Direct Tax Vista

Your weekly Direct Tax recap

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1. Effort to decriminalize Income Tax Laws – A Balm for taxpayers!

In our Direct Tax Vista Edn 14, we have reported that Taxpayers are now witnessing a new era where economic offenses are no more taken with an attitude of "Letting things be". Even when an assessee failed to file its Return in time and to pay the tax due before the due date of filing the return of income, prosecution u/s 276 CC and 276C (1) of the Income Tax Act was launched and The High Court also refused to grant relief. The Court ruled that Section 278E gives a presumption to lay prosecution in case of non-filing of Return within the time limit and suppression of income in the Return filed, is with malafide intention to evade Tax.

As the field officers take the matters to prosecution more frequently, the CBDT has come up with the balm in the right time, by issuing revised guidelines vide for Compounding of Offences under the Income-Tax Act vide F. No. 285/08/2014-IT (Inv.V)/196 dated 16th September 2022. Compounding of offence is a process whereby the person/entity committing default will file an application to the compounding authority accepting that it has committed a crime, so that same should be condoned.

The offenses have been classified into Category A & B. The category A offences are the ones where the offences are of technical nature caused by an act of omission. Whereas the category B offences are non-technical offences attributed to an act of commission.

Some of the major changes made include making offence punishable under Section 276 of the Act as compoundable but have been moved from category A to category

B. Section 276 talks about removal, concealment, transfer or delivery of property to thwart tax recovery. As always, there is also a negative list which would not be compounded. Offences punishable under sections 275A & 275B shall not be compounded in any circumstances. Compounding of Category A offences on more than three occasions and Category B offence other than first offence, will not be permissible except on exceptional circumstances. Further any offence which has bearing on any offence under the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015, Benami Transactions (Prohibition) Act,1988; or investigations by the ED/CBI/Lokpal/Lokayukta/ any other Central or Stage Agency shall not be allowed to be compounded.

The guideline also comes with a Caveat that Compounding of offences is not a matter of right; offences may be compounded by the Competent Authority on satisfaction of the eligibility conditions prescribed in these guidelines keeping in view factors such as conduct of the person, the nature and magnitude of the offence in the context of the facts and circumstances of each case. Further The person applying for compounding should have paid the outstanding tax, interest (including interest u/s 220 of the Act), penalty and any other sum due, relating to the offence for which compounding has been sought before making the application. Also, the applicant should undertake to withdraw appeals filed by him, if any, related to the offence(s) sought to be compounded. Furthermore, any application for compounding of offence u/s 276B/276BB of the Act by an applicant for any period for a particular TAN should cover all defaults constituting offence u/s276B/276BB in respect of that TAN for such period.

Further, the scope of eligibility for compounding of cases has been relaxed whereby case of an applicant who has been convicted with imprisonment for less than 2 years being previously non-compoundable, has now been made compoundable. The discretion available with the competent authority has also been suitably restricted. The time limit for acceptance of compounding applications has been relaxed from the earlier limit of 24 months to 36 months now, from the date of filing of complaint. The compounding charges shall be 1.25 times the normal compounding charges in case the application of compounding is filed after the end of 12 months, but within

24 months, from the end of the month in which prosecution complaint, if any, has been filed in the court of law.

The application can be made in Annexure 1; Suggested Check List for Compounding has been made available for the filed officers in Annexure 2; Order u/s 279(2) has been made available in Annexure 3. Specific upper limits have been introduced for the compounding fee covering defaults across several provisions of the Act. Additional compounding charges in the nature of penal interest at the rate of 2% per month up to 3 months and 3% per month beyond 3 months have been reduced to 1% and 2%, respectively.

While there could be many further relaxations which taxpayers expected, yet it is important that an effort has been made by these guidelines to initiate the process of decriminalization of tax laws.

2. CBDT gives "benefit" to taxpayers by issuing Circular 18 of 2022 for TDS u/s 194R! Taxpayers need more!

New Clarifications on Sec 194R have been issued vide Circular 18 of 2022 by the CBDT. Many clarifications and further clarifications have been issued but more is needed due to the wide impact of not only these TDS provisions but also its resultant impact on Section 28(iv) and GST. In line with our concern, the Circular issues a Caveat that these circulars are only for removal of difficulties u/s 194R and will not influence taxability in the hands of the recipients. The following are the difficulties which this circular tries to address and further difficulties which may arise –

- TDS u/s 194R is applicable when perk/benefit is in the form of a Capital Asset. To remove difficulties it is stated that incase of loan settlement by Banks / PFIs / SFCs / Certain NBFCs / Certain other Companies as mentioned in this circular there would be no TDS. What can be inferred is that there would be a TDS incase of loan/debt waiver/settlement between other Private parties. This would remain a burden on the settlor of the loan/debt. Further the counterparty will take the TDS Credit and pay the tax on such a settlement. This still remains a big issue.

- Sales Discount/ Cash Discount/ Rebates are benefits/perquisites but no TDS u/s 194R is required to be deducted. However, Incentives/ target trips/ free samples are benefits/perquisites & 194R is applicable. **The question is whether "Post Sale Discount" is a benefit / perquisite? Incase it is then under GST whether these are taxable or not as a supply?** The field officers have varied views and a clarification on this important point is needed.

