



Bombay Chartered Accountants' Society

Interaction of Central Technical Committee Members with Tax Professionals at Mumbai

Bombay Chartered Accountants' Society

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Date: 15th March 2017

Central Technical Committee (CTC)
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Mumbai.

Respected Sirs,

Sub: Interaction of CTC Members with Tax Professionals at Mumbai

We write to you in continuation of our discussion on the 20th February 2017 at Mumbai. We take this opportunity to present a few suggestions with a request to consider the same. These suggestions, if accepted, will go a long way in reducing contentious tax issues.

We request you to consider these suggestions favourably. We will be happy to present ourselves for any explanation and clarification that may be required by you.

Thanking you,

We remain,

Yours truly,

For BOMBAY CHARTERED ACCOUNTANTS' SOCIETY

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1. **Applicability of Section 50C to transactions covered by Section 45(3):**

In a case where assessee transfers capital asset being land or building or both and the full value of consideration for such a transfer is lower than the stamp duty value of the asset so transferred, section 50C deems stamp duty value of the asset transferred to be the full value of consideration. Thus, for applicability of section 50C the consideration for transfer of land or building or both has to be compared with the stamp duty value thereof which necessarily presupposes existence of consideration. In the absence of consideration, section 50C will not be applicable.

In a situation where an assessee introduces his capital asset into a firm or an association of persons where he is a partner or a member, Supreme Court has held that there is no consideration. It is said that in such cases consideration lies in the womb of the future - Sunil Siddharthbhai v.CIT [(1985) 156 ITR 509 (SC)]. It was to overcome the ratio of this decision that section 45(3) was introduced in the Act w.e.f. 1.4.1988. Section 45(3) deems the amount credited to the account of the partner / member to be the full value of consideration. Therefore, by a fiction created by section 45(3) the amount credited to the account of the partner / member who has introduced the asset is regarded as full value of consideration.

A question arises as to whether in a case where an assessee introduces capital asset being land or building or both in a firm in which he is a partner and the amount credited to his capital account in the books of the firm is lower than the stamp duty value of the asset so introduced by him, are the provisions of section 50C applicable. It is submitted that for the following reasons, provisions of section 50C are not applicable to such a case –

- i) consideration for introducing the asset into the firm in which assessee is a partner lies in womb of the future and therefore the value credited to the account of the partner / member is not consideration for transfer but it is deemed to be full value of consideration for charging capital gains;
- ii) section 50C creates a fiction. Section 45(3) also creates a fiction. It is settled position in law that there cannot be a fiction on a fiction.

Suggestion: Appropriate clarification be issued by the CBDT clarifying that the provisions of section 50C are not applicable to cases covered by section 45(3).

2. **Section 115JB:**

Tax on book profits was introduced because it was felt that many companies are making profits, declaring dividends but because of incentives under the provisions of the Act they are not paying any taxes. The intention of the provision is never to tax the same amount twice once under the normal provisions of the Act and once under the provisions of section 115JB. There are several instances where because of the timing difference between point when the profits are offered for taxation under the provisions of the Act and the time when they are recorded in the books of accounts, the charge of tax under the normal provisions of the Act arises in a year which is different from the year in which the transaction is recorded in the books of accounts. To illustrate, in view of the inclusive definition of 'transfer' as defined in section 2(47) of the Act, the charge to capital gain arises in the year in which possession is granted whereas the profit on sale is recorded in the books in the year in which conveyance is executed. There could be a gap of one or two years between the two events. This results in the assessee paying tax under the normal provisions in the year of handing over possession and in subsequent year the same profits form part of "book profits". Another example could be of a person who is engaged in development and construction of housing projects and is following project completion method in his books of accounts but for taxation purposes, to avoid any controversy, is following percentage completion method. In such a case, also, the profits get taxed under the provisions of the Act first and then in a subsequent year, on completion of the project, the very same profits form part of "book profits". It is relevant to mention that the Andhra Pradesh High Court has in the case of CIT v. Nagarjuna Fertilisers & Chemicals Ltd. [52 taxmann.com 397 (AP)] held that MAT is restricted to income "incomes of relevant tax year" and incomes undisputedly pertaining to earlier tax year/s cannot be roped in for MAT; and that it is a cardinal principle of taxation that same income cannot be

subjected to tax more than once in different years in absence of specific provisions and MAT provisions are no exception to this principle.

