

LUTHRA & LUTHRA LLP

CHARTERED ACCOUNTANTS



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- CBDT amends rules 17 for charitable entities opting to set apart funds for applying in future.
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News Highlights



CBDT issues Guidelines for issuance of notice u/s 148 of the Income Tax Act 1961 (the Act)

CBDT has issued revised/new guidelines for initiating reassessment proceedings under the new regime as amended vide Finance Act, 2021 and 2022.

Before issuing notice u/s 148, the AO shall follow the procedures laid down u/s 148A except in certain categories of cases as specified in the proviso to section 148A.

Notice u/s 148 can be issued only if there is any information available with the AO which suggest that income chargeable to tax has escaped assessment. The AO shall conduct enquiry, if required, with the prior approval of specified authority as specified in Section 151 in respect of the information which suggests that income chargeable to tax has escaped assessment.

The notice shall provide not less than 7 days but not exceeding 30 days for furnishing the response and the AO shall enclose:

- (i) Copy of all the relevant information available along with supporting documents
- (ii) Details of letter, brief summary of information along with relevant extract of such report and details of documents relied, in case information is received from the investigation wing
- (iii) Details of enquiry conducted
- (iv) Judicial order (i.e. Case Laws) on which reliance is being placed, if any.

CBDT amends Rule 17 for Charitable Entities opting to set apart funds for applying in future



CBDT, vide Notification No. 96/2022 dated August 17, 2022, amends Rule 17 by exercising the power under section 295 of the Act. The new Rule shall come into force with effect from April 1, 2023.

The Rule provides that the option to be exercised under Explanation to Section 11(1), when income applied falls short of 85% of the income derived from property held under trust, in respect of income of any previous year relevant to the assessment year beginning on or after April 1, 2016 shall be in Form No. 9A.

Further, it also provides that the Statement to be furnished under Explanation 3(a) to the third proviso to Section 10(23C) or u/s 11(2)(a) or u/s 10(21) shall be in Form No. 10.

Both of these forms shall be furnished, electronically, before the expiry of the due date of filing ITR u/s 139(1) of the Act.

CBDT notifies Canada-based 'CPPIB India Private Holdings Inc.' for Section 10(23FE) exemption

The CBDT vide Notification No. 97 of 2022, dated August 17, 2022, notifies the pension fund, namely, CPPIB (Canada Pension Plan Investment Board) India Private Holdings Inc., as the specified person u/s 10(23FE) in respect of eligible investment made by it in India on or after August 17, 2022 but on or before the March 31, 2024 subject to the fulfillment of the condition regarding various compliances required u/s 10(23FE). In case of violation of any of the conditions as stipulated in section 10(23FE) of the Act and of this notification shall render the assessee ineligible for the tax exemption.

CBDT amend the time-limit for furnishing Form 67 for claiming FTC

The CBDT vide Notification No. 100 of 2022, dated August 18, 2022, has amended Rule 128(9) of the Income Tax Rules. The statement in Form No. 67 referred to in Rule 128(8)(i) and the certificate or the statement referred to in Rule 128(8)(ii) shall be furnished on or before the end of the assessment year in which the foreign sourced income has been offered to tax or assessed to tax in India provided the return for such AY has been furnished within the time-limit specified u/s 139(1)/139(4).

Further, where an updated return is filed u/s 139(8A), the same shall be furnished on or before the date on which updated return is furnished to the extent it relates to the income included in the updated return.

The amended rule shall be effective from April 1, 2022 and shall apply to all the claims of FTC furnished during FY 2022-23.

Prior to the amendment, Rule 128(9) provided that statement in Form No. 67 referred to in Rule 128(8)(i) and the certificate or the statement referred to in Rule 128(8)(ii) shall be furnished on or before the due date of filing ITR under Section 139(1) of the Act.

Indian/Global Updates



ATO releases Consultation paper on thin capitalization, royalty and intangibles deduction rules

ATO releases consultation paper on 'Multinational tax integrity and enhanced tax transparency'. ATO proposed to amend Australia's existing thin capitalization rules to limit interest deductions for MNEs in line with the OECD's recommended approach under Action Plan 4 of BEPS program and seeks consultation on the implementation of proposals to thin capitalization.

ATO also seeks consultation on proposal to introduce a new rule limiting MNE's ability to claim tax deductions for payments relating to intangibles and royalties that lead to insufficient tax paid.

Lastly, ATO seeks consultation on proposal to ensure enhanced tax transparency by MNEs through measures such as public reporting of certain tax information on a country-by-country basis, mandatory reporting of material tax risks to shareholders and requiring tenderers for Australian government contracts to disclose their country of tax domicile.

