Direct Tax Vista

Your weekly Direct Tax recap

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1. PMLA further tightens the noose covering further activities carried out on behalf of business or profession

Vide Notification S.O. 2135(E) dated 08/05/23, The Ministry of Finance has notified an amendment to Section 2(1)(sa) of the Prevention of Money Laundering Act, 2002 (PMLA). The following activities, when carried out on behalf of or for another person in the course of business, will be regarded as 'activities' for the purpose of designated business or profession'. The said activities and their impact are analysed as under –

(a) **Acting as a formation agent of companies and LLPs** - All individuals involved in the process of incorporating and forming a company or LLP will now be subject to the provisions of PMLA. Hence professionals who are helping in formation of companies should be careful and do their due diligence as regards for what purpose and for which people they are getting the company/LLP formed. However, where mere 'filing' is done by CA/CMA/Advocate/ CS, then it would not be covered.

(b) **Acting as (or arranging for another person to act as) a director or secretary of a company, a partner of a firm or a similar position in relation to other companies and LLPs** – Hence persons so designated or those who have arranged for others to be so designated should be conscious of their obligations for maintaining records of financial transactions, identifying and verifying the books, etc.

(c) **Providing a registered office, business address or accommodation, correspondence or administrative address for a company or an LLP or a trust** – Many a times the office of professionals like CA/CMA/CS/Advocate

is used as registered office. Also these professionals are designated Authorised representatives of the organisation. These persons would now be responsible in case of any covered activities carried out by the registered entity. However, any activity carried out as part of an agreement of lease, sub-lease, tenancy or any other agreement or arrangement for the use of land or building or any space and where the consideration is subject to deduction of income tax u/s 194I would be exempt from the purview of PMLA. Hence mere renting of office space would not be covered in this respect.

(d) **Acting as (or arranging for another person to act as) a trustee of an express trust or performing the equivalent function for another type of trust** – Trustees would thus be liable for the activities of their trusts.

(e) **Acting as (or arranging for another person to act as) a nominee shareholder for another person** - Companies must identify the person who actually owns or controls the shares, even if they are not listed as registered shareholders.

(f) Employee carrying out an activity on behalf of his employer in the course of or in relation to his employment would not be covered.

These amendments in PMLA very clearly indicate “fasten your seat belts” for turbulence ahead.

2. Complete transition from LIBOR from 1st July 2023 - Opportunity for consulting firms

The use of LIBOR was called into question following the global financial crisis. The RBI had issued an advisory on 'Roadmap for LIBOR Transition' in July 2021 wherein banks/FIs, inter-alia, were encouraged to undertake transactions using widely accepted Alternative Reference Rate (ARR), as soon as practicable and in any case by Dec’21 and insert robust fallback clauses in relevant LIBOR linked financial contracts. Now it has issued an advisory RBI/2023-24/30 - CO.FMRD.DIRD.01 / 14.02.001/2023-24 dated 12th May 2023 asking to banks and other RBI-regulated

entities, emphasising the need to take steps to ensure a complete transition from the London Interbank Offered Rate from July 1, 2023.

LIBOR isn't sustainable because of a lack of transactions providing data. Libor became a byword for corruption after traders were caught manipulating the benchmark, leading to about $9 billion in fines and the conviction of several bankers. Regulators globally have asked firms to move away from Libor to other alternate, risk-free rates (RFRs)

3. Subscription Fees for accessing standard online market research database is not Royalty

There are many online databases which set out the details of the modules that are required by the Customers and permitted to be accessed with applicable fees. For making these databases data is collected from relevant sources and in various forms and then compiled/extrapolated and such information is provided to the Customers in the form of Reports. Subscription fees are charged to the customers for this service. Now the question is whether this Subscription Fees for standard online market research database is to be taxed as Royalty under Section 9(1)(vi) of the Income-tax Act, 1961 (the Act) and under Article 12 of tax treaties? To answer this question, one has to look into various issues as follows –

1. Is there a use of or right to use any copyright of literary, artistic or scientific work or any patent trade mark or for information of commercial experience.
2. Are the reports provided Customised or general from publicly accessible data.
3. Is the server in India or outside India.

If a service provider collects information available in public domain and all information are maintained on a central computer which is not in India and which is accessible to each constituent who pays subscription fees, then such subscription fees cannot be treated as royalty or even fee for technical services.

