

LAW AND PROCEDURAL ASPECTS IN TDS - ISSUES,
CONTROVERSIES, RECENT DEVELOPMENTS

DTRC II 2015

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***I AM THE COUNTRY'S DRAFTSMAN,
I DRAFT THE COUNTRY'S LAWS,
FOR MOST OF THE LITIGATION,
I AM THE CAUSE!***

AS QUOTED BY RETD.JUSTICE SMT. SUJATA MANOHAR

FACTORS GIVING RISE TO DEVELOPMENTS AND CONTROVERSIES:

- **AMENDMENTS TO THE ACT RELATED TO TDS AS WELL AS OTHER PROVISIONS**
- **ISSUE OF CIRCULARS AND NOTIFICATIONS**
- **INTERPRETATIONAL ISSUES**
- **CASELAWS AND LEGAL PRECEDENTS**

INTRODUCTION:

- **AGENTS OF THE GOVERNMENT WITHOUT REMUNERATION**
- **ONEROUS RESPONSIBILITY**
- **NO REWARD FOR ACTION ON BEHALF OF THE GOVERNMENT**
- **CONSEQUENCES FOR NON / MIS-COMPLIANCE**
 - **INTERESTS**
 - **PENALTIES**
 - **PROSECUTIONS**
 - **DISALLOWANCES OF EXPENSES**
 - **ADDITION TO INCOME FOR ACTIONS OF OTHERS.**

AGENTS OF THE GOVERNMENT WITHOUT REMUNERATION:

S. 200 Duty of person deducting tax:

- Deduct the tax at appropriate time
- Pay within the prescribed time
- Prepare and deliver the statements as prescribed
- Issue certificates – section 203 vide form 16 / 16A – downloading
- Issues in downloading – Can TRACES restrict the downloading?
- Default on each of the above gives rise to consequences

- INTEREST U/S 201/ 201 (1A):
 - Failure to deduct the whole or any part of the tax, or delay in remitting, tax deducted at source.
 - 1% for every month or part of a month from the date on which the tax was deductible to the date on which such tax is deducted
 - 1.5% for every month or part of the month on the amount of such tax from the date on which such tax was deducted to which such date
 - Doctrine of unjust enrichment
 - Hindustan Coca-cola Beverage P Ltd 163 Taxman 355 (SC)
 - First proviso to Section 201 – “not deemed to be assessee in default” – Form 26A - 12.9.2012
 - No machinery to record form 26A on TDS portal – Rule

- INTEREST U/S 220:
 - Failure or delay in payment of any amount other than advance tax, specified in notice of demand u/s 156
 - 1% per month or part thereof
- FEE U/S 234E:
 - Fee for default in furnishing statements
 - Rs. 200 per day during which failure continues.
 - Maximum amount tax deductible or collectible
 - Payment before delivering the statement
 - After 1.7.2012
 - Constitutional Validity
 - Bombay High Court v Other Courts
 - Rashmikant Kundalia v UOI Bombay HC 9.2.2015
 - Notices u/s 194(IA)

TDS - ISSUES, CONTROVERSIES, RECENT DEVELOPMENTS

- PENALTY U/S 271C:
 - W.E.F 1.4.1989 Failure to deduct the whole or any part of tax at source
 - W.e.f 1.4.1997, failure to pay the whole or any part of tax u/s 115-O(2) or 194B proviso 2.
 - Tax that should have been paid
- PENALTY U/S 272B
 - Quoting or intimating PAN which is false / incorrect.
 - Rs. 10,000
- PENALTY U/S 272A(2)
 - Failure to file statements
 - Failure to issue certificates
 - Rs. 100 per day subject to tax deducted

- PROSECUTION U/S 276B

Failure to pay tax to the credit of Central Government under Chapter XII-D or XVII-B.

276B. If a person fails to pay to the credit of the Central Government,—

(a) the tax deducted at source by him as required by or under the provisions of Chapter XVII-B; or

(b) the tax payable by him, as required by or under—

(i) sub-section (2) of [section 115-O](#); or

(ii) the second proviso to [section 194B](#),

he shall be punishable with rigorous imprisonment for a term which shall not be less than three months but which may extend to seven years and with fine.]

S 279. Prosecution to be at instance of *Principal Chief Commissioner* or Chief Commissioner or *Principal Commissioner* or Commissioner.

- A person shall not be proceeded against for an offence except with the previous sanction of the *Principal Commissioner* or Commissioner or Commissioner (Appeals) or the appropriate authority.
- the *Principal Chief Commissioner* or Chief Commissioner or, as the case may be, *Principal Director General* or Director General may issue such instructions or directions to the aforesaid income-tax authorities as he may deem fit for institution of prosecution proceedings.
- No prosecution where penalty waived u/s 273A
- Compounding of offence either before or after institution of the proceedings.
- **Guidelines for compounding of offences under direct tax laws, 2014 - Letter [f.No.285/35/2013 it (inv.V)/108, dated 23-12-2014**

DISALLOWANCE OF EXPENSES WHERE TDS IS DEFAULTED.

