

RE-OPENING OF THE ASSESSMENT ORDER (Escapement)

Escapement or re-opening of assessment is an essential ingredient in revenue law. Generally other domain of civil law other than revenue law, if we go through Civil Procedure Code-1908, there are provisions provided for review but there is as such nothing is provided for reopening of order/decreed already passed. Reason is very simple that for example, one person named "X" has filed a claim for damages or compensation against another person named "Y" then it is mandatory for the "X" that he will specify the claim amount in the plaint along with the supporting documents. Thereafter court will issue the notice to "Y" and will give him the opportunity to counter the claim of "X" with the documents in his possession. At the end, court will hear both the parties and decide on the claim of the "X". Suppose Mr. "X" has filed a claim for Rs. 5 Crores then court may decide the claim amount in between Nil to Rs. 5 Crores and pass a decree based on submission of parties. In this case each individual party is defending her own interest and it is naturally expected that each party will presents all fact or documents in her favour so there is no chance for escapement.

In revenue law or any other law related to assessment of dues, the situation is entirely different as in that case proceeding is initiated by one party on behalf of some third party against second party for example in EPF&MP Act-1952 interest of employees (Third Party) represented by RPF of the region (First Party) through the Enforcement Officer before Inquiry Officer against the employer (Second Party). This is not a state forward procedure as in Civil Court where one party has filed a claim against second party for his own interest but this is a back and forth procedure where at first, second party will file return based on the available documents with him and first party will carry out scrutiny of the return and call for additional documents in case first party has a reason to believe that second party has not filed a proper return. Based on document supplied by second party, the first party will put up proposal to initiate assessment proceeding against second party. Thereafter, notice will be issued by the Inquiry Officer to second party. As soon as cognizance is taken by Inquiry Officer for the inquiry then he ceased to be an administrative officer or the officer of the department. It is expected from him that he will act as the arbitrator or neutral person. Inquiry officer will give opportunity to second party to submit documents. Through inquiry officer documents will be supplied to representative of the first party. First party will submit a demand report and that will be served on the second party for counter. Thereafter, inquiry officer will pass the assessment order based on final submission of the parties. (in this paragraph **First Party means Concerned Department, Second Party means Employer or Assessee**)

At first, we will discuss the basics of the escapement or re-opening proceeding.

1. There must be omission or failure on the part of second party to make any document or record available. (Primarily stand to be taken by first party.)
2. There must be omission or failure on the part of second party to disclose all material fact necessary for determination of the correct amount. (Primarily stand to be taken by first party.)
3. Third case may that any information received from the reliable sources at the end of inquiry officer itself which prima-facie establish that there is escapement of dues at

the end of second party despite the fact there is no omission or failure at the end of the second party. This is exceptional power vested in inquiry officer to re-open any case suo-moto to protect the interest of the third party but this has to be exercised with abundant caution in exceptional circumstances only.

4. There must be **reason to believe** (not a **reason to suspect** as in most of escapement notices are issued based on suspicion) that failure or omission on the part of second party led to escapement of dues at the time of the assessment. This reason to believe must be supplied to the affected party and affected party must be given chance to prove that there is no omission or failure on the part of affected party. At this stage, inquiry office cannot be judge in his own case so that must be countered by opposite party.
5. It is expected from the inquiry officer that he will hear both the parties and pass a speaking order on two counts. First, he will decide that whether there was omission or failure on the part of second party. Second, he will decide that omission or failure lead to escapement of due. He must decide that this is case of escapement not the case "**let off**" at the end of first party.
6. Re-opening or escapement proceeding is always barred by time. For example, in EPF&MP Act-1952, time limit is 5 years from the date of **communication** of the order.

Here, we have to keep in mind that documents are supplied by one party and demand report has to be prepared by other party. So, there is quite chances are there that second party will try to lessen the liability by any mean and there may be failure even at the end of first party as they may miss scrutiny of some documents while calculating dues or they have taken a different approach.

