A non-resident is not under an obligation to apply for PAN, for TDS purposes, as per section 206AA

- S.K. Tyagi

Of late, a query is being raised by a number of clients whether a non-resident will also be required to apply for permanent account number (PAN) in view of the provisions of section 206AA of the Income-Tax Act, 1961 (the Act), which was inserted by the Finance (No.2) Act, 2009, with effect from 1.4.2010

As per the aforesaid section 206AA, any person entitled to receive any sum or income or amount, on which tax is deductible under Chapter XVII, shall furnish his PAN to the person responsible for deducting such tax at source. It is further provided therein that if the tax-deductee fails to furnish his PAN to the tax-deductor then the tax will be deductible at source at the higher of the following rates :-

(i) at the rate specified in the relevant provisions of this Act; or

(ii) at the rate or rates in force; or

(iii) at the rate of twenty per cent

It is in view of the aforesaid requirements, laid down under section 206AA, that the aforesaid query is being raised by a number of clients, particularly in view of the reason, that the aforesaid provisions will come into effect from 1.4.2010.

In order to answer the aforesaid query, it will be necessary to refer to the provisions of section 206AA, as also the provisions of section 139A of the Act. Besides, rule 114C of the Income-Tax Rules, 1962 (the Rules), is also relevant in the present context and therefore, the same will also be examined. Besides, the relevant case-law will also be referred to, wherever necessary.

In order to correctly understand the scope and purpose of the insertion of section 206AA, by the Finance (No.2) Act, 2009, it will be necessary to examine the provisions thereof, in detail. For the sake of ready reference, the provisions of section 206AA are reproduced, as follows :

Requirement to furnish Permanent Account Number.

206AA. *(1) Notwithstanding anything contained in any other provisions of this Act, any person entitled to receive any sum or income or amount, on which tax is deductible under Chapter XVIIB (hereafter referred to as deductee) shall furnish his Permanent Account Number to the person responsible for deducting such tax (hereafter referred to as deductor), failing which tax shall be deducted at the higher of the following rates, namely:—*

*(*i*) at the rate specified in the relevant provision of this Act; or*

(ii) at the rate or rates in force; or

(iii) at the rate of twenty per cent.

(2) No declaration under sub-section (1) or sub-section (1A) or sub-section (1C) of section 197A shall be valid unless the person furnishes his Permanent Account Number in such declaration.

(3) In case any declaration becomes invalid under sub-section (2), the deductor shall deduct the tax at source in accordance with the provisions of sub-section (1).

(4) No certificate under section 197 shall be granted unless the application made under that section contains the Permanent Account Number of the applicant.

(5) The deductee shall furnish his Permanent Account Number to the deductor and both shall indicate the same in all the correspondence, bills, vouchers and other documents which are sent to each other.

(6) Where the Permanent Account Number provided to the deductor is invalid or does not belong to the deductee, it shall be deemed that the deductee has not furnished his Permanent Account Number to the deductor and the provisions of sub-section (1) shall apply accordingly.

If we examine the aforesaid provisions of section 206AA, then it will be clear that the same will apply only in a case where a person is entitled to receive any sum or income or amount, on which, tax is deductible under Chapter XVII of the Act. It will, therefore, be necessary, on my part, to clearly state here that all the payments to non-residents are not liable to TDS under Chapter XVII, of the Act. Therefore, the aforesaid provisions of section 206AA will come into play in respect of a non-resident, only in case the payment being made to him is subject to TDS. In this context, it will also be necessary to point out that tax is deductible at source in case of any payment to a non-resident, under section 195 of the Act and as per section 195, tax is deductible at source under section 195, in respect of payment of an interest or any other sum to a non-resident, in case the same is chargeable to tax under the provisions of the Act. It may, thus, be safely concluded that as regards a non-resident, the provisions of section 206AA may apply only in respect of payment to him which is chargeable to tax in India.