- **S 40. Amounts not deductible.**
- Non obstante clause vis- a-vis section 30 to 38
- Payments to Nonresidents without TDS – expenses disallowed.
- Payments to residents (other than salaries) attracting TDS and if the same is not deducted and paid, **thirty percent** of the expenses will not be allowed as a deduction.
- Exception – where tax paid before due date of filing the return
- Else allowed in year of payment.
- **Controversies re:**
 - part payment,
 - lower rate,
 - Disallowance 100% under old provision, payment made when new provisions are in place – will relief be granted only to extent of 30%?

- **SECTION 192 Salary.**

(1) Any person responsible for paying any income chargeable under the head "Salaries" shall, at the time of payment, deduct income-tax on the amount payable at the **average rate** of income-tax computed on the basis of the rates in force for the financial year in which the payment is made **on the estimated income** of the assessee under this head for that financial year.

- Circular 17/2014 dated 10.12.2014
- Circular 8/2013 dated 10.10.2013
- Circular 8/2012 dated 5.10.2012
- Circular No. 5/2011 dated 16.08.2011
- Circular No. 8/2010 dated 13.12.2010
- Circular No. 1/2010 dated 11.01.2010

The circulars generally further contain the general spirit in the following words:

The amount of tax as arrived at para 6.3 should be deducted every month in equal installments. Any excess or **deficit arising out of any previous deduction can be adjusted by increasing or decreasing the amount of subsequent deductions** during the same financial year.

These instructions are **not exhaustive** and are issued only with a **view to help the employers to understand the various provisions relating to deduction of tax from salaries.**

However the terms used have been interpreted and applied in a manner to lead to following decisions:

CIT v. ITI Ltd. 183 Taxman 219 (SC)

CIT v. Larsen & Toubro ltd. 313 ITR 1 (SC)

JANUARY 21, 2009

Section 10(5), read with section 192, of the Income-tax Act, 1961 - Leave travel concession - Whether an employer is under no statutory obligation to collect evidence to show that its employee has actually utilized amount paid towards leave travel concession/conveyance allowance for purpose of TDS under section 192 - Held, yes

HELD

*The beneficiary of exemption under section 10(5) is an individual employee. Further, **there is no circular of the Central Board of Direct Taxes (CBDT) requiring the employer under section 192 to collect and examine the supporting evidence** to the declaration to be submitted by an employee(s). For the above reasons, it was to be held that the assessee-employer was under no statutory obligation to collect the evidence to show that its employees had actually utilized the amount paid towards leave travel concession/conveyance allowance.*

CIRCULAR OF 2013 and 2014 – Stark Difference in comparison with all earlier circulars. The recommendatory tone is now the mandatory tone.

“DDOS TO SATISFY THEMSELVES ABOUT THE GENUINENESS OF CLAIM:

*The Drawing and Disbursing Officers **should** satisfy themselves about the actual deposits/ subscriptions / payments made by the employees, by calling for such particulars/ information as they deem necessary before allowing the aforesaid deductions. In case the DDO is not satisfied about the genuineness of the employee's claim regarding any deposit/ subscription/ payment made by the employee, he **should not** allow the same, and the employee would be free to claim the deduction/ rebate on such amount by filing his return of income and furnishing the necessary proof etc., therewith, to the satisfaction of the Assessing Officer.”*

**INTRODUCTION OF SUB-SECTION (2D) IN SECTION 192
by Finance Act 2015**

(2D) The **person responsible** for making the payment referred to in sub-section (1) **shall**, for the purposes of estimating income of the assessee or computing tax deductible under sub-section (1), **obtain from the assessee the evidence or proof or particulars of prescribed claims (including claim for set-off of loss) under the provisions of the Act** in such form and manner as may be prescribed.”.

SECTION 17(2)(vii): Superannuation fund contribution:

- When FBT provisions were introduced, the contribution to Superannuation was subjected to FBT in the hands of the employer.
- After one year, it was revised and the amount subjected tax was only in excess of Rs.1 lac per employee per year.
- With the withdrawal of FBT the taxability has shifted back to the employee and thus the contribution of amounts exceeding Rs. 1 lac is subjected to tax in the hands of the employee.
- The employee is thus taxed for an amount which he does not receive in hand.
- On retirement, when the annuity is taken, the same is again subject to tax therefore the **same income is being taxed twice.**

SUGGESTION:

- Restore position to prior to FBT regime:
 - the contribution to Superannuation was not taxed in the hands of the employee
 - pension to be taxed as and when received.

