

# Direct Tax Vista

Your weekly Direct Tax recap

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## 1. Faceless assessment: Fresh SOPs issued to address taxpayers' conflicts

Since inception, Faceless Assessments witnessed various conflicts between the assesseees and the Revenue Authorities. The biggest conflict was the invocation of Best Judgement Assessments without giving any opportunity of being heard or taking cognizance of the written submissions of the assesseees. Other disputes included - not being granted adjournments, too many questionnaires been sent to assesseees, too much of repeated information being asked for, etc.

The NaFAC has issued SOP for various units viz., Assessment unit (AU), verification unit (VU, Technical unit (TU) and Review unit (RU) under the Faceless Assessment provisions of Sec 144B, to provide for the procedures to be followed by various units for conducting faceless assessment. Most of these disputes have been addressed therein. However, **the same is with a Caveat that the SOPs is strictly for Departmental Use only. If any conflict in the SOP is noticed with the statute, then the provisions of the Statute shall prevail.** Hence this cannot be used against the Department in a Court of Law.

For the AU, the following are the major points –

1. Question on specific grounds viz., ground on which case is selected or set aside or reopened shall be included in the framed questionnaire u/s 142(1) – This is a welcome move and hence incase the SCN going forward is other than these grounds, then the same can be challenged.

2. Further all internal and external information available with the department including other databases like MCA, etc should be used for making the initial questionnaire. Effort should be made to make the initial questionnaire exhaustive, so that no more questionnaires are required.

3. The AU would work in a Time Bound Manner and specific requirements in this regard have been laid down in the SOP –

a. Time limit of 15 days for initial notice and 7 days for subsequent notices shall be provided for compliance by the assessee. This time limit may be curtailed in time-barring cases.

b. Adjournment shall be granted up to a period of 7 days – The no. of adjournments allowed are not mentioned. However as per the principles of natural justice, it is possible that atleast 3 adjournments be granted.

c. In case of non-compliance of notices by the assessee, reminder notices shall be sent to all the registered email IDs with a request to comply within 5 days.

**d. Further, physical letter thorough speed post or SMS in the registered mobile number may be sent.**

e. Penalty under section 271(1)(b) may be initiated and also Show-cause notice u/s 144 shall be issued.

f. After examining the reply of the assessee, additional questions may be framed.

g. SCN shall be issued where any addition or disallowance is proposed and shall give at least 7 days time to the assessee to respond. This 7 days time limit may be curtailed in time barring cases.

h. Within 2-3 days of the request of the assessee, the personal hearing shall be mandatorily granted to the assessee.

i. The adherence to principles of natural justice has been given due importance as per the SOP.

4. The assessing officer will prepare an income and loss determination

proposal (ILDLP) after considering the taxpayers' reply to a show-cause notice and a personal hearing in each case as follows –

- a. ILDP should be fair and judicious.
  - b. The assessing officer must submit it for risk analysis within a reasonable time.
5. The faceless authority has even defined roles of the AU, VU, TU and RU in the revised SOP, which was absent earlier.
6. The authority also suggested key conditions for verifying the assessment case. It should be done in case of non-availability of digital footprint of "third person" (other than assessee). The assessing officer can seek verification if it requires -- cross verification of evidence, examination of books, recording of statement, examining of witness, etc.
7. The faceless authority has even defined roles of the assessment unit, verification unit, technical unit and review unit in the revised SOP, which was absent earlier.
8. Further, to improve compliance, the department will send a centralised communication to taxpayers in case of non-responsiveness of the notices.
9. The assessing officer can also seek special audit in a specific case such as nature and complexity of accounts, volume of accounts, doubts about transactions, and specialised nature of business activity

While this SOP is a positive step by The NfAC, yet the fact that it cannot be used by the assesseees would mean that it may not have the desired impact on ground. It is important that atleast the salient features of this SOP be codified by the CBDT in the form of a Circular such that it becomes binding on the officers and invokable by the assesseees.

