Direct Tax Vista

Your weekly Direct Tax recap

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1. TDS on year end provisions…When applicable, when not

The question which has arisen many a times is that how TDS Provisions can be applied where Payee is not known as TDS is deducted and deposited in payee's name? At the year-end on accrual basis and prudence, certain expenses have to be accounted for in the relevant financial year on "estimated basis" to bring true and fair financial picture. As the payee name or amount in some cases is not known at the time of provisions, how can TDS be deducted?

Section 4(1) provides that income-tax is a charge on total income of a previous year of a person. As per section 4(2), such income tax shall be paid by way of advance tax or TDS. Further, section 190(1) provides that the tax on total income shall be inter-alia payable by deduction or collection at source in accordance with the provisions of Chapter XVII. Section 190(2) makes it clear that the provisions of section 190(1) would not prejudice the charge of tax under the provisions of Section 4(1) of the Act which signifies that the deduction or collection of tax is only a mode of payment or recovery of tax payable by a person on his total income of the previous year. As per the scheme of TDS under Chapter XVII-B Section 199, the credit for the TDS is to be given to the deductee. Thus, the identification of the person from whose account income tax was deducted at source is a prerequisite condition so as to make the provision for Chapter XVII-B workable. Tax deducted at source is considered to be tax paid on behalf of the person from whose income the deduction was made and, therefore, the credit for the same is to be given to such person. When the payee is not identifiable, to whose account the credit for such TDS is to be given. Section 203(1) lays down that for all tax deductions at source, the tax deductor has to furnish a certificate to the person to whose account such credit is to be given. Therefore, when the tax deductor cannot ascertain the payee who is

the beneficiary of a credit of tax deduction at source, the mechanism of Chapter XVII-B cannot be put into service.

TDS is a vicarious liability and not required unless there is an income in the hands of the payee was held in Eli Lily & Co. [[2009] 312 ITR 225 (SC)], GE India Technologies [[2010] 327 ITR 456 (SC), Bharti Airtel [[2015] 372 ITR 33 (Kar)];

However, contrary judgements are prevalent in the cases of Palam Gas Service Vs. CIT [[2017] 394 ITR 0300 (SC)]; CIT, New Delhi Vs. Eli Lily & Co (India) (P) Ltd [Stated Supra] and Associated Cement Co. Ltd. Vs. CIT. [467 Taxman 346 (SC)], where it is laid down that the scheme of TDS provisions applies not only to the amount paid, which bears the character of “income” but also to gross sums, the whole of which may not be income or profit in India in the hands of the recipient. Section 40(a) (ia) of the Act read with Section 194J Explanation(C), requires that tax has to be deducted at source when amount is paid or credited to the account of payee whichever is earlier.

In the matter of M/s SUBEX LTD Vs THE DEPUTY COMMISSIONEROF INCOME TAX [2023-VIL-02-KAR-DT], The Hon’ble High Court held that the existence or absence of entries in the books of accounts is not decisive or conclusive factor in deciding the right of the assessee claiming deduction and set aside the ITAT’s order to the contrary. However, in the light of the above judgements and provisions, taxpayers may have to follow certain steps in the matter which are as follows -

1. No TDS for general provisional entries which are made in respect of various expenses on an estimated basis. For example Bonus on Salaries where the Bonus may be variable.
2. On the first day of the new FY, the provisional entries need to be reversed.
3. Once the bills or invoices are received in the next year or the payment becomes dues, TDS is applicable.
4. TDS provisions fail to apply only when the identity of the deductee is not known precisely and/or the quantum of the amount payable is also unascertainable. It should be an ad hoc provision.

2. No penalty for violation of 269SS when Test of Reasonable Cause is passed

Sec 273B provides that no penalty shall be imposable on an assessee, for a failure if he proves that there was reasonable cause for the said failure. Hence, while accepting Loans through Journal Entries would be a violation of Sec 269SS, yet incase reasonable cause is shown, then there would be no penalty.

