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The Malad Chamber of Tax Consultants

40 Years MCTC Bulletin

"Never Stop Learning, Never Stop Growing"

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President's Communiqué

'Shivmastu Sarve Jagatah: Parheet-Nirata-Bhavantu Bhutagana,
Doshah Prayantu Nasham, Sarvatra Sukhi Bhavantu Lokah:'

'Let there be well being in the whole world, Let every living being make continuous efforts in doing good for everyone. Let everybody be without any shortcomings and Let everybody be forever happy.'

With these words welcoming everybody and wishing progress and peace for everyone.

The interim Union Budget (Finance Bill) 2019 was presented in Parliament on 1st February, 2019 by interim Finance Minister CA Piyush Goyal. For the benefit of our Members, we have given a brief insight on the various Budget Proposals of the Finance Bill 2019 as part of our Bulletin.

We are conducting the 16th Regional Refresher Course (RRC) at Cloud 9 Hills Resort, Lonavala on 23rd and 24th February 2019. The participation of our Members for the RRC is excellent. We are grateful to Dr. Bharat D. Vasani who will be speaking on 'Appeals, Revisions and Stay Petition' and CA Ujwal Thakrar who will be making presentation on the subject 'NRI Taxation'. The Participant Members are bound to get bountiful knowledge and information on both topics.

We will be undertaking the Rajubhai Chokshi Oration Fund lecture on 2nd March 2019. Details of the programme is given in the forthcoming events section of this Bulletin. We are also planning the Triangular Series of Box Cricket along with CTC and GSTPAM in the month of March 2019, details for the same will be informed to all members. All the members of the Chamber are requested to participate in these programmes in large numbers to make it successful.

With warm Regards,

CA Vaibhav D. Seth
President

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FORTHCOMING EVENTS	
Half day Seminar under the auspices of Rajubhai Chokshi Oration Fund	
Day & Date	Saturday, 2nd March, 2019
Time	5.30 P.M. to 9.30 P.M.
Topic	Recent Amendments in GST
Speaker	Eminent Faculty
Fees	For Members Rs. 400 & Non Members Rs. 500
Venue	N. L. College Conference Hall, S. V. Road, Malad West, Mumbai-400 064.

DIRECT TAX PROPOSALS CONTAINED IN FINANCE BILL, 2019

Compiled by CA Ketan Vajani

The interim budget, being the last budget of the present government has been presented by the interim Finance Minister Shri Piyush Goyal on 1st February, 2019. It is first time in the history of the country that a chartered accountant has presented the budget, albeit interim, in parliament. The expectations from the budget were naturally high considering the fact that this is the last budget before the country goes for general elections in May 2019. It was expected to be a populist budget and the Hon. Finance Minister has largely met these expectations by announcing many schemes benefiting large sections of people. Since this was an interim budget, the magnitude of tax provisions and amendments are much lesser as compared to the Finance Bill of recent past. This article seeks to analyse the amendments proposed in the Income-tax Act, 1961. The amendments proposed are dealt herewith in detail.

Tax Rates

There was an expectation that the rates of tax will be reduced for both corporate and non-corporate taxpayers and also the basic exemption limits for the individual taxpayers will be enhanced considerably. The expectation was perhaps misplaced considering that as a matter of precedence, the government refrained from making substantial amendments in tax provisions.

The tax rates have remained unaltered and the basic exemption limit for individual taxpayers also continues to be the same. However, the Finance Minister has given an indirect benefit in tax outgo for the middle class individuals having incomes up to ₹ 5,00,000/- by proposing amendment in Section 87A of the Income-tax Act.

Rebate under Section 87A

Under the existing provisions of Section 87A of the Act, a rebate is allowed to a resident individual of 100% tax subject to maximum ₹ 2,500/-. This is available subject to a condition that the total income of the individual does not exceed ₹ 3,50,000/-. The Finance Bill seeks to amend the provisions of Section 87A so as to provide that the maximum rebate will be ₹ 12,500. The bill also seeks to enhance the upper limit eligible for rebate to ₹ 5,00,000/- from present ₹ 3,50,000/-.

However, one must bear in mind that the basic exemption limits have not changed and the same continues to be ₹ 2,50,000/-. Accordingly, there will be no benefit at all in cases where the income of the individual tax payer exceeds Rs. 5,00,000/-. The entire benefit will be lost even in a case where the income goes up by very marginal amount.

The following table will be helpful in clarifying in the matter :

Taxable Income	Position at Present			Position after amendment			Benefit
	Tax	Rebate u/s. 87A	Net Outgo	Tax	Rebate u/s. 87A	Net Outgo	
Upto 2,50,000	Nil	Nil	Nil	Nil	Nil	Nil	Nil
3,50,000	5,000	2,500	2,500	5,000	5,000	Nil	2,500
4,00,000	7,500	Nil	7,500	7,500	7,500	Nil	7,500
5,00,000	12,500	Nil	12,500	12,500	12,500	Nil	12,500
5,00,100	12,520	Nil	12,520	12,520	**NIL**	12,520	**NIL**

As such, it is very clear that the benefit has been given to individuals having taxable income of maximum ₹ 5,00,000/-. The individuals having taxable income of more than ₹ 5,00,000/- will not have any benefit whatsoever and will continue to be governed by the tax position prevalent as of now.