In this connection, it may be further stated that whether a payment to a non-resident is chargeable to tax in India, will also depend upon the relevant provisions of double taxation avoidance agreement (DTAA), entered into between India and the country of residence of the non-resident concerned.

We may now look at the provisions of section 139A, the provisions of rule 114C of the Rules and other legal aspects relevant in the present context. The same are discussed as follows :

1. Section 139A(5A) – Requirement to intimate PAN.

Section 139A deals with the requirement of quoting the PAN in respect of various transactions. Further sub-section (5A) of section 139A deals with the requirement that every person receiving any sum or income or amount from which tax has been deducted under the provisions of Chapter XVII-B, shall intimate his PAN to the person responsible for deducting such tax under that Chapter. For the sake of ready reference, section 139A(5A) is reproduced as follows :

Permanent account number.

139A *(5A) Every person receiving any sum or income or amount from which tax has been deducted under the provisions of Chapter XVIIB, shall intimate his permanent account number to the person responsible for deducting such tax under that Chapter :*

Provided further *that a person referred to in this sub-section shall intimate the General Index Register Number till such time permanent account number is allotted to such person.*

From the aforesaid provisions of section 139A(5A), it may be seen that every person receiving any sum or income or amount, which is subject to TDS, shall intimate his PAN to the tax-deductor.

In the present context, the provisions of section 139A(8)(d) are also relevant. The same are discussed in the following para.

2. Section 139A(8)(d) – Class or classes of persons to whom provisions of section 139A shall not apply.

In the present context, the provisions of section 139A(8) are also relevant. The same are reproduced as follows :

Permanent account number.

139A. *(8) The Board may make rules providing for—*

(a) the form and the manner in which an application may be made for the allotment of a permanent account number and the particulars which such application shall contain;

(b) the categories of transactions in relation to which Permanent Account Numbers or the General Index Register Number] shall be quoted by every person in the documents pertaining to such transactions;

(c) the categories of documents pertaining to business or profession in which such numbers shall be quoted by every person;

(d) class or classes of persons to whom the provisions of this section shall not apply;

(e) the form and the manner in which the person who has not been allotted a Permanent Account Number or who does not have General Index Register Number shall make his declaration;

(f) the manner in which the Permanent Account Number or the General Index Register Number shall be quoted in respect of the categories of transactions referred to in clause (c);

(g) the time and the manner in which the transactions referred to in clause (c) shall be intimated to the prescribed authority.

From the aforesaid provisions of section 139A(8), it may be seen that as per section 139A(8)(d), the Board may make rules for a class or classes of persons, to whom the provisions of section 139A shall not apply. This provision was brought on the statute, vide Finance (No.2) Act, 1998, with effect from 1.8.1998. For this purpose, rule 114C of the Rules was framed by the CBDT, which reads as follows :

Class or classes of persons to whom provisions of section 139A shall not apply.

114C *(1) The provisions of section 139A shall not apply to following class or classes of persons, namely :—*

(a) the persons who have agricultural income and are not in receipt of any other income chargeable to income-tax :

Provided *that such persons shall make declaration in Form No.61 in respect of transactions referred to in rule 114B;*

(b) the non-residents referred to in clause (30) of section 2;

(c) Central Government, State Governments and Consular Offices in transactions where they are the payers.

(2) Every person including,—

(a) a registering officer appointed under the Registration Act, 1908 (16 of 1908);

(b) a registering authority referred to in clause (b) of rule 114B;

(c) any manager or officer of a banking company referred to in clause (c) or clause (i) or clause (j) or clause (l) of rule 114B;

(d) post master;

(e) stock broker, sub-broker, share transfer agent, banker to an issue, trustee of a trust deed, registrar to issue, merchant banker, underwriter, portfolio manager, investment adviser and such other intermediaries registered under section 12 of the Securities and Exchange Board of India Act, 1992 (15 of 1992);

(f) any authority or company receiving application for installation of a telephone by it;

(g) any person raising bills referred to in clause (h) or clause (k) of rule 114B;

