Direct Tax Vista

Your weekly Direct Tax recap

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By Vivek Jalan, Partner, Tax Connect Advisory Services LLP

1. CBDT redefines 'intra-group loans' and amends safe harbour norms for MNC group transactions

The CBDT vide *Notification No. 104/2023 dated December 19, 2023*, has issued the Income-tax (Twenty-Ninth Amendment) Rules, 2023, amending Rules 10TA and 10TD of the Income Tax Rules, 1962 (**"the IT Rules"**). The amendments aim to redefine intra-group loans and specify conditions under which they fall within the Safe Harbour provisions. These changes are set to come into effect from April 1, 2024.

Rule 10TA of the Income Tax Rules, 1962 outlines several definitions pertaining to Safe Harbour Rules, while additional provisions related to these rules are specified in rules ranging from Rule 10TB to Rule 10TG. The CBDT has notified the Income-tax (Twenty-Ninth Amendment) Rules, 2023, to amend Rules 10TA and 10TD. Rules have been amended to revise the definition of intra-group loans and circumstances in which they are treated as Safe Harbour. The intra-group loan definition has been revised to include loans extended to "Associate Enterprise" rather than wholly owned subsidiaries. Further, the condition for the loans to be advanced must be sourced in Indian Rupees has been omitted. The updated definition of intra-group loan is now stated as follows:

"Intra-group loan" means a loan advanced to an associated enterprise being a non-resident, where the loan—

> **(i)** is not advanced by an enterprise, being a financial company including a bank or a financial institution or an enterprise engaged in lending or borrowing in the normal course of business, and

(ii) does not include credit line or any other loan facility which has no fixed term for repayment;

Rule 10TD has been amended to replace the conditions for safe harbor in the event of the advancement of intra-group loans denominated in a foreign currency. The reference to “CRISIL” credit rating has been omitted from Rule 10TD. Thus, the credit rating of any other entities can be used while determining Safe Harbour.

These changes Provide greater clarity and certainty for taxpayers dealing with intra-group loans. It reduce potential disputes with tax authorities regarding transfer pricing of such loans. It also Promote ease of doing business for multinational companies operating in India.

For taxpayers, the existing loans may need to be reviewed and restructured to comply with the new definition and safe harbour conditions. With the widened definitions of intra-group loans, the tax department may see increasing number of taxpayers opting for safe harbour provisions who have foreign currency loan transactions with their group entities.

2. RBI Tightens Norms for Banks, NBFCs Investing in AIFs

In a move aimed at curbing evergreening stressed loans, the RBI has directed banks, NBFCs and other lenders not to invest in any scheme of Alternative Investment Funds (AIFs) which has downstream investments in a debtor company. Evergreening of loans is a process whereby a lender tries to revive a loan that is on the verge of default or in default by extending more loans to the same borrower. An AIF means any fund established or incorporated in India which is a privately pooled investment vehicle, and which collects funds from sophisticated investors, whether Indian or foreign, for investing it in accordance with a defined investment policy for the benefit of its investors. Regulated entities (REs) make investments in units of AIFs as part of their regular investment operations.

RBI has been concerned about round-tripping of potentially bad loans, rise of unsecured lending and heavy linkages between AIFs and regulated entities. It has always been concerned with hidden NPAs and evergreening as a principle.

The RBI has specified a 30-day deadline for banks/NBFCs to liquidate investments in an AIF if it downstream invests in a debtor company.

3. RBI CIMS Project Implementation – Discontinuation of Submission in Legacy XBRL

The RBI, through Circular No. 09/10/11/12 dated December, 2023, announced a significant shift in the reporting mechanism for Rupee Drawing Arrangement, Trade Credit for imports into India, Liberalised Remittance Scheme (LRS) for Resident Individuals & gold imported by the nominated/ non-nominated banks/ agencies/ EOUs/ SEZs in Gem & Jewellery sector. With effect from December, 2023, submission of the statements through the XBRL site will be discontinued and shifted to the Centralized Information Management System (CIMS), which is Bank's new data warehouse. AD Category – I banks have already been onboarded on CIMS portal and are currently submitting the return on XBRL site as well as CIMS portal. The statements have been assigned return codes – 'R129/R131/R132/R133/etc' on CIMS portal.

Accordingly, all AD Category – I banks and others shall upload the above-mentioned statement on CIMS portal (URL: https://sankalan.rbi.org.in) from the quarter ending December 2023. In case no data is to be furnished, AD Category – I banks shall upload a 'NIL' report.

The transition to CIMS reflects a move by RBI to leverage advanced data management systems and streamlining processes for AD Category-I banks.

4. RBI Tweaks Foreign Exchange Management (Manner of Receipt and Payment) Regulations and notifies New Regulations

The RBI has introduced Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2023. As per the newly introduced norms, the receipt and

payment between a person resident in India and a person resident outside India shall, be made through an Authorised Bank or Authorised Person through Trade transactions, and Transactions other than trade transactions. These new regulations issued by the RBI aim to streamline and regulate the manner of receipt and payment in foreign exchange transactions, ensuring compliance with FEMA. Market participants, businesses, and individuals engaged in cross-border transactions should carefully review and adhere to these updated guidelines to avoid any non-compliance issues. Broadly the changes are outlined hereinunder -

Manner of Receipt and Payment: Primarily, no resident in India can make or receive payments from a non-resident without adhering to the Act's guidelines, unless the Reserve Bank of India (RBI) provides special permission. The regulation further provides that all the receipts and payments between a person resident in India and a person resident outside India shall be made through an Authorised Bank or Authorised Person. Regulation 3 of the Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2023, has bifurcated the transactions for receipt and payment into Trade Transactions & Transactions other than Trade Transactions.

