such an extent that the auditor works to nullify incriminating evidence. Weak audit rotation framework in Germany probably allows to develop cozy relationship between the auditor and management that gives rise to confirmation bias.

- **Groupthink** - a tendency to think or make decision as a group that discourages creativity or individual responsibility;

  EY engagement partner looked into forensic experts who could not provide adequate negative information and the engagement partner perhaps could not take individual responsibility to institute additional probe before negating presence of fraud when indeed the company's accounts were impacted by fraud.

- **Over confidence bias** – tendency to over estimate own ability;

  It is an alternative to Groupthink bias. EY engagement partner might be overconfident of his/her analytical ability and application of professional judgment because of past experience of handling large audit.

- **Anchoring bias**– tendency to overweight initial piece of information and thus subsequent information is inadequately assessed;

  Prolonged audit engagement tends to create anchoring bias. EY engagement partner might be overwhelmed with business of Wirecard in Germany and that anchoring bias played role in ignoring incriminating information about the company's Asian business.

- **Automation bias**– tendency to favour output generated from automated system although human reasoning or contradictory information raises question;

EY engagement partner might be under automation bias depended too much on automated financial statements

rather than applying logic whether a particular set of business is competent to produce revenue shown by management.

Paragraph A36 of IAS 220 suggests possible actions to avoid conscious and unconscious bias which might cause impediments to exercising professional skepticism:

1. Remaining alert to changes in the nature or circumstances of audit engagement which may necessitate deployment additional or different resources;

   Continuing FT reports about overpriced acquisition and unreliable customer relationship asset in Asian business should triggered EY to deploy additional/different engagement team capable of handling fraud.

2. Seeking advice from more experienced members of engagement team in planning and performing audit;

3. Changing composition of engagement team involving more experienced or specific expertise;

4. Involving more experienced members in the engagement team while dealing with members of management who are difficult and challenging to interact with;

5. Involving members in the engagement team with specialized skill and knowledge or expert to assist the engagement team with complex and subjective areas of audit.

   EY engagement partner perhaps did not properly took assistance of experts with specialized to skill in business valuation in auditing Wirecard wherein every year there were one or more business acquisition and there was risk in overstating goodwill and customer relation asset. **Over confidence bias** might have engulfed EY engagement partner's professional skepticism.

6. Modifying the nature, timing, and extent of direction, supervision or review by involving more experienced engagement team members, more in-person oversight on a more frequent basis or more in-depth reviews of certain working papers:

   - complex or subjective areas of audit

- areas that pose risk to achieve quality on the audit engagement
- areas with fraud risk
- identified or suspected non-compliance with laws and regulations
- setting expectations for less experiences engagement team members to seek advice from experienced members and more experienced team members to be available to less experienced team members

7. Communicating with those charged with governance when management puts undue pressure or engagement team experience difficulties in accessing records, facilities, certain employees, customers, vendors, or others from whom audit evidence may be sought.

It is expected that Wambach Report on Wirecard audit should cover actions taken by EY engagement partner to eliminate impediments to professional skepticism in view of investigations in Singapore and what lead to form audit opinion in 2018 that there was no misstatement in accounts. Otherwise, EY engagement partner would face the charge of gross negligence in conducting audit.

ISQM 1 deals with firm's responsibilities to design, implement and operate a system of quality management for audits or reviews of financial statement or other assurance or related service engagement. ISQM 1 also emphasized the need for inculcating professional skepticism to achieve the purpose of the standard. Paragraphs 15 and A78 of ISQM 1 [11] cross-referred to ISA 220 regarding impediments to professional skepticism and actions for eliminating conscious and unconscious biases.

ISQM 2 [12] deals with the appointment and eligibility of the engagement quality reviewer, and the performance and documentation of engagement quality reviewer. The engagement quality review should assess significant judgement taken by the engagment team in the light of exercise of professional skepticism. For audits of financial statements, the requirement and relevant application material in ISA 315 (Revised 2019) Identifying and Assessing the Risks of

Material Misstatements, ISA 540 (Revised 2018) Auditing Accounting Estimates and Related Disclosures, and other ISAs also provide examples of areas in an audit where the auditor exercises professional skepticism. These ISAs provide guidance to the quality reviewer in evaluating application of professional skepticism by the engagement team.

In particular, Paragraph A13 of ISA 315 (Revised 2019) states examples of application of professional skepticism in risk assessments:

i. Questioning contradictory information and reliability of documents;

ii. Considering response to inquiries and other information obtained from management and those charged with governance;

iii. Being alert to conditions that may indicate possible misstatement due to fraud and error;

iv. Evaluating whether audit evidence supports the auditor's identification and assessment of risks of material misstatement in the light of entity's nature and circumstances.

