Direct Tax Vista

Your weekly Direct Tax recap

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By Vivek Jalan, Partner, Tax Connect Advisory Services LLP

E-Commerce transactions under Ministry of Finance's close scrutiny as CBDT further Clarifies w.r.t. TDS u/s 194O in Multiple ECO Model; CBIC also notifies new reporting for transactions with ECO

The CBDT vide Circular No. 20/2023 dated December 28, 2023, has issued guidelines addressing challenges and providing clarity on the application of section 194-O of the Income-tax Act, 1961, particularly in a multiple e-commerce operator model such as the Open Network for Digital Commerce (ONDC). According to Section 194O of income tax act, an E-commerce operator is responsible for deducting TDS at the rate of 1% of the gross amount credited to the seller's account or at the time of making payment, whichever is earlier. This applies to any transaction the e-commerce platform facilitates involving goods and services which includes professional and technical services. The TDS must be deducted at the time of crediting the seller's account, irrespective of the mode of payment. Section 194O under the Financial Act 2020 imposes taxes on the e-commerce platform, which was not done before.

Further to give effect to the decision of The GST Council meeting, the GSTN added two new tables in GSTR-1 starting from January 2024 onwards to disclose transactions with ECO. Hence the buyers and sellers will disclose the transactions with ECO and the same would be cross-reconciled with the transactions reported by the ECO.

Let's discuss both these one by one. First, CBDT's circular provides the following clarifications as follows –

I. Who should deduct the TDS in Multiple ECO Model -

The tax shall be deducted on the "gross amount" of sales of goods or services and shall be deducted by the Seller-side ECO at the time of credit to the account of a seller (being e-commerce participant) or at the time of payment or deemed payment thereof to such seller by any mode, whichever is earlier.

Seller ECO would file the requisite TDS return in Form 26Q and issue certificate to seller under Form 16A.

Hence for buyer side ECO, process needs to be put in place to track as to –

A. Is the transaction an ECO-to-ECO transaction. Keep evidences in this regard.
B. The very fact that the buyer side ECO does not need to deduct TDS and to distinguish such transaction from others and report accordingly.
C. Due to big data analysis by the dept., one needs to note that multiple queries will follow once the GSTR-1 and Form 26AS are matched, as to why such TCS was not deducted

II. Incase Seller is also an ECO – The tax shall be deducted on the "gross amount" of sale of goods or provision of services and shall be deducted by **the ECO making payment to the ECO-Seller** at the time of credit to the account of a seller or at the time of the payment or the deemed payment thereof to such seller by any mode, whichever is earlier. Such **ECO making payment to the ECO-Seller** would file the requisite TDS return in Form 26Q and issue certificate to the seller under Form 16A.

III. TDS on Various Fees / etc charged in the chain:
Example –
A. Buyer purchases goods worth Rs 100 from Seller and opts for home delivery.
B. The Seller charges the Buyer an additional –

a. Rs 5 as packing fees
b. Rs 10 as shipping fees

c. Rs 3 as a convenience charge (to recoup the fees charged by the seller-side ECO, which includes Rs 1 charged by the Buyer-side ECO and Rs 2 charged by the Seller-side ECO itself).
d. So the seller will issue an invoice for Rs 118 (i.e. Rs 100 + 5 + 10 + 2 + 1) to the buyer.

Solution – TDS shall be deducted by the seller-side ECO on the gross amount of sales of goods (Rs 118) or provision of services at the time of payment (including deemed payment) or credit. Seller-side ECO would file the requisite TDS return in Form 26Q and issue certificate to the seller under Form 16A.

No Other TDS (Eg. u/s 194H) shall be applicable. However, incase TDS u/s 194S (VDA) is applicable then, to that extent 194O shall not prevail.

Hence, when these charges are disclosed in the expense side by the buyer, he has to keep a reconciliation ready that TDS u/s 194O was infact deducted by the ECO and hence no other TDS was applicable and not invoked by it.

IV. TDS u/s 194O on GST, etc

U/s 194-O of the Act, when tax is deducted at the time of credit of amount in the account of seller and the component of GST/various state levies and taxes comprised in the amount payable to the seller is indicated separately, **tax shall be deducted under section 194-O of the Act on the amount credited without including such GST/various state levies and taxes.**

However, if the tax is deducted on payment basis because the payment is earlier than the credit, the tax would be deducted on the whole amount as it is not possible to identify that payment with GST/various state levies and taxes component of the amount to be invoiced in future.

TDS on GST paid in cases of advance would be required to be reconciled as this would again create a mismatch between the income disclosed and the

TDS deducted. The GST Returns data also needs to be reconciled with the Form 26AS and TDS returns.