Reliance can be placed on the following cases- CIT vs. Triumph International Finance (India) Limited [ITA No. 5745/2010- unreported judgment dated 17.08.2012. - CIT vs. Triumph International Finance (India) Limited [345 ITR 272 Bombay HC] - Goldstar Electricals Pvt. Ltd. vs. ACIT [ITA No. 5509/Mum/2013). The Hon'ble Bombay High Court, in order dated 06/02/2018 in the case of [CIT(C)- IV.vs. Ajitnath Hi-Tech Builders Pvt. Ltd. (ITA No.171/2015) has also held similarly that no penalty can be levied in respect of transactions made through journal entries. The Hon'ble Supreme Court has also dismissed the Special Leave Petition (SLP) filed by the Department against the above decision of the Hon'ble Bombay High Court. The same was also held in the case of DEPUTY, COMMISSIONER OF INCOME TAX, CC-7(3), MUMBAI Vs M/s MAHAVIR BUILD ESTATE PVT. LTD. [2023-VIL-26-ITAT-MUM]

The reasonable cause for such transactions may be the following –

(i) avoiding the delay in procedural hassles of preparing cheques and obtaining signature of authorised person
(ii) avoiding temporary arrangement of funds for clearance of cheques
(iii) Helping in earlier settlement of the transactions as settlement of transactions through banking channels results in avoidable delay of 3-5 days
(iv) avoided the blocking of funds for temporary period without any corresponding commercial gain.

Further the following additional procedures must be followed -

(i) All the entities recognize the transactions in their books of accounts

(ii) Balance Confirmations and documents like Credit Notes/ Debit Notes for substantiating the transactions, be taken

Taxpayers with similar facts may wish to evaluate the potential impact of this ruling to their specific circumstances.

3. Payment/Refund of tax may keep the interest meter ticking

We have reported earlier that many a times, a question arises during business operations whether to stop the interest burden from accruing by making a payment of tax, even under dispute. Would it be a wise decision that the tax amount be paid under protest and the litigation continued. This would lead to freezing the interest portion till the date of the payment it is argued. Assesses need to be careful in this approach as the Co–ordinate Bench of Tribunal in Union Bank of India v/s ACIT, [2017] 162 ITD 142 (Mum.), after considering the decision of the Hon'ble Supreme Court in Gujarat Fluoro Chemicals, has held that where the amount of tax demanded is paid by the assessee then it shall first be adjusted towards interest payable and balance if any whatever tax payable. **Hence the interest 'meter' would still go on.** The same analogy applies while granting refund u/s 244A as was held in DY. COMMISSIONER OF INCOME TAX Vs MSM SATELLITE (SINGAPORE) PTE. LTD. [2022-VIL-707-ITAT-MUM]. The refund already granted to the assessee should be first adjusted against the interest component and balance, if any, towards the tax component of the refund due.

Again in the case of KARSANBHAI KACHARABHAI PATEL Vs I.T.O. WARD-5(3)(1), AHMEDABAD [2023-VIL-25-ITAT-AHM], the assessee has paid advanced tax, whereas income was determined at rupees NIL, accordingly, amount of advance tax paid by assessee became due to him. In this case Assessee has first adjusted full amount of interest payable till November 1987 against refund and balance amount was treated as recovery against principal amount. It was contended that the interest should be calculated on this amount till date of issuance of second instalment of refund. Amount of refund granted to assessee, first, has to be adjusted against interest payable to assessee. The AO was directed to allow amount of interest to assessee.

This is not charging/granting '**interest on interest**' which was considered incorrect by The Hon'ble Supreme Court in Gujarat Fluoro Chemicals.

4. Certificates would be valid proof for claim of TDs even in absence of entry in Form 26AS

To ease compliance burden on the Tax Deductors, Industry bodies have approached the Ministry of Finance to dispense off with the requirement of issuance of TDS Certificate and reply on only Form 26AS. However these TDS Certificates act as a saviour sometimes when there is a mismatch of Form 26AS due to technical glitches and a grant of claim of TDS is allowed on the basis of TDS Certificates. If the AOs do not allow the same, the assessees can get a relief from the Courts by invoking a Writ of Mandamus. The Income Tax Act empowers and authorises the Assessing Officer to verify the contents of the return and notices can be issued to a third party, i.e. the deductor, to furnish information and details incase of mismatch in the Form 26AS of the deductee.

