ADMISSIBILITY OF ELECTRONIC EVIDENCES – INCOME TAX PROCEEDINGS

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1. INTRODUCTION

1.1. Over the past few years, with the advent of technology, there have been great strides in communication systems, leading to increased use of electronic devices in our day to day lives. New communication systems and digital technology have made drastic changes in the way we live and transact business.

1.2. Paper based transactions have, to a large extent, given way to electronic transactions because of them being easier to store, transmit and retrieve. Voluminous data/information can now be easily and efficiently stored in devices such as computers, pen drives, hard disks, CDs, etc.

1.3. Inevitably, extensive transactions, being done through electronic means, and storage of data in digital form have led to amendments in various laws such as the Information Technology Act, 2000, to keep pace with the changing circumstances. Resultantly, amendments have also been made to the Evidence Act, 1872 and also Income Tax Act, 1961 ("ITA").

1.4. As a result of this paradigm shift, in recording/maintaining information, there are many instances, now-a-days, wherein, Income Tax Department, as a result of search/survey operations conducted, comes across lot of data in electronic form, stored in computers, pen drives, hard disks, etc. Such information is then used by the Income Tax Department, for initiating proceedings, such as re-opening of assessment, under the provisions of the ITA, on the third parties, whose data/information is said to be found on those devices.

1.5. The point which needs consideration is whether such data/information, found as part of electronic record, in excel sheets or stored/copied in hard disks, pen drives, etc., can be admissible as evidence for making additions in the hands of third parties or whether the Department, under law, is duty bound to follow certain procedure before considering such data/information to be "sacrosanct". This is inevitable for the reason that electronic record, in comparison to records in paper format, are amenable to, intended or unintended, changes, modifications, etc. Also, the electronic records are susceptible to bugs, malfunctioning, viruses, etc.

1.6. The scope of the present article is only restricted to the evidentiary value of the information/data contained in electronic format or any printouts therefrom apropos the proceedings, in relation to third parties, initiated by the Department.

2. ADMISSIBILITY OF ELECTRONIC EVIDENCES UNDER THE EVIDENCE ACT

2.1. Any evidence, by way of electronic record, under the Evidence Act can be proved only in accordance with the procedure prescribed under Section 65A and 65B of such Act.

2.2. Section 65A is a **special provision** with regard to evidence relating to electronic record. As per Section 65A, the contents of the electronic record may be proved in accordance with Section 65B. Thus, whatever is contained in the electronic record, can only be proved if the provisions of Section 65B are complied with.

2.3. Section 65B, which starts with a *non-obstante* clause, is apropos the admissibility of the electronic record, as an evidence. Thus, with regard to the admissibility of the electronic record, the provisions of Section 65B shall always supersede any other provision contained in the Evidence Act, in this regard.

2.4. As per Sub-section (1) of Section 65B, information contained in an electronic record, (i) which is printed on paper; or (ii) which is stored, recorded or copied in optical or magnetic media produced by a computer, is considered as a "computer output".

2.5. Although, the word "document" has been defined under Section 3 of the Evidence Act, but the same does not include or refer to electronic records. However, Section 65B(1) deems such computer output to be a "document", if the conditions as specified in sub-section (2) of Section 65B are satisfied. The deeming fiction only takes effect if further conditions, as mentioned in the said section, are satisfied in relation to both the information and the computer in question.

2.6. In other words, computer output, in the form of printouts, or devices on which the data is copied/reproduced, can be considered as a document, under the Evidence Act, with the prerequisite that the conditions, as prescribed under sub-section (2) of Section 65B, are mandatorily fulfilled.

2.7. Following are the conditions as specified under Sub-section (2) of Section 65B, with reference to the admissibility of computer output as evidence, which need to be satisfied cumulatively: -

(a) The computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer.

(b) During the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities.

(c) Throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents.

(d) The information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

2.8. Further, where a statement in evidence is sought to be given by virtue of Section 65B, Section 65B(4) requires a certificate to be produced that *inter alia* identifies the electronic record containing the statement and describes the manner in which it is produced, and gives particulars of the device involved in the production of the electronic record to show that the electronic record was produced by a computer, either by a person occupying a responsible official position in relation to the operation of the relevant device, or in the management of the relevant activities, whichever is appropriate.

2.9. **Supreme Court**, in the case of **Anvar P.V. vs. P.K. Basheer, AIR 2015 SC 180**, by referring to Section 65A and 65B of the Evidence Act, held that the safeguards, as provided in such sections, are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record, sought to be used as an evidence. It was noted in the said judgement that electronic records, being more susceptible to tampering, alteration, transposition, excision etc., without such safeguards, the whole trial based on proof of electronic records can lead to **"travesty of justice".** In the said judgement, **Supreme Court** overruled its earlier decision in the case of **State (N.C.T. of Delhi) Vs. Navjot Sandhu and Ors., (2005) 11 SCC 600**, which held that even if certificate containing details in sub-section (4) of Section 65B is not filed, with respect to electronic record, but that does not mean that secondary evidence, in such cases, cannot be given even if the law permits such evidence to be given in the circumstances mentioned in Section 63 and 65 of the Evidence Act.