V. Impact of Purchase Return –

TDS u/s 194-O is applicable at the time of payment or credit, whichever is earlier. Thus, before purchase return happens, the tax must have already been deducted under section 194-O of the Act on that purchase. If that is the case and against this purchase-return the money is refunded then this tax deducted, if any, may be adjusted against the next transaction by the deductor with the same deductee in the same financial year.

Further, the tax deducted and deposited will be allowed as credit to the seller. Further, no adjustment is required if the purchase-return is replaced by the goods, since in that case the transaction on which tax was deducted under section 194- O of the Act has been completed with goods replaced.

VI. Discounts:

Seller Discount explained: if the label-price of a product is Rs 100, and the seller offers a discount of Rs 10, Rs 90 will be receivable from the buyer. In this case, the seller will invoice the buyer for Rs 90, and hence the TDS will be calculated on Rs 90.

Buyer ECO or Seller ECO Discount explained: if the price quoted by the seller is Rs 100, and the buyer ECO gives a discount of Rs 10, Rs 90 (i.e. 100 - 10) will be collected from the buyer and remitted to the seller, and the buyer ECO will pay the remaining Rs 10 to the seller via the seller ECO. The invoice on the buyer will be raised for Rs 100 and tax will therefore be deducted by the seller-side ECO on Rs 100, which is the gross amount of sales.

New Disclosure in GSTR -1

Now lets understand the changes in GSTR-1 from Jan 2024 -

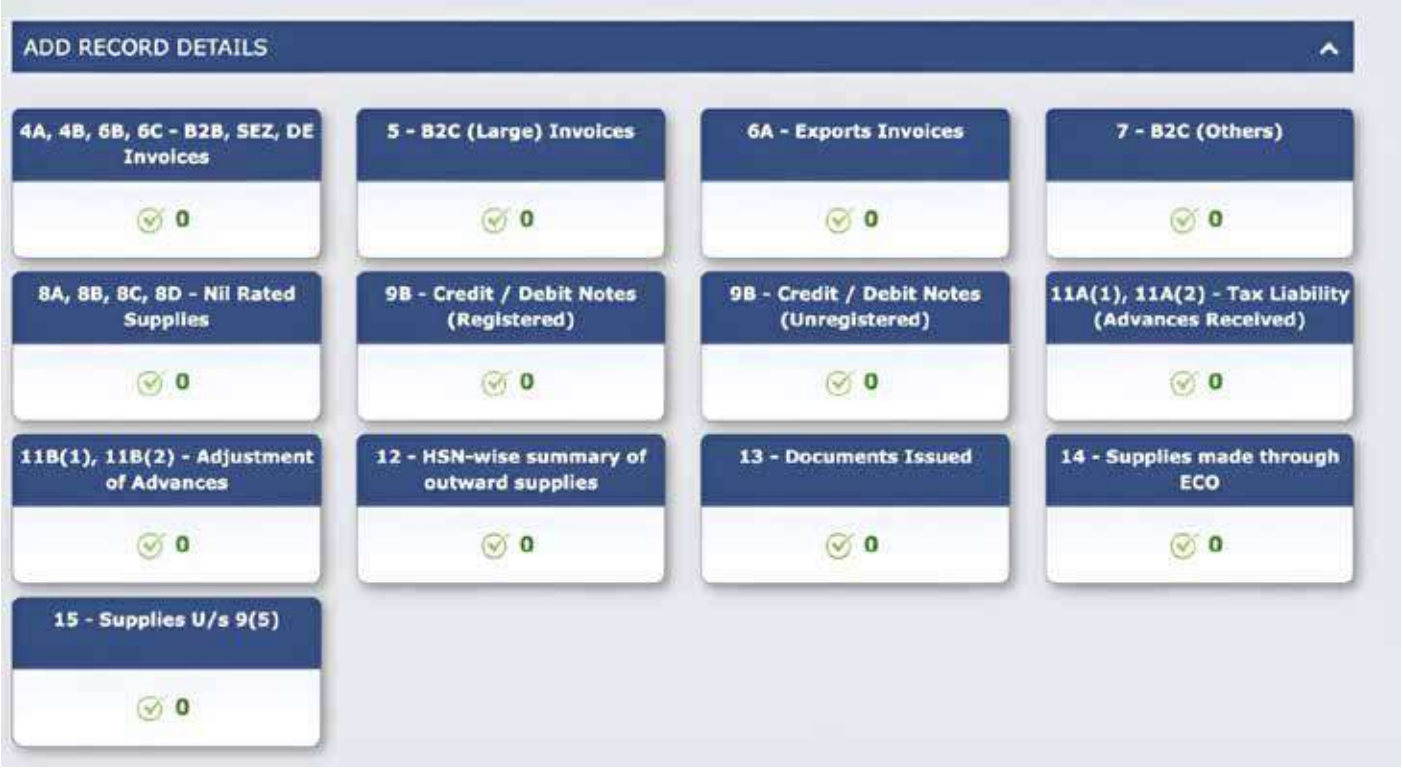
Table 14 – Supplies Made Through E-Commerce Operators (In this table, you can add details of taxable outward supplies made through e-commerce operator.)