(h) any person who purchases or sells the immovable property or motor vehicle;

(i) the principal officer of a company referred to in clause (l) or clause (n) or clause (o) of rule 114B;

(j) the principal officer of an institution referred to in clause (l) or clause (o) of rule 114B;

(k) any trustee or any other person duly authorised by the trustee of a Mutual Fund referred to in clause (m) of rule 114B;

(l) an officer of the Reserve Bank of India, constituted under section 3 of the Reserve Bank of India Act, 1934 (2 of 1934),

who has received any document relating to a transaction specified in rule 114B shall ensure after verification that permanent account number has been duly and correctly quoted therein.

From the aforesaid rule 114C(1)(b), it may be seen that the provisions of section 139A shall not apply to non-residents referred to in clause (30) of section 2 of the Act. As per section 2(30), '*Non-resident'* means a person who is not a resident and for the purposes of sections 92, 93 and 168, includes a person who is not ordinarily resident within the meaning of section 6(6) of the Act.

From the aforesaid discussion, it is clear that the provisions of section 139A will not apply to a non-resident.

Thus, there appears to be a conflict between the provisions of section 139A(8)(d), r.w.r.114C and the provisions of section 206AA of the Act.

3. The special provision overrides a general provision

If we look at the provisions of section 139A(5A), as also the provisions of section 206AA, it may be seen that they impose an obligation on every person receiving any sum or income or amount subject to TDS, to intimate his PAN to the tax-deductor. In this context, it will be relevant to understand that both the aforesaid provisions, viz. sections 139A(5A) and 206AA apply to all tax-deductees, whether they are resident or non-resident in India. In other words, both the aforesaid sections, viz. sections 139A(5A) and 206AA are general provisions, imposing an obligation on the aforesaid persons to intimate their PAN to the tax-deductor.

In contrast to the aforesaid general provisions, the provisions of section 139A(8)(d), r.w.r.114C is a special provision, which provides an exception to the aforesaid provisions of sections 139A(5A) and 206AA and prescribes a class or classes of persons to whom section 139A shall not apply. For our purpose, rule 114C(1)(b) is relevant. It provides that the provisions of section 139A shall not apply to non-residents, as defined under section 2(30) of the Act. Thus, the provisions of section 139A(8)(d), r.w.r.114C(1)(b), provide an exception to the provisions of section 139A(5A) of the Act.

As per the General Clauses Act, 1897, a special provision overrides the general provision, with regard to the same head in a statute. For this proposition, reliance may also be placed on the judgement in the case of *Addl.CIT Vs.Tarun Commercial Mills Ltd.[1978] 113 ITR 745 (Guj.).*

It was held in this case that where there is a general enactment, as well as special enactment in respect of the same head in a statute, the special enactment would override the general enactment.

In the light of the aforesaid reasons, the special provisions of section 139A(8)(d), r.w.r. 114C(1)(b) will override the general provisions of sections 139A(5A) and 206AA of the Act.

4. The provisions of DTAA will override the provisions of the I.T.Act, 1961.

In the present context, the provisions of section 90(2) of the Act are also relevant. When the requisite Notification has been issued under section 90, the provisions of section 90(2) spring into operation and an assessee who is covered by the provisions of double taxation avoidance agreement (DTAA) is entitled to seek the benefits thereunder, even if the provisions of DTAA are inconsistent with those of the Act. In other words, the provisions of the DTAA will override the provisions of the I.T.Act, 1961.

In this connection, a reference may also be made to Circular No.333, dated 2.4.1982 [137 ITR (St.) 1], issued by the Central Board of Direct Taxes (CBDT). For the sake of ready reference, the same is reproduced as follows :

Circular No.333, dated April 2, 1982.

Subject : ***Conflict between the provisions of the Income-Tax Act, 1961, and the provisions of the Double Taxation Avoidance Agreement – Clarification.***

It has come to the notice of the Board that sometimes effect to the provisions of double taxation avoidance agreement is not given by the assessing officers when they find that the provisions of the agreement are not in conformity with the provisions of the Income-Tax Act, 1961.