SECTION 9

Income deemed to accrue or arise in India.

(1) The following incomes shall be deemed to accrue or arise in India—

(i)

(ii) **income which falls under the head "Salaries", if it is earned in India.**

[**Explanation** : For the removal of doubts, it is hereby declared that the income of the nature referred to in this clause payable for—

(a) service rendered in India; and

(b) the rest period or leave period which is preceded and succeeded by services rendered in India and forms part of the service contract of employment, shall be regarded as income earned in India.]

HISTORY:

- CIT v. S G Pgnatale 124 ITR 391 (Guj)
- Amendment
- CIT v. Eli Lilly Company India Private Limited. 312 ITR 225 SC
- Impact on Indians deputed abroad

Arvind Singh Chauhan v. Income-tax Officer, Ward 1(2), Gwalior
42 taxmann.com 285 (Agra - Trib.)

IT/ILT-I : Salary income cant be said to accrue in India merely because appointment letter is issued in India

IT/ILT-II : Non-resident cant be deemed resident by applying sec. 6(5) as the said provision has become redundant since 1989-90

S.5: Scope of total income–Non–resident–Salary income–Accrual of Income from employment could not be taxed in India-DTAA-India-UK [S.90, Art.16]

Where assessee, a NRI, received salary income in India against employment exercised in U.K. and offered same for taxation in U.K. in pursuance of article 16, it could not be taxed in India as per DTAA between India and U.K. (AY.2006-07)

ITO v. Sri Sunil Chitranjan Muncif (2013) 58 SOT 356 (Ahd.)(Trib.)

New Section 192A:

- Notwithstanding anything contained in this Act,
- Where an employee having a balance in the Recognised Provident fund or under the Employees' Provident Fund Scheme, 1952,
- Withdraws any amount from the Fund, and
- Has rendered less than five years of service, and
- Not falling within the exceptions of Rule 8 of Part A of the Fourth Schedule
- The said withdrawal shall be subjected to TDS @ 10%
- Except if the aggregate amount of such payment to the payee is less than thirty thousand rupees
- However if the PAN of the employee is not furnished the deduction shall be at the maximum marginal rate.

What is overlooked:

Rule 9 of Part A of Fourth Schedule already prescribes the method for determining the Tax on such withdrawal and Rule 10 prescribes that the same shall be deducted at source

Section 194A(3), w. e. f. 1st day of June, 2015,—

- Interest on bank deposits which was taken on basis of each branch of the bank will now be reckoned on the basis of all branches of the same bank, if the bank has adopted the core banking solutions
- Interest on deposits with co-operative banks, exceeding Rs. 10000 will also attract TDS
- income credited by way of interest on the compensation amount awarded by the Motor Accidents Claims Tribunal in excess of Rs. 50,000 will attract TDS
- Recurring deposit interest will also be taken into consideration while considering the interest on time deposits while determining the amount on which TDS is to be effected.
- All other cases amount of interest if it exceeds Rs.5000/-

Section 194C – TDS on payments to Contractors

- Subsection (6) – relating to contractors in the business of plying, hiring or leasing of goods carriages
- The present provision required the contractor to furnish his PAN and no TDS would be deducted, however,
- with effect from the 1st day of June, 2015, for the words “on furnishing of”, the words “where such contractor owns ten or less goods carriages **at any time during the previous year** and furnishes a declaration to that effect along with” shall be substituted.

Section 194DA: TDS on Payments in respect of Life Insurance Policies:

- Payments to residents – after 1-10-2014
- Policies other than those mentioned in Section 10(10D)
- Exceeding Rs. 100,000 per year
- Rate of TDS 2 %

Section 195 : Certification of Foreign Remittances – Form 15CA / 15CB:

Old Section: Section 195(6) required that a person responsible for paying any **sum chargeable to tax under the Income Tax Act, 1961**, to a Non resident, should furnish the information relating to such payment vide form 15CA and 15CB to the Board.

New Section: (effective 1.6.2015)

The person responsible for paying to a non-resident, any sum, **whether or not chargeable under the provisions of this Act**, shall furnish the information

Penalty u/s 271 I: (effective 1.6.2015)

Failure to file Form 15CA / 15CB attraction penalty of Rs. 1 lakh.

Effect:

- **Every** payment of foreign exchange, like a simple import of a commodity, will be required to be supported by Form 15CA and 15CB, thereby increasing the number of certificates many fold, without any tax / revenue generation.
- Response to notices by Department will increase **Unproductive Work**.
- Professionals and accountants shall get engaged in **non productive** work of repetitive nature, thereby draining valuable resources of the nation.
- Penalty causes further hardship and compulsion on the assessee.

ACTION REQUIRED:

Immediate notification that new section shall not be operative from 1.6.2015

Thank you for a patient hearing!