Circuitous amendments of section 90 / 90A, relating to Tax Residency Certificate

[Newly inserted rule 21 AB rendered redundant]

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There is a peculiar history regarding the amendments of section 90 of the Income-Tax Act, 1961 (the Act), by the Finance Act, 2012 and the Finance Act, 2013, in respect of the requirement of Tax Residency Certificate (TRC) to be obtained by an assessee, in order to avail of the benefit of Double Taxation Avoidance Agreement (DTAA) between India and the country of his residence.

In this connection, it may be stated that for the first time, vide Finance Act, 2012, sub-section (4) was inserted in section 90 of the Act, with effect from 1.4.2013. The aforesaid sub-section (4) as inserted by the Finance Act, 2012, reads as follows :

"90. Agreement with foreign countries or specified territories.

(4) An assessee, not being a resident, to whom an agreement referred to in sub-section (1) applies, shall not be entitled to claim any relief under such agreement unless a certificate, containing such particulars as may be prescribed, of his being a resident in any country outside India or specified territory outside India, as the case may be, is obtained by him from the Government of that country or specified territory."

In this context, it may be appropriate to refer to the relevant part of the Memorandum, explaining the aforesaid sub-section (4) of section 90, as proposed by the Finance Bill, 2012. The relevant part of the aforesaid Memorandum is reproduced as follows :

"*It is noticed that in many instances the taxpayers who are not tax resident of a contracting country do claim benefit under the DTAA entered into by the Government with that country. Thereby, even third party residents claim unintended treaty benefits.*

Therefore, it is proposed to amend section 90 and section 90A of the Act to make submission of Tax Residence Certificate containing prescribed particulars, as a necessary but not sufficient condition for availing benefits of the agreements referred to in these sections.

These amendments will take effect from 1st April, 2013 and will, accordingly, apply in relation to the assessment year 2013-14 and subsequent years."

The requisite particulars in regard to the Tax Residency Certificate were, later on, prescribed, vide rule 21AB, which was inserted in the Income-Tax Rules, 1962 (the Rules), by the IT (Twelfth Amdt.) Rules, 2012, w.e.f.1.4.2013.

Thereafter, vide the Finance Bill, 2013, a new sub-section (5) was inserted in section 90 of the Act, which is reproduced as follows :

"(5) The certificate of being a resident in a country outside India or specified territory outside India, as the case may be, referred to in sub-section (4), shall be necessary but not a sufficient condition for claiming any relief under the agreement referred to therein."

At this stage, it will also be appropriate to refer to the relevant part of the Memorandum, explaining the provisions of the Finance Bill, 2013, in respect of the Tax Residency Certificate, which is reproduced as follows :

"*It is proposed to amend sections 90 and 90A in order to provide that submission of a tax residency certificate is a necessary but not a sufficient condition for claiming benefits under the agreements referred to in sections 90 and 90A. This position was earlier mentioned in the memorandum explaining the provisions in the Finance Bill, 2012, in the context of insertion of sub-section (4) in sections 90 and 90A".*

The aforesaid amendment proposed in respect of section 90 generated lot of concern and controversy relating to the requirements in respect of Tax Residency Certificate.

As a result, the Finance Ministry issued a Press Release, dated 1.3.2013, by way of a clarification on Tax Residency Certificate. Vide para 4 of the aforesaid Press Release, it was pointed out that the language of the proposed sub-section (5) of section 90, could mean that the TRC produced by a resident of a contracting State could be questioned by the Income-Tax Authorities in India. It was, therefore, explained that the Government would wish to make it clear that it was not the intention of the proposed sub-section (5) of section 90. The Tax Residency Certificate produced by a resident of a contracting State would be accepted as evidence that he is a resident of that contracting State and the Income-Tax Authorities in India would not go behind the Tax Residency Certificate and question his resident status. Further, vide para 6 of the aforesaid Press Release, it was stated that the aforesaid concern would be addressed suitably when the Finance Bill, 2013, would be taken up for consideration.

In the light of the aforesaid reasons, the Finance Minister moved the requisite amendments, by way of Notice of amendments of the Finance Bill, 2013. As per the aforesaid amendments, sub-section (4) of section 90 was amended, whereas sub-section (5) of section 90, as proposed in the Finance Bill, 2013, was substituted.

As a result, in sub-section (4) of section 90, for the words "*a certificate containing such particulars as may be prescribed, of his being a resident*", the words "*a certificate of his being a resident*" would be substituted.

Besides, sub-section (5) of section 90, as proposed by the Finance Bill, 2013, as reproduced earlier, was totally substituted by a new sub-section (5), which is reproduced as follows :

"90. Agreement with foreign countries or specified territories.

(5) The assessee referred to in sub-section (4) shall also provide such other documents and information, as may be prescribed."

As a consequence of the aforesaid exercise, viz. the relevant amendment proposed in section 90 by the Finance Bill, 2013, the Press Release issued by the Finance Minister, dated 1.3.2013 and the Notice of amendments of the Finance Bill, 2013, as introduced in the Lok Sabha by the Finance Minister, the final shape of sub-sections (4) and (5) of section 90 is as follows :

"90. Agreement with foreign countries or specified territories.

(4) An assessee, not being a resident, to whom an agreement referred to in sub-section (1) applies, shall not be entitled to claim any relief under such agreement unless a certificate, of his being a resident in any country outside India or specified territory outside India, as the case may be, is obtained by him from the Government of that country or specified territory."

(5) The assessee referred to in sub-section (4) shall also provide such other documents and information, as may be prescribed."

From the aforesaid provisions of sub-section (4), it may be seen that the words "*a certificate containing such particulars as may be prescribed"* are no longer there. In place of the aforesaid words, the words "*a certificate of his being resident*" have been substituted.

Further the aforesaid circuitous amendments were also brought about in respect of section 90A. After the aforesaid circuitous amendments in respect of section 90A, the final shape of sub-sections (4) and (5) of section 90A is as follows :

"90A. Adoption by Central Government of agreement between specified associations for double taxation relief.

(4) An assessee, not being a resident, to whom the agreement referred to in sub-section (1) applies, shall not be entitled to claim any relief under such agreement unless a

certificate of his being a resident in any specified territory outside India, is obtained by him from the Government of that specified territory.

(5) The assessee referred to in sub-section (4) shall also provide such other documents and information, as may be prescribed."

It may, thus, be seen that the aforesaid circuitous amendments are equally applicable *mutatis mutandis*, as regards the provisions of section 90A, relating to adoption by Central Government of agreement between specified associations for double taxation relief.

In the aforesaid context, it may be appropriate to examine the relevance of the provisions of the aforesaid newly inserted rule 21AB in the Income-Tax Rules, 1962, as a result of the amendments brought about in sub-section (4) of sections 90 and 90A and the newly substituted sub-section (5) of sections 90 and 90A of the Act.

As already stated that after the amendment of sub-section (4) of sections 90 and 90A, no particulars have been prescribed therein, as regards the Tax Residency Certificate to be furnished by an assessee for claiming the benefit of DTAA between India and the country of his residence.

In the light of the aforesaid reasons, it is quite clear that a Tax Residency Certificate need not contain the particulars as prescribed in the aforesaid rule 21AB and **accordingly, rule 21AB and the prescribed Form Nos.10FA and 10FB have become redundant.**

As a consequence of the aforesaid amendments, a Tax Residency Certificate may be issued in the format being already followed by the contracting State of which the assessee claims to be a resident.

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