Suggestion: Section 115JB should be suitably amended to provide for adjustment in cases where the profit included in “book profit” is to be charged to tax under the normal provisions in a different year i.e. a year other than the year in which the profit is recorded in the books of account. The Act should incorporate what has been laid down by the Hon’ble Andhra Pradesh High Court in the case of CIT v. Nagarjuna Fertilisers & Chemicals Ltd. (supra).

3. Non-Levy of Late Filing Fee u/s. 234E prior to 01-06-2015

The legislature has introduced section 234E vide Finance Act, 2012 to provide for fees for late filing of TDS return. The Hon’ble Bombay High Court in the case of **Rashmikant Kundalia and Ors v. UOI & Ors. (2015) 54 Taxmann.com 200 (Bom)** has upheld the constitutional validity of the section. As a matter of fact, the Hon’ble Apex court has admitted SLP against the decision of the Hon’ble Bombay High court.

Vide amendment made by the Finance Act, 2015, the Legislature amended the section 200A w.e.f. 01-06-2015 to enable the revenue to levy late filing fee u/s. 234E vide order passed u/s. 200A. By virtue of this amendment, a question arises as to whether the late filing fees prescribed u/s. 234E were legitimately levied for the period prior to 01.06.2015 or not.

Various courts and tribunals have deliberated on this and have given consistent view that the levy of late filing fees u/s. 234E prior to 01.06.2015 vide intimation u/s. 200A was not permissible under the law. Attention in this regard is drawn to various decisions as under:-

Recently the Hon’ble Kerala High Court in the case of **Fateraj Singhvi v. UOI73 taxmann.com 252 (Kar)** has held that section 200A is not retrospective and has only prospective application from 01-06-2015. The Hon’ble High Court observed that the mechanism provided for computation of fee and failure for payment of fee under section 200A which has been brought about with effect from 1-6-2015 cannot be said as only by way of a regulatory mode or a regulatory mechanism but it can rather be termed as conferring substantive power upon the authority. Thus, amendment made under section 200A has prospective effect, hence, no computation of fee for demand or

intimation for fee under section 234E could be made for TDS deducted for respective assessment year prior to 1-6-2015.

The Hon'ble Amritsar Bench of ITAT in the case of **Sibia Healthcare Pvt Ltd. v. DCIT (TDS)63 taxmann.com 333** has held that the revenue was not competent to levy fee u/s. 234E prior to 01-06-2015 by passing an order u/s. 200A.

The Hon'ble Mumbai ITAT in the case of **Kash Realtors Pvt Ltd v. ITO [2016-TIOL-1842-ITAT-MUM]** and the Chennai ITAT in the case of **G. Indhirani v. DCIT (60 taxmann.com 312)** have also affirmed that prior to 01.06.15, fees u/s 234E of the Act could be levied in intimation u/s 200A of the Act in respect of defaults in furnishing TDS statements.

Now, the situation that has arisen by the act of levying such late filing fees in the intimation issued u/s. 200A for the respective years prior to 01.06.2015 needs rectification u/s. 154 as the same is a mistake apparent from record for the very fact that during that period, there was no enabling provision to levy such late filing fees. Attention in this regard is also invited to the judgment in the case of **Gajanan Constructions and others v. DCIT, CPC (TDS) – Pune ITAT –(1292 & 1293/PN/2015)**.

Accordingly, the late fee levied needs to be deleted suo-moto by rectifying the intimation/ order passed u/s. 200A of the Act. The above position though seems to be simple and clear has various complex practical issues and what seems to be a fairly straight path is full of bumpers, speed breakers and hurdles. The first among them being the recent shift in rectification mechanism. Practically, the concerned Income Tax Officer (TDS) have informed that they do not have any power of rectification and the powers of rectification have been conferred with the CPC (TDS).

The rectification enabled by CPC (TDS) has limited options of rectification available to the deductor. The mechanism does not allow the deductor to apply for rectification in this peculiar circumstance.

Practically, neither the Income Tax Officer (TDS) is empowered nor the systems at CPC (TDS) are enabled to allow processing of rectification application of such kind.

Accordingly, this leads to uncertainty in the mind of the deductor and has no other option but to drag his case into unnecessary litigation adding to his cost and grievance.

Suggestion: The CBDT should enable the Income Tax Officer and/or system at CPC (TDS) to resolve this issue and delete all the demands raised u/s. 234E for the years prior to 01-06-2015 at its own motion.

4. **Disallowance u/s. Section 40A(3) in case of unaccounted transactions:-**

Where the assessee incurs any expenditure in respect of which a payment or aggregate of payments made to a person in a day, otherwise than by an account payee cheque / bank draft exceeds Rs. 20,000/-, no deduction of such expenditure is allowed u/s. 40A(3) of the Act. (Now proposed to be in excess of Rs. 10,000/-).