Paragraph 8 of ISA 540 (Revised 2018) states that exercise of professional skepticism is important when there is greater susceptibility to misstatement due to management bias or fraud. Paragraphs A60, A95, A96, A137 and A139 provide examples of ways in which the auditor may exercise professional skepticism.

Frequent audit failures should be linked to failure of the auditors to apply professional skepticism and professional judgment appropriately because of inadequate training or deficient value ethics. Cardinal values that an auditor should inculcate to exercise professional skepticism could be linked Plato's four cardinal values - wisdom, temperance, courage and justice. Audit professional is essentially different from accounting, and learning theory and practice of auditing is essentially different from accounting and financial reporting. Increasing accounting frauds require creation of **separate audit profession** with specialized audit training and developing value ethics that creates capability of an individual to exercise professional skepticism. Creation of separate audit profession has been argued in Brydon Review in the UK in the background of the

collapse of construction giant Carillion- **see authors article Carillion Failure, Improving Audit Quality and Brydon Review: Devising a separate audit profession [2021] 127 taxmann.com 207 (Article), 6 May 2021**.

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Annexure 1
List of Wirecard Subsidiaries

Subsidiaries of Wirecard		% share holding
1.	Wirecard Sales International Holding GmbH, Aschheim, Germany	100%
2.	Wirecard Payment Solutions Holding Ltd., Dublin, Ireland	100%
3.	Wirecard UK and Ireland Ltd. Dublin, Ireland	100%
4.	Herview Ltd. Dublin, Ireland	100%
5.	Wirecard Global Sales, GmbH, Aschheim, Germany	100%
6.	Wirecard Acquiring & Issuing GmbH, Aschheim, Germany.	100%
7.	Wirecard Bank AG, Aschheim, Germany	100%
8.	Wirecard Brazil SA, Sao Paulo, Brazil	100%
9.	Wirecard Solutions Ltd., Newcastle, UK	100%
10.	Wirecard E-Money Philippines Inc., Manila, Philippines	100%
11.	Wirecard Luxembourg SA, Luxembourg	100%
12.	Wirecard Odema Ve Elektronik Para Hizmetieri AS, Istanbul, Turkey	100%
13.	GI Technology Pvt. Ltd.,Chennai, India	60%
14.	Wirecard North America Inc., Conshohocken. United States	100%
15.	Wirecard Australia A&I Pte. Ltd., Melbourne, Australia	100%
16.	Wirecard Hongkong Ltd., Hongkong	100%
17.	Wirecard Payment Solutions Hongkong	100%
18.	Wirecard Technologies GmbH, Aschheim, Germany	100%
19.	Wirecard Communication Services GmbH, Leipzig, Germany	100%
20.	Wirecard Retail Services GmbH, Aschheim, Germany	100%
21.	Cardsystems Middle East FZ LLC, Dubai, United Arab Emirates	100%
22.	MyGate Communications Pte., Cape town, South Africa	100%
23.	Wirecard Acceptance Technologies GmbH, Aschheim, Germany	100%
24.	Wirecard Service Technologies GmbH, Aschheim, Germany	100%
25.	Wirecard Issuing Technologies GmbH, Aschheim, Germany	100%
26.	Wirecard NZ Ltd., Auckland, New Zealand	100%
27.	Wirecard Australia Pte Ltd., Melbourne Australia	100%
28.	Wirecard Africa Holding Proprietary Ltd., Cape Town, South Africa	100%
29.	Wirecard South Africa Holding Proprietary Ltd., Cape Town, South Africa	100%
30.	Wirecard Payment Services Namibia Pty Ltd., Windhoek, Namibia	100%
31.	Wirecard Slovakia s.r.o. Kosice, Slovakia	100%

Subsidiaries of Wirecard	% share holding
32. Click2Pay GmbH, Aschheim, Germany	
33. Wirecard Central Eastern Europe GmbH, Graz, Austria	100%
34. Wirecard Romania SA, Bucharest, Romania	100%
35. Romcard SA, Bucharest, Romania	100%
36. Supercard Solutions and Services SRL, Bucharest, Romania	100%
37. Wirecard Poland Sp.Zo.0, Warsaw, Poland	100%
38. Wirecard LLC, Moscow, Russia	100%
39. Wirecard Asia Holding Pte. Ltd., Singapore	100%
40. Wirecard Singapore Pte. Ltd.,Singapore	100%
41. Wirecard (Vietnam) Ltd. Ha Noi City, Vietnam	100%
42. Wirecard Payment Solutions (Malaysia) SDN BHD Kuala Lumpur, Malaysia	100%
43. PT Prima Vista Solusi, Jakarta, Indonesia	100%
44. PT Aprisma Indonesia,Jakarta, Indonesia	100%
45. Wirecard Myanmar Ltd., Yangon, Myanmar	100%
46. Wirecard (Thailand) Co Ltd., Bangkok, Thailand	100%
47. Wirecard India Private Ltd., Chennai, India	100%
48. Hermes I Tickets Pvt. Ltd.,Chennai, India	100%
49. G I Philippines Corp., Manila, Philippines	100%
50. Wirecard Forex India Pvt. Ltd., Bangalore, India	100%
51. American Payment Holding Inc., Toronto, Canada	100%
52. Wirecard Mexico SA De CV, Mexico City, Mexico	100%
53. Wirecard Gibraltar Ltd., Gibraltar	100%
54. Wirecard Processing FZ LLC Dubai	100%