## **2. Even NIL Income is disclosure of Income**

It is the mandate of Law that the assessee should be put to notice before making adjustment u/s 143(1)(a). Any adjustment sans any notice is vitiated. This is a well-accepted principle and has to be followed by the Authorities at all levels. AO should make a proposal u/s 143(1)(a) before making adjustments.

Further, Hon'ble Delhi High Court in the case of Commissioner of Incometax-15 v. Relcom [2015] 62 taxmann.com 190 (Delhi) affirmed that the credit cannot be disallowed to the person on the mere ground that assessee has not shown the income in its income tax return. So, incase the income is a pass through one and the income disclosed is NIL, there remains no question of disallowance of the corresponding TDS.

## **3. Cash payment for 'business necessities' cannot be disallowed arbitrarily**

In various businesses like civil contractors, transporters, hotels and restaurants, mines, etc where huge unorganised labourers are involved, there is no option but to pay labourers in cash. These payments are generally looked at with aspersions by the field officers and sometimes a part of them are added back without much reason. Incase cash amounts are transferred for the business exigencies of the company and not for personal use and there is no doubt on their genuineness, then the expenses cannot be disallowed. Hence incase cash payments have to be made by contractors to labourers for extra hours worked, it will be considered as a business necessity. The same was held in the case of DY.CIT-14(1)(1) Vs M/s AYG REALTY LTD [2022-VIL-979-ITAT-MUM]. Therefore, incase there is a business case, the cash payments cannot be added back arbitrarily.

## **4. CBDT issues conditions, forms to get income tax exemption on covid 19 help money**

The government, vide Union Budget 2022, confirmed that money received by an individual for expenses incurred on the treatment of Covid-19 or as ex-gratia received (by family members) on death due to covid-19 from an employer or any relative/well-wisher would be exempt from income tax. Now, the CBDT issued notification 92/2022 requiring family members (of individuals who had passed away

due to covid, who had received ex-gratia payment from the employer of the deceased or financial assistance from relatives and other well-wishers, to submit Form A and specified proofs to the assessing officer. Form A must be submitted within 9 months from the end of the financial year in which money is received or December 31, 2022, whichever is later. Hence, if you have received the money in FY 2020-21 (which ended on March 31, 2021), then you have to submit the 'Form-A' by December 31, 2022 deadline. Further, the CBDT has specified the conditions under which the above-mentioned income tax exemption can be claimed by the family members and also records to be kept for the purpose. The conditions and records are as follows:

- a) Condition - the death of the individual should be within six months from the date of testing positive or from the date of being clinically determined as a COVID-19 case, for which any sum of money has been received by the member of the family;
- b) Record to be kept - the COVID-19 positive report of the individual, or medical report if clinically determined to be COVID-19 positive through investigations in a hospital or an inpatient facility by a treating physician;
- c) Record to be kept - a medical report or death certificate issued by a medical practitioner or a Government civil registration office, in which it is stated that death of the person is related to coronavirus disease (COVID-19).

## **5. No TDS u/s 195 for purchase of software product – There is a clear distinction between “Copyright” and “Copyrighted Article”**

The issue of taxability of software receipts has been analysed by The Hon'ble Supreme Court threadbare in **Engineering Analysis Centre of Excellence Private Limited vs. Commissioner of Income Tax and Anr.** (2021) SCCOnline SC 159. It is incorrect to state that a licence had been granted would be sufficient to conclude that there was a transfer of copyright, and that there was no justification for the use of the doctrine of noscitur a sociis to confine the transfer by way of a

licence to only include a licence which transferred rights in respect of copyright, by referring to explanation 2 to section 9(1)(vi) of the Income Tax Act.