Here, the following possibilities (6 Test Checks) may arise: -

1. It is established that **first party has failed to demand complete set of documents** and second party has supplied all the documents demanded by first party. Second party has fully co-operated during the assessment proceeding and answered all questions. In that case, second party is not liable for the escapement of the due because there is no omission or failure on the part of the second party. This is not the case of escapement but this is a case of "**let off**" where first party is incompetent so second party should not suffer for that and first party cannot be allowed to take advantage of their own fault or incompetence.
2. **First party has demanded complete set of documents but second party was not in position to supply the documents as documents were not available with the second party due to circumstance beyond the control the second party and later on documents received from the reliable sources.** It is established from reliable sources that there is escapement of due to non-receipt of the document. Although, this is not the case of omission or failure on the part of the second party as well as there is no fault or incompetence at the end of first party as first party has demanded all the documents. We have to admit the fact that escapement of due is there and this escapement is going to affect some third party which was represented

- by first party in the assessment proceeding. For that purpose, there is scope left at the end of inquiry officer to re-open the case suo-moto by providing just one opportunity to the affected party to counter. In this case, second party is liable for the escapement proceeding despite not having any omission or failure on their part.
3. **First party has demanded complete set of documents from second party but second party has submitted few documents** stating that remaining documents are not available. Later on, it came to the knowledge of the first party that documents were available with the second party but second party has not presented documents during the assessment proceeding. This is a clear case of omission or failure on the part of second party so second party is liable for the escapement proceeding.
 4. **First party has demanded complete set of documents but second party has supplied forged or fake documents** leading to under-assessment of dues. This is a clear case of omission or failure on the part of second party so second party is liable for the escapement proceeding. In addition to that second party will be liable for prosecution under section **193** and **196** of **Indian Penal Code** as proceeding before inquiry officer is deemed judicial proceeding for that purpose.
 5. It came to notice of first party that **one more approach was possible in the case other than the approach adopted by inquiry officer**. Review or escapement proceeding is not provided for change of opinion. Suppose, Officer while passing the order has taken one approach and assessment order was passed for Rs. 5 Crore. In case, other approach would have taken then assessment amount would have been Rs. 7 Crore on same set of documents and both approaches are permitted in law. In that case, officer cannot take second approach either at the request of parties or suo-moto as the case may be. In that case, only remedy available for the affected parties is to file the appeal.
 6. In case, original order was **based on a principle or question of law** and that question of law overturned or modified by superior court in any other subsequent matter before the superior court then it is not ground to seek review or seek escapement proceeding as this is not allowed for change of principle or change of opinion.

Escapement Proceeding in PF

We have a common problem that we, being administrative authority, are not ready to accept the independence of our sub-ordinate quasi-judicial authority. Superior administrative authority will not leave any stone unturned to nullify the act the subordinate authority even if subordinate authority acting in quasi-judicial capacity. For that purpose, different tools are being used such as objection of internal audit party, review note, circulars or vigilance report etc. To make my point clear, I would like to put a circular issue in EPFO as the reference. In Section 7C of the EPF&MP Act-1952, the procedure for re-opening the assessment order is prescribed. Central Provident Fund Commissioner(CPFC) is one in the list of the authorities prescribed to carry out assessment proceeding under section 7A, which is to be followed by review proceeding under Section 7B and escapement proceeding in Section 7C of the Act. It is pertinent to highlight that CPFC, being executive head of the organisation, is given limited power to make administrative and financial arrangement and that is not through the Act but

through the Schemes. It can be very well said that these are only administrative powers for administrative arrangements. CPFC has issued a circular no RRC.II/28(31)07/53677 to 53777 dated 17th Oct 2007 with the following directions: -

*“Without prejudice to the powers available to the officer who has passed the order under Section 7A, the officer at higher level who conduct supervisory test check of the Assessment may, if he so thinks, **direct** the concerned officer to exercise the powers under Section 7C or may **do it himself** treating the order passed under Section 7A as an order passed by himself in exercise of his original jurisdiction provided, however, that the powers shall be exercised by one of the two only in each case.”*