The Courts have held time and again that the statutory powers given to the Assessing Officer are sufficient and should be resorted to and the assessee cannot be left to the mercy or the sweet will of the deductors. When an assessee approaches the Assessing Officer with requisite details and particulars, the said Assessing Officer shall verify whether or not the deductor has made payment of the TDS and if the payment has been made, credit of the same should be given to the assessee. The TDS certificate should be starting point for the Assessing Officer to ascertain and verify the true and correct position. The Assessing Officer will be at liberty to get in touch with the TDS circle in case he requires clarification or confirmation. He is also at liberty to get in touch with deductor by issuing a notice and compelling him to upload the correct particulars/details. The said exercise must be and should be undertaken by the Assessing Officer as an assessee who suffers in such cases is not due to his fault and can justifiably feel deceived and defrauded.

The stand of the Revenue was dismissed that they can only write a letter to the deductor to persuade him to correct the uploaded entries or to upload the details.

Power and authority of the Assessing Officer, cannot match and are not a substitute to the beseeching or imploring of an assessee to the deductor. The directions given above, are in accord with the provisions of the Act, namely, Section 133 and TDS provisions of the Act. If required and necessary, the income tax authorities can obtain prior approval from the Director or the Commissioner. The authorities can also examine whether general approval can be given. The said exercise is undertaken by the Assessing Officer while verifying or examining the return. Section 234E will also require similar verification by the Assessing Officer. In such cases, if required, order under Section 154 of the Act may also be passed. Circular No. 4 of 2012 will be equally applicable.

In the same matter, once again relief was granted by The ITAT in the case of MACHINE TOOLS INDIA LTD Vs ACIT, CIRCLE-1(1), KOLKATA [2023-VIL-30-ITAT-KOL]. Hence TDS claim is an indefeasible claim and cannot be denied due to technical glitches or mismatches.

5. FDI Compliance Rationalised of Reporting in Single Master Form (SMF) on FIRMS Portal

Various information is required to be filed with RBI to inform about FDI. RBI has taken all necessary steps to keep reporting simplified and sorted. Therefore, various changes have been made in the reporting requirement of FDI.

Earlier, all information related to Foreign Direct Investment was required to be provided through various forms such as FC-GPR (Foreign Currency-Gross Provisional Return), Form LLP-I, Form LLP-II etc. All forms were required to be filed separately and therefore, the process of filing was complicated and time taking. All applicable forms were required to be filed on the e-biz platform separately. The RBI vide A.P (DIR Series) **Circular No. 30 dated June 07, 2018** (FDI Circular) had simplified the foreign investment reporting by the Indian entities by introducing one master form namely-Single Master Form (SMF). Now, **the following changes are being implemented with respect to the reporting of foreign investment in SMF on FIRMS portal:**

1. All forms submitted on the portal with the requisite documents will be auto-acknowledged on the FIRMS portal with a time stamp and an auto-generated e-mail will be sent to the applicant.

2. The AD banks shall verify the forms within 5 working days.

3. In cases of delayed reporting, the AD banks shall either advise the Late Submission Fee (LSF) to the applicants, which will be computed by the system or advise for compounding of contravention, as the case may be.

4. For forms filed with a delay less than or equal to three years, the AD banks will approve the same, subject to payment of LSF.

5. The LSF will be computed by the system and an e-mail will be sent to the applicant and the concerned Regional Office (RO) of RBI specifying the amount and the timeline within which it is to be paid to the concerned RO of RBI.

6. Once the LSF amount is realised, the concerned RO will update the status in the FIRMS portal and the updated status will be communicated to the applicant through a system generated e-mail, which can also be viewed in the FIRMS portal.

7. The AD bank will approve the forms filed with a delay greater than three years, subject to compounding of contravention. The applicant may thereafter approach RBI with their application for compounding.

8. The remarks of the AD Bank for rejection of forms, if any, will be communicated to the applicant through a system generated e-mail and the same can also be viewed in the FIRMS portal.

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