With the said changes contemplated in consultation paper, ATO seeks to target activities deliberately designed to minimize tax, while considering the need to attract and retain foreign capital and investment in Australia, limit potential additional compliance cost

considerations for business and continue to support genuine commercial activity. ATO invites comments on this paper up until September 2, 2022.

OECD's Global Forum publishes Peer Review Reports on transparency and exchange of information on request (EOIR) for 8 jurisdictions

OECD's Global Forum on Transparency and Exchange of Information for Tax Purposes publishes eight new Peer Review Reports on transparency and EOIR for Finland, Sweden, Portugal, Poland, Pakistan, Cook Islands, Ecuador, and Sint Maarten.

The Report rated Sweden as 'Compliant' overall and upgraded the Portugal's overall rating from 'Largely Compliant' to 'Compliant' since its last review. The Report downgrades the rating for Finland from 'Compliant' to 'Largely Compliant' and Cook Islands was rated largely compliant.

Ecuador, Pakistan, Poland and Sint Maarten were not given any overall rating and would be rated upon completion of Phase 2 review which was not undertaken owing to COVID related travel restrictions.



Transfer Pricing / B E P S



ICAI releases Guidance Note on Tax Audit u/s 44AB wherein it incorporates guidance on reporting with respect of secondary adjustment u/s 92CE of the Act

ICAI releases the Eighth Edition of the Guidance Note on Tax Audit u/s 44AB for AY 2022-23 where Clause 30A of the Tax Audit Report requires reporting of primary adjustment for the purpose of making secondary adjustments u/s 92CE.

The Guidance Note highlights that the tax auditor is required to verify whether any primary adjustment is made in terms of Sec. 92CE(1) during the previous year under consideration. The primary adjustment made may not necessarily relate to previous year under consideration. It is also necessary that the disclosure under clause 30A may need to be done in respect of each and every type of primary adjustment made in relevant financial year irrespective of the previous year to which this adjustment pertains to.

For this purpose, the tax auditor should obtain a certificate from the assessee as to what transfer pricing adjustment have been made and he should also check tax records whether there is any such occurrence. The tax auditor is required to report the fact

that there has been a primary adjustment made during the previous year.

The tax auditor needs to report the relevant clause of section 92CE(1) under which the relevant adjustment falls, and the amount of adjustment. In this regard, the auditor should also obtain a prior management representation on the information obtained to be true and accurate.

Under clause 30A(b)(iii), the requirement is to report whether the excess money available with the associated enterprise is required to be repatriated to India as per the provisions of section 92CE(2). The answer of the same is required to be given in "YES" or "NO".

The tax auditor has to verify whether the excess money has been received, and whether it has been received within the prescribed time. He should report accordingly. In case the excess money or part thereof has not been repatriated within the prescribed time, the imputed interest income needs to be computed.



For this purpose, the tax auditor should ask the taxpayer to obtain certificates of the relevant SBI/LIBOR interest rates, and provide the computation of the imputed interest income. The tax auditor verifies the correctness of such calculation of interest, on the basis of the certificates regarding the SBI/LIBOR rates plus the incremental interest, as per rule 10CB

In respect of interest income is to be reported, there is some ambiguity - whether interest income imputed till the end of the previous year is to be reported or whether interest income imputed up to the date of furnishing of Tax Audit Report is to be reported.

Since the reporting is for the previous year, guidance note recommends to report the amount of interest imputed till the end of the previous year is furnished. In case the interest up to the date of filing of the tax audit report is given, requires to furnish a break-up of the amount of interest imputed till end of the relevant previous year and for the period post the end of the relevant previous year ending with the date of filing tax audit report.

CBDT notifies TCS provisions u/s 206C(1G) don't apply to Non-resident -buyer who doesn't have PE in India

CBDT has withdrawn its earlier notification wherein exemption was provided to non-resident who is visiting India. Further, the CBDT has notified that the provisions of Section 206C(1G) shall not apply to a person (being a buyer) who is a non-resident and who does not have a permanent establishment in India.



Issue of the month



Taxation of Independent Personal Services

Introduction

The DTAA generally deals with taxation of various types of income. One such income is from rendering of '*Independent Personal Services*'.

'Independent Personal Service' as referred in Double Tax Avoidance Agreement broadly deals with professional income. The profession is distinguished from service and it is for this reason that both are treated differently not only for tax purpose as in domestic laws but also for the purpose of double tax relief.

As per various tax treaties between countries, generally the term 'Professional services' include especially independent scientific, literary, artist, educational, or teaching as well as the independent activities of physicians, lawyers engineers, architects, dentists and accountants.