The said section is quite unambiguous and simple in terms of language but what acquires significance is its implementation in a peculiar circumstance where books of accounts are not prepared and incriminating loose papers in the form of noting, etc. about unaccounted sale / purchase transactions are found in the course of search and seizure action.

For example, in a situation where certain loose sheets / documents containing a noting of unaccounted sale transactions are found and seized in the course of search, the Assessing Officer has the detail of unaccounted sales and under the provisions of Act, he is required to make a proper and just estimate of income earned by the assessee on such unaccounted sales by bringing on record material in the form of comparables in support of his estimate of profit earned by the assessee. In other words, in such a situation, the Act, under the provisions of section 2(24) r.w.s. 5, mandates the Assessing Officer to correctly assess the **income** earned by the assessee.

However, currently, divergent and extravagant views have been taken by few of the Assessing Officers. It has been seen in such situations that the Assessing Officers have taxed the entire unaccounted sales by disallowing the unaccounted purchases under the guise of section 40A(3). This results in taxing the entire unaccounted sales which is not "income" as defined u/s. 2(24) of the Act. An Assessing Officer is allowed to tax only the element of income and not the total turnover by applying the provision of section 40(A)(3)

of the Act which actually results in absurdity and is unlawful. The Hon'ble Apex Court in CIT v. Shoorji Vallabhdas & Co. [1962] 46 ITR 144 (SC) has held that **income tax is a tax only on income**. The real income theory has not only been accepted but in fact propounded by the Hon'ble Apex courts as well as various High Courts time and again. The Assessing Officer to protect itself from these embarrassments tries to disallow purchases u/s. 40A(3) of the Act. It is significant to note that though the purchase is stated to be disallowed u/s. 40A(3), the resultant addition amounts to taxation of the entire sale proceeds thereby grossly disregarding the settled law laid down by the Hon'ble Apex Court. Therefore, such an action of the Assessing Officer is completely against the spirit of the law laid down by the Apex Court.

Further, the following ingredients to invoke provision of section 40A(3) of the Act needs to be met cumulatively:-

- Payment of expenditure is made in cash
- Payment exceeds Rs. 20,000/- (Now proposed Rs. 10,000/-)
- Payment is made to a person in a day

Thus, the burden of proof to prove the existence of cumulative ingredients as per section 40A(3) lies heavily on the Assessing Officer and if the same is not evident from the loose sheets, there does not arise any question of making disallowance under the said section unless the onus is appropriately discharged by the Assessing Officer.

It is true that section 40A(3) does not make any distinction between the transactions recorded in the books of accounts or not recorded in the books of accounts. However, it is also true that if no books of accounts are maintained as per the provisions of section 145 of the Act, the Assessing Officer is duty bound to make the best judgment assessment u/s. 144 of the Act which requires him to take into account all relevant material which he has gathered to determine the amount of income earned. Hence, in a given situation, a significant question arises as to whether any expense can be disallowed when the books of accounts have not been maintained and income is to be estimated on the basis of incriminating material found in the course of search. In fact, when the income is to be estimated, then there cannot be any locus standi of a specific claim of expenditure made. The question is simple and clearly answered in unanimity by various Hon'ble High Courts that no

disallowance u/s 40A(3) is warranted when income is estimated - [Indwell Constructions v. CIT (1998) 232 ITR 776 (AP); CIT v. Purshottamlal Tamrakar (270 ITR 3140) (MP); CIT v. Banwarilal Banshidhar (1998) 148 CTR 533 (All.)]. Accordingly, once the Assessing Officer estimates income, he is debarred from making disallowance under the normal provisions of the Act. The Kerala High Court in the case of CIT v. PD Abrahm (2012) 252 CTR 407 has held that unaccounted expenditure can be set off against unaccounted income which again supports the real income theory.

There also prevails a decision of the Hon'ble Gujarat High Court in the case of Hynoup Food and Oil Industries reported at 290 ITR 702 which has taken a contrary view against the assessee. However, considering the various divergent views of the courts, the Hon'ble Pune ITAT in the case of Shri Narendra Mithailal Agrawal (ITA no. 811 & 808/ PN/2010) has followed the decision of the Hon'ble Supreme Court in the case of CIT v. Vegetable Products Ltd (1973) 88 ITR 192 (SC) and has rendered the verdict in favour of the assessee.

In entirety, the above position though appears amply clear as to no disallowance of expenses can be made on estimation of income, it does not seem to be digestible to the departmental officers and therefore the assessee is made to pass through the long-drawn process of litigation.