Effective Date : The amendment is with effect from 1-4-2020 and will apply from A.Y. 2020-21

Standard Deduction to Salaried Employees

As per existing provisions of section 16 of the Act a standard deduction of ₹ 40,000/-, subject to actual salary, is available to a salaried individual. The Finance Bill seeks to amend the section 16 so as to enhance the limit of standard deduction to ₹ 50,000/- from present ₹ 40,000/-.

Effective Date : The amendment is with effect from 1-4-2020 and will apply from A.Y. 2020-21

Amendments related to Income from House Property

Amendments to Section 23 and 24 : Two Houses can be self-occupied properties and extension of period for Stock-in-Trade deemed to be let out under Income from House Property

Existing Provisions

Section 23 of the Income-tax Act provides for determination of annual value in respect of Income from House Property. Sub-section (2) of the section provides that where the property is possessed for the purpose of own residence of the assessee or where the property cannot actually be occupied on account of the fact that the assessee has to reside at other place not belonging to him on account of his employment, business or profession, the annual value of the property will be Nil.

Sub-section (4) of the section provides that where the property referred to in sub section (2) consists of more than one house, the Nil value can be adopted in respect of any one house property at the option of the assessee and the other house, which is not considered as self occupied property, will be treated as deemed to be let out and the annual value for such house will be computed under normal provisions of section 23.

Sub section (5) of section 23 provides that in a case where the building or land appurtenant thereto is held as stock-in-trade and the same is not let during the year or part of the year, the annual value of such property will be taken at Nil for the period up to one year from the end of the financial year in which the certificate of completion of construction of the property is obtained from the competent authority.

Section 24 of the Act provides for deduction from Income from House Property.

Proposed Amendments

Clause 4 of the Finance Bill seeks to amend sub-section (4) of Section 23 of the Income-tax Act, so as to provide that the assessee can consider two house properties as self occupied house properties instead of one house property as provided as of now. As such, the assessee will now be in a position to avoid the deeming fiction provided under sub-section (4) of Section 23 in respect of two house properties as per his choice. Clause 5 of the Finance Bill seeks to make consequential amendments to Section 24 of the Act in this direction.

Clause 4 also seeks to amend sub-section (5) of Section 23 so as to extend the period of annual value being Nil from the present one year to two years from the end of the financial year in which the certificate of completion of construction of the property is obtained from the competent authority.

Effective Date : The amendments are with effect from 1-4-2020 and will apply from A.Y. 2020-21

Amendment to Section 54 of Income-tax Act : Exemption from Long Term Capital Gains on transfer of a residential house

Existing Provision

Section 54 of the Income-tax Act, 1961 grants exemption from long term capital gains arising on transfer of a residential house. The section provides for exemption in a case where the assessee purchases another residential house either within one year before or two years after the transfer of the old residential house or constructs a residential house within three years from the date of transfer of the old residential house. The exemption is allowed to the extent of the investment made by the assessee in the new residential house subject to maximum of the long term capital gain arising to the assessee.

Up to the assessment year 2014-15, the section was providing for exemption in respect of investment in *“a residential house”* on transfer of the old residential house. The phrase *“a residential house”* had been subject matter of controversy. The issues arose as to whether the assessee can make investment in more than one residential house and seek exemption in respect of all such residential houses. There were different views taken by different tribunals across the country. However, the issue thereafter reached somewhat settled position and the courts took a view that the expression "*a residential house*" should be understood in a sense that the building should be of residential nature and "a" should not be understood to indicate a singular number. *[CIT vs. D. Ananda Basappa (2009) 309 ITR 329 (Kar); CIT Vs. K. G. Rukminiamma (2011) 331 ITR 211 (Kar.); CIT vs. Syed Ali Adil (2013)352 ITR 418 (AP)].* There were also cases where the assessee had successfully claimed exemption in respect of investment in new residential houses outside India.

This position was altered by the amendment made to section 54 by the Finance (No. 2) Act, 2014. The Finance Act replaced the phrase "a residential house" with "one residential house in India" and hence the position with effect from A.Y. 2015-16 is that the assessee is eligible to make investment in only one residential house in India against the long term capital gains arising on transfer of the old residential house.

Proposed Amendment

Clause – 6 of the Finance Bill seeks to amend Section 54 of the Act by inserting two provisos to sub-section (1) of Section 54. The first proviso seeks to provide that in a case where the amount of long term capital gains does not exceed two crore rupees, the assessee at his option, can make investment in two residential houses in India and claim exemption in respect of the investment in two houses. The second proviso however, provides that where such option has been exercised by the assessee in any assessment year, he shall not be entitled to exercise such option subsequently in the same assessment year or any other assessment year.