On the same issue, the decision of The High Court was upheld in the case of M/s IQVIA AG (FOREIGN COMPANY) Vs DEPUTY COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION) -2(2)(2) [2023-VIL-598-ITAT-MUM]

4. Tax Limits for Dept. to file appeals before ITAT/High Court/ Supreme Court

As per CBDT's Circular No.17/2019, The department cannot file appeals before the ITAT/High Court/ Supreme Court incase the tax impact (except interest and penalty) of disputed issues exceed the following limits –

S. No.	Appeals/SLPs in income-tax matters	Monetary Limit (Rs.)
1	Before Appellate Tribunal	50,00,000
2	Before High Court	1,00,00,000
3	Before Supreme Court	2,00,00,000

Now the question is, what lies incase where separate order is passed by higher appellate authorities for each assessment year vis-à-vis where composite order for more than one assessment years is passed. In such cases, The AO shall calculate the tax effect separately for every assessment year in respect of the disputed issues in the case of every assessee. If, in the case of an assessee, the disputed issues arise in more than one assessment year, appeal can be filed in respect of such assessment year or years in which the tax effect in respect of the disputed issues exceeds the monetary limit specified as above. No appeal shall be filed in respect of an assessment year or years in which the tax effect is less than the monetary' limit specified above.

Even in the case of composite order of any High Court or appellate authority which involves more than one assessment year and common issues in more than one assessment year, no appeal shall be filed in respect of an assessment year or years in which the tax effect is less than the monetary limit specified in the above table. In case where a composite order/ judgement involves more than one assessee„ each assessee shall be dealt with separately.

Let's understand by means of an examples –

1. Say incase of an assessee, an issue regarding disallowance of 'provision for gratuity' arises for 3 AY's 2019-20, 2020-21 and 2021-22 in separate orders as follows -

AY	Amt. of demand
2019-20	Rs. 60 Lakhs
2020-21	Rs.40 Lakhs
2021-22	Rs. 50 Lakhs

The department can file an appeal before the ITAT for AY 2019-20 only. However, even for AY 2020-21 and 2021-22 it should not be construed that the Department has accepted the earlier order. The Commissioners shall specifically record that "*even though the decision is not acceptable, appeal is not being filed only on the consideration that the tax effect is less than the monetary limit specified in this instruction*".

2. Incase for a matter for 3 AY's 2014-15, 2015-16 and 2016-17, w.r.t. an issue regarding disallowance of provision for gratuity for Rs. 60 Lakhs, Rs. 50 Lakhs and Rs. 40 Lakhs respectively, when the CIT(A) passes say a composite Order, even then the department can file an appeal before the ITAT for AY 2014-15 only.

3. Incase the dispute in AY 2019-20 is regarding the applicability of Interest and penalty in a matter where tax has been delayed paid. The amount of the demand of Interest is Rs.55 Lakhs and penalty is Rs.51 Lakhs, then also the department can file an appeal before the ITAT for interest as well as penalty as both the disputed issues are above Rs.50 lakhs threshold and would be regarded as 'tax impact'.

3. Incase Constitutional Validity of say Section 148 is challenged – In such case the Circular would not apply as matters where the Constitutional validity of the provisions of an Act or Rule are under challenge are excluded from the scope of the circular.

4. The other cases which are excluded from the scope of the circular are as follows–

(A) Where Board's order, Notification, Instruction or Circular has been held to be illegal or ultra vires,

(B) Where Revenue Audit objection in the case has been accepted by the Department.

(C) Where the tax effect is not quantifiable or not involved, such as the case of registration of trusts or institutions under section 12 A of the IT Act, 1961.

5. Incase of appeal made by the department before August 2019, then also this circular would apply to the effect that incase the thresholds are breached the appeals would have to be withdrawn. The concession extended by the CBDT not only applies to the appeals to be filed in future but it is also equally applicable to the appeals pending for disposal as on the date of issuance of the Circular. The circular dated 8th August 2019 is not a standalone circular. It is to be read in conjunction with the CBDT circular no 3 of 2018 (and subsequent amendment thereto), and all it does is to replace paragraph nos. 3 and 5 of the said circular. The same was decided in the case of THE ITO, WARD-3(1), LUDHIANA Vs M/s A. NAIRSONS INDUSTRIES (INDIA) [2023-VIL-599-ITAT-CHD].

5. A difference of opinion cannot lead to invocation of penalty u/s 271(1)(c)

The invocation of Sec 271(1)(c) of The Income Tax Act 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

2(a) or (b) above could be invoked incase the following conditions are satisfied –

1. Details supplied should be inaccurate, not exact or correct, not according to truth or erroneous.
2. Condition of *Mens Rea* should be satisfied.

The Hon'ble Supreme Court in case of CIT vs. Reliance Petroproducts Pvt. Ltd. (2010) 322 ITR 158 held that the disallowance of claim which is not allowable as per the provisions of law by itself will not amount to furnishing of inaccurate particulars of income when the assesse has disclosed and furnished all the relevant facts and details.

Incase the correctness of the expenditure incurred by the assesse under the heads is not in doubt, in no way can it be considered as concealment of income, merely because the classification of the expenditure was in doubt. A difference of opinion cannot lead to invocation of penalty u/s 271(1)(c), was held in the case of TURNING POINT ESTATES PVT. LTD Vs ACIT 5(1) INDORE [2023-VIL-601-ITAT-IND]

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