

Direct Tax Vista

Your weekly Direct Tax recap

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1. Practicing CA/CS/CMA's under the scanner with new amendment in PMLA

The biggest development of the week is Notification No. S.O. 2036(E), dated 03.05.2023 amending Section 2 of the Prevention of Money Laundering Act (PMLA). The MoF has widened the ambit of the term "Reporting Entity" as defined in Section 2(1)(wa), read with sec. 2(1)(sa) of the PMLA. As per the amended norms, financial transactions carried out by practicing Professionals (PPs) - CA/CS/CMA, on behalf of their clients will now fall under the scope of the PMLA. However, lawyers and legal professionals have been kept out of the new definition of entities covered under the Act. The government may have brought about the changes in the PMLA against the backdrop of rising cases of shell companies. One must remember that in March 2023, the government had widened the ambit of reporting entities under money laundering provisions to incorporate more disclosures for non-governmental organisations and defined politically exposed persons (PEPs) under the PMLA in line with the recommendations of the FATF.

The MoF has notified that the "**financial transactions**" carried out by these persons on behalf of their clients, in the course of their profession, in relation to the following activities shall be under the scanner -

- (i) buying and selling of any immovable property;
- (ii) managing of client money, securities or other assets;
- (iii) management of bank, savings or securities accounts;
- (iv) organisation of contributions for the creation, **operation or management of companies**;
- (v) creation, operation or management of companies, limited liability partnerships or trusts, and buying and selling of business entities,

The implications of this notification can be as follows –

1. The notification is only restricted to 'practising' CA/CMA/CS and not those in employment.
2. The notification is restricted to 'financial transactions' "in relation to" the activities as specified above. The limitation to 'financial transactions' has been widened by the words "in relation to". Hence wherever there are the specified financial transactions, any activity in relation to these transactions, whether direct or indirect, will be covered.
3. Hence even incase a CA/CMA/CS suggests any buying/selling of investments or properties or creation of a company or opening of a bank account where financial transactions may be done by the client, the sweep of the notification would hold the CA/CMA/CS responsible incase an illegal activity is carried on in relation to these.
4. The coverage of "**financial transaction in relation to operation or management of companies**" makes the sweep very wide. Hence incase an Income Tax/ GST return is filed by the client but the CA/CMA/CS assists in filing of the same, then the liability of such CA/CMA/CS may arise therein too, incase any activity is detected which deals with proceeds of crime.
5. If there is a transaction involving a client's use of funds or sourcing of funds, and the transaction is suspicious and may have implications relating to use of the money for money laundering or promotion of terrorism, then a professional, carrying such transaction, cannot contend that he is not aware of the credentials of his client, because he is required to carry due diligence on his client; and it is the duty of the professional to report the same to the authorities.

If the PPs have any suspicion about client suspiciously involving in proceeds of crime, then the PPs should dig further in to the transaction. Further the PPs should

maintain the record of the due diligence executed for a period of five years from the date of transaction.

All practising CA/CMA/CS have already taken note of this notification and thus should consider its impact on their professionals.

2. FATCA reportable accounts may use TINs/specified Codes for calendar year 2022 (due by September 30, 2023)

CBDT has issued guidance for the Indian Reporting Financial Institutions (RFIs) to follow in respect of reporting of U.S. reportable accounts vide F. No. 500/107/2015-FT&TR-III. This would be applicable for reporting for calendar year 2022 (due by September 30, 2023).

The RFIs should ensure that the U.S. TIN is reported in respect of all U.S. Reportable accounts. However, if the U.S. TIN is not obtained, the RFI may populate the TIN field with specified codes in scenarios mentioned in the FAQ 6 (reporting) of U.S. IRS.

In all such cases where TIN has not been obtained, the U.S. IRS system will still generate an error notification to indicate that the entry is invalid when one of the above-mentioned codes are used.

Reporting for calendar year 2022 (due by September 30, 2023) is considered to be a transition year, and to be eligible for relief, RFIs must either use the TIN codes specified in the clarification issued on 31 January 2022 or the updated TIN codes mentioned in the FAQ6 as per this Circular.

For subsequent years, RFIs will have to follow the updated TIN codes referred in FAQ 6.

3. Cross-border wire transfers shall be accompanied by accurate, complete, and meaningful originator and beneficiary information

The RBI Vide RBI/2023-24/25 has instructed banks and financial institutions to ensure that cross-border as well as domestic wire transfers contain complete

information about the originator and beneficiary. This is done to prevent them from being misused as a channel for money laundering, terrorist financing platforms.

Domestic wire transfers of Rs 50,000 and above, where the originator is not an account holder of the ordering RE, shall also be accompanied by originator and beneficiary information as indicated for cross-border wire transfers. The instructions, however, are not intended to cover any transfer that flows from a transaction carried out using a credit card, debit card, or Prepaid Payment Instrument (PPI) for the purchase of goods or services.

