AKSHAY SHAH
22-08-2022

AUG 2022
ISSUE 68

TAXTIME

NEWSLETTER

DIRECT TAX NEWS

NON-RESIDENT WITHOUT PERMANENT ESTABLISHMENT IN INDIA NOT LIABLE FOR TCS

The Income Tax Department has said that the provision related with Tax Collected at Source (TCS) will not be applicable on buyers who are non-resident Indians (NRI) and not having permanent establishment (PE) in India. This will also help tour operators selling overseas tour packages to such non-resident buyers.

The Central Board of Direct Taxes (CBDT) has notified the exemption with effect from August 17. It will suppress previous notifications issued in March this year. Income Tax Act defines non-resident Indian as an individual, being a citizen of India or a person of Indian origin but who is not a "resident". Further, an individual is said to be resident in India in any previous year, if he is in India in that year for a period or periods amounting in all to one hundred and eighty-two days or more.

TCS and TDS are two means for collecting income tax on transaction. While in TCS, it is the responsibility of the receiver to collect tax and deposit it with the government, TDS rules implies tax to be deducted by the givers and deposited with the government.

Decoding the present notification, Aravind Srivatsan, Tax Leader, Nangia Andersen LLP, says Finance Act 2020 introduces Section 206C(1G) effective October 2020 to keep a tab on forex spends by persons who are residents of India . The provision requires TCS applying 5 per cent on the underlying value by an authorised dealer on monies received for remittance out of India under LRS (Liberalised Remittance Scheme) of RBI and domestic tour operators on monies received for overseas tour package for consideration in excess of ₹7 lakh.

Services of domestic tour operators whose services were increasingly being used by non-residents faced the dilemma of collecting such TCS and administering provisions of this section, and meanwhile, the non residents faced the dilemma of dealing with the inability to claim credit for TCS since they had no obligation to file tax returns in India. Accordingly as part of post pandemic relief a notification was issued on March 31, 2022 providing exclusion to non-residents visiting India.

"Now with August notification, issued in suppression of the earlier notification, the scope of exemption has been broad based to also exempt collection of TCS from non-residents who do not have a PE in India, which could include corporate and professional firms who were availing of such services," said an expert.

DIRECT TAX NEWS

WINDFALL GAIN TAX ON CRUDE LOWERED TO ₹13,000 A TONNE

The Finance Ministry has lowered the windfall gain tax on domestically produced petroleum crude. However, export levy on diesel has been raised and resumed on jet fuel (Aviation Turbine Fuel).

This is the third revision after export levies were imposed on July 1. The revision is done fortnightly and the revised levies has been made effective from August 19.

According to notifications issued by the Central Board of Indirect Taxes & Custom (CBIC), the windfall gain tax on petroleum crude produced domestically will now be ₹13,000 as against ₹17,750 per tonne.

Initially, it was ₹23,250 per tonne, which was cut to ₹17,000 per tonne on July 18 and then rose to ₹17,750. One of the reasons for cutting the windfall gain tax could be fall in the crude prices.

The decision to impose the windfall gain tax followed the sharp rise in the crude prices in recent months. The domestic crude producers sell to refineries at international parity prices thereby, making windfall gains. Considering this, a cess was imposed. Imported crude was not subject to this cess.

The government has already clarified that this cess will have no adverse impact on the pump prices. Further, small producers, whose annual production of crude in the preceding financial year was less than 2 million barrels, are exempt from the cess. Also, to incentivise additional production over the preceding year, no cess has been imposed on the quantity of crude produced in excess of last year's output.

INDIRECT TAX NEWS

CBIC ISSUES NORMS FOR SUMMONS, ARREST UNDER GST ACT

An arrest can be made in GST-related offences only if the amount exceeds ₹2 crore and the tax officials have reason to believe that the person concerned can tamper with evidence, according to new guidelines issued by the Central Board of Indirect Taxes and Customs (CBIC). Also, the top management of an entity will not be summoned at the first instance.

CBIC's GST investigation wing issued two sets of instructions — one related to arrest and bail, and the other on issuance of summons. Experts believe these will not only bring clarity for officers, but also ensure that businesses do not face ad-hocism.

Summons should be issued only after obtaining approval from an officer not below the rank of DC/AC. The reason for the same has to be recorded in writing. Summons should be avoided for calling documents available on the GST portal. Also, the senior management of a company can be summoned only upon clear indication of involvement, the guidelines said.

"This will go a long way in preventing undue harassment of senior company officials, particularly when they may not be involved in routine compliance matters," said an expert.

On the terms of arrest and bail, the guidelines say that a Commissioner should have reason to believe (based on credible material data and must be unambiguous) that the person has committed the offence of making a supply without issuing an invoice or issuing invoice without any supply or fraudulently getting input tax credit and the amount involved exceeds ₹2 crore. Also, before arresting a person, the Commissioner must determine whether or not it is essential to ensure proper investigation or the person is likely to tamper with the investigation or evidence. Further, the element of mens rea (intent) should exist for taking the person into custody. Once the person is arrested and if the offence is non-cognisable and bailable, then the person is to be released on bail against a bond. That person needs to be produced before a magistrate within 24 hours only in cases where the conditions for granting bail are not fulfilled.

