

MULUND CA CPE STUDY CIRCLE

Post Assessment Measures & Appellate procedures

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Aspects covered:

1. First Appellate Forum:
 - a. CIT(A) - Procedures with few important case laws
 - b. DRP - Procedures and updates
 - c. Dispute Resolution Scheme 2016 – Important features
2. High Pitched Assessment Commission
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4. Rectification application u/s 154 – important updates
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Right to appeal – is it a statutory right or inherent right?

1	The right of appeal is not a natural or inherent right attached to litigation.
2	It is a statutory right. Such right has to be clearly spelt out in the statute. Otherwise it is not available. CIT Vs Ashoka Engineering Co 194 ITR 645 (SC).
3	If no right of appeal has been expressly provided in the statute in respect of any order or direction or any other action, no appeal can be preferred against such order, direction or action.
4	Example: The order of CIT U/s 264 is not appealable. No right is explicitly conferred on the assessee to challenge it in appeal.
5	However, in these cases, the aggrieved persons can resort to constitutional remedies by way of filing writ petitions before the HC.

1. First Appellate Forum

A. CIT(A) - Procedures with few important case laws

i. Appealable orders before Commissioner (Appeals) [Section 246A]

Any assessee or any deductor or any collector aggrieved by any of the orders specified in S. 246A may appeal to the Commissioner (Appeals) against such orders.

- Few Examples of appealable orders:
 1. An intimation under sub-section (1) of Section 143, where the assessee objects to the making of adjustments.
 2. An intimation u/s 200A(1), where the deductor objects to the making of adjustments in TDS Statements.
 3. An intimation u/s 206CB(1), where the collector objects to the making of adjustments in TCS statements.
 4. Any order of assessment under sub-section (3) of Section 143 (except an order passed in pursuance of directions of the Dispute Resolution Panel) or Section 144
 5. An order of assessment, reassessment or recomputation under Section 147 (except an order passed in pursuance of directions of the Dispute Resolution Panel)
 6. An order of assessment of search cases u/s 153A (except an order passed in pursuance of directions of the Dispute Resolution Panel).
 7. An order made u/s 201 or u/s 206C(6A)
 8. An order made under Section 154 or section 155 (rectification order)
 9. Order imposing penalty under Chapter XXI.

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- **Judicial Decisions**

1. The right of appeal is not confined merely to the assessee on whom order of assessment has been made but to any assessee aggrieved by the said order e.g. beneficiary may be aggrieved for an order made on the trust. **[CGT v A.C. Mahesh (2001) 252 ITR 440 (Mad)]**
2. Determination of interest u/s. 234A/B/C is a part of determination of tax liability of the assessee. Therefore, an appeal is maintainable if the assessee contends that he is not liable to levy of interest at all or that the interest is wrongly calculated. However, no appeal lies against improper exercise of discretion to waive or reduce interest or where the assessee disputes the quantum of interest. **[Central Provinces Manganese Ore Co. Ltd. v CIT (1986) 160 ITR 961 (SC)]**.

- **Examples of non appealable orders:**

- (i) Order rejecting revision petition u/s 264.
- (ii) Order of Authority for Advance Rulings and Settlement Commission.

ii. **Procedure for filing an appeal [Section 249 and Rule 45 and 46]**

- **Form of appeal [Section 249(1)]:**

The appeal is to be filed in **Form No. 35** & verified in the prescribed manner.

Signing of appeal : Form No. 35, ground of appeal and the form of verification thereto shall be signed & verified by the person who is authorized to sign the Return of income under Section 140.

- **Online filing of appeal [Press Release dated 30.12.2015]**

Electronic filing of appeal before CIT(Appeals) is being made mandatory for persons who are required to file the return of income electronically.

- **Time limit for filing appeal [Section 249(2)]:**

The appeal should be filed within a period of 30 days of -

- (a) The **date of service of notice of demand** relating to assessment or penalty if it relates to assessment or penalty; or
- (b) The date on which intimation of the order sought to be appealed against is served, if it relates to any other cases.

For this purpose, **the date** on which **the order is served is to be excluded**. If the order is not served along with the notice of demand then the time required for obtaining a copy of the order should be excluded, as provided in Section 268.