Effective Date : The amendments are with effect from 1-4-2020 and will apply from A.Y. 2020-21

Purpose : The purpose as emerging from the speech of the Hon. Finance Minister is to enable a hitherto joint family to settle as two nucleus families by having two residential houses and also to address a situation where the assessee needs to have two houses at different places on account of his employment or business or profession.

Implications of the Amendment

1. Restriction of Capital Gain of maximum ₹ 2 Crores

   The amendment permits exemption in respect of investment in two houses in India only where the long term capital gains on transfer of the original house does not exceed rupees two crores. One has to note that there is an upper cap of long term capital gains being rupees two crore for exercising option provided in first proviso to Section 54(1). In a case where the long term capital gain is more than ₹ 2 crores, the proviso will not apply. However the main provision of sub-section (1) will continue to apply and the assessee will be eligible to claim exemption in respect of investment in one residential house as is available as of now.

   For example Mr. A transfers his residential house for ₹ 4 crore and the long term capital gains after indexation is ₹ 1.99 Crores. In this case, Mr. A is eligible to make investment in two residential houses say one at Mumbai for ₹ 1.50 Crore and the other at his native place in Gujarat for ₹ 50 Lakhs and seek exemption of entire ₹ 1.99 Crores. However if the long term capital gains in the same example is ₹ 2.01 Crores, then the exemption will be confined to only one such residential house i.e., at Mumbai for ₹ 1.50 Crores and will have to offer balance ₹ 61 lakhs as long term capital gains.

2. Option can be exercised only once

   One more very important point to note is that the second proviso restricts the option given under the first proviso for only once. The second proviso clearly states that once the option has been exercised by the assessee in any assessment year, he shall not be entitled to exercise such option subsequently in the same assessment year or any other assessment year.

   Consider a case where Mr. X is the owner of two residential houses, one at Malad and the other at Andheri. He transfers the residential house at Malad in May 2019 and earns long term capital gains of ₹ 1.95 crores. He makes investment in two residential houses at Kandivali say in June 2019 say ₹ 1 crore each. As such the assessee claims entire long term capital gains on sale of Malad house as exempt under the first proviso. Now in August, 2019 the assessee again transfers the residential house at Andheri. The assessee wants to make investment in two houses one at Vile Parle and the other at Dadar.

   In such a situation, since the assessee has already exercised the option under the first proviso while he transferred the residential house at Malad, he will not have the same option again and will have to confine the exemption to any one house i.e., either at Vile Parle or at Dadar as per his choice under the main provision of sub-section (1). Further it is to be noted that the option under the first proviso cannot be taken even in any of the subsequent years. In short the option under the first proviso is a once in life time option and one will have to use it sensibly considering future likelihood of having the same situation again.

   Amendment to Section 80-IBA of Income-tax Act : Deduction in respect of profits and gains from housing projects

Existing Provision

As per the existing provision of sub-section (1) of section 80-IBA of the Act an assessee is eligible to claim deduction of 100% of the profits and gains derived from the business of developing and building housing projects subject to some further provisions laid down in the section. Sub-section (2) of Section 80-IBA provides for the conditions to be fulfilled by the housing project, to qualify for the deduction. One of the conditions is that the project is approved by the competent authority after 1-6-2016 but on or before 31-3-2019.

Proposed Amendment

Clause – 7 of the Finance Bill seeks to amend sub-section (2) so as to extend the time limit of approval of the project from present 31-3-2019 to 31-3-2020. As such, the housing projects approved till 31-3-2020 will now be eligible for deduction of 100% of profits and gains earned from such housing project.

Effective Date : The amendments are with effect from 1-4-2020 and will apply from A.Y. 2020-21

Increase in threshold limits for non-deduction of TDS

Clause 9 of the Finance Bill seeks to enhance the threshold limits for non-deduction under sections 194A from present ₹ 10,000/- to ₹ 40,000/- where the payer is a banking company to which the Banking Regulation Act, 1949 applies or a co-operative society engaged in carrying on the business of banking or on any deposit with post office under any scheme framed by the Central Government and notified by it in this behalf. It is to be noted that there is no amendment proposed as regards cases other than the above and in such other cases the present limit of ₹ 5,000/- shall continue to apply.

Similarly Clause 10 of the Finance Bill seeks to enhance the threshold limits for non-deduction under Section 194I from present ₹ 1,80,000/- to ₹ 2,40,000/-.

Conclusion

The amendments proposed in the Finance Bill 2019 are largely of benevolent nature and one does not have any complaints to be made. However, personally it is felt that the restriction of ₹ 2 crore under the first proviso under Section 54 should not have been there. Similarly the restriction of allowing the option to be exercised only once in the life time should have been avoided considering the primary purpose of Section 54. The Finance Bill has addressed only very limited part of the Income-tax Act and lot more provisions are likely to be amended when the new Government presents its full fledged budget post election.

I express my sincere thanks to the Malad Chamber of Tax Consultants for giving me this opportunity to share some of my thoughts with all the readers through this article. The opportunity made me read through the Finance Bill minutely, which probably I might have missed out due to busy schedule of life. In the process, I must admit that I have gained some better insight of the Finance Bill. Thanks again.

