Direct Tax Vista

Your weekly Direct Tax recap

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By Vivek Jalan, Partner, Tax Connect Advisory Services LLP

1. TDS Deductors may witness notices on deduction, if the counter-party disagrees

Advance income tax collection through TDS/TCS mechanism has been a top target of the Government, alongwith tracking of the flow of income on goods or services. Over the years we have witnessed the TDS/TCS mechanism getting more wider and stringent. Earlier in this FY, the Income Tax Department has set a target of 50 cases per Assessing officer to be picked up for survey/online TDS verification. It has prescribed 16 parameters on which these cases could be picked up. These parameters include negative growth in TDS payment against healthy growth in Advance tax payment, cases of sick units or units with negative operating margins, cases showing a negative trend in payment etc. However, it is a fact that mere deduction of TDS would not allow a deductor to take the deduction of expense incase the deductee does not report the corresponding income.

Taxpayers are aware that Information on payments received and tax deducted on such payments under various provisions of Income Tax Act is being displayed in the AIS of the Taxpayer available to the taxpayer in the compliance portal of Insight. The Taxpayers have been given functionality to verify the information displayed in AIS and to furnish their feedback (about the correctness of Information). In case of any disagreement with the reported Information, the taxpayer's feedback (as gathered in AIS) is shared with the Information Source through an automated information exchange system and a notice u/s e-Verification Scheme 2021 is generated to the Information Source for their confirmation. In case correction is required in the information furnished by the source, a correction statement is required to be filed.

If the information source does not submit its response to the confirmation request or does not provide updated information within the specified time as mentioned in the notice under e-Verification Scheme 2021 and subsequent reminders sent, a Compliance Case is created against the relevant Information Source.

Now the CBDT has issued e-Verification Instruction No. 1 of 2024 vide which Compliance Case of Deductors on Taxpayers feedback in TDS/TCS shall be created against the relevant Information Source. These Compliance cases will then assigned to the appropriate Income Tax Authority to ensure compliance from the Information sources in accordance with law. For Information Source Type of Deductors/ Collectors (reporting through TAN), the Relevant Income Tax Authority shall be TDS A.O. - assignment based on the mapping available for TAN and TDS A.O. The following activities can thereafter be performed by the TDS AO for the Compliance cases –

1. Re-assign Case (Re-assignment to a superior officer or subordinates)
2. Issue Notice u/s 133(6)
3. Mark case as Non-responsive
4. Mark case as Untraceable
5. Mark case as Responsive
6. Mark case as Traceable
7. Enter Comments
8. No Action Required
9. Submit Case Closure Report

Hence, now Deductors may witness notices on deduction of TDS. They have to be more vigilant in their TDS compliances.

2. Bogus purchase admitted in GST would result in a liability in Income Tax too... Incase of services, the situation is grimmer

Bogus purchase admitted in GST would result in a liability in Income Tax too. Where the parties are non-existent the GST Authorities would disallow the ITC. However, incase the taxpayer has the supporting documents in the form of tax invoice,

delivery challan, E-Waybill, lorry receipts, stock register, etc in support of such purchases, then there can be a contest under income tax. Even incase such documents are not available, the entire bogus purchases cannot be added. A reasonable disallowance of the purchases would be made to meet the possibility of revenue leakage. This might range generally from 10% - 15% of the purchase amount, considering the gross profit in the business, as was held by The Hon'ble Mumbai High Court in PCIT v/s Paramshakti Distributors Ltd. in ITA No. 413 of 2017 decided on 15/07/2019; The same was followed in the case of SHRI RAJESH G. JAIN Vs INCOME TAX OFFICER [2024-VIL-190-ITAT-MUM].

The situation however become gimmer incase of services received. Here the recipient has to have the agreement, the proof of delivery of services, etc incase the supplier is non-existent. Say for manpower suppliers, the register where the security guards entered and exited or their access cards tracker or such other evidences should be maintained.

3. No set off for losses for calculating tax as per Section 115B(2)... Only after amendment as per FA 2016

Section 115BBE of Income Tax Act provides for Tax on income referred to in section 68 or section 69 or section 69A or section 69B or section 69C or section 69D. The income-tax payable here shall be at the rate of sixty per cent. Further as per Section 115BBE(2) no deduction in respect of any expenditure or allowance would be available and no set off of any loss shall be allowed to the assessee under any provision of this Act in computing this income.