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- **Condonation of delay in filing appeal [Section 249(3)]:**

The Commissioner (Appeals) may admit an appeal after the expiration of the prescribed period, if he is satisfied that the appellant had sufficient cause for not presenting it within that period.

- **Judicial Decisions:**

In the following cases, it was held that Court should adopt a pragmatic approach or a liberal approach in disposing of a condonation application.

1. 167 ITR 471(SC) Collector, Land Acquisition vs. Mst. Katji&Ors.
2. 253 ITR 798(SC) Vedabai Alias Vijayanatabai Baburao Patil vs. Shantaram Baburao Patil & Ors.
3. 346 ITR 428(Gau) - CIT vs. Williamson Tea Assam Ltd
4. 102 TTJ 53(Mum) Sterlite Industries (India) Ltd. Vs. Addl. CIT

- **Amount of tax payable before filing appeal: [Section 249(4)]**

No appeal shall be admitted unless at the time of filing of the appeal :

(a) Where a return has been filed by the assessee, he has paid the tax due on the income returned by him, or

(b) Where no return has been filed by the assessee, the assessee has paid an amount equal to the amount of advance tax which was payable by him. However, in this case the Commissioner (Appeals) may admit the appeal without the requirement of payment of tax if an application is made by the appellant in this behalf. The CIT(A) shall record the reasons in writing.

It may be noted that it is not necessary to pay the assessed tax demanded in an order against which an appeal is filed. The assessee is required to pay the tax only on the returned income.

- **Judicial Decisions:**

1. The object of Section 249(4) is that where the assessee has taken the advantage of the appeal under chapter XX, he should have paid at least the admitted tax liability before the appeal is admitted. This provision is applicable even for appeals against the order of penalty. Therefore, in the circumstances, no appeal against the penalty could be admitted unless the admitted tax liability was paid by the assessee. CIT v Smt. G.A. Samanthakamani [259 ITR 215 (Mad.)]

- **Document to accompany Form No. 35:**

Appeal is required to be made in duplicate. The memorandum of appeal, statement of facts and the grounds of appeal should be accompanied by a copy of the order appealed against and the notice of demand in original, if any.

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- **Fee for filing appeal [Section 249(1)] :**

The memorandum of appeal shall be accompanied by a fee as under :

- | | |
|--|-------|
| (a) Where assessed income is upto ` 1,00,000 or less | ` 250 |
| (b) Where assessed income exceed ` 1,00,000 but does not exceed ` 2,00,000 | 500 |
| (c) Where assessed income exceeds ` 2,00,000 | 1,000 |
| (d) Any other subject matter | 250 |

In respect of penalty appeals- fees applicable shall be Rs. 250

- iii. **Procedure in hearing appeal [Section 250]**

- The Commissioner (Appeals) shall fix a day and place for the hearing of the appeal and shall give notice of the same to the appellant and to the Assessing Officer against whose order the appeal is preferred.
- The following persons shall have a right of being heard at the hearing of the appeal :
 - The appellant, either in person or through authorised representative;
 - The Assessing Officer, either in person on through a representative;
- The appellate authority shall have the power to adjourn the hearing of the appeal from time to time.
- The appellate authority may, before disposing off any appeal, make such further inquiry as he thinks fit and may direct the Assessing Officer to do so and report the same.
- The appellate authority may, at the hearing of the appeal, **allow the appellant to go into any ground of appeal not specified in the grounds of appeal**, if he is satisfied that **omission of such ground of appeal was not willful or unreasonable.**

- **Judicial Decisions**

1. **(1991) 187 ITR 688 (SC)Jute Corpn. of India Ltd. v CIT**

In this case it was held that the appellate authority has the jurisdiction to permit the appellant to raise an additional ground if the ground so raised could not have been raised at the stage when the return was filed or when the assessment order was made and the ground became available on account of a change of circumstances or law.

2. **229 ITR 383(SC) NTPC vs. CIT**

In this case it was held that the Tribunal has jurisdiction to examine a question of law which arises from the facts as found by the authorities below and having a bearing on the tax liability of the assessee, notwithstanding the fact that same was not raised before the lower authorities.

