Direct Tax Vista

Your weekly Direct Tax recap

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1. Powers of the ED for search & seizure under PMLA

A search and seizure under PMLA Act is distinct and more serious than the same operation under the Income Tax Act. Hence the ED needs to be more cautious before invoking Section 17(1) of The PMLA Act. The officer who proceeds for a search and seize under the PMLA Act must have a "**reason to believe**" recorded "**in writing**" that a person has committed any act of money-laundering, or is in possession of any "**proceeds of crime**" involved in money laundering, or is in possession of records relating to money-laundering, or is in possession of any property related to crime. For implicating a person, there must be evidence that the person has committed "an activity" related to any "property" derived directly or indirectly by any person as a result of criminal activity related to a scheduled offence as well as any property which is used in the commission of an offence under The PMLA or any of the scheduled offences. Besides, commission of an offence would only qualify as money-laundering if the offence generates proceeds of crime and tainted property.

The power to enter and search any place or to seize any record or property must be predicated by the satisfaction of all the requirements as above which should find a particularized statement in the written "reason to believe" component by the authorised officer under Section 17(1). **It is only on the fulfillment of the conditions stipulated that the power to search and seize is crystallized.**

Where there was an absence of "statements of reasons" or the basis of an apprehension for freezing the properties of the accused, it was considered that the impugned orders fall short at all levels of the statutory requirements by The Calcutta High Court in the case of M/s RASHMI METALIKS LIMITED & ANR. Vs ENFORCEMENT DIRECTORATE & ORS. [2022-VIL-196-CAL-DT].

2. Doctrine of unjust enrichment applies even to the Revenue Authorities; Filing of ITR is a 'deemed intimation' incase ITR is not processed in time

The principle of unjust enrichment applies even to the department. It is unjust to allow the department to retain a benefit at the expense of the taxpayer. After filing of the return (under Section 139 of the Act) along with due verification (under Section 140 of the Act) and paying taxes as per return (under Section 140A of the Act), a tax-payer has to simply wait for the refund (as computed in the return) unless the same is disputed by the Tax Department through notices under Sections 142(1) or 143(2) or a defect memo under Section 139(9) of the Act. Prior to expiry of time for processing of return, the assessee has no right to expect refund. However, upon the department's failure to process an assessee's return within time, the right to refund arises by operation of law. Incase the AO fails to process the return of the petitioner filed in accordance with law within the prescribed time, then the return as declared/filed will have to be treated as 'deemed intimation' and an order under Section 143(1) of the Act. Incase, then refund is not processed then as per the Supreme Court's nine Judges Bench judgment in Mafatlal Industries Ltd. vs. Union of India, (1997) 5 SCC 536, once unjust enrichment is proved, restitution is the answer i.e. the department must give back the benefit. The above was held in a landmark judgement in the case of M/s M.J. ENGINEERING CONSULTANTS P LTD Vs INCOME TAX OFFICER & ORS. [2022-VIL-201-DEL-DT]

3. RBI's digital lending norms and data privacy concerns

The growth and acceptance of mobile lending apps and online lending platforms have sparked several major questions with systemic repercussions. To balance the legislative environment to foster innovation while upholding data security, privacy, secrecy, and consumer protection the RBI has issued guidelines to all lenders including banks to protect the data of borrowers using digital lending apps from being misused. The new regulations are founded on the idea that only organisations that are either governed by the central bank or are legally licensed to do so may engage in lending and credit facilitation activities. The protections offered are as follows –

- The guidelines explicitly state that digital lending apps cannot access mobile phone resources such as file and media, contact lists, call logs, telephone functions, etc. One-time access can be taken for camera, microphone, location or any other facility necessary for the purpose of onboarding/ KYC requirements only, with the explicit consent of the borrower.

- The borrowers must be informed about the storage of customer data including the type of data that can be stored, the length of time for which data can be stored, restrictions on the use of data, data destruction protocol, standards for handling security breach, etc. The information must be provided on their website and the apps at all times.

- At the time of disbursing the loans using digital apps, a key Fact Statement (KFS) must be issued to the borrower before the execution of the contract in a standardized format for all digital lending products.

- The borrower must be informed about the all-inclusive cost of digital loans and should also be a part of the Key Fact Statement.

- The penal interest/charges levied, if any, on the borrowers shall be based on the outstanding amount of the loan. Further, the rate of such penal charges shall be disclosed upfront on an annualized basis to the borrower in the Key Fact Statement.

- Any fees charges etc. payable to lending service providers must be paid by the regulated entities and borrowers must not be charged for this.

- The Key fact statement should contain the details of the annual percentage rate, the recovery mechanism, details of grievance redressal officer designated specifically to deal with digital lending/FinTech-related matters and the cooling-off/ look-up period. The cooling-off/look-up period is the amount of time given to the borrower for exiting digital loans, in case a borrower decides not to continue with the loan.

- Any charges that are not mentioned in the Key Fact Statement are not chargeable to borrowers at any stage during the loan term.

- The information shall be sent to the borrowers on their verified email/SMS on the successful execution of loan contract/transaction. The information must be sent on the letterhead of the regulated entity (bank) and must contain a Key Fact statement, a summary of loan product, sanction letter, terms and conditions, account statements, privacy policies of the LSPs/DLAs with respect to borrowers data, etc.

- At the time of the sign-up/onboarding stage, information related to product features, loan limit and cost, etc., must be informed to the borrowers.

- The banks, and NBFCs must publish the list of their digital lending apps, and lending service providers, engaged by them on their websites.