In case, we go through the circular of Ld. CPFC then we can very well say that this is influenced by Section 263 of the Income Tax Act-1961 but he has failed to understand that Section-263 is vesting statutory power in the authority and standing on the entirely different footing. Ld. CPFC has failed to understand that any officer who is conducting the supervisory check is only exercising the administrative power and he need to look into the order from administrative point of view only. He cannot be allowed to correct judicial defect in the order by exercising the judicial powers. We need to understand that any administrative authority cannot be vested with the power of judicial supervision that is through circular when same is not vested by statute. Any executive head of the any organisation cannot get into shoes of the legislature and start framing or modifying the law in the name of circulars. So, correct way will be to carry out the administrative scrutiny of the order passed by assessing officer and record the reasons that why this is fit case to re-open the case. Thereafter he cannot direct the assessing officer but he can direct the concerned Enforcement Officer to put a request before the assessing officer to re-open the case. Thereafter, assessing officer will take cognizance on the application and decide on its maintainability. In case, assessing officer has found that application is maintainable then he will issue notice to the opposite party to invite objections against the application. At last, after hearing the parties, he will pass a formal order for re-opening the assessment and assessment stand re-opened from that date.

Ld. CPFC has gone so overboard in second part of the circular that superior administrative authority can get in to shoes of the assessing officer who has passed a judicial power. This is not sustainable for the following reasons: -

1. As soon as cognizance is taken by assessing officer then he ceased to be officer of department and administrative authorities higher in hierarchy are just one party before him. In case, administrative authorities are allowed to get into shoes of assessment officer merely on the name of administrative scrutiny then it will lead to situation where one party can distort the result of the proceeding at the his sweet will by using administrative powers in the guise of judicial power. This will give upper hand to one party which is against the principle of natural justice to provide the level playing field to both the parties.
2. This will render the provision of the appeal in the Act as useless as whatever order which will not be in favour of department then administrative authority will carry out formal administrative scrutiny of the order and re-open it.
3. This is against the principle of judicial independence in every case passed by assessing officer against the department will be nullified by administrative authority higher in hierarchy. It will shake the faith of other party in the fairness & independence of the Inquiry Officer as whatever order will be passed by the inquiry

officer that will be nullified by the administrative authority on the name of administrative review to re-open it.

4. CPFC is only an administrative head of the organization and Act has not vested any power in CPFC or any other authority subordinate to him to issue circulars in the matter of assessment specially when he is also one of the authorities designated to carry out assessment functions under section 7A of the Act. CPFC being as administrative head of the organization can only make administrative arrangements for the inquiries. CPFC can take a stand that CBT is the authority to administer the Schemes and he is ex-officio secretary of the CBT so he can exercise the executive powers on behalf of the CBT. It is pertinent to highlight that CBT is given limited power to administration of Schemes and power of delegation is vested in Central Government that need to be exercised through framing of Schemes. CBT has not given any power to issue circular in the Act for assessment purpose. For example, CBDT is given power to issue circular under section 119 of the Income Tax Act in the general matter related to assessment but CBT has not been given any such power. Moreover, CBDT is the department of the Central Government and Central Government has the ownership over the revenue but position of CBT is very weak compared to CBDT as CBT is only a trustee.
5. Inquiry Officer under section 7A of the Act is the judicial authority performing judicial functions and other authorities may be above in hierarchy but they are just administrative authorities for the particular case. Judicial authority is always supreme and any administrative authority cannot dictate the terms to judicial authority until specifically permitted by legislature for some particular objective as provided in the Income Tax Act.
6. Through this circular CPFC has created one appellate authority or superior judicial authority over the inquiry officer. That means CPFC gets into the shoes of legislature despite being an administrative authority despite the fact he is only a creature of the Act. In fact, through this circular, he has amended the law to create one more appellate authority to direct re-opening of the assessment.
7. This is nothing but a situation where Superintendent of Police/DGP/State or Prosecution is retaining the power to re-open any criminal case with themselves which is not sustainable in law as it is strictly against the principle of natural justice as well as principle of separation of powers. It is re-iterated that only the authority who has passed the order has the power to re-open it or any authority which is judicially superior authority or any authority specifically authorized by statute has power to give direction to assessing officer to re-open the case. Rest, in all the cases, any administrative authority can file application for re-opening the assessment before the assessing officer or take the plea of reassessment through appeal.

It is statutory duty casted on the assessing officer that he must justify the re-opening of the assessment order to the satisfaction of the affected party. It is duty casted on him that his order at the time of conclusion of the re-assessment proceeding to be speaking one but it is equally important that his order at the time of re-opening the assessing must be speaking one.