There is a distinction between a copyright and copyrighted article. What is a copyrighted article? When, under a non-exclusive licence, an end-user gets the right to use computer software in the form of a CD, the end-user only receives a right to use the software and nothing more. The end user does not get any of the rights that the owner continues to retain under section 14(b) of the Copyright Act read with subsection (a)(i)-(vii) thereof. Thus, the conclusion that when computer software is licensed for use under an End Use License Agreement (EULA), what is also licensed is the right to use the copyright embedded therein, is wholly incorrect. The licence for the use of a product under an EULA cannot be construed as the licence spoken of in section 30 of the Copyright Act, as such EULA only imposes restrictive conditions upon the end-user and does not part with any interest relatable to any rights mentioned in sections 14(a) and 14(b) of the Copyright Act. Also, any ruling on the more expansive language contained in the explanations to section 9(1)(vi) of the Income Tax Act would have to be ignored if it is wider and less beneficial to the assessee than the definition contained in the DTAA, as per section 90(2) of the Income Tax Act read with explanation 4 thereof, and Article 3(2) of the DTAA. Further, the expression "copyright" has to be understood in the context of the statute which deals with it, it being accepted that municipal laws which apply in the Contracting States must be applied unless there is any repugnancy to the terms of the DTAA.

The amounts paid by resident Indian end-users/distributors to non resident computer software manufacturers/suppliers, as consideration for the resale/use of the computer software through EULAs/distribution agreements, is not the payment of royalty for the use of copyright in the computer software, and that the same does not give rise to any income taxable in India, as a result of which the persons referred to in section 195 of the Income Tax Act were not liable to deduct any TDS under section 195 of the Income Tax Act.

## **6. Transfer Pricing BLT as an approach is not permissible for undertaking any addition on account of AMP expenses**

The very existence of an international transaction cannot be presumed by assigning some price to it and then deducing that since it is not an ALP, an 'adjustment' has to be made. The burden is on the Revenue to first show the existence of an international transaction. Next, to ascertain the disclosed 'price' of such transaction and thereafter ask whether it is an ALP. If the answer to that is in the negative the TP adjustment should follow. The objective of Chapter X is to make adjustments to the price of an international transaction which the AEs involved may seek to shift from one jurisdiction to another. An 'assumed' price cannot form the reason for making an ALP adjustment. Quantitative adjustment, in the nature of Bright Line Test (BLT) is not permissible for the purposes of a TP adjustment under Chapter X, equally it cannot be permitted in respect of AMP (Advertisement, Marketing and Promotional) expenses either.

BLT involved in respect of AMP expenses may be contemplated in the taxing statutes of certain foreign countries like U.S.A., Australia and New Zealand, no provision in Chapter X of the Act contemplates such an adjustment. An AMP TP adjustment to which none of the substantive or procedural provisions of Chapter X of the Act apply, cannot be held to be permitted by Chapter X. In other words, with neither the substantive nor the machinery provisions of Chapter X of the Act being applicable to an AMP TP adjustment, the inevitable conclusion is that Chapter X as a whole, does not permit such an adjustment.

## **7. Premature redemption under Gold Monetisation Scheme payable only in rupees: RBI**

The Gold Monetisation Scheme (GMS) was launched in November 2015. The redemption under the scheme can be in INR or physical gold. However the premature redemption of Medium or Long term Government deposit (MLTGD) will only be in INR.

## **8. 2022-23 looks bright for manufacturers as well as Service Companies as per RBI**

The RBI released various forward-looking surveys including OBICUS Survey on manufacturing sector and Services and Infrastructure Outlook Survey. Overall, the result of the surveys looks positive for businesses.

Services sector companies were optimistic on demand conditions in terms of overall business situation and turnover in Q2:2022-23. The job landscape is likely to improve in terms of both full-time and part-time employment. Cost pressures are expected to continue with rise in selling prices. In H2:2022-23, Enterprises expect further improvement in overall business situation, turnover and employment in the second half of the financial year. Input cost pressures may continue with gradual easing in the later half of the year.

Manufacturers retained their optimistic outlook on demand conditions, as reflected in their expectations on production, order book, and employment for Q2:2022-23. Pressures from purchase of raw materials, staff cost and cost of financing are likely to continue and to adjust for the cost escalation, the manufacturers expected improvement in pricing power and profit margin. The business expectations index (BEI) improved to 137.7 in Q2:2022-23 from 134.7 in the previous quarter. Manufacturers perceive sequential improvement in demand conditions and overall business situation till Q4:2022-23.

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