■■■

DIRECT TAXES – LAW UPDATE

Compiled by CA Haresh P. Kenia

1. Double Taxation Agreement-Section 90-Agreement between India and Hong Kong

The Central Government *vide* Notification No. S.O.6247(E)[No.89/2018(F.No.500/124/97-FTD-II] dated 21/12/2018, notifies that agreement between the Government of the Republic of India and Government of the Republic of Hong Kong special administrative Region of People's Republic of China for the avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income. The agreement was signed on 19th March, 2018 and shall have effect in India in respect of Income derived in any fiscal year beginning or after the first day of April following the date on which the agreement entered into force. The agreement entered into force on 30th November, 2018.

2. Income-tax Authorities–Section 119 of the Income-tax Act 1961–Extension for furnishing report u/s. 286(4) of the Income-tax Act-Instruction to subordinate authorities

The CBDT *vide* Circular No. 9/2018 [F. No. 370142/17/2018-TPL] dated 26/12/2018 extends the period for furnishing of the report u/s. 286(4) read with Rule 10DB(4) of the Income-tax Rules, by the constituent entities referred to u/s. 286(4)(a) or (aa), in respect of reporting accounting years ending upto February 28,2018 to March 31, 2019. The Board in exercise of the power u/s. 119 issued the clarification as a one time measure, in order to remove the genuine hardship.

This is in view of notification in GSR 1217(E) dated 18-12-2018 which has amended and substituted rule 10DB(4) to provide that the period for furnishing of the report u/s. 286(4) by the constituent entity shall be 12 months from the end of the reporting accounting year.

It was further provided that in case the parent entity of the constituent entity is resident of a country or territory, where, there has been a systemic failure of the country or territory and the said failure has been intimated to such constituent entity, the period for submission of the report shall be six months from the end of the month in which said systemic failure has been intimated.

The CBDT received the representation stating that constituent entity of an international group, which is resident in India, having parent entity resident in jurisdictions with which India does not have an agreement providing for exchange of the report of the nature referred to in sub-section(2) of the Act and where the reporting accounting year is calendar year based, i.e., ending on December 31 of the year, would need to furnish the report under sub-section (4) of section 286 of the Act in India by December 31, 2018.The constituent entity in such case for the reporting accounting year ending on 31/03/2017 would have been required to furnish CbCR by 31/03/2018 which is not plausible.

In order to remove genuine hardship the Board extended the period for furnishing the report u/s. 286(4) read with the Rule 10DB(4), in respect of the reporting accounting year upto February 28, 2018 to March 31, 2019.

3. Deduction of tax at source-Section 197 read with Section 206C of the Income-tax Act-Certification for deduction at lower rate – no deduction of Income-tax

The Principal Director General of Income-tax (systems) *vide* Notification No. 8/2018 [F.No. PR.DGIT(S)/CPC(TDS)/Notification/2018-19] dated 31-12-2018, in exercise of the powers delegated by the Central Board of Direct Taxes under Rule 28(2)/37G(2) of the Income Tax Rules, specifies the procedure, formats and standards for the purpose of electronic filing of Form No. 13 and generation of certificate u/s. 197(1)/206C(9) through TRACES as per the procedure given in the notifications.

The Rule 28/37G of the Income Tax Rules,1962 has been amended *vide* CBDT Notification No. 74/2018 dated 25-10-2018 to provide for filing an application for grant of certificate for deduction of Income Tax at lower rate or no deduction u/s. 197(1)/206C(9) to be made in Form No. 13 electronically in accordance to the procedures, formats and standards for ensuring secure capture and transmission of data and uploading of documents to be laid down by the Principal Director General of the Income Tax (systems)

The notification provides for the following:-

a. Procedure for electronic filing of Form 13

b. Procedure for assignment of application to the TDS assessing officer

c. Processing of the tax payer/deductee's request by the TDS assessing officer, Range Heads and Commissioner of the Income Tax.

d. Issuance of Certificate.

4. Income from other sources-Section 56(2)(viia) –not to apply in case of receipt of shares by closely held company or firm as a result of fresh issuance of shares by closely held company

The CBDT *vide* Circular No.:10/2018 [F.No.173/626/2018-ITA.I] dated 31/12/2018 clarified as under:-

The CBDT, keeping in view the legislative intent to apply anti-abuse provision contained in Section 56(2) (viia) to transfer of shares for no or inadequate consideration, clarified that Section 56(2) (viia) of the Act shall apply in cases where a specified company or firm receives the shares of the specified company through transfer for no or inadequate consideration. Hence, the provisions of Section 56(2)(viia) of the Act shall not be applicable in cases of receipt of shares by the specified company or firm as a result of fresh issuance of shares as mentioned above, by the specified company.

The Section 56(2) (viia) of the Income-tax Act,1961 provides for taxation of income where a company in which public are not substantially interested or a firm receives shares of a specified company from a person for no or inadequate consideration.

The representation was received by the board that the term "receives" used in Section 56(2)(viia) of the Act, being of a wider import and might lead to taxation of Income in the cases where the shares are received by a firm or specific company as a result of a fresh issuance of shares including by way of issue of bonus shares, right shares and preference shares or transactions of similar nature by the specified company.

