

TDS, TCS and Finance Bill

The TDS and TCS provisions were introduced with an aim to collect tax from the very source of income. As per the TDS concept, a person (deductor) who is liable to make payment of specified nature to any other person (deductee) shall deduct tax at source and remit the same into the account of the Central Government. While as per the TCS concept, a person (collector) who is liable to receive payment for specified goods and services to any other person (seller) shall collect tax at source and remit it into the account of the Central Government. Read on...



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The deductee or the seller, as the case may be, from whose income tax has been deducted or collected at source would be entitled to get credit of such amount so deducted or collected. The amount of credit is determined on the basis of Form 26AS or TDS/TCS certificate issued to him.

The Finance Bill, 2022 has made proposals to amend provisions the Income tax Act, 1961 (the Act) relating to TDS and TCS. The proposals are dealