

## 2<sup>nd</sup> INCOME TAX DIGEST

- ❑ Income Tax Act Revamping - Update
- ❑ Sec 40A(3) not applicable in certain cases
  - ❑ Royalty Vs License fee
- ❑ IT on Capital Reserve on Amalgamation
- ❑ Interest on additional compensation is capital in nature



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# **Income Tax Act Revamp (Comprehensive Review): Status and Suggestion on TDS/TCS provisions (cumbersome, rates & overlap)**

1. The income tax department has received 6,500 suggestions from stakeholders over the past month

## **Suggestions on TDS –**

### **A. Reduce no:of Sections under TDS –**

As of now there are 71 Sections under TDS as follows –

- i. Section 190-191(2 Sections) – Provision for TDS/ Direct Payment
- ii. Section 192 – 196D (45 Sections)- Provisions for specific deductions
- iii. Section 197 – 206CCA (24 Sections) - Procedural

### **B. Lower Rates of TDS -**

### **C. There should not be any overlap between TCS and TDS.**

### **D. Introduction of 194Q and overlap with Section 206C (1H) and unintended consequence of Rule 31AA:**

**Excessive payment u/s 40A(3) are not disallowed incase business expediency and identity and genuineness of parties is proved**

Excessive payment u/s 40A(3) are not disallowed incase it can be established as follows-

1. Payments have to be made in order that the assessee's business does not suffer or is hampered.
2. Expenses which are sometimes not predictable or planned
3. Expenses are extremely essential

The nature of the assessee's business is varied and no two events are comparable. Hence it was laid down in the case of **SHRI MUNISH ARORA Vs THE ACIT [2024-VIL-1543-ITAT-CHD]** that where due to business compulsions when the events are taking place, payments have been made to specified persons in spite of all constraints as they were holding an event to ransom and could have caused immense damage to the assessee's Goodwill and the assessee thereafter fired these people; the same would not be disallowed.

In Goenka Agencies vs Commissioner of Income Tax on 12 May, 2003 Equivalent citations: V (2003) 184 CTR Cal 104, 2003 2631TR145 Cal, same was held also.

**Receipts for Transfer of “Copyright” by a Non-Resident** (not having a PE in India) to a Resident in India is taxable in India as ‘**royalty**’. However, **Transfer of “License” is not**. Hence the question comes as to what is a “Copyright” and what is a “License” in a copyrighted article. Lets analyse incase of a software. For a transfer of license, the following are the criteria which may be proved -

- (i) The software **can only be used** by the transferee by installing it on a particular computer hardware.
- (ii) **The software cannot in any manner be reproduced** for sale, publication, disclosure, rent lease modify, loan, distribution, etc. It cannot be altered.
- (iii) **Nontransferable license** - The software may be in the form of an End-User-Licence to the transferee.
- (iv) **The software cannot be modified** other than customised for the user slightly.
- (v) **There is no right in the copyright of the end-user.**
- (vi) **The software license though may be supplied for a lifetime.**

It was held in the case of **QOGNIFY PTE LTD Vs DEPUTY COMMISSIONER OF INCOME TAX [2024-VIL-1547-ITAT-CHE]** that the fact that ‘no title or ownership’ of the software or software documentation was transferred to transferee by the transferor; the ownership of the software documentation, modification, enhancement, improvements, adaptations shall remain at all times with the transferor. Therefore, a conclusion cannot be drawn of treating the transfer as a sale of copy rights to consider as taxable under the head ‘royalty’.

The Hon’ble ITAT In support of the claim of the assessee, relied on the decision of **Hon’ble Supreme Court in the case of Engineering Analysis and Centre of Excellence Pvt Ltd vs CIT** [Civil Appeal No. 8733 to 8734 of 2018], wherein it has been held that payments made to the supplier of software would constitute royalty, only if the copy right or ownership of software part with any of the rights/interest as specified in section 14(a) and 14(b) of the Copyright Act, 1952. The Hon’ble Supreme Court has further held that, the consideration for mere use of software for the purpose for which it was supplied does not amount to royalty for the use of copyright in the software.

## **Capital Reserve generated on amalgamation is not taxable as benefit/perquisite**

**In order to tax any amount w/s. 28(iv) of the Act, the following prerequisites need to be satisfied-**

- (i) there must be benefit or perquisite.
- (ii) It must be received in a form other than money.
- (iii) it must arise out of the business or profession carried on by the recipient, and
- (iv) it must be revenue in nature.

By amalgamation, nobody gets rich or poorer.

Incase a merger qualifies as an exempt transfer u/s 47(vi) of the Act, receipt of any property by the amalgamated company, pursuant to merger with amalgamating company should be exempt in hands of appellant u/s 56(2)(x) of the Act on account of the specific exemption provided.

The same was held in the case of **DY. COMMISSIONER OF INCOME TAX Vs SAMAGRA WEALTHMAX PRIVATE LIMITED [2024-VIL-1549-ITAT-MUM]**.



## Interest takes the colour of the underlying principle: Interest on additional compensation is capital in nature

Section 28 of Land Acquisition Act of 1894 which contemplates payment of interest by the Collector on the direction of the Court on the difference of the amount, which the Collector ought to have awarded as "compensation" and the sum which the Collector did award as "compensation". However, Section 34 of the Act enjoins the Collector to pay interest, if the amount of "such compensation" is not paid or deposited on or before taking possession of the land.

Relying upon the basic principle that "*interest takes the colour of the underlying principle*", it can be understood that interest on compensation not granted shall take the colour of the compensation itself. However, interest for payment not made in time would be purely for delayed payment.

Based on this underlying principle, in case of Compulsory land acquisitions by the Government under the Land Acquisition Act, the Hon'ble Supreme Court in the case of **CIT vs. Ghanshayam (HUF)** reported in 315 ITR 31, held that the interest received in accordance with section 28 of Land Acquisition Act of 1894 which is part and parcel of amount of additional compensation eligible for exemption under section 10(37) of the Act.

However, interest u/s 34 would be chargeable under section 56(2)(viii) of Income Tax Act read with section 145A(b) of the I.T. Act. Deduction @50% u/s 57(iv) would be available.

# THANK YOU



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