Note: Companies in the second panel are subsidiaries of the subsidiary companies of Wirecard AG.For example, Sl No. 2. Wirecard Payment Solutions Holding Ltd., Dublin, Ireland is a subsidiary company of Sl. No1. Wirecard Sales International Holding GmbH, Aschheim, Germany, and companies in the third panel *i.e.* Sl. No. 3 Wirecard UK and Ireland Ltd. Dublin, Ireland and Sl. No. 4 Herview Ltd. Dublin, Ireland are subsidiaries of the company mentioned under Sl No 2 Wirecard Payment Solutions Holding Ltd., Dublin, Ireland.

Annexure 2
Timeline : Rise and Fall of Wirecard AG Summarised

1999	Wirecard founded in Munich, Germany backed by venture capital in the late stages of the dotcom boom. Initially it was an unlisted company.
2002	Markus Braun, previously a KPMG consultant, takes over as chief executive when it was a fledgling start-up and on the verge of collapse. Under the leadership of Markus Braun the company grew as a 'global driver of innovation in the digitalization of payment' [Annual Report of Wirecard AG 2016]
2003	Wirecard AG into the field of settling and optimizing electronic payment processes by initiating integration of CLICK2PAYGmbH. This business divisions commenced operations in May 2004
2004	In the process of reverse merger with InfoGenie, Wirecard AG appeared as a listed company. The original core operations of InfoGenie Europe AG, i.e. virtual call center services was integrated. The company reported more than 2,000 customers to fully outsource their payment and finance processes by making use of its software platform, experienced consultancy, technology and call center team and a comprehensive international network of partners. [Annual Report of Wirecard AG 2004]. It had then accumulated loss of € 1,817,278. Revenue and total assets of the company 2004-2018 are presented in Figure 1.
2005	Consolidated accumulated loss turned into consolidated accumulated profit of €6,238,605. The company has just eight subsidiaries.
2006	Wirecard was included in TecDax stock index tracks the performance of the 30 largest German companies from the technology sector. Wirecard acquired XCOM for € 5050 thousand and renamed it as Wirecard Bank which was licensed by Visa and Mastercard, by which it could both issue credit cards and handle money on behalf of merchants.
2007	Wirecard acquired TrustPay International AG,Grasbrunn, Germany at € 42,785 K and its goodwill increased by that acquisition by € 41,787 K *i.e.* 97.67% of price was for goodwill. [Wirecard AG Annual Report 2007]
2008	The Head of German Shareholders Association raised issues on accounting irregularities of Wirecard. The Supervisory Board commission special audit by Ernst & Young (EEY) with special consideration to acquisition of TrustPay International AG. It was observed that 'On the whole, there were no indications of any misleading statements in the consolidated financial statements and consolidated management report for 2007'. [Wirecard AG Annual Report 2008]
2009	The company acquired E-Credit Plus Pte. Ltd., Singapore. The purchase price of € 13283 K included goodwill of € 11314K and Customer Relationship Asset of 1210K i.e. 94.29% of the purchase price comprise of goodwill and customer relationship.
2010	Jan Marsalek, a young protégé of Markus Braun and a fellow Austrian, is appointed as chief operating officer. Both Markus Braun and Jan Marsalek are indicted for accounting fraud on the collapse of Wirecard in 2020.