5. Income from other Sources–Section 56(2)(viia) of the Income-tax Act-Withdrawal of Circular No. 10/2018 [F. No. 173/626/2018-ITA.I] dated 31-12-2018 on applicability of Section 56(2)(viia) of the Income-tax Act for issue of shares by company in which public are not substantially interested

The CBDT *vide* Circular No. 02/2019 [F. No. 173/616/2018-ITA.I] dated 04-01-2019 withdraws the circular no. 10/2018 dated 31-12-2018 and clarified that said circular shall be considered to have been never issued.

It has been brought to the notice of the Board that the matter relating to interpretation of the term "receives" used in Section 56(2) (viia) of the Income-tax Act, 1961 is sub-judice in certain higher judicial forums. Further, representations have been received from stakeholders seeking clarification on other similar provisions in section 56 of the Act.

Accordingly, the matter has been reconsidered by the Board. Given the fact that the matter relating to interpretation of the term "receives" used in Section 56(2)(viia) of the Act is pending before judicial forums and stakeholders have sought clarifications on similar provisions in Section 56 of the Act, the Board is of the view that the matter is required to be examined afresh so that a comprehensive circular on the matter can be issued.

6. Deduction of Tax at source–Salaries –Section 192–Income Tax deduction from salaries during the financial year 2018-19

The CBDT *vide* Circular No. 01/2019 [F. No. 275/192/2018-IT(B)] dated 01-01-2019 specifies the rates of deduction of Income Tax from the payment of income under the head "salaries" under Section 192 of the Income-tax Act during the financial year 2018-19 and also explains certain related provisions of the Act and Income Tax Rules, 1962.

7. Finance Act 2018-Explanation notes

The CBDT *vide* circular no. 8/2018 [F.No. 370/142/07/2018-TPL], dated 26/12/2018 gives explanatory notes to the provisions of the Finance Act, 2018.

8. Income Tax Authorities–Section119–Exception from online filing of the application under Section 197 and 206C(9) in the cases of NRI's and resident applicants

The CBDT by virtue of the powers u/s. 119 of the Act issued the order dated 24-12-2018, allowing the following:-

i. Allows non-resident Indians (NRI's), who are not able to register themselves on TRACES, to file manual application in Form No. 13 before the TDS officer or in ASK Centres till 31-03-2019.

ii. Allows resident applicants to file manual application in Form No. 13 before the TDS officer or in ASK Centres till 31/12/2018.

The Rule 28 was amended *vide* notification 74/2018 dated 25-10-2018, to prescribe electronically filing of application for lower deduction or no deduction u/s 197 using digital signature or EVC. Similar changes are also made in Rule 37G to prescribe electronic filling of application u/s. 206C(9) for lower or NIL rate of tax collection at source.

The functionality of online filling has since been made available by CPC-TDS through TRACES Portal Form No. 13 is a common form for application u/s. 197 and 206C(9).

In order to remove genuine hardship being faced by the certain applicants in filing online application in Form No. 13 and for proper administration of the provision of Section 197 and 206C(9), the Board has allowed the Non-Resident Indian and Resident applicants to file manual application in certain circumstances.

9. Clarification on revision of monetary limits for filling appeals by the Department–Para 10 of the circular 3 of 2018 dated 11-07-2018

The CBDT *vide* Circular No. 279/MIS/M-93/2018-ITJ, dated 11-12-2018 has issued the following clarification:

The CBDT had *vide* Circular No. 3 of 2018 dated 11-07-2018 raised threshold limit for filling appeal before ITAT, High Courts and Supreme Courts. In order to reduce litigation on the Income-tax matters, the CBDT has sharply increased the threshold limit for filling appeal before jurisdictional authorities as under:

Sr. No.	Appeals /SLPs in Income-tax Matters	Monetary Limit (₹)
1	Before Appellate Tribunal	20,00,000
2	Before High Court	50,00,000
3	Before Supreme Court	1,00,00,000

The CBDT now clarified as under:

In para 10 of the said Circular read with Board's letter issued *vide* F. No. 279/ Misc. 142/2007-ITJ (Pt), dated 20-08-2018, it has been unambiguously and expressly provided that adverse judgments relating to the following issues should be contested on merits notwithstanding that the tax effect entailed is less than the monetary limits specified in para 3 above or there is no tax effect:

a. Where the Constitutional validity of the provisions of an Act or Rule is under challenge, or

b. Where Board's order, Notification, Instruction or Circular has been held to be illegal or *ultra vires*, or

c. Where Revenue Audit objection in the case has been accepted by the Department, or

d. Where addition relates to undisclosed foreign income/undisclosed foreign assets (including financial assets)/undisclosed foreign bank account.

e. Where addition is based on information received from external sources in the nature of law enforcement agencies such as CBI/ED/DRI/SFIO/Directorate General of GST Intelligence (DGGI).

f. Cases where prosecution has been filed by the Department and is pending in the Court.