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3. 349 ITR 336(Bom)CIT vs. Pruthvi Brokers & Shareholders (P) Ltd.

After dealing with the Supreme Court judgement in case of Goetze, the Hon'ble Court held that additional claim can be taken before the appellate authorities for the first time.

- vi. The order of the appellate authority disposing off the appeal shall be in writing and shall state the points for determination, the decision thereon and the reason for the decision.
- vii. The order passed by the Commissioner (Appeals) shall be communicated to the assessee and to the Chief Commissioner / Commissioner.
- viii. Section 250(6A) provides that in every appeal, the Commissioner (Appeals), where it is possible, **may** hear and decide such appeal within a period of one year from the end of the financial year in which such appeal is filed before him under sub-section (1) of Section 246A.

Production of additional evidence [Rule 46A]:

- 1) Rule 46A provides that the appellant shall not be entitled to produce additional evidence before appellate authority except in the following circumstances:
 - i. Where Assessing Officer refused to admit the said evidence which ought to have been admitted.
 - ii. Where appellant was prevented by sufficient cause from producing evidence called upon by the Assessing Officer.
 - iii. Where the appellant was prevented by sufficient cause from producing before the Assessing Officer any evidence which is relevant to any ground of appeal.
 - iv. Where Assessing Officer made the impugned order without giving sufficient opportunity to appellant.
- 2) However, the appellate authority must record in writing the reasons for admission of additional evidence.
- 3) The Commissioner (Appeals) shall not take into account any evidence produced above unless the Assessing Officer has been allowed a reasonable opportunity:
 - a) To examine the evidence or document or to cross-examine the witness produced by the appellant, or
 - b) To produce any evidence or document or any witness in rebuttal of the additional evidence produced by the appellant.
- 4) In any case, the Commissioner (Appeals) shall have the power to direct the production of any document or examination of any witness to enable him to dispose of the appeal or for any other substantial cause.

Judicial Decisions favouring assessee

- 1. 231 ITR 1(Bom) - Smt. Prabhavati S. Shah vs. CIT
- 2. 293 ITR 53(Bom) - CIT vs. Suretech Hospital & Research Centre LTD.

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3. 295 ITR 252(Gau) – CIT vs. Poddar Swadesh Udyog (P) Ltd.
4. 332 ITR 396(Del) – CIT vs. Virgin Securities & Credits (P) Ltd.

iv. Powers of the Commissioner (Appeals) [Section 251]

In disposing of an appeal, the Commissioner (Appeals) shall have the following powers :

- (a) in an appeal against an order of assessment, he may **confirm, reduce, enhance or annul the assessment;**
- (b) in an appeal against an order imposing a penalty, he may **confirm or cancel such order** or vary it so as either to **enhance** or to **reduce** the penalty;
- (c) in any other case, he may pass such orders in the appeal as he thinks fit.
- (d) The Commissioner (Appeals) shall not enhance an assessment or a penalty or reduce the amount of refund unless the appellant has had a reasonable opportunity of showing the cause against such enhancement or reduction.
- (e) In disposing of an appeal, the Commissioner (Appeals) may consider and decide any matter arising out of the proceedings in which the order appealed against was passed, notwithstanding that such matter was not raised before the Commissioner (Appeals) by the appellant.

• Judicial Decisions

1. The Commissioner (Appeals) has plenary powers in disposing of an appeal. The scope of his power is coterminous with that Assessing Officer. He can do what the Assessing Officer can do and also direct him to do what he has failed to do. [**CIT v Kanpur Coal Syndicate [1964] 53 ITR 225 (SC)**]
2. However CIT (Appeals) cannot discover new source of income. Whenever the question of tax on income from a new source of income is involved, which has not been considered by the Assessing Officer, the jurisdiction to deal with the same in appropriate cases may come within the provision of section 147 / 148 and section 263, if relevant conditions are fulfilled. It is inconceivable that in the presence of such specific provisions, a similar power is available to the CIT (Appeals). Thus the Commissioner (Appeals) has no power to consider a new source of income – **CIT v Sardari Lal & Co. [2001] 251 ITR 864 [2002] (Delhi)**.