However, Circular No. 3/2017 as well as 11/2019 have amply clarified regarding amendment made in section 115BBE(2) of the Act. They clarified that there was uncertainty on the issue of set-off of losses against income referred to in section 115BBE. They stated clearly that pre-amended provision of section 115BBE of the Act did not convey the intention that losses shall not be allowed to be set-off against income referred to in section 115BBE of the Act and hence, the amendment was made vide the Finance Act, 2016. Therefore, the legal position is very clear and has

been held accordingly in the case of ALISHAN STEELS PVT LTD Vs DCIT, CIRCLE - 1(1), KOLKATA [2024-VIL-200-ITAT-KOL]

4. Lease equalization charges are not unascertained liability

The difference between capital recovery and interest or finance income is essential for accounting with reference to the substance over the form. Lease equalization is an essential step in the accounting process to ensure that real income from the transaction in the form of revenue receipts only is captured for the purposes of income tax. Hence it has to be allowed. The ratio of The judgement of The Apex Court in the case of CIT vs. Virtual Soft Systems Ltd. [2018] 92 taxmann.com 370 (SC) was followed in the case of COGNIZANT TECHNOLOGY SOLUTIONS INDIA PVT LTD Vs THE DY. COMMISSIONER OF INCOME TAX, CHENNAI [2024-VIL-187-ITAT-CHE]

5. Date of payment is considered to be the date on which the cheque is delivered, regardless of when the cheque is actually presented for payment

Section 54F being a relief provision, should be viewed in a bit of a relaxed manner. Thus Incase the seller ignores depositing post-dated cheques on due dates, once cheques have been issued, appellant's liability shall be considered as fulfilled. Further the case can be defended incase sufficient bank balance is maintained throughout to discharge the amounts as per the PDCs, as was considered in the case of INDIRA GIRI Vs ASSESSING OFFICER [2024-VIL-181-ITAT-JAI]

It was laid down by The Apex Court in the case of Commissioner of Income-tax v. Ogale Glass Works Ltd. [1954] 25 ITR 529 (SC) that when the cheque is tendered, there is a presumption that payment would be realised in due course, and hence the date of payment is considered to be the date on which the cheque is delivered, regardless of when the cheque is actually presented for payment. Even if cheques are taken conditionally when the cheques are not dishonored but cashed, the payment relates back to the dates of the receipt of the cheques and in law, the dates of payments were the dates of the delivery of the cheques.

'Doctrine of Impossibility' lays down that Law does not compel any one to do anything which is not possible. A law cannot be interpreted in vacuum. It has to be interpreted having regard to the facts and circumstances involved in each case. Where the assessee had already issued postdated/undated cheques to builder pursuant to a legally binding contract, it was impossible on assessee's part to arrange separate funds to make deposits under Capital Gain Scheme also.

6. Form 67 is directory and not mandatory to claim foreign tax credit

It is high time that necessary amendments should be made in the Income Tax Act/Rules to incorporate the process of claiming the tax credit, where the foreign tax credit certificates are received by an assessee even after the end of the assessment year. This would avoid hardship for the assessees and will also serve the ends of natural justice. The background of the issue is that as per the provisions of section 90 read with Rule 128 and Form 67, an assessee is entitled to relief of the tax paid in foreign country on the income which is also taxed in India, as per the prescribed guidelines. As per Rule 128, for claiming the tax credit under section 90, the assessee needs to file Form 67 along with the proof of payment of tax on or before the end of the assessment year relevant to the previous year in which FTC is claimed by an assessee [as per the recent CBDT Notification No. 100 of 2022]. In cases where the details of such foreign tax payment are available to the assessee company only after the end of the relevant assessment year, the above timeline prescribed for filing Form 67, continue to act as deterrent to claim the tax credit u/s 90 of the Act. Till now, When such FTC relief was being claimed during assessment, the assessing officers are raising objections citing non filing of such additional claim before the due date of filing the return of income & now may say it should have been claimed before end of the AY. As a result, the assessees are/will be denied tax credit for no fault of theirs, since it is impossible to make such claims in the absence of requisite details, for which Indian assessees are helpless and are dependent on the tax authorities of respective foreign jurisdiction.