- 194R is applicable on Gifts given to directors/employees of Customers. TDS u/s 194R is to be deducted on the PAN of the Organization. The Organization may subsequently deduct TDS on the directors / employees u/s 192 or any other section.

- TDS u/s 194R is applicable on reimbursements to an agent incase the service provider is not acting as a "Pure Agent" under GST. Incase the service provider is acting as a "Pure Agent" under GST, then TDS u/s 194R would not be applicable.

- A small relief has been given for dealer conferences. incase of stay for one day before/after the conference 194R is not applicable. Well, in a lighter vein it can be said that this is a "benefit" given by CBDT to taxpayers! However, it is immediately taken back by The CBDT by clarifying that Incase valuation is not possible, then expenses should not be claimed as a deduction by the taxpayer. Therefore, balancing has been done by the CBDT.

- TDS u/s 194R will not be applicable for "UN (Privileges and Immunity Act)", international organization whose income is exempt, High Commission, legation, commission, consulate and the trade representation of a foreign state.

- Bonus/Right share is not a benefit/Perquisite… But wait, there are two conditions – It is so only Incase of Public Companies incase bonus/right shares are issued to ALL shareholders. For private Companies they still remain a

benefit. Even for public companies incase these are not issued for all shareholders, it still remains a benefit.

CBDT officials are saying that they are open to address more issues of taxpayers in this matter. Well, we have already cited few of them on which they must act and fast so that after Sec 148, another litigation box does not open up.

3. NRIs can now directly make payments for bills on behalf of their families from abroad

The RBI has allowed the Bharat Bill Payment System (BBPS) to process cross-border inbound payments to facilitate payment of utility bills by non-resident Indians (NRIs). Bharat Bill Payment System was conceptualised by the RBI and is driven by the NPCI.

Currently, foreign inward remittances received under the RDA are allowed to be transferred to the KYC compliant beneficiary bank accounts through electronic mode, such as, NEFT, IMPS, among others. The BBPS is a one-stop destination for payment of various bills like electricity, gas, water, DTH, among others. It offers an interoperable platform for standarised bill payment experience, centralised customer grievance redress mechanism, uniform customer convenience fee, among others. Over 20,000 billers have been onboarded on the BBPS and more than 8 Cr transactions are processed on a monthly basis.

RBI vide circular dated September 15, 2022 has allowed foreign inward remittances received under the Rupee Drawing Arrangement (RDA), to be transferred to the KYC compliant bank account of the biller (beneficiary) through Bharat Bill Payment System (BBPS).

4. Liaison office shall not be considered PE incase it is compliant with the RBI guidelines

Can liaison office be considered as PE of the assessee under Article 5 of India and Japan Double Taxation Avoidance Agreement, as it is actively engaged in business activity? This is an important question and would impact similar cases.

Liaison office, as the word suggest it is an office that facilitates close working relationships between the parent company situated abroad and the business parties in India. The other term for Liaison offices is Representative Office. Liaison offices have restrictions and cannot undertake any business activities in India and also cannot earn any income in India. The liaison office can only Represent the foreign company in India; Promote export from or import to India; Encourage technical/financial collaboration between parent or group companies and Indian companies; Act as a communication channel between the parent company and the Indian company. Hence a liason office only activities which are preparatory and auxiliary in nature and not the core business activity independent of the Head Office. Incase the RBI also finds that activities of the liaison office are not non-compliant with the terms and conditions of its permission, it will not constitute PE in India. The matter was decided in the case of NAGASE AND COMPANY LTD. Vs ASSTT. DIRECTOR OF INCOME TAX [2022-VIL-1143-ITAT-MUM], in favor of the assessee and it could be an important precedence.

5. How to prove a claim for 'Bad Debt'

Circular No.12/2016 dated May 30, 2016 has clarified that after 01.04.1989, while claiming deduction of bad debt under Section 36(1)(vii) of the IT Act, it is not necessary for the assessee to establish that the debt, had, in fact become irrecoverable, but, it is enough if bad debt is written-off as irrecoverable in the books of accounts of the assessee.

Even in the case of Big Bags International Pvt. Ltd. Vs. Deputy Commissioner of Incometax, (2021) 125 Taxmann.com 338 (para 6) The Karnataka High Court had held that the Act mandates that in order to claim bad debts, the assessee has to write-off the same in his Books of accounts and he is not required to prove that the debt was irrecoverable, we answer this question in favour of the assessee and against the Revenue. Similar view was taken in the case of THE COMMISSIONER OF INCOME-TAX Vs M/s ING VYSYA BANK LTD [2022-VIL-214-KAR-DT].

6. Shares of Holding Company granted as ESOP is an allowable claim u/s.37(1)

Shares of Holding Company granted as ESOP granted to employees of the subsidiary motivates the employee who performs mainly for the subsidiary company. The expenditure is wholly and exclusively for the purpose of the business of the assessee and the fact that the parent company is also benefited by reason of a motivated work force cannot be a ground to deny the claim of the subsidiary for deduction, which otherwise satisfies all the conditions referred to in section 37(1). Hence it was held in the case of CERNER HEALTHCARE SOLUTIONS INDIA PRIVATE LIMITED Vs THE DEPUTY COMMISSIONER OF INCOME TAX [2022-VIL-1160-ITAT-BLR] that expenditure incurred by the assessee towards ESOP expenses is an allowable claim u/s.37(1) of the Act

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