2. *The correct legal position is that where a specific provision is made in the double taxation avoidance agreement, that provision will prevail over the general provisions contained in the Income-Tax Act, 1961. In fact the Double Taxation Avoidance Agreements which have been entered into by the Central Government under section 90 of the Income-Tax Act, 1961, also provide that the laws in force in either country will continue to govern the assessment and taxation of income in the respective country except where provisions to the contrary have been made in the Agreement.*

3. *Thus, where a Double Taxation Avoidance Agreement provides for a particular mode of computation of income, the same should be followed, irrespective of the provisions in the Income-Tax Act. Where there is no specific provision in the agreement, it is the basic law, i.e. the Income-Tax Act, that will govern the taxation of income.*

(Sd.) K.R.Gupta,

Director, Central Board of Direct Taxes

[F.No.506 / 42 / 81-FTD]

From the aforesaid Circular of the CBDT, it is clearly established that in case there is a beneficial provision under the DTAA, the same would prevail over the provisions of the respective statutes.

The aforesaid legal proposition is also supported by the judgement of the Apex Court, in the case of *Union of India Vs. Azadi Bachao Andolan [2003] 263 ITR 706 (SC).*

In this connection, a reference to the judgement of the Bombay High Court, in the case of *CIT Vs. Siemens Aktriongesellschaft [2009] 310 ITR 320 (Bom.)* will also be relevant. In this case, the Hon. Bombay High Court was seized with the issue relating to the interpretation of the provisions of double taxation avoidance agreement (DTAA) vis-à-vis the relevant provisions of the Income-Tax Act, 1961. It was, *inter alia*, held in this case that by a unilateral amendment, it is not possible for one nation which is a party to an Agreement, to tax income which otherwise was not subject to tax. Such income was not to be subject to tax under the expression '*Laws in force'* [Observations

on page 333 of the Report]. In view of the aforesaid principle laid down by the Bombay High Court, the Income-Tax Act, 1961, could not be unilaterally amended by the insertion of the aforesaid section 206AA therein, vide the Finance (No.2) Act, 2009, with effect from 1.4.2010, in so far as the applicability of the same to non-residents is concerned.

Besides, in the present context, it is also relevant to state that in most of the cases of non-residents, the TDS rates have been specified in the relevant DTAA and in view of the aforesaid reasons, the TDS rates as prescribed in the DTAA will always override the TDS rates prescribed in the I.T.Act, 1961, including the TDS rates, according to the provisions of section 206AA of the Act, in case PAN is not intimated by a non-resident tax-deductee to the resident tax-deductor. In other words, the higher rates of TDS, as laid down under the newly inserted section 206AA, will not apply to the non-residents, even if they do not intimate their PAN to the payer of income to them, located in India.

In the light of the aforesaid reasons, the provisions of section 206AA will not apply in respect of payments to non-residents, if the relevant TDS rates have been specifically provided under the relevant DTAA.

From the aforesaid discussion, it may be seen that there is another conflict, as regard the provisions of section 206AA of the Act vis-à-vis the TDS rates prescribed under the DTAA.

5. The provisions of section 206AA will create unnecessary inconvenience and hardship to non-residents, in view of the role and objectives of tax-treaties :

In the first place, we may refer to the role of tax-treaty. Tax is a barrier to trade and inhibits its growth. International tax basically is a part of the trade which encompasses trade in goods and services and capital and financial markets. Tax-treaties play the following roles:

(i) Elimination of double taxation, thus creating a more favourable investment climate in the country.

(ii) Facilitating inward investment flows. These include preventing discrimination between the tax-payers.