Table 15 – Supplies under Section 9(5) of the CGST Act (In this table, you can add details of taxable outward supplies on which the e-commerce operator is liable to pay tax under Section 9(5) of the CGST Act.)

In GSTR – 3B, Table 3.1.1 addresses supplies notified under Section 9(5) of the CGST Act, 2017. This table requires suppliers and e-commerce operators (ECOs) to separately report supplies on which the e-commerce operator is liable to pay tax.

Previously, GSTR-1 did not have specific tables for reporting these transactions separately. As a result, Table 3.1.1 in GSTR-3B was not auto-filled due to the absence of corresponding reporting sections.

Starting from January 2024, GSTR-1 has introduced Tables 14 and 15 specifically designed for reporting supplies on which e-commerce operators are liable to pay tax. This modification ensures accurate auto-filling of Table 3.1.1 in GSTR-3B for both suppliers and e-commerce operators.



2. Balance Sheets should be prepared year-on-year to substantiate cash utilization

Section 69A of the Income Tax Act, 1961, is a provision extensively employed by the tax department when issuing notices to taxpayers for cash deposited during demonetization. It empowers the tax authorities to treat unexplained cash deposits as income that has not been disclosed or accounted for by the taxpayer. Section 69A of Income Tax Act provides as follows –

69A. *Where in any financial year the assessee is found to be the owner of any money, bullion, jewellery or other valuable article and such money, bullion, jewellery or valuable article is not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and source of acquisition of the money, bullion, jewellery or other valuable article, or the explanation offered by him is not, in the opinion of the [2][Assessing] Officer, satisfactory, the money and the value of the bullion, jewellery or other valuable article may be deemed to be the income of the assessee for such financial year.]*

This provision thus:

1. Allows the tax authorities to initiate an inquiry into any substantial unexplained cash deposits and subsequently assess them as unexplained income.
2. Casts onus on the assessee to substantiate the legitimacy of the deposited cash through proper documentation and evidence.
3. Casts onus on the assessee to render proper explanation where the assessee does not maintain books of accounts.

In the case of NANAKCHAND AGRAWAL Vs THE INCOME TAX OFFICER WARD DHAMTARI (C.G.) [2024-VIL-03-ITAT-RPR], where the assessee had contested that the cash deposit during demonetization had been made out of the loans/advances made in earlier years, the same was discarded due to the fact that proper cash flow

could not be provided. Hence, it is always suggested to all taxpayers that the balance sheets should always be maintained year on year so that such issues can be handled during assessments. Availability of cash withdrawals with the assessee cannot be summarily discarded merely on account of lapse of a substantial period unless utilization of the said amount during the intervening period is proved.

3. Functional Analysis is important to carve out comparable in Transfer Pricing Cases

Functional analysis is used for transfer pricing purposes. It analyzes the functions performed (taking into account assets used and risks assumed) by associated enterprises in a transaction. Vide functional analysis the business story of an Multi National Enterprise (MNE) can be narrated one transaction at a time. When delineating a transaction, one may find that one entity performs a particular function, but that the risk in the transaction is borne by another entity. One entity may carry legal risk while another carries financial risk. The functional analysis will highlight these nuances, identify who is benefiting from what, and determine the appropriate compensation. These puzzle pieces should first be put together before going into Transfer Pricing study. Hence such comparable cannot be justified. It was thus held in the case of ACIT CIRCLE – 21(1) NEW DELHI Vs RESERVATION DATE MAINTENANCE INDIA (PVT.) LTD [2024-VIL-07-ITAT-DEL] that–

A. An entity which develops its own software and rendered medical transcription services is different from an entity which is providing BPO services.
B. Activities of a KPO providing specialized services is different in nature of routine BPO services
C. Again, a company which develops a software such as Transport Management Software is also dissimilar to from a pure BPO Company.