- Details of nodal grievance redressal officer must be displayed on the websites of banks, NBFCs, lending service providers, digital lending apps and also on the key fact statement.

- Digital lending apps and websites must allow a borrower to lodge their complaint.

- If the complaint lodged by the borrower is not resolved within 30 days, then he/she can lodge a complaint on the Complaint Management System (CMS) portal under the Reserve Bank-Integrated Ombudsman Scheme (RB-IOS). For entities currently not covered under RB-IOS, a complaint may be lodged as per the grievance redressal mechanism prescribed by the Reserve Bank.

- The banks, NBFCs must capture the economic profile of the borrowers covering (age, occupation, income, etc.), before extending any loan over their own Digital

Lending Apps and/or through Lending Service Providers engaged by them, with a view to assessing the borrower's creditworthiness in an auditable way.

- There shall be no automatic increase in credit limit unless explicit consent of the borrower is taken on record for each such increase.

- During the cooling-off/look-up period, the borrower shall be given an explicit option to exit the digital loan by paying the principal and the proportionate APR without any penalty during this period. The cooling-off period shall be determined by the Board of the bank, NBFC. The period so determined shall not be less than three days for loans having tenor of seven days or more and one day for loans having tenor of less than seven days. For borrowers continuing with the loan even after look-up period, pre-payment shall continue to be allowed as per extant RBI guidelines.

- The borrower shall be provided with an option to give or deny consent for use of specific data, restrict disclosure to third parties, data retention, revoke consent already granted to collect personal data and if required, make the app delete/ forget the data.

- Explicit consent of the borrower shall be taken before sharing personal information with any third party, except for cases where such sharing is required as per statutory or regulatory requirements.

- No biometric data is stored/ collected in the systems associated with the Digital Lending Apps of regulated entities / their Lending Service Providers unless allowed under extant statutory guidelines.

- The banks and NBFCs shall ensure that any lending done through their Digital Lending Apps and/or Digital Lending Apps of Lending Service Providers is reported to Credit Information Companies (such as CIBIL) irrespective of its nature/ tenor.

- Any extension of structured digital lending products by banks, NBFC and/or Lending Service Providers engaged by them over a merchant platform involving short-term, unsecured/ secured credits or deferred payments, need to be reported to Credit Information Companies.

- According to the provisions of the Credit Information Companies' (CIC) Regulation Act, 2005, issued by RBI from time to time, registered entities shall ensure that any lending done through their DLAs and/or DLAs of LSPs is reported to CICs irrespective of their nature or tenor.

- The regulated entities shall ensure that all loan servicing, repayment, etc., shall be executed by the borrower directly in the regulated entities' bank account without any pass-through account/ pool account of any third party. The disbursements shall always be made into the bank account of the borrower except for disbursals covered exclusively under statutory or regulatory mandate (of RBI or of any other regulator), flow of money between regulated entities for co-lending transactions and disbursals for specific end use, provided the loan is disbursed directly into the bank account of the end-beneficiary. Regulated entities shall ensure that in no case, disbursal is made to a third-party account, including the accounts of Lending Service Providers and their Digital Lending Apps, except as provided for in these guidelines.

The guidelines issued are applicable to existing customers availing fresh loans and to new customers getting onboarded from the date of the circular dated September 2, 2022. However, in order to ensure a smooth transition, Regulated Entities are given time till November 30, 2022, to put in place adequate systems and processes to ensure that 'existing digital loans' (sanctioned as on the date of the circular) are also in compliance with the guidelines in both letter and spirit. The guidelines issued by the RBI cover the following regulated entities - All Commercial Banks, Primary (Urban) Co-operative Banks, State Co-operative Banks, District Central Co-operative Banks; and Non-Banking Financial Companies (including Housing Finance Companies)

4. The assessment made u/s 153A would only be made on the basis of seized material even though Section 153A does not say so specifically.

A fresh assessment cannot be made u/s 153A by The AO u/s 153A and incase an assessment has already taken place earlier, it cannot be interfered with arbitrarily otherwise than on the basis of incriminating evidence. This assessment cannot be arbitrary or made without any relevance or nexus with the seized material. The assessment u/s 153A thus is very specific and AO cannot go beyond it. The Apex Court in the case of PCIT vs. Bhadani Financiers Pvt. Ltd., 2021 SCC OnLine Del 4430 has held that where the assessment of the respondents had attained finality prior to the date of search and no incriminating documents or materials had been found and seized at the time of search, no addition could be made under Section 153A of the Act as the cases of the respondents were of non-abated assessment. The same was again relied on and held in the case of PCIT Vs ALCHEMIST CAPITAL LTD [2022-VIL-202-DEL-DT]

5. The delivery of a service via technological means does not make the service technical

“Make Available” factor is a major determining factor for deciding whether TDS needs to be deducted on Fees for Technical Service. The fee for the provision of a service will not be a technical fee, unless the special skill or knowledge is required when the service is provided to the customer. Thus, It is crucial to determine at what point a special skill or knowledge is used. The same has been held in many cases but still the cases of withholding taxes keep coming up and argued successfully on the same grounds.

Leadership/soft skills training provided by the assessee does not result in making available any technical knowledge, experience or skill, to the employees of the counterparty, which could enable them to use it later on. Hence not TDS needs to be deducted thereon. On the same lines The ITAT held in the case of M/s INFOSYS BPO LIMITED Vs THE DEPUTY COMMISSIONER OF INCOME TAX [2022-VIL-1100-ITAT-BLR].

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