EMPLOYERS T.D.S. HEADACHE & ITS REMEDY

(S.192 OF THE INCOME TAX ACT)

The present day employers, particularly large corporate employers, are a harried lot. The Government has found a new tool in the form of enlargement of the scope of Tax Deduction at Source (T.D.S.) for augmenting tax revenues. Vide Finance Act 1995 , the scope of T.D.S. has been vastly enlarged and as a concomitant measure the administrative machinery for ensuring proper compliance in respect therof, has also been strengthened by way of creation of new T.D.S. circles comprising Dy.C.I.T., A.C.sI.T and I.T.Os (T.D.S.). There can not be any quarrel with the anxiety of the Government to increase and strengthen the machinery for proper compliance with T.D.S. provisions. The real problem arises when the concerned officials in their misguided zeal, use strong arm tactics and unimaginative methods in the guise of enforcing compliance with the relevant rules and procedures, particularly in respect of T.D.S. from salaries u/s 192; a provision which is as old as the I.T. Act itself. What I mean to say here is that nothing new has happened so far as T.D.S. from salaries, is concerned.

The additional man power in the form of T.D.S. circles should have been used for ensuring compliance with newly incorporated T.D.S., provisions. Instead of chasing the new targets for T.D.S., the concerned officials have displayed a tendency of running after the easy targets in the form of T.D.S. from salaries in respect of well known corporate employers. There are instances where officials of the T.D.S. Circles have conducted survey operations on a number of corporate employers in order to check details of T.D.S. from the salaries of employees and pointed out minor faults here and there in respect of valuation of perquisites and kind of evidence furnished by emplyoees for claiming exemption u/s 10, regarding various allowances. The main points of disputes thrown up as s result of such survey operations, are regarding claims of exemption in respect of conveyance allowance u/s 10(14) and leave travel assistance (L.T.A) u/s 10(5) and claim of deduction in respect of hospital expenses or re-imbursement of medical expenses .

In order to resolve the aforesaid disputes and bring about total clarity regarding the provision for T.D.S. from the salaries etc. of the employees, the important and relevant issues / points are discussed as follows :

1. **Scheme of the I.T. Act for T.D.S. :**

All the sections regarding T.D.S. fall under chapter XVII of the I.T. Act. 1961 and the heading of this chapter is “Collection and Recovery of Tax “. As per S.190 , pending regular assessment, tax is deductible at source wherever so provided. Section 191, provides for a direct levy and assessment of tax on the assessee:

(i) Where no provision has been made for T.D.S; or

(ii) Where there is such a provision for T.D.S; but no tax has actually been deducted at source.

T.D.S. is only a mode of recovery of tax, according to S.202. From the aforesaid discussion it is clear that T.D.S. is only one of the modes of recovery of tax and no irrecoverable loss of revenue is caused if there is a default in respect of T.D.S. Besides, the principal liability for payments of income - tax is that of the person who receives the income viz. employee.

2. <u>Whether Employer is legally bound to deduct tax at source from income / receipts which are prima - facie exempt from tax</u> :

S.4 of the IT Act is the charging section for the levy of income-tax. S.4(1) is the authority under which income - tax is charged in respect of **" total income"** of the previous year of every person. **Under Section 4(2), income - tax is deductible at source in respect of income chargeable u/s 4(1) i.e. " total income" .**

S.10 deals with certain receipts which enjoy exemption from income-tax. In other words, the receipts falling u/s 10, do not form part of **"total income"**. It is also clear from the heading of chapter III, which is, "incomes which do not form part of total income". Therefore, all types of incomes or receipts which are exempt u/s 10, do not form part of " total income".

Therefore, any part of receipt in the hands of the employee by way of any allowance or other payment by the employer which is exempt u/s 10, does not form part of " **total income"**, and therefore no tax is deductible at source in respect thereof. This view is also supported by the decision of Andhra Pradesh High Court in the case of C.I.T Vs Coromandel Fertilizers Ltd. 187 I.T.R P. 673. In this case the A.P High Court has laid down that where the employee is not liable to pay tax under the head " Salaries " on any part of the sum paid to him by his employer, there is no obligation on the employer to deduct tax u/s 192(1) .

Therefore, if certain allowances / payments by the employer, are prima facie exempt u/s 10, they will not form part of " **total income**" and hence there will be no obligation on the employer to deduct tax at source u/s 192(1), in respect thereof. **In other words, it may be stated that if the employee is able to make out a prima facie case that certain part of allowances/payments, receivable/received from the employer, is exempt u/s 10 and therefore does not form part of his " total income" then employer will be under no obligation to deduct tax in respect thereof. S**ome of the examples of such allowances / payments, may be as follow

(i) A special allowances or benefit granted to meet expenses in the performance of duties - S.10(14).