Besides, the general objectives of bilateral tax agreements may be seen to include the full protection of taxpayers against double taxation and the prevention or discouragement which taxation may provide for the free flow of international trade and investment and transfer of technology. They also aim at preventing discrimination between the taxpayers in the international field, and to provide a reasonable element of legal and fiscal certainty as a framework within which international operations are carried out. The agreements have an objective of co-operation between tax authorities in carrying out their duties. Such agreement is an attempt to invoke the concept of the comity of nations or of rules of international law in interpretation of an agreement that derives legal sanctity from a country's own Income-Tax Act. In India, section 90 is such a provision.

We may now summarize the main objectives of DTAA or tax-treaty. The tax-treaty seeks to achieve three basic objectives, viz.:

(i) To eliminate tax barriers to international trade and investment.

(ii) To combat international tax avoidance and evasion.

(iii) To promote mutual economic relations, trade and investment.

In furtherance of these goals, the tax agreement seeks to mediate between competing jurisdictional bases for income taxation (typically between source and residence States), to develop common frameworks for certain basic concepts necessary to the application of the tax agreements, such as determination of residence and entitlement to benefits; and to establish mechanism for resolving inter-Governmental disputes as well as alleviate any remaining instances of potential double taxation of taxpayers covered by the tax agreements. Cross-border investment would be seriously impeded if there was a danger that the returns are taxed twice, both where money was invested and where the investor is resident. The tax-treaty avoids this eventuality by providing clear basic rules for taxing income and capital. Double taxation is avoided with respect to investment income by allocating taxing rights between the residence and the source countries. Matters which are covered in a treaty are ;

(i) imposing liability to tax in one country whilst granting exemption in the other;

(ii) granting exemption from tax in either or both countries, but having regard nonetheless to the exempted income when computing effective rates of tax on other non-exempted assets ;

(iii) deeming geographical source provisions for particular categories of income to be in one country than in the other:

(iv) imposing liabilities to tax in the country in which the income is deemed to arise.

Thus, one of the paramount objectives of a tax-treaty is to avoid double taxation of income in the country of source of income and the country of residence of the taxpayer.

In the light of the aforesaid role and objectives of a tax-treaty or DTAA it becomes quite clear that the provisions of section 206AA will create unnecessary inconvenience and hardship to certain non-residents. In other words; it may be stated that the provisions of section 206AA will create unintended inconvenience and hardship to certain non-residents, particularly in view of the reason that if rate of TDS prescribed under the DTAA or tax-treaty is lower than twenty per cent then the same will have to be applied for TDS purposes vis-à-vis the maximum rate of twenty per cent provided under section 206AA of the Act.

6. **In the case of ambiguity, the matter is to be resolved in favour of the tax-payer.**

In the present context, in the light of the aforesaid discussion, there appears to be an ambiguity as regards the interpretation of the provisions of sections 139A(5A) and 206AA, vis-à-vis the provisions of section 139A(8)(d) of the Act.

The Supreme Court has held that ambiguity in interpretation has to be resolved in favour of the tax-payer. This was held by the Apex Court, in the case of *CIT Vs. Kulu Valley Transport Co.Pvt.Ltd. [1970] 77 ITR 518 (SC).* Besides, the view that the benefit of doubt as to interpretation of law should go to the tax-payer is now well established, as held in the cases of –

(a) CIT Vs. Madhav Prasad Jatia [1976] 105 ITR 179 (SC).

(b) CIT Vs. Vegetable Products Ltd. [1973] 88 ITR 192 (SC)

In view of the aforesaid reasons, the ambiguity regarding the interpretation of the provisions of section 139A(5A) and 206AA on the one hand and the provisions of section 139A(8)(d), r.w.r.114C(1)(b) on the other, the matter has to be resolved in favour of the tax-payer. This will imply that a non-resident will not be required to intimate his PAN to the tax-deductor.

7. **Conclusion**

In the light of the discussion in the preceding paragraphs, it may be safely concluded that the provisions of sections 139A(5A) and 206AA of the Act, will not be applicable in the case of non-residents. It would mean that non-residents will not be required to apply for PAN and intimate the same to the tax-deductor, as required under sections 139A(5A) and 206AA of the Act.

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