The double taxation of '*Independent Personal Services*' has been discussed in Article 14 of UN Model Convention. The Article on '*Independent Personal Services*' was deleted from the OECD model as it was

felt that it could adequately be dealt under business profits i.e. Article 7 of such model. The deletion was made on the basis of report titled 'Issue Related to Article 14 of the OECD Model Tax Convention'.

The effect of deletion of Article 14 is that income derived from Professional services or other activities of an independent characters is now dealt with Article 7 as Business Profit in OECD Model.

Taxation of '*Independent Personal Services*' in India

• Article 14 – UN Model convention

The UN Model Convention is a compromise between the source principle and the residence principle. However, it generally gives more weight to the source principle as against the residence principle. UN Model



is designed to encourage flow of investments from the developed countries to developing countries.

Article 14 of the Model Tax Convention, dealing with Independent Personal Services, provides that income derived by a resident of a Contracting State in respect of professional services or other activities of an independent character shall be taxable only in that State except in the following circumstances, when such income may also be taxed in the other Contracting State:

a) if the resident of a Contracting State has a fixed base regularly available to him in the other Contracting State for the purpose of performing his activities; or

b) if the resident of a Contracting State stays in the other State for a period or periods aggregating to 183 days or more in any 12-month period commencing or ending in the fiscal year concerned;

• Indian tax treaties

The Article 14 of UN Model is followed by India generally in the Indian tax treaties for the purpose of taxation of *'Independent Personal Services'*.

This Article deals with the taxation of income derived by a person for professional or specified services which are offered in the source state through some presence.

The basic principle is that a person carrying on professional or independent activities in a country other than the country of his residence shall be subject to tax in that other country only if he has a fixed base available in that other country or his stay in that another country is of 183 days or more in twelve months period of a fiscal year.

Further, in some Indian tax treaties entered into with other countries (example: Canada and Zambia), there are additional conditions present in the Article relating to *'Independent Personal Services'*.

The additional condition in case of India-Canada tax treaty is that if the remuneration for the services in the other contracting state is either derived from residents of that other contracting state or is borne by a permanent establishment of a non-resident, such income shall be taxable in the other contracting state (other than country of his residence) subject to a threshold limit of USD 2,500.

The article on *'Independent Personal Services'* covers independent activities involving skills most commonly the professional skills. Normally it covers services rendered by individuals. However, in case of DTAAs with some countries like Australia, UK, USA etc. firms are also covered.

Conclusion

The taxation of *'Independent personal services'* is generally dependent on the test that whether such service is rendered from a fixed base of the individual rendering such service or the number of days of stay in a fiscal year in the other country exceed certain threshold.

The definition of *'Professional Services'* excludes industrial or commercial activities, services performed by an employee and independent activities which are covered by more specific provisions.

The Indian tax treaties on *'Independent Personal Services'* are in line with the Article 14 of UN Model. However, certain additional conditions have been provided in Indian tax treaties entered into with certain countries (example: Canada and Zambia) in the Article relating to *'Independent Personal Services'*.

Legal Corner



Supreme Court in the case of Pr. Commissioner of Income Tax – 5 & Anr. Vs. M/s Page Industries Ltd.

Facts of the case:

Page Industries Ltd. (**the assessee**) is engaged in the business of manufacture and sale of ready-made garments. The assessee is a licensee of the brand-name 'Jockey' for the exclusive marketing of Jockey readymade garments under license agreement with Jockey International Inc, USA (**JII**), a company incorporated in USA and the owner of the brand Jockey. During the year under consideration i.e. AY 2010-11, in respect of granting the right to use brand name, the Assessee has paid royalty @ 5% of the sales to JII which is within the limit as prescribed by the RBI. Further, assessee incurred expenditure on advertisement of Rs. 17,63,62,415/-.

The case of the assessee was selected for scrutiny and the case was referred to TPO. The TPO, vide order u/s 92CA(3) of the Act, proposed transfer pricing adjustment of Rs.20,20,07,861/- by treating the expenditure incurred on advertisement and marketing and product promotion (AMP) to be an international transaction.

Aggrieved with the draft assessment order, the assessee filed objections before the DRP. However, DRP rejected the objections filed by the assessee and confirmed the adjustment proposed by the TPO.

Assessee filed an appeal before ITAT against final assessment order.

Assessee's Contention

Before the Hon'ble ITAT, the assessee contended that the conditions laid down u/s 92A (1) of the Act are not satisfied in the instant case. Thus, the assessee and JII are not AEs. Consequently the transfer pricing regulations should not apply.