4. Mechanical approval u/s 153D of Income Tax Act may lead to quashing of Orders

Section 153D of The Income Tax Act is not merely a procedural step but a substantive legal requirement, as underscored by the Central Board of Direct Taxes (CBDT) in Circular No. 3 of 2008, dated 12.3.2008. Granting of approvals without

application of mind may lead to quashing of the assessment orders themselves as held in the case of THE DY. C.I.T, NEW DELHI Vs NEETU NAYYAR [2024-VIL-14-ITAT-DEL]. Section 153D reads as under –

> ***Prior approval necessary for assessment in cases of search or requisition.***
>
> ***153D.*** *No order of assessment or reassessment shall be passed by an Assessing Officer below the rank of Joint Commissioner in respect of each assessment year referred to in clause (b) of 2[sub-section (1) of section 153A] or the assessment year referred to in clause (b) of sub-section (1) of section 153B, except with the prior approval of the Joint Commissioner.]…*

The aim of 153D is to prevent arbitrary or biased decisions by introducing a layer of accountability and oversight in the assessment process. Prior to the insertion of Sec. 153D of the Act, there was no provision for taking approval in cases of assessment and reassessment in cases where search has been conducted. Thus, the legislature wanted the assessments/ reassessments of search and seizure cases should be made with the prior approval of superior authorities which also means that the superior authorities should apply their minds on the material on the basis of which the officer is making the assessment and after due application of mind and on the basis of seized materials, the superior authorities have to approve the assessment order. The obligations of the approval of the Approving Authority serves two purposes:

(i) He has to apply his mind to ensure the interest of the revenue against any omission or negligence by the Assessing Officer in taxing right income in the hands of right person and in right assessment year.

(ii) Superior authority is also responsible and duty-bound to do justice with the taxpayer by granting protection against arbitrary or creating baseless tax liability on the assessee.

Supreme court has also upheld the decision of the High Court of Orissa's decision in "ACIT v. Serajuddin & Co." providing a profound insight into the interpretation and implications of this section.

If an approval has been granted by the Approving Authority in a mechanical manner without application of mind then the very purpose of obtaining approval under Section 153D of the Act and mandate of the enactment by the legislature will be defeated.

For granting approval under Section 153D of the Act, the Approving Authority shall have to apply independent mind to the material on record for "each assessment year" in respect of "each assessee" separately. The words 'each assessment year' used in Section 153D and 153A have been considered to hold that effective and proper meaning has to be given so that underlying legislative intent as per scheme of assessment of Section 153A to 153D is fulfilled.

The "approval" as contemplated under 153D of the Act, requires the approving authority, i.e. Joint Commissioner to verify the issues raised by the Assessing Officer in the draft assessment order and apply his mind to ascertain as to whether the required procedure has been followed by the Assessing Officer or not in framing the assessment.

The approval, thus, cannot be a mere formality and, in any case, cannot be a mechanical exercise of power.

5. Rejection of books summarily not acceptable, AO has to make a case

Consider a case where net profits have declined due to the following reasons –

A. The AO found that the appellant has shown steady decline in net profit rate of 0.51% for AY 2012-13, 4.87% for AY 2011-12 and 6.24% for AY 2010-11.
B. The AO stated that there is substantial increase in repairs and maintenance of machinery, factory expenses, legal and professional expenses, etc.

C. The AO stated that of the bills and vouchers of the expense viz. communication, travelling and conveyance, printing and stationery, postage and courier, office expenses, vehicle running and hiring expenses, legal and professional, freight and forwarding, sales discount, business promotion, and other selling expenses are not properly vouched and not fully verifiable.
D. Expenses have also been incurred on cash basis which are also not verifiable.
E. Cash vouchers were also made which do not have any signature or thump impression of the recipients.

Noting these issues, he rejected the explanation of the appellant and also the books of accounts and estimated the net profit for the year at the average rate of 3.87%.

Now lets consider what the AO did not do –

A. AO has not done any analysis and summarily rejected the basic argument of the appellant AO that net profits had declined due to huge forex losses and finance charges.
B. The AO has not questioned the correctness of these expenses or loss
C. The AO has not considered bringing on record any specific instance of why the books of accounts are incorrect and incomplete. On the contrary he has made some general comments.
D. AO has not built up a case on the fact as to why cash expenditure has to be disallowed.
E. He had not even considered that the GP Ratio had actually increased.

Hence, if an AO reject audited books of accounts, he has to give cogent reasons and build up a case. Summarily, he cannot reject books of accounts as was also held in the case of ASST. COMMISSIONER OF INCOME-TAX, CENTRAL CIRCLE-3, VADODARA Vs M/s JEWEL CONSUMER CARE PRIVATE LIMITED [2024-VIL-11-ITAT-AHM]

(*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)