MOBILE DISPLAY ASSEMBLY WILL ATTRACT BASIC CUSTOMS DUTY OF 10%, SAYS CBIC

The Central Board of Indirect taxes & Custom (CBIC) has said that the display assembly of a mobile handset, imported with or without back support, will attract basic customs duty (BCD) of 10 per cent. However, if it comes with various components, the rate of duty will be 15 per cent.

This circular has been issued at a time when the Directorate of Revenue Intelligence (DRI) has been booking companies such as Vivo and Appo on the issue of mis-declaration of certain items. In case of Vivo India, DRI said mis-declaration resulted in wrongful availment of ineligible duty exemption benefits amounting to ₹2,217 crore.
Similarly, for Oppo India, DRI said mis-declaration resulted in wrongful availment of ineligible duty exemption benefits amounting to ₹2,981 crore.

According to the circular, although the back support frame of metal/ plastic has no essential function in display and only provides strength, protection and structural stability, the mere attachment of a back support frame of metal/plastic on the display assembly does not alter the essential characteristic of display in any manner, and the assembly would continue to be treated as a display assembly of a cellular mobile phone.

Therefore, "if display assembly of mobile phone is imported with merely a back support frame of metal/ plastic attached to it, the assembly continues to be a display assembly of a cellular mobile phone and a BCD rate of 10 per cent shall be applied," it said. However, if the back support frame of metal/plastic is imported individually, it will attract a BCD rate of 15 per cent.

Also, if any other item, including the SIM tray, antenna pin, speaker net, power key, slider switch, battery compartment, Flexible Printed Circuits (FPCs) for volume, power, sensors, speakers, finger print, come fitted with a display assembly, with or without a back support frame of metal/plastic, then the whole assembly will attract a BCD rate of 15 per cent, said the circular.

The CBIC said though there has been notification, there have been instances of mis-declaration. Also, the Ministry of Electronics and Information Technology (MeitY) shared a technical document that provided the prominent constituents of a display assembly of a cellular mobile phone, which was shared with field formations for ease of assessment.

MeitY said the display assembly of a cellular mobile phone is an assembly of components and sub-components such as touch panel, cover glass, brightness enhancement film, indicator guide light, reflector, LED backlight and polarisers, put together to form a single assembly having the principal function of displaying images and text.

INDIA, OTHERS OPPOSE OECD PLAN ON FUTURE DIGITAL TAXES

India and other developing countries have objected to a provision in a multilateral convention that bars nations from enacting any future digital services taxes such as equalization levy, saying the clause will unduly restrict sovereign rights to make laws, a development seen delaying a global tax deal to address digitaisation challenges.

"We should be conscious that any commitment beyond a political commitment, will effectively constrain future law-making powers of sovereign jurisdictions," according to the comments submitted by the G-24 (Group of 24 countries that includes India) on the Progress Report on Amount A of Pillar One of the proposed OECD/G20 tax deal.

According to the OECD framework agreement, Pillar One will apply to multinational companies with profitability above 10% and global turnover above €20 billion. The profit to be reallocated to markets will be calculated as 25% of the profit before tax (Amount A) in excess of 10% of revenue. Pillar Two suggests a minimum 15% tax rate.

In March this year, finance minister Nirmala Sitharaman had justifying the 2% equalisation levy (EL) imposed by India on the supply of services by multinational enterprises, saying it was a sovereign right to tax revenues earned from operations in the country.

"After arriving at some measure of consensus, implementation of Pillar One would require changes in domestic laws of member countries to align with the pillar one framework. In particular, for a country like India where a " digital service tax" like equalisation levy is already in play, a careful evaluation of the impact of final measures under pillar one will need to be done before India agreed to withdrawal of EL. Similar considerations will govern the future course of action for other countries as well. Hence, it is very likely that the roadmap to implementation may get extended," said an expert.

The G24 has also objected to inclusion of withholding taxes in Amount A as it will lead to erosion of existing taxing rights and will make Pillar One unattractive and meaningless for the developing countries. "G-24, therefore, strongly urges the Inclusive Framework to keep withholding taxes out of Amount A allocation," the grouping said.

The developing countries also expressed strong concern about proposed dispute resolution mechanism, saying independent experts should not perform what is in essence a sovereign function.

On October 8, 2021, 136 out of the 140 countries have politically committed to potentially fundamental changes to the international corporate tax system. The global tax deal is proposed to come into effect in 2024.

INDIA TO TAKE UP IT FIRMS' TAX ISSUE WITH AUSTRALIA

India will ask Australia to amend its domestic law swiftly for the resolution of the tax issue being faced by Indian IT companies under the double-taxation avoidance agreement (DTAA), when trade ministers of both nations meet here next month.

New Australian trade minister Don Farrell will visit India in September for the joint ministerial commission meeting with commerce and industry minister Piyush Goyal, an official source said.