2.10. Section 61 of the Evidence Act deals with proof of contents of the documents and states that the contents of the documents may be proved either by **Primary or Secondary evidence**. Section 62 of the Evidence Act defines primary evidence as meaning the document itself produced for the inspection of the Court. Section 63 of the Evidence Act speaks of the kind or types of secondary evidence by which documents may be proved. Section 64 states that the documents must be proved by primary evidence, except in certain circumstances and lastly, section 65 sets out the cases in which secondary evidence relating to document may be given. Now the question arises whether for the purpose of determining the admissibility of electronic record as evidence, one has to refer to the provisions contained in Section 61 to 65 of the Evidence Act or one has to only advert to the provisions of Section 65A and 65B by considering them to be special provisions apropos electronic record as evidence.

2.11. In this regard, a three Judge Bench of the **Supreme Court**, in the case of **Arjun Panditrao Khotkar vs. Kailash Kushanrao Gorantyal and Ors., 2020 SCC Online SC 571,** *vide* its recent order dated 14.07.2020, Supreme Court held that a Certificate under Section 65B(4) is mandatory and a condition precedent to admissibility of evidence by way of electronic record and that the *non-obstante* language of Section 65B(1) makes it clear that when it comes to information contained in an electronic record, its admissibility is only possible, if all the conditions prescribed in such section are fulfilled, irrespective of whatever has been provided in Section 62 or 65 of the Evidence Act.

2.12. Supreme Court, in the aforementioned case, further held that the requirement of Section 65B(4) is not necessary, if the original document itself is produced. This can be done by the owner of the laptop, tablet or even a mobile phone by stepping into the witness box and proving that the concerned device, on which the original information is **first stored**, is owned and/or operated by him. Where the computer happens to be on a system or network and it is impossible to physically bring such system or network to court, then the only means of providing information contained in such electronic record is in accordance with Section 65B(1), together with the requisite certificate under Section 65B(4).

2.13. Thus, in view of the aforementioned judgement, if the computer or any other similar device in which the information is **first stored** is itself produced as an evidence, then one may not have to satisfy the conditions of Section 65B(4). On the other hand, if the information is contained in the computer is subsequently copied into another device such as a hard disk or a pen drive, by the owner of the computer himself or by any other person relying on the information, then there shall have to be strict compliance of the conditions prescribed under Section 65B. Without fulfilling such conditions at the threshold, the information/data, whether be it in electronic format, in hard disk or pen drive etc., or in the form of printouts, cannot be considered as an evidence admissible in accordance with the Evidence Act. The purpose of these provisions is clearly to sanctify the “computer output” in electronic form or in the form of printouts, generated by computer/laptop in which the information is first stored.

2.14. Thus, certificate as prescribed under section 65B(4) must mandatorily accompany the electronic record, such as the computer printout, CD, pen-drive, hard disk, etc., when the same is produced as an evidence. Only, if the computer output is duly produced in terms of Section 65B and is found to be admissible, then there arises a question as to its genuineness thereof.

2.15. It is pertinent to note that through the judgement in the case of **Arjun Panditrao Khotkar** *(supra),* Supreme Court overruled its earlier decisions in the case of **Tomaso Bruno (2015) 7 SCC 178**, wherein, it was held that secondary evidence of the contents of the electronic record can be led under Section 65. Also, the decision in the case **of Shafhi Mohammad (2018) 2 SCC 801** was overruled, wherein, it was held that the

requirement of producing a certificate under Section 65B(4) is procedural and not always mandatory. **Thus, the ratio as laid down by Supreme Court in the case of Arjun Panditrao Khotkar *(supra)*, apropos the admissibility of electronic record as evidence, as per Section 65A and 65B, is now settled.**

2.16. Apropos the certificate under Section 65B(4), it was held by the Supreme Court in **Arjun Panditrao Khotkar** *(supra)* that the person who gives this certificate can be anyone out of several persons who occupy a 'responsible official position' in relation to the operation of the relevant device, as also the person who may otherwise be in the 'management of relevant activities'. Section 65B(4) makes it clear that it is sufficient that such person gives the requisite certificate to the "best of his knowledge and belief".

3. EVIDENCE ACT VIS-À-VIS INCOME TAX ACT

3.1. Although, in income tax proceedings, strict laws of evidence do not apply, however, since the electronic evidences are amenable to changes, it is inevitable that the Income Tax Department, before relying on the electronic evidence complies with the conditions as prescribed under Section 65B. Not complying with such conditions may lead to **"travesty of justice"**.

3.2. Moreover, in the case of **Chauharmal [1988] 172 ITR 250**, it was held that though the income tax authorities are not strictly bound by the rigors of technical rules of evidence, they are not precluded from invoking the principles contained in the Evidence Act whenever the occasion demands. The decision was rendered in the context of Section 110 of the Evidence Act which stipulates that unless the contrary is proved the title always follows possession.

4. CONCLUSION

In view of the relevant provisions of the Evidence Act and also the ratio laid down by the Hon'ble Supreme Court, it is inevitable that the Income Tax Authorities, before relying on any information/data contained in a computer output should fulfill the conditions as set out in Section 65A and 65B of the Evidence Act. This is of utmost importance as the evidences found in the electronic form, in hard disks/pen drives generated from a computer, are susceptible to tampering/modifications. Thus, standard of proof of its authenticity and accuracy has to be more stringent than other documentary evidence.