As per the updated Master Directions, all cross-border wire transfers must be accompanied by the following information about the originator and beneficiary -

- (a) name of the originator;
- (b) the originator account number where such an account is used to process the transaction;
- (c) the originator's address, or national identity number, or customer identification number, or date and place of birth;
- (d) name of the beneficiary; and
- (e) the beneficiary account number where such an account is used to process the transaction.

The RBI has updated the instructions in the Master Direction on KYC related to Wire Transfers in order to align the same with the relevant recommendation of the Financial Action Task Force (FATF). Further, domestic wire transfer, where the originator is an account holder of the ordering Regulated Entity, shall be accompanied by the originator and beneficiary information, as in the case of cross-border wire transfers.

"Cross-border wire transfer" refers to any wire transfer where the ordering financial institution and beneficiary financial institution are located in different countries. This term also refers to any chain of wire transfer in which at least one of the financial institutions involved is located in a different country.

“Domestic wire transfer” refers to any wire transfer where the ordering financial institution and beneficiary financial institution are located in India. This term, therefore, refers to any chain of wire transfer that takes place entirely within the borders of India, even though the system used to transfer the payment message may be located in another country.

4. Disallowance u/s 36(1)(va) applicable to PF/ESIC but not to NPS

In recent times any news related to Adani generates interest. This time, in Income Tax the group is in news for a reason which will generate the interest of businesses which have been suffering post the judgement of The Apex Court in The Case of Checkmate Services and others. It is important to note that employees’ contribution to NPS is not the same as employees’ contribution to PF/ESI. There is no due date prescribed under the NPS for the deposits of employees’ contribution, and it is totally voluntary contribution to the scheme. Therefore there cannot not be any case of delayed deposit of employees contribution to the said scheme so as to attract disallowance u/s 36(1)(va) of the Income Tax Act. Incase payment of the contribution of the employees to the NPS had been made within the due date of filing of the return, the same should be allowed as a deduction.

The proposition that delay in employees’ contribution to ESI & PF will attract the provisions of section 36(1)(va) of the Act warranting addition to the income of the assessee to the extent of amount so delayed to be deposited, has been settled by the Hon’ble Apex Court in the case of Checkmate Services P.Ltd. Vs. CIT, 143 taxmann.com 178 (SC) dated 12.10.2022. There is no doubt that such delayed payments of employees’ contribution to ESI /PF would attract adjustment even in intimations made u/s 143(1) of the Act. However, the judgement is as much applicable for NPS in as far as there cannot be any disallowance for NPS incase the same is paid before due date of filing the return, has been held in the case of ADANI WILMAR LTD Vs AO-CPC BANGALORE [2023-VIL-561-ITAT-AHM].

5. Penalty notice u/s 271(1)(c) is distinct from the assessment

The assessment proceedings form the basis for the penalty proceedings, but they are not composite proceedings to draw strength from each other, nor can each cure the other’s defect. A penalty proceeding is a corollary; nevertheless, it must stand

on its own. It culminates under a different statutory scheme that remains distinct from the assessment proceedings. Therefore, the assessee must be informed of the grounds of the penalty proceedings through statutory notice. An omnibus notice suffers from the vice of vagueness. A penal provision, even with civil consequences, must be construed strictly. And ambiguity, if any, must be resolved in the affected assessee's favour. In this context let us understand Section 271(1)(c) of The Income tax Act which specifies as under -

271. (1) If the Assessing Officer or the Joint Commissioner (Appeals) or the Commissioner (Appeals) or the Principal Commissioner or Commissioner in the course of any proceedings under this Act, *is satisfied* that any person-.. (c) *has concealed the particulars of his income or furnished inaccurate particulars of such income, or..*

he may direct that such person shall pay by way of penalty,-..

iii) in the cases referred to in clause (c) ...in addition to tax, if any, payable by him, a sum which shall not be less than, but which shall not exceed three times, the amount of tax sought to be evaded by reason of the concealment of particulars of his income or fringe benefits or the furnishing of inaccurate particulars of such income or fringe benefits.

Hence invocation of Sec 271(1)(c) has the following pre-requisites –

1. The officer must record his satisfaction in the notice invoking the said Section
2. The Officer specify the charge he is levying being –
 - a. the assessee has concealed the particulars of his income, or
 - b. the assessee has furnished inaccurate particulars of such income

Hence, it was held in the case of VANSI INDUSTRIES LTD Vs ACIT, CIRCLE: 26 (1) NEW DELHI [2023-VIL-560-ITAT-DEL] that the notice u/s 274 cannot be a stereotyped one not clearly specifying the charge and also an explanation as to the evidences which led to the officer's satisfaction that 271(1)(c) should be invoked.

As notices of penalty under various sections keep flowing, the judicial discipline in serving notices can be enforced by the assesses.

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