(ii) Leave travel concession / assistance - S.10(5)

(iii) House rent allowance - S. 10(13A)

(iv) Death-cum-retirement gratuity - S.10(10) etc.

3. Progressive Legislation from year to year for granting relief to salaried employees:

There has been a progressive attempts on the part of the Legislature to grant more and more relief to the salaried tax payers. First, the concept of standard deduction was incorporated. Then restriction on standard deduction in case of the employees in receipt of conveyance allowance was removed. The amount of standard deduction has also been enhanced from year to year. Further, relief is granted in the form of full standard deduction even in case of employees with the facility of conveyance by the employer. There is yet another relief in the form of explanation to S.17(2), that use of vehicle provided to an employee for journey between residence and place of work, will not be treated as a perquisite in the hands of the employees.

4. Approach of the I.T Department has always been lenient and practical regarding the valuation of perquisites etc.

As far back as in 1955, the Central board of Revenue (now C.B.D.T) had issued a circular No. 33(LXXVI-5) dated 1.8.1955 , regarding valuation of perquisites and it, inter-alia, stated therein, " It is not the intention that a meticulous appraisal of each and every benefit or amenity, is to be made. Generally it should be possible for these matters to be settled by the I.T.Os on a board basis in agreement with the assessee".

5. Reasonable Conveyance Allowance for Commuting between residence and place of work is not salary income and no tax is deductible at source in respect thereof:

Vide Circular No. 23 (LVII-B) dated 9.7.1956, the board has clarified that trips between the residence and office or regular place of work, to and fro, would be regarded as being for the purpose of employment. Further as per explanation to S.16 (1), (which has been omitted w.e.f 1.4.1990), use of any vehicle for journey by assessee between his residence and office or other place of work , was to be regarded as in the performance of his duties .Explanation to S.17(2), should dispel all doubts in this regard as in accordance therewith , use of any vehicle provided by a Company or an employer for journey between residence and office or regular place of work would not be regarded as s benefit or amenity for the purposes of S.17(2).

When such is the position in regard to a vehicle provided by the employer , expenses granted to the employee for maintenance of a vehicle , at a reasonable rate can not be treated as part of salary . The I.T.A.T. Bombay in

the case of I.C.I.C.I Vs 4th I.T.O. ,47 I.T.J (Bom) P.401; has fully supported the aforesaid view.

In view of the aforesaid reasons the employer is not obliged to deduct tax at source on such conveyance allowance.

6. No details of expenses actually incurred need be asked in respect of special allowance or benefit for granting exemption u/s 10(14) of the I.T., Act:

In view of recent amendment of S.!0 (14) vide Finance Act 1995, w.e.f . 1.7.95, only such allowance or benefit would be entitled to exemption u/s 10(14), which has been prescribed. Such allowances are prescribed under Rule 2 BB of the I.T Rules 1962 . There have been occasions when the officials of T.D.S circles or the assessing officers of the employees, have raised controversies regarding the details of expenses incurred on conveyance and uniforms etc. . Any allowance granted to meet the expenditure incurred on conveyance in performance of duties of an office or employment of profit, has been prescribed under Rule 2BB. Similarly any allowance for the purchase and maintenance of uniform is also prescribed u/R 2BB . There are circulars issued by the Board (formerly Central Board of Revenue and now Central Board of Direct Taxes) which state that the officials of the I.T. Department, need not call for details in respect of special allowances, for granting exemption u/s 10(14) of I.T Act 1961 or S.4(3) (vi) of the I.T Act 1922. Some of these circulars are discussed as follows :

(a) Circular No.33 (LXXVI - 5) dated 1.8.1955:

As per this circular, where the specific allowances are reasonable with reference to the nature of the duties performed by the assessee and are not disproportionately high compared to the salary recieved by him, no attempts should ordinarily be made to call for details of expenses actually incurred by him.

(b) Circular No. 23 (LVIII - 8) dated 9.6.1956 as corrected by Circular No. 37 (LVIII - 10) dated 21.9.1956 :

As per this circulars where adequate details in respect of expenditure incurred on running the conveyance, are not available, the employee should furnish a certificate to the effect that total cost of running and maintaining the vehicle was not less than the conveyance allowance.

(c) Circular No. 196 (F.No. 275/29/76 - I.T.J) dated 31.3.1976 :

According to this circular , if the disbursing authority is satisfied that conveyance allowances granted to the employee is covered by S.10(14),

then the obligation to deduct tax thereon , may not arise. In such a contingency tax is not liable to be deducted at source from this allowance.