However, even barring the amendment, the issue is whether Form 67 is mandatory or directory for claiming foreign tax credit. In a decision in Anuj Bhagwati vs DCIT, in ITAs No.1844 and 1845/Mum./2022, the coordinate bench of the Tribunal vide

order dated 20/09/2022, while deciding the issue held that section 90/91 of the Act has not been amended insofar as grant of foreign tax credit is concerned and Rules cannot override the Act and therefore filing of Form No. 67 is not mandatory but it is directory. Following the decision, it was held in the case of NIRMALA MURLI RELWANI Vs ASSTT. DIRECTOR OF INCOME TAX [2022-VIL-1550-ITAT-MUM] that mere delay in filing Form No. 67 as per the provisions of Rule 128(9), will not preclude the assessee from claiming the benefit of foreign tax credit in respect of tax paid outside India.

Again, what happens incase Form 67 is not filed erroneously. In the case of DCIT, CIRCLE – 2(2)(1), BENGALURU Vs SHRI. DEVESH M NAYEL [2024-VIL-173-ITAT-BLR] it was held that where on realizing the mistake that Form 67 was not filed along with return of income and same was filed subsequently, the delay should not be considered as fatal to claim FTC.

Hence until a consequential amendment is made, foreign tax credit can be claimed accordingly on the basis of the decisions.

7. Incase due to technical reasons there is a difficulty in uploading the e-return, paper return may be considered

Law does not require any person to do an impossible thing. Incase due to technical reasons, there is a difficulty in uploading the e-return and grievance application also goes un-answered and, therefore assessee submits the paper return with a request to consider the same, the same should be considered. The technical difficulty in uploading the return of income and filing of grievance should be backed by evidence. Further a Co-ordinate Bench of the Tribunal, following the decision of the Hon'ble Punjab and Haryana High Court in the case of CIT vs. Rajiv Garg [2008] 175 Taxman 184 (P&H) held that the return filed in response to notice under section 148 of the Act is to be considered as return filed under section 139 of the Act for the purpose of penalty under section 271(1)(c) of the Act.

The same was held in the case of VIZAG APPAREL PARK FOR EXPORT Vs INCOME TAX OFFICER [2024-VIL-176-ITAT-HYD]. While the same was held in the case of a

Government Company, yet law requires that all assessees should be given equal treatment.

8. No contract, No TDS u/s 194C

Not very often do we witness IAS officers and bureaucrats being served with tax notices and orders. But when they are, the case needs to be discussed and hence we are penning down a simple matter of non-deduction of TDS in the case of THE PUNJAB IAS AND PCS OFFICERS HOUSE BUILDING SOCIETY LIMITED Vs THE ITO (TDS-2), CHANDIGARH [2024-VIL-163-ITAT-CHD]. TDS u/s 194C of Income Tax Act is applicable incase of works contract, but for such TDS liability to exist, there has to be a 'contract' at first at the free consent of parties to contract. Where the work is executed by a Govt. agency and payment is made to it, other than out of any contractual obligations and due to a liability towards the Govt. agency, no TDS can be made applicable.

9. No TDS u/s 195 on 'sales commission' in certain cases

The expression 'Technical Services' cannot be construed in a narrow sense, and would not to be confined only to technology relating to engineering, manufacturing or other applied sciences, but also other services. Hence, incase a commission agent in addition to securing orders also has to assist a taxpayer in identifying markets, making introductory contacts, arranging meeting with prospective clients, assisting in preparation of presentations for target clients, then the services of the Commission agent constitutes technical service because such services require the agents vast technical knowledge and experience.

However, commission paid to independent foreign sales agents merely for procuring successful orders only after agreed price is released by foreign purchaser, would not be considered as 'technical services' as was held in the case of SUNBEAM LIGHTWEIGHTING SOLUTIONS PVT LT Vs DCIT, CIRCLE 24(2), NEW DELHI [2024-VIL-160-ITAT-DEL]. Hence no TDS would be liable u/s 195 incase it can be demonstrated that the sales agents rendered services outside India and that they had no 'business connection' or PE and that they are tax residents outside India;

the payments made and remitted directly to them in foreign exchange are thus not taxable under the provisions of DTAA.

(*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*)