Transactions between residents and non-residents must typically occur through an Authorised Bank or Authorised Person. The regulations specify different mechanisms for trade and non-trade transactions:

Trade Transactions: These involve payments for exports or imports. For countries like Nepal and Bhutan, transactions should be in Indian Rupees, with exceptions in specific cases. For member countries of the Asian Clearing Union (ACU) other than Nepal and Bhutan, the ACU mechanism or directions from the RBI apply. For countries outside the ACU, payments can be in Indian Rupees or any foreign currency.

Non-Trade Transactions: These include other types of cross-border financial exchanges. Transactions with Nepal and Bhutan should be in Indian Rupees, with provisions for foreign currency in certain cases. For other countries, transactions can be in Indian Rupees or any foreign currency.

Special Provisions for Current Account Transactions: For any current account transaction not involving trade, occurring between a resident and a non-resident visiting India, the payment must be in Indian Rupees. Furthermore, payments or receipts under these regulations can also be settled by debit or credit to a bank account, as per the rules under the Act.

5. In cases of Non-residents - positive evidence of accrual/receipt in India is to be brought on record by Department for bringing them to tax in India

Taxation for Non-Residents (NRs) in simple words, is that an NR is liable for tax in India only on those income which has Indian Connection. Incase an NR has deposited money in a foreign bank account out of the receipts from a foreign company, and having no relation to any source in India, the amount could not be taxed in India. Unless it is established that the income accrues or arises or it is deemed to accrue or arise in India or is received or deemed to be received in India, it will not be taxable in India. In other words, positive evidence of accrual/receipt in India is required to be brought on record by the Department for bringing such items of income to tax in India in the cases of non-residents. When the assessee is a non-resident and there is no finding that any income has accrued or received in India, in that case, no addition can be made if the assessee is a non-resident. Having money in foreign country cannot be called upon to pay income tax on that money in India unless it satisfies the tests of taxability of non-resident under the provisions of the Income Tax Act in India. The same was held in the case of DCIT CENTRAL CIRCLE-3, VADODARA Vs SHRI VIMAL KANUBHAI PATEL [2023-VIL-1692-ITAT-AHM].

6. Suspicion cannot take the place of the evidence... Merely an unusual activity does not give an authority to the revenue to make the addition

The Hon'ble Supreme Court in the case of Roshan Di Hatti Vs. CIT [1992] 2 SCC 378 has held that if the assessee fails to discharge its onus by producing cogent evidence and explanation, the AO would be justified in making additions to the income of the assessee. However, it is also the settled law, that a suspicion cannot take the place of the evidence as held by Hon’ble Supreme Court in the case of CIT vs. Daulat Ram Rawatmull reported in 53 ITR 574. Hence, during the demonetization

period, the activity of withdrawing the cash, keeping the same as it is and redeposit the same in the bank after considerable period is very unusual practice but there is no prohibition under any of the law for the time being in force for doing such activity. Merely an unusual activity of the assessee does not give an authority to the revenue to make the addition to the total income of the assessee.

Incase the assessee discharges the onus imposed under the provisions of section 68/ 69 of the Income Tax Act by furnishing the necessary details on the reasons why cash was withdrawn and then again redeposited, the onus would thereafter shift upon the revenue to disprove the contention of the assessee based on the tangible materials. However incase the department cannot provide any evidence suggesting that the amount of cash deposit was not out of the cash withdrawal from the bank and also there is no information that the assessee has spent the cash withdrawal somewhere else towards the capital or revenue expenses, no addition can be made, as was held in the case of RADHE DEVELOPERS (INDIA) LIMITED Vs A.C.I.T, CIRCLE-3(1)(2), AHMEDABAD [2023-VIL-1689-ITAT-AHM].

7. Global Minimum Tax: OECD/G20 Inclusive Framework releases new information on key aspects of the Two-Pillar Solution

On 18 December 2023, the OECD/G20 Inclusive Framework released a third tranche of Administrative Guidance on the Pillar Two Global Anti-Base Erosion Rules, addressing various technical issues and providing new rules regarding the application of the Transitional Country-by-Country Reporting Safe Harbour. On the same date, the Inclusive Framework released an updated timeline for Pillar One, reflecting a commitment to finalizing the Multilateral Convention for Amount A by the end of March 2024 with the aim of having a signing ceremony by the end of June 2024.

On Pillar Two, the Inclusive Framework released Administrative Guidance on the Global Anti-Base Erosion (GloBE) Model Rules, which provides additional information a series of technical issues under the GloBE Rules. On Pillar One, the Inclusive Framework released a statement updating the timeline for the multilateral convention (MLC) on Amount A, which expresses the member jurisdictions'

commitment to finalize the MLC text by March 2024. The December Guidance covers:

1. Purchase price accounting adjustments in Qualified Financial Statements
2. Transitional Country-by-Country Reporting (CbCR) Safe Harbour
3. Application of the GloBE Rules
4. Allocation of Blended Controlled Foreign Company (CFC) Taxes
5. Transitional filing deadlines for Multinational Entity (MNE) Groups with short Reporting Fiscal Years
6. Simplified Calculations Safe Harbour for Non-Material Constituent Entities

The December Guidance will be incorporated into a revised version of the Commentary that will be released in 2024 and will replace the original version of the Commentary released in March 2022.

Companies should monitor ongoing developments with respect to both Pillars in the global negotiations and in the jurisdictions where they operate.

(*The author is a CA, LL.M & LL.B and Partner at Tax Connect Advisory Services LLP. The views expressed are personal. The author is The Lead - Indirect Tax Core Group of CII-ER and The Chairman of The Fiscal Affairs Committee of The Bengal Chamber of Commerce. He has Authored more than 15 books on varied aspects of Direct and Indirect Taxation. E-mail - vivek.jalan@taxconnect.co.in*)