B. Dispute Resolution Panel [Section 144C]

- 1) This section provides safeguard to an 'eligible assessee'. It provides that the assessing officer shall forward a draft of the proposed order of assessment (on the basis of order of the TPO), to the assessee if he proposes to make any variation in the returned income or loss, which is prejudicial to his interest.
- 2) This section shall apply in case if any Transfer pricing adjustment has been made or in case of Foreign Company

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- 3) 'Dispute Resolution Panel' means a collegium comprising of three Commissioners of Income-tax constituted by the Board for this purpose.
- 4) On receipt of such draft order from the A.O., the eligible assessee shall either file his acceptance of variation to the A.O. or file his objections thereto with the Dispute Resolution Panel & the A.O., within 30 days of receipt of the draft order.
- 5) The A.O. shall complete the assessment on the basis of draft order (on the basis of order of the TPO) if the assessee intimates his acceptance or does not file his objections within the specified period of 30 days and pass the assessment order within one month from the end of the month in which acceptance is filed or period for filing objections expires.
- 6) On receipt of any objections from the assessee, the Dispute Resolution Panel shall, after giving an opportunity of being heard to the assessee and Assessing Officer, issue such directions, as it thinks fit, within nine months from the end of the month in which the draft order is forwarded to the eligible assessee
- 7) The Dispute Resolution Panel may, before issuing any such directions, make such further enquiry, as it thinks fit; or cause any further enquiry to be made by any income-tax authority and report the result of the same to it.
- 8) The Dispute Resolution Panel may confirm, reduce or enhance the variations proposed in the draft order. However, it shall not set aside any proposed variation or issue any direction for further enquiry and passing of the assessment order. The power of the Dispute Resolution Panel to enhance the variation shall include the power to consider any matter arising out of the assessment proceedings relating to the draft order, notwithstanding that such matter was raised or not by the eligible assessee.
- 9) Every direction issued by the Dispute Resolution Panel shall be binding on the Assessing Officer.
- 10) Upon receipt of the directions, the Assessing Officer shall in conformity with the directions, complete the assessment **without providing any further opportunity of being heard to the assessee**, within one month from the end of the month in which such direction is received.
- 11) Such order can be appealed against, to the Appellate Tribunal **only by the Assessee**. Department cannot appeal against the said order of the DRP (Finance Act 2016).
- 12) CBDT has notified Income-tax (Dispute Resolution Panel) Rules, 2009 vide Notification No. 84/2009, dated 20-11-2009 to regulate the procedure of the Dispute Resolution Panel.
- 13) Objections to be filed in Form 35A. It should be filed in quadruplicate duly accompanied by 4 copies of draft assessment order duly authenticated by the assessee.
- 14) For each objection the assessee has to submit the following
 - a) ground of objection,
 - b) facts as submitted to the AO,

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- c) facts if any modified by the AO,
- d) whether the assessee agrees with the modification and if not, the reason for the same,
- e) legal arguments submitted to the AO,
- f) case law relied upon before the AO,
- g) legal arguments of the AO,
- h) case law relied upon by the AO,
- i) any new case laws which the assessee may rely upon,
- j) factual and legal arguments.

Judicial Decisions

- 1) If no Draft assessment order is passed in case of eligible assessee and directly final assessment order is passed, then such final order is void and has no legal standing - **Zuari Cement Limited Vs. ACIT (WP No. 5557/2012)(AP)/ Vijay Television Private Limited Vs. DRP (2014)(46 Taxmann 100)(Mad) 369 ITR 113(Mad)/ Lionbridge Technologies Pvt.Ltd vs. DCIT - I.T.A. No.1041/Mum/2015**