India will likely ask Australia to amend its laws, in accordance with a formal pact reached between the two sides in April, and stop taxing the offshore income of Indian firms providing technical support there.

Both sides have already acknowledged the need for an early ratification of the interim trade deal, or the India Australia Economic Cooperation and Trade Agreement (ECTA), which was signed in April.

Once implemented, Canberra's move to tweak the law will correct a costly anomaly in the 1991 DTAA between the two countries and enable Indian IT and ITeS players to substantially scale up their operations in Australia. The anomaly is expected to have cost Indian IT companies about $1.3 billion since 2012, according to an industry estimate.

Using the provisions of the India-Australia DTAA, Canberra has been taxing income generated from offshore IT services rendered from India as royalty, even when the same income is being taxed in India as well.

Since 2000, key IT firms such as Infosys, TCS, Wipro, Tech Mahindra Satyam and HCL have stepped up operations in Australia, but this taxation continues to be an issue for them. Once it is resolved, the firms can significantly ramp up business there.

The Indian IT services industry grew 2.7% on year in FY21 to $99 billion, according to Nasscom. The broader industry, including e-commerce, business process management and global back offices, grew 2.3% to $194 billion in FY21. According to RBI data, Australia and New Zealand together accounted for 3.1%, or $4.2 billion, of India's software services exports in FY21.

FROM PAYMENT FOR NOT SERVING NOTICE PERIOD TO CHEQUE DISHONOUR, CBIC CLEARS THE AIR

With the completion of 5-years since the introduction of GST, the certainty of tax positions and ease of compliances for taxpayers have emerged as key drivers for a robust GST system. Recent circulars issued by CBIC are a step towards removing ambiguity and disputes on interpretational issues under the law.

One such issue is GST on payment towards breach of contractual obligation, which has attracted protracted litigation under both service tax and GST laws. Tax treatment of payment by an employee to an employer for not serving the notice period agreed in the employment contract is a classic example of this dilemma

Whether such payment is a consideration received by the employer to tolerate the act of premature exit and hence taxable under GST or compensation for breach of the employment contract and hence not taxable has been a question for ages. While CESTAT rulings under service tax laws have primarily held that service tax is not applicable on such payments or liquidated damages towards contractual non-performance, GST authorities and advance rulings under GST have treated these payments as consideration for tolerating an act and sought GST at 18%. This led to a corresponding increase in litigation as taxpayers relied on favourable interpretation under international VAT and service tax laws to contest this view.

In this backdrop, the Circular (No.178/10/2022-GST) issued by CBIC is a much-awaited relief benefiting taxpayers at large, as it clarifies that GST is not applicable on liquidated damages, notice pay/bond amount recovered from employees, fine for cheque dishonour, compensation paid for cancellation of coal blocks, the penalty for violation of laws, etc. It is clarified that the levy of GST would arise only if there is an independent agreement between the parties for doing something against a payment. Mere flow of money from one party to another would not lead to a presumption of payment for an independent taxable activity.

The Circular also mentions non-compete fees, late payment charges by utility providers of electricity, water or cancellation charges levied by railways, airlines, hotels, tour operators as examples of payments made towards the independent activity of tolerating an act. These payments are to be taxed at the same rate as that of the principal supply e.g., cancellation charges of railway tickets would attract GST at the same rate applicable to ticket booking. Therefore, the essence of the arrangement would have to be examined to determine the applicability of tax.

This clarification would go a long way in providing certainty to businesses while entering into contractual arrangements. Taxpayers can also revisit existing tax positions to evaluate instances where GST is required to be paid/not paid and related refunds to be claimed. Early recourse in pending litigation can be explored in cases where the Circular is favourable. While the Circular is silent on immunity to taxpayers who had paid GST on liquidated damages and availed credit/refund, one hopes that an instruction will be issued to plug any potential litigation on this aspect.

Overall, the Circular is a welcome move given the prolonged litigation regarding liquidated damages, fines and penalties under GST and service tax laws. It is expected that clarifications on pending interpretational GST issues would also be issued to provide certainty of tax positions and facilitate ease of business.

TODAY'S QUOTE

Opportunity is missed by most people because it is dressed in overalls and looks like work

- Thomas Edison

DISCLAIMER

This publication contains information for general guidance only. The contents are solely for information and knowledge purpose. It does not constitute any professional advice or recommendation. The contents are gathered from different newspaper and websites as mentioned in 'Source of content'. We do not accept any responsibility and liabilities for any loss or damage of any kind arising out of any information in this publication nor for any actions taken in reliance thereon. This is a private circulation for clients and professionals only.

Source of Content

https://epaper.thehindubusinessline.com/
https://epaper.thehindu.com/
https://economictimes.indiatimes.com/epaper-print-edition/
https://www.gst.gov.in/newsandupdates/read/509\
https://economictimes.indiatimes.com/small-biz/gst/gst-from-payment-for-not-serving-notice-period-to-cheque-dishonour-cbic-clears-the-air/articleshow/93583074.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

AKSHAY SHAH
Email: ca.akshah@gmail.com
Contact No.: 9958975768
Website: www.jainshah.com