From the aforesaid circulars of the Board, it is clear that details of expenses actually incurred should not be called for, for the purpose of granting exemption u/s 10(14) of the I.T Act 1961. It follows as corollary, that the employer would be under no obligation to deduct tax at source from such allowance (particularly conveyance allowance) if the employee makes out a prime facie case for exemption of such allowances u/s 10(14).

7. No change in the basic provisions under erstwhile S. 4(3) (vi) of the 1922 Act and S. 10(14) of the 1961 Act :

I have observed many persons glibly arguing that after the amendment of S.10(14) w.e.f 1.4.89, the exemption u/s 10 (14) is to be allowed only **"to the extent to which such expenses are actually incurred for that purpose".** The correct position is that such a condition was incorporated in erstwhile S.4(3)(vi) of 1922 act w.e.f 1.4.1955. Even in S.10 (14) of the I.T Act 1961, the aforesaid condition or qualification has been there right from the very beginning.

The real change which has come about in S.10(14) is that only such allowances or benefit was to be covered u/s10(14) which may be notified w.e.f. 1.4.1989 or prescribed w.e.f 1.7.1995.

8. A word about Board ' s Circular No. 701 dt 23.3.1995 :

Vide para (3) of the aforesaid Circular, it has been clarified that consequent to amendment of S.10(14) w.e.f 1.4.1989 all circulars, instructions and clarifications issued by the Board regarding S.10(14) upto 31.3.1989 ceased to have effect from the assessment year 1989-90 and onwards. From the aforesaid para(3) of the Circular it is clear that the C.B.D.T did not withdraw the earlier notifications etc. The said circular was issued to the C.Cs.I.T. and Ds.G.I.T. on the subject of taxability of allowances received by persons having income under the head " Salaries ". It was clarified that as per sub-clauses (iiia) & (iiib) of S.2(24) r.w.s. 17 of the Act , any allowance by whatever name called, given by the employer to the employee, is taxable as income in the hands of the employee. The major exemptions allowed under the Act through various Notifications were also enumerated. Thereafter in para (3), the aforesaid clarification has been given.

Thus the purpose of the Circular was to lay emphasis on the fact that after amendment of S.10(14) w.e.f. 1.4.1989, only the notified allowances would be covered u/s 10(14). The fact that clarification about an amendment effective from 1.4.1989 ; has been issued in 1995; is also relevant. It is thus clear from the aforesaid facts that all the circulars etc. regarding S.10(14) , would become

inoperative in so far as they relate to allowances or benefits which were not notified w.e.f 1.4.1989 or have been prescribed u/R 2BB w.e.f 1.7.1995.

From aforesaid discussion, it clearly emerges that all the earlier Circulars etc. regarding S.10(14), would continue to be operative even after 1.4.1989 in respect of those allowances which are prescribed u/R 2BB of the I.T Rules. Thus all the circulars discussed in para (6) of this Article would continue to be operative even after 1.4.1989. In any case Circulars No.33 of 1955 and 23 of 1956 are not regarding S.10(14) but S.4(3)(VI) of I.T Act, 1922, and the same would, therefore, not be affected by Circulars No. 701 of 1995.

9. Only a bonafide estimate of the salary income of his employees is required on the part of the employer u/s 192 of the I.T Act :

Under 192 the obligation of an employer is to deduct tax computed on the estimated income of the employees . If the employer exercises reasonable diligence while estimating the income of his employees and deducting tax thereon; the I.T Department can not raise further demand of tax in view of short deduction of tax as per the version of the IT authorities . In other words the estimate of income u/s 192 can only be made by the emploter and if he has done so in a bonafied manner then

the I.T.O (T.D.S) is only concerned with the obvious and patent mistakes and he cannot go into controversial matters such as taxability or valuation of perquisites etc. The following decisions support the aforesaid view :

(I) Gwalior Rayon Silk Co. Ltd. Vs. C.I.T . 140 I.T.R.P .832 (M.P) .

(ii) C.I.T Vs Divisional Mgr New India Assurance Co. Ltd., 140 I.T.R. P.230 (M.P)

(iii) C.I.T Vs Divisional Mgr New India Assurance Co - op Development Bank Ltd - 137 I.T.R P.230 (M.P)

(iv) C.I.T Vs. Shri Synthetics Ltd. - 151 I.T.R P.634 (M.P) .

10. Conclusion :

If an employer follows the aforementioned guidelines while estimating the income of his employees and deducting tax thereon; he would not be deemed to be an assessee-in-default u/s 201(1) and therefore, would not be, liable to pay panel interest u/s 201 (1A) and penalty u/s 221 of the I.T Act 1961.

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