Suggestion: It is advisable that the CBDT makes necessary amendment in Rule 6DD to include the situations of unaccounted transactions as exceptional circumstance so that no disallowance u/s. 40A(3) of the Act is made when in such situations, the Assessing Officer is required to estimate income on his best judgment after taking into account the relevant material gathered in his possession and thereby avoid gross injustice of bringing to tax the entire sale proceeds.

5. **Difficulty in availing credit of Tax deducted at source for assesses following cash system of accounting**

Assesse following cash system of accounting record income on receipt basis i.e as and when the amount is received by him. The payer however deducts tax as and when provision is made in the books for amount payable. TDS therefore appears in Form 26AS of the year in which the payer makes the

provision. The assessee claims credit for tax in the year in which he actually receives the amount. Since the TDS credit does not appear in Form 26AS of the year in which the assessee has offered the income to tax based on cash system of accounting, credit is not granted to him, though the income from which tax is deducted is duly offered for tax in the relevant year. TDS credit is not granted to the assessee in the year in which it appears in 26AS because the income from which the said tax is deducted is not offered for tax in that year.

Due to the mismatch in the year in which TDS credit appears and 26AS and the year in which income is offered for tax, the assessee does not get credit for TDS in either of the years and often loses the claim forever.

The issue is very relevant for professionals like lawyers, chartered accountants, architects, who record income on cash basis.

In such cases, the concerned tax payers have no recourse but to make repeated requests to the CPC for rectification. Thereafter, the case gets transferred to the field officers. The assessee has to then make fresh application to the field officer and it requires herculean efforts to finally get an order of rectification passed.

Suggestion: There has to be proper mechanism for granting credit of TDS where income has been offered for tax on cash basis of accounting.

6. **Payment made to non-residents, who do not have PAN**

Section 206AA requires deduction of tax at source @ 20% if the payee does not have a PAN. Notification dated June 24, 2016 was issued to state that on submission of specific documents by a non-resident provisions of section 206AA would not apply and tax can be deducted as per the rate applicable under the Act or as per the applicable DTAA. Form 27EQ available on NSDL website does not have any provision/field to enter details of such alternative documents received due to which, tax is deducted at lower rate and not at 20%. In the absence of such mechanism, demand is raised for short deduction of tax while processing the TDS statement filed.

Suggestion: Form 27EQ needs to be amended to capture the simplification as stated in the notification.

7. **Applicability of Sec.43B to both employee and employer contributions. No disallowance u/s 36(1)(va) if paid before due date of filing return of income.**

Sections 36(1)(va) of the Act provides that deduction in respect of any sum received by the taxpayers as contribution from his employees towards any welfare fund of such employees is allowed only if such sum is credited by the taxpayer to the employee's account in the relevant fund on or before the due date under the relevant Statute. The issue arises as to whether due date for payment of employees contribution to staff welfare fund viz. ESIC / PF under section 36(1)(va) is same as contemplated under section 43B.

The following court rulings have been passed in favour of taxpayer wherein it is held that Sec.43B is applicable to both employee and employer contributions – see CIT v. Kichha Sugar Co. Ltd. [2013] 216 Taxman 90 (Uttarakhand), CIT v. Hemla Embroidery Mills (P.) Ltd. [2013] 217 Taxman 207 (Punj. &Har.), Spectrum Consultants India Pvt Ltd v. CIT [2013] 215 Taxman 597 (Kar.), CIT v. AIMIL Ltd. [2010] 188 Taxman 265 (Delhi) , CIT v. State Bank of Bikaner & Jaipur [2014] 225 Taxman 6 (Raj.) , CIT v. Jaipur Vidyut Vitran Nigam Ltd. [2015] 228 Taxman 214 (Raj.) CIT v. Magus Customers Dialog (P.) Ltd. [2015] 231 Taxman 379 (Kar.), Sagun Foundry (P.) Ltd v. CIT [2017] 78 Taxmann 47 (Allahabad).

However, the Assessing Officer are making disallowance u/s 36(1)(va) read with Sec.2(24)(x) even if the contribution received from the employees is deposited before the due date for filing the Income Tax Return.

Suggestion: The CBDT should come out with circular to clarify the settled position that “due date” for payment of employees contribution to staff welfare fund viz. ESIC / PF under section 36(1)(va) is same as contemplated under section 43B i.e due date for filing the return of income.



BOMBAY CHARTERED ACCOUNTANTS' SOCIETY

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Bombay Chartered Accountants' Society

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