2011	Goodwill increased by € 26,225K arising out of consolidation of System @ Work Group (€ 17550 thousand) and Pro Card Services FZ LLC (€8675 K) in Dubai. By this Goodwill totalled to € 127,565K. The company written off for the first time customer relationship asset of € 42,775K. [Wirecard AG Annual Report 2011] From 2011 onwards Wirecard raises a total of € 500 million and undertook variety of obscure acquisitions across the globe, including its regional headquarters in Singapore and in India.
2014	Wirecard acquired PT Aprisma Indonesia at gross value € 99611k of which of goodwill accounted for 24.58% and customer relationships 59.58% totaling 84.15%. Also, acquisition of Mikro Odeme Istanbul at gross value of €28781 K of which goodwill accounted for 45.41% and customer relationships 37.40% totaling 82.8%. Other companies were acquired with more or less similar break up of Goodwill and Customer Relationship asset.
2015	Wirecard acquired 100 per cent of the shares from GI Retail and financial investors of companies operating payment services in India, the Philippines, Indonesia and Malaysia under the brands "iCASHCARD", "Smartshop", "StarGlobal", "Commerce Payment" as well as several segment brands. Furthermore, Wirecard acquire 60 per cent of the shares in GI Technology Private Limited (GIT), a licensed Prepaid Payment Instrument (PPI) issuer in India. Wirecard took over more than 900 staff in offices in Delhi, Chennai, Hyderabad, Bangalore, Mumbai, Kolkata, Lucknow, Manila, Batam and Kuala Lumpur. Wirecard acquired Herms and Star Global at a gross price of € 358312K comprising of 74.09% goodwill and 14.15% customer relationship totaling 88.24%. Reportedly, Hermes was sold at a valuation of $40 million before being acquired by Wirecard for more than $250 million. London Judges Panel observed that Wirecard India deal started with fraud. Financial Times raised questions about irregularities in the Balance Sheet of Wirecard to the tune $250 million which Wirecard attempted to suppress by legal actions. J Capital Research also raised questions of presence of Wirecard in Asia as compared to acquisition price.
2018	Wirecard established global presence structured around five key locations with 54 subsidiaries and sub-subsidiaries: Group Headquarters at Aschheim for Europe Singapore for Asia-pacific region Sao Paulo for Latin America Conshohocken (Philadelphia) for North America Dubai for the Middle East FT released internal financial reports of Wirecard revealing transactions with fake and defunct companies which led to engagement of KPMG to conduct special audit.
2019 - 20	Wirecard scandal busted. KPMG reported that Wirecard did not provide adequate information. External auditor could not find € 1.9 billion cash. On 25 June, 2020 Wirecard AG filed application for insolvency. Wirecard Bank was kept outside the scope of insolvency proceedings.

Sources: Financial Times [4] & Reuters [5], Annual Reports of Wirecard AG 2004-2018; compilation by the author

Features of e-TDS
(2021 edition)

CLICK & KNOW MORE

ERROR-FREE AND EASY TO USE

- e-TDS provides a precise calculation of TDS and interest. Simple navigation of the software helps you at every step to prepare the TDS returns in a few clicks

AMENDED UP TO FINANCE ACT, 2021

- The software is updated with all amendments made by the Finance Act, 2021 and the latest FVU/RPU version provided by the NSDL

IMPORT/EXPORT WITH MS EXCEL

- Facility to import and export the data through the excel template

ONE INTERFACE FOR ALL TDS COMPLIANCE

- Manage every activity related to TDS compliance from one interface. Covering return generation and uploading, preparation of TDS/TCS certificates from TRACES, request for a revised return for any correction on TRACES, Bulk PAN Verification, etc. It's a complete TDS compliance online software without any paperwork

DEFAULT PREDICTOR NOTICE

- The software algorithm identifies the possible errors in the return and predicts the possibility of getting a default notice. It helps you to generate an error-free return and minimize the chances of the default notice

TDS AS PER ALTERNATE TAX REGIME

- The software provides an option to calculate the TDS on salary income as per the old regime or the new regime. Just select an option, and the tax shall be computed as per the chosen regime

SECTION 194N UTILITY

- A new functionality is provided to check whether deductee has filed his return of income or not on the basis of PAN. It is very simple to use and just 2 step process. Deductor can easily check deductee ITR compliance by using this utility. It will display result as per Income Tax Department (ITD) database.

  Software will deduct TDS automatically on higher rate on the basis of selection by user.

FLEXIBLE AND CUSTOMIZATION OPTION FOR BULK USERS

- Customization facility is available for bulk users

REBUILT ON LATEST TECHNOLOGY

- E-TDS has been rebuilt on the latest technology to provide you with a secured database (password protected), fast processing, and better experience. Now quickly generate bulk TDS entries

NO LOSS OF DATA AND BACKUP FLEXIBILITY

- Facility to take backup of your data from e-TDS to Dropbox.com. You can quickly restore data from Dropbox.com in case of any damage/loss of data. Backup can be taken organization wise, year-wise or full backup

RECENT CHANGES IN FORM 26Q,27Q AND 27EQ.

- All the statutory changes in Form no. 26Q, 27Q and 27EQ as per Notification No. 71 of 2021 dated 8th June,2021 are duly incorporated in the software.

Ahmedabad:

7, Abhinav Arcade, Ground Floor, Nr. Bank of Baroda,
Pritam Nagar Paldi, Ahmedabad – 380007

Tel : +91-079-26589600/02/03,
Mobile : +91-9909984900,9714105770, 9714105771
E-mail : sales.ahmedabad@taxmann.com

www.taxmann.com

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