C. Direct Tax Dispute Resolution Scheme, 2016(Chp X of the Finance Bill, 2016)

Salient features

- 1) Applicable to appeals pending before CIT(A) as on 29 February 2016.
- 2) Declaration to be filed before a Designated Authority on or after the 1st day of June, 2016 but on or before a date to be notified by the Central Government in the Official Gazette in prescribed form.
- 3) Tax payable shall be as under:
 - a) In case of appeal in respect of tax and interest
 - i) Where disputed tax does not exceed ten lakh rupees - whole of the disputed tax and the interest on disputed tax till the date of assessment or reassessment
 - ii) In other case - whole of the disputed tax and the interest on disputed tax till the date of assessment or reassessment along with 25% of the minimum penalty leviable.
 - b) In case of appeal in respect of penalty
 - i) twenty-five per cent. of the minimum penalty leviable and the tax and interest payable on the total income finally determined
- 4) Effect of such declaration – Appeal before the CIT(A) shall be deemed to have been withdrawn.
- 5) The designated authority shall, within a period of 60 days from the date of receipt of the declaration, determine the amount payable by the declarant in accordance with the provisions of this Scheme and grant a certificate.

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- 6) The declarant shall pay the sum determined by the designated authority as per the certificate granted within 30 days of the date of receipt of the certificate and intimate the fact of such payment to the designated authority and the designated authority shall thereupon pass an order stating that the declarant has paid the sum.
- 7) The declarant shall get immunity from prosecution and penalty and interest other than the penalty and interest payable under the scheme.
- 8) Scheme is not applicable to assessment made u/s 153A or 153C or in case of reassessment subsequent to survey

2. High pitched assessment -set up of Local Committee

The CBDT has issued Instruction No. 17/2015 dated 09.11.2015 in which it has admitted the tendency of the AOs to frame high-pitched and unreasonable assessment orders reflects harassment of taxpayers and leads to generation of unproductive work for the Department. Therefore they have set a committee. If it is found that unreasonable and high-pitched additions have been made, then committee would send a report to Pr. CCIT and suitable administrative action would be taken. Further, departmental position as determined by the Local Committee in such cases would be appropriately presented before the Appellate Authorities so that litigation is curtailed. However, the Local Committee, in no way, can be considered to be an alternative /additional appellate channel.

3. Grievance Redressal Forum - updates

- The Central Board of Direct Taxes ("CBDT") has issued a press release dated 07.03.2016 stating that it has issued an Order setting up a dedicated structure for delivery and monitoring of tax payer services in the Income Tax Department. Member (Revenue and Tax Payer Services) will oversee the delivery and monitoring of taxpayer services in CBDT.
- Government Portal – PMO – www.pgportal.gov.in

4. Rectification u/s 154 -

- **The Supreme Court in the case of T.S. Balaram, ITO v Volkart Bros. (1971) 82 ITR 40, held that 'a mistake apparent on the record' must be an obvious and patent mistake and not something which can be established by a long-drawn process of reasoning on points on which there may be conceivably two opinions. A decision on a debatable point of law is not a mistake apparent from the record.**
- **A detailed procedure for online rectification of demand is given in Circular no 8/2015.**
- The CBDT has issued Instruction No. 01/2016 dated 15.02.2016 in which it has directed Assessing Officers to strictly follow the time limit of six months

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prescribed under section 154(8) of the Income-tax Act, 1961 to pass rectification orders.

- The CBDT has issued Instruction No. 02/2016 dated 15.02.2016 in which it has directed Assessing Officers to pass rectification orders in writing and serve a copy on the assessee and not just make an entry on the AST system

TDS Mismatch -

- The CBDT has issued Office Memorandum dated 11.03.2016 by which it has drawn attention to its earlier letter dated 01.06.2015 in which it was stated that in case of an assessee whose tax has been deducted at source but not deposited to the Government's account by the deductor, the deductee assessee shall not be called upon to pay the demand to the extent tax has been deducted from his income. (Instruction No 275/29/2014 - IT -(B) dated 1.6.2015 TDS not deposited by the deductor)

5. Stay of demand

Stay of disputed demand [Section 220(6)]:

- Although an appeal can be filed by the assessee after depositing the tax due on the returned income, but the Assessing Officer normally continue with the recovery proceedings of the tax demanded as per notice of demand.
- In such cases the assessee who has presented an appeal against such order can apply to the Assessing Officer for stay of the disputed demand.
- Where an assessee has presented an appeal under section 246A, the Assessing Officer **may**, in his discretion, and subject to such conditions as he may think fit to impose in the circumstances of the case, treat the assessee as not being in default in respect of the amount in dispute in the appeal, even though the time for payment has expired, as long as such appeal remains undisposed of.
- Stay can also be granted by CIT(Appeal)** : The Madras High Court has held that the first appellate authority i.e. the CIT (A) has power to grant stay of demand as the power to grant stay of collection of tax is an inherent and incidental power of the appellate authority. [PaulsonsLitho Works v ITO (1994) 208 ITR 676 (Mad)].

e) Office Memorandum dated 29.2.2016

Stay of demand on payment of 15% of demand if appeal is filed before CIT(A). In case where addition on the same issue has been deleted in earlier years or there is a favourable High Court and Supreme Court judgment then stay may be granted on payment of lower amount than 15%. Petition should be disposed off in 2 weeks of filing the same.

f) Important judgments:

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In the following cases, full stay was granted, in view of the fact that a high pitched assessment was made.

- a. 323 ITR 305(Del) Soul vs.DCIT
- b. 222 CTR 0521(Del) Taneja Developers & Infrastructure Ltd. v. ACIT
- c. 307 ITR 103(Del) Valvoline Cummins Limited v. DCIT
- d. 64 taxmann.com 339(Mad) N. Jegatheesan v. DCIT
- e. S.A. No.72/Mum/2016 - Dimension Data Asia Pacific Pte. Ltd vs. DCIT
- f. 155 TTJ 0535(Jodhpur) Tania Charitable Trust v. ACIT

6. ITAT Appeal – Latest updates

- Appeal by Department in ITAT – monetary limit of filing appeal by Department raised to Rs. 10 lakh i.e. if the tax effect involved in the appeal exceeds Rs. 10 lakh then the Department can file appeal. Further, this limit is introduced with retrospective effect (Circular No 21 of 2015)
- Limit for appeals to be heard by SMC Bench increased to Rs. 50 lakh of total assessed income from Rs. 15 lakh (Finance Bill, 2016)
- No appeal to ITAT by the Department from the order of Dispute Resolution Panel (Finance Bill, 2016)
- Rectification order by the ITAT can now be passed within 6 months from the end of the month in which the order is passed by the ITAT (Finance Bill, 2016)
- Stay can be granted by the ITAT for a maximum period of 365 days - this provision is rendered invalid by the Hon'ble Delhi High Court in case of Pepsi Foods Pvt. Ltd vs. ACIT. Thus, the ITAT can now grant stay for period more than 365 days. This view is also taken by the Hon'ble Bombay High Court.

7. Assessments

- Time Limit for completion of assessment - 21 months from the end of the AY instead of 2 years - Amendment by Finance Bill, 2016.
- The CBDT has issued Instruction No. 19/2015 dated 29.12.2015 stating that instances have come to the notice of the Board that in cases selected under scrutiny, while issuing the first notice, Assessing Officers do not convey the specific compliance requirements like production of accounts, furnishing of documents, information, evidences, submission of other requisite particulars etc

Online submission mail submission

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- The CBDT has issued a letter dated 15.12.2015 stating that the Revenue Secretary has directed that henceforth any notice/letter/communication issued by any officer under Department of Revenue; including CBDT, its directorates and field formations; to the tax payers, members of public should invariably contain mention of email address and office phone numbers, of the officers signing such,
- The CBDT has issued Notification No. 2 of 2016 dated 03.02.2016 in which the procedure, Formats and Standards for ensuring secured transmission of electronic communication have been specified in detail
- Pursuant to the CBDT's directives regarding 'Paperless Assessment Proceedings', 'E-Sahyog Project To Avoid Physical Presence Of Taxpayers During Assessment' and 'Redressal of grievances received from Taxpayers by email at AayakarSampark Kendra', the CBDT has issued a Notification dated 02.12.2015 by which it has amended the Income-tax Rules, 1962 to provide that for purposes of section 282(1) of the Act, service of notice, summons, requisition, order and other communication may be done by email

Thank You

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