The direction that appeals be 'contested on merits' in itself implies that there should not be any mechanical filing of appeals in these cases. It is therefore reiterated that the import and intent of para 10 of Circular 3 of 2018 is that even on issues mentioned in the said para, appeals against the adverse judgments should only be filed on merits.

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APPLICABLE TAX ON RETENTION MONEY DUE AND RECEIVED ON AND AFTER 1ST JULY 2017 IN RESPECT OF CONTRACT EXECUTED (PRIOR TO 01-07-2017) UNDER EARLIER LAW

Compiled by CA Bhavin Mehta

'Retention money', which is retained in the power of the employer as a security for the due performance of the work and as a fund to be drawn upon, should occasion arise, either to complete the work or to rectify defects upon failure of the contractor to do so. In short, amount retained is towards performance guarantee, which is due for payment as and when the performance guarantee period is over.

The payment of retention money is deferred and is contingent on the satisfactory completion of the work and removal of defects and payment of damages, if any. Till then, there is no admission of liability and no right to receive any part of the retention money accrues to the assessee. Contractually, the contractor does not acquire any right to enforce the claim nor does the amount become due to them as a claim, which you can make until all the preconditions are cleared. Thus it can be derived that the point of taxation of such retention money would be when it becomes due i.e. at the time of completion of defect liability period and not earlier.

The issue in respect of taxability of retention money either under VAT and/or Service Tax law or under GST law arises where the works contract was executed before 01-07-2017 but retention money is due after 01-07-2017. In order to determine under which law retention money would be taxable i.e., under old law or under GST law, it is essential to refer to Section 142(10), 143 and 174 of the CGST Act (provisions under SGST Act are *pari materia* to CGST Act). Section 142(10), Section 173 and Section 174 are reproduced below:

"142 (10) Save as otherwise provided in this Chapter, the goods or services or both supplied on or after the appointed day in pursuance of a contract entered into prior to the appointed day shall be liable to tax under the provisions of this Act."

"173. Save as otherwise provided in this Act, Chapter V of the Finance Act, 1994 shall be omitted."

"174 (1) Save as otherwise provided in this Act, on and from the date of commencement of this Act, the Central Excise Act, 1944 ………….

(2) The repeal of the said Acts and the amendment of the Finance Act, 1994 (32 of 1994) (hereafter referred to as "such amendment" or "amended Act", as the case may be) to the extent mentioned in the sub-section (1) or Section 173 shall not –

(a) Revive anything not in force or existing at the time of such amendment or repeal; or

(b) Affect the previous operation of the amended Act or repealed Acts and orders or anything duly done or suffered thereunder; or

(c) Affect any right, privilege, obligation, or liability acquired, accrued or incurred under the amended Act or repealed Acts or orders under such repealed or amended Acts;

Provided that any tax exemption granted as an incentive against investment through a notification shall not continue as privilege if the said notification is rescinded on or after the appointed day; or

(d) Affect any duty, tax, surcharge, fine, penalty, interest as are due or may become due or any forfeiture or punishment incurred or inflicted in respect of any offence or violation committed against the provisions of the amended Act or repealed Acts; or

(e) Affect any investigation, …………

(f) Affect any proceedings including that relating to an appeal, review or reference, ………………..

(3) The mention of the particular matters referred to in sub-sections (1) and (2) shall not be held to prejudice or affect the general application of Section 6 of the General Clauses Act, 1897 (10 of 1897) with regard to the effect of repeal."

Section 142(10) states in respect of contracts entered into prior 01-07-2017, goods or services or both supplied on or after 01-07-2017, the provision of GST would be applicable. Whereas section 174(2)(c) states GST Act would not affect any right, privilege, obligation, or liability acquired, accrued or incurred under the earlier Acts.

The language used in Section 142(10) and Section 174(2)(c) appears to be incoherent. For contracts entered into prior to 1st July 2017, Section 142(10) talks about payment of GST on supplies made on and after 01-07-2017, whereas saving clause under Section 174(2) prescribes provision under GST would not affect any right, privilege, obligation or liability acquired or accrued under the old Acts. However, such saving of right and liabilities is in respect of those rights and liabilities which were acquired or incurred under a repealed statute. What is unaffected by the repeal of a statute is a right acquired or accrued under it and not a mere "hope or expectation of", or liberty to apply for, acquiring a right.

When the question arises as to the meaning of a certain provision in a statute, it is not only legitimate but proper to read that provision in its context. The context here means, in respect of contracts entered prior to 01-07-2017 but supplies made on and after 01-07-2017 (no supplies made prior to 01-07-2017) would be covered under Section 142(10) of the CGST Act. Section 174 protects rights, privileges, obligation or liability acquired or accrued under old law and shall be given treatment as per the provision of old laws. It is elementary rule of interpretation that the intention of legislature must be found by reading the statute as a whole. Every clause of a statute should be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole statute relating to the subject matter. In *State of W.B. v. Union of India AIR 1963 SC 1241,* Hon'ble Chief Justice of India Mr. Sinha stated "The Court must ascertain the intention of the legislature by directing its attention not merely to the clauses to be construed but to the entire statute; it must compare the clause with the other parts of the law, and the setting in which the clause to be interpreted occurs."