Order of the Hon'ble ITAT

ITAT held that the definition of the term 'Associated Enterprise' (**AE**) is divided in two sub-sections - sub section (1) and sub section (2). Sub-section (1) of



section 92A defines AE as an enterprise which participates, directly or indirectly, in management or control or capital of another enterprise. Also as per sub-section (1), if a common person participates in management, control or capital of two enterprises, the two enterprises would be considered AEs. Sub-section (2) contains deeming provisions and enumerates 13c specific circumstances when two enterprises are deemed to be AEs.

While interpreting Section 92A, Hon'ble ITAT referred the amendment made by Finance Act, 2002 w.e.f. 01.04.2002 to the opening words of sub-section (2) of section 92A of the Act. Further, Hon'ble ITAT referred the relevant extract of Memorandum of Finance Bill, 2002 as under:

"It is proposed to amend sub-sec. (2) the said section to clarify that the mere fact of participation of one enterprise in the management or control or capital of the other enterprise or the participation of one or more persons in the management or control or capital of both the enterprises shall not make them associate enterprise unless the criteria specified in sub-sec (2) are fulfilled."

Hon'ble ITAT relied upon the case of **State of Tamil Nadu v. M.K. Kandaswami** and observed that in interpreting a provision, a construction which would defeat its purpose should be avoided. Further relying upon the case of **Calcutta Jute Manufacturing Co. v. CTO, (1997) 106 STC 433, 439 (SC)** Hon'ble ITAT also

observed that the courts should not adopt construction which would upset or even impair the purpose in introducing a particular provision in the statute.

Taking into account the above, Hon'ble ITAT held that in order to constitute the relationship of AE, the parameters laid down in both - sub-section (1) and sub section (2) should be fulfilled.

Thus, the Hon'ble ITAT held that since in the instant case the parameters laid down in sub-section (1) of section 92A are not fulfilled, assessee and JII are not AEs and therefore, the provisions of Chapter X of the Act should not apply.

Consequently, transfer pricing adjustment made by TPO was deleted.

Hon'ble High Court (HC)

Aggrieved with the Hon'ble ITAT 's order, Revenue filed an appeal before the Hon'ble Karnataka High Court. The Revenue challenged the order of the Hon'ble ITAT contending that the transaction entered into by the assessee shall be treated as International transaction since the condition laid down u/s 92A(2)(g) of the Act are met.

Hon'ble HC held that sub-section (1) and (2) of section 92A of the Act are interlinked and have to be read together. Therefore, the requirement contained in sub section (1) and (2) of section 92A of the Act

cannot be ignored. Accordingly, Hon'ble HC dismissed the appeal filed by the revenue and upheld the decision of ITAT.

Hon'ble Supreme Court (SC)

Revenue further challenged the order of HC by filing SLP before Hon'ble SC. However, the SC also dismissed the SLP of the Revenue.

Comment

The interplay between Sub section (1) and sub section (2) of Section 92A of the Act has been a subject of debate for many years. In fact, there are many contradictory judgments on the issue. While the decision of Hon'ble Supreme Court settles the same, now the taxpayers as well as tax authorities will have to grapple with the interpretation of Section 92A(1). Section 92A of the Act states that participation in 'management', 'control' and 'capital' makes two entities, AE's. However, meaning of the terms – 'management' and 'control' is not provided in the Act. Further Section 92A(1) Act also does not provide any threshold for participation in 'capital'. Thus, the applicability of Section 92A(1) will be very difficult to test and is likely to result in another wave of tax litigation.



Glossary



Act	Income Tax Act, 1961
A.Y.	Assessment Year
ALP	Arm's Length Price
AO	Assessing Officer
BEPS	Base Erosion and Profit Shifting
CBDT	Central Board of Direct Taxes
DRP	Dispute Resolution Panel
DTAA	The Double Taxation Avoidance Agreement
EOIR	Exchange of Information on Request
FTC	Foreign Tax Credit
ITR	Income Tax Return
ITAT	Income tax Appellate Tribunal
ICAI	Institute of Chartered Accountant of India
ITR	Income Tax Return
ITAT	Income Tax Appellate Tribunal
LIBOR	London Interbank Offer Rate
MNE	Multinational Enterprises
OECD	Organization for Economic Co-operation and Development
Rules	The Income Tax Rules, 1962
RBI	Reserve Bank of India
SLP	Special Leave Petition
TPO	Transfer pricing Officer
UN	United Nations

GET IN TOUCH

Do write us back your Feedback/Queries/Comments, if any at taxhelpdesk@llca.net

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