In the present case, the object of clause (c) is to preserve rights and privileges acquired and accrued on the one side, and the corresponding obligation or liability incurred on the other side, so that if no right had accrued under the repealed statute there is no question of any liability being preserved. CGST Act does not contain express words to show the intention of the Legislature to affect existing rights. The effect of clauses (c) to (f) of the Section 174(2) of the CGST Act is to prevent the obliteration of a statute in spite of its repeal to keep intact rights acquired or accrued and liabilities incurred during the operation and permit continuance or institution of any legal proceedings or recourse to any remedy which may have been available before the repeal for enforcement of such rights and liabilities.

In the premises of above discussion it can be derived that in case of contract commenced prior to 01-07-2017, the tax treatment applicable to goods or services or both supplied in respect of such contract would be in terms of the provision of old Acts. Retention money towards default liability period would be a right acquired after the necessary step is taken. The tax treatment applicable to retention money though due after 01-07-2017 would be as per the provision of old Acts. Retention money is part of the single works contract, wherein such single works contract is spread into period under VAT/Service Tax law as well as under GST law; the correct tax treatment in my opinion would be in VAT and/or Service Tax should be collected and paid as per respective legislation.

Input Tax Credit

Having derived the conclusion that tax applicable on such retention money would be as per the provision of old Acts, the question which arises is whether input tax credit of GST would be entitled on supplies received on and after 01-07-2017. In this respect relevant provision pertaining to ITC is examined as under:

1. As per Section 16(1), every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, be entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person.

In the present case supplies on which GST is charged by the supplier is used for furtherance of business.

2. As per Section 17(2), where the goods or services or both are used by the registered person partly for effecting taxable supplies including zero-rated supplies under this Act or under the Integrated Goods and Services Tax Act and partly for effecting exempt supplies under the said Acts, the amount of credit shall be restricted to so much of the input tax as is attributable to the said taxable supplies including zero-rated supplies.

Exempt supply is defined under Section 2(47) which means supply of any goods or services or both which attracts nil rate of tax or which may be wholly exempt from tax under Section 11, or under Section 6 of the Integrated Goods and Services Tax Act, and includes non-taxable supply. Further, Non-taxable supply is defined under Section 2(78) means a supply of goods or services or both which is not leviable to tax under the CGST Act or under the IGST Act.

Section 17(2) restricts the amount to input tax credit in respect of goods and services used for effecting only for taxable supplies. In the present case, tax on retention money is discharged under the old law and therefore supplies which are not leviable to tax under GST law will be termed as non-taxable supplies, which in terms of section 2(47) is considered as exempt supply.

Basis above literal provision of the law, assessee would not be entitled to claim the ITC in respect of supplies of goods and services used towards retention period (defect liability period).

However, it is possible to lend the argument that saving clause contained in clause (c) of Section 174(2) would be applicable even to ITC. Under the erstwhile VAT law and Service Tax law, ITC on goods and services respectively was entitled to assessee. The principle of set-off of ITC from old law to new law can be seen under transitional provision. Similarly, principally, ITC of new law may be set-off against liability under old law. Taxes levied under old Acts are subsumed under GST. Therefore credit should be granted of GST collected on supplies used towards retention period output supplies, otherwise, it would have cascading effect.

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SYNOPSIS OF GST NOTIFICATIONS AND CIRCULARS

Compiled by CA Brijesh M. Cholera

NOTIFICATION

1/2019 - CENTRAL TAX DT. 15-1-2019

Notification No. 48/2017 Central tax dated 18-10-2017 which notifies certain supply as deemed Exports now amended by this notification and inserted Proviso for supplies against advance authorisation scheme :-

Provided that goods so supplied, when exports have already been made after availing input tax credit on inputs used in manufacture of such exports, shall be used in manufacture and supply of taxable goods (other than nil rated or fully exempted goods) and a certificate to this effect from a chartered accountant is submitted to the jurisdictional Commissioner of GST or any other officer authorized by him within 6 months of such supply.

Provided further that no such certificate shall be required if input tax credit has not been availed on inputs used in manufacture of export goods.

In the Explanation against serial number 1 the words “on pre-import basis” shall be omitted.

2/2019 – CENTRAL TAX DT. 29-1-2019

The provisions of the CGST (Amendment) Act, 2018, shall come in to force wef 1.2.2019 except Section 8(b), section 17, section 18, section 20(a) pertain to New Returns, Section 28(b)(i) and 28(c)(i) pertain to Transition Credit (Section 140 of the CGST Act, 2017)

3/2019 – CENTRAL TAX DT. 29-1-2019.

Notified the amended rules w.e.f. 1-2-2019 the Central Goods and Services Tax (Amendment) Rules, 2019

4/2019 – CENTRAL TAX DT. 29-1-2019.

Amended the Notification No. 2/2017 Central Tax regarding jurisdiction of Central Tax Officers.

5/2019 – CENTRAL TAX DT. 29-1-2019

Notification No. 8/2017 Central Tax for composition dealer amended and thereby an amount calculated at the rate mentioned in Rule 7 of the Central Goods and Services Tax Rules, 2017 will be applicable w.e.f. 1-2-2019.

7/2019 – CENTRAL TAX DT. 31-1-2019

By this Notification time limit for furnishing the return by a registered person required to deduct tax at source under the provisions of Section 51 of the said Act in FORM GSTR-7 for the months of October, 2018 to December, 2018 extended up to 28-2-2019.

1/2019 – CENTRAL TAX (RATE) DT. 29-1-2019

Notification No. 8/2017 Central Tax (Rate) amended and now the date of effect for CGST exemption from reverse charge up to ₹ 5000 per day under Section 11 (1) is 1-2-2019.

1/2019-Integrated Tax dated 29.1.2019

The provisions of the Integrated Goods and Services Tax (Amendment) Act, 2018, shall come in to force wef 1.2.2019

Circular

Circular No. 82/01/2019-GST dt. 01-01-2019

Applicability of GST on various programmes conducted by the Indian Institutes of Managements (IIMs)

Circular No. 83/02/2019-GST dt. 01-01-2019

Applicability of GST on Asian Development Bank (ADB) and International Finance Corporation (IFC).

Circular No. 84/03/2019-GST dt. 01-01-2019

Clarification on issue of classification of service of printing of pictures covered under 998386

Circular No. 85/04/2019-GST dt. 01-01-2019

Clarification on GST rate applicable on supply of food and beverage services by educational institution

Circular No. 86/05/2019-GST dt. 01-01-2019

GST on Services of Business Facilitator (BF) or a Business Correspondent (BC) to Banking Company

Circular No. 87/06/2019-GST dt. 02-01-2019

Central Goods and Services Tax (Amendment) Act, 2018-Clarification regarding Section 140(1) of the CGST Act, 2017

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JUDICIAL JUDGMENTS

Compiled by CA Rupal Shah

PCIT vs. Vembu Vaidyanathan, [2019] 101 taxmann.com 436 (Bombay High Court), 22nd January, 2019

Period of holding where allotment and construction of flats / houses by co-operative societies / other institutions is similar to DDA (Delhi Development Authority), will be considered from date of allotment and not date of agreement.

Facts of the case

For AY 2009-10, assessee being an individual declared long term capital gains from transfer of residential house, taking date of allotment letter as date of acquisition. AO considered date of agreement as date of acquisition. Hence treating the gains as short-term capital gains.

CIT(A) and ITAT held in favour of the assessee relying on various judgments of different High Courts and CBDT' Circular Nos. 471, dated 15 October 1986 and 672, dated 16th December, 1993.

Aggrieved by decision of ITAT, Revenue filed appeal before High Court contending that mere letter of allotment does not lead to creation of proper and effective right over the capital asset sought to be acquired, and the same is completed by execution of agreement.

High Court observed as follows

As per Circular No. 471 when an assessee purchases a flat to be constructed by DDA for which allotment letter is issued, the date of such allotment would be date of acquisition for calculating capital gains.

It was also observed that since such allotment is cancelled or withdrawn only under exceptional circumstances allottee gets title to the property on the issue of allotment letter and the payment of instalments and taking of possession is only consequential.

As per Circular 672, similar view was extended to cases of allotment by other institutions which follow similar scheme of allotment and construction as that of DDA.

Based on the above, High Court upheld the view of ITAT and dismissed Revenue's appeal.

PCIT-5 vs. Perfect Circle India Pvt Ltd, ITA No. 707 of 2016, (Bombay High Court), 7th January, 2019

The deeming provision of second proviso of section 40(a)(ia) that assessee has deducted and paid TDS on sum liable for TDS, has retrospective effect from 1st April 2005 i.e., the date of the main proviso.

Facts of the case

During assessment AO made a disallowance of ₹ 1,44,78,000 u/s. 40(a)(ia) stating that Company failed to deduct and pay tax at source on certain expenses. However, assessee contended relief under second proviso to 40(a)(ia).

To simply state, the second proviso states that where deductor has a certificate from deductee that the sum paid by the deductor is included in his return of income and due tax is paid thereon u/s. 139, then the deductor will not be an assessee in default under first proviso to Section 201(1) and accordingly there will not be any disallowance on account of non-deduction of tax at source

CIT(A) and ITAT favoured the view of the assessee. Aggreived by the order of lower authorities, revenue filed appeal before High Court holding that second proviso was introduced w.e.f. 1st April, 2013 and cannot be given retrospective effect.

High Court observed as follows

Though second proviso to Section 40(a)(ia) was introduced from 1st April, 2013, it is not penal in nature rather it is remedial in nature

Placing reliance on Delhi High Court judgment in the case of *CIT vs. Ansal Land Mark Township Pvt Ltd [2015] 377 ITR 635 (Delhi)* whereby second proviso is declaratory and curative in nature and would have retrospective effect from 1-4-2005.

Based on the above, High Court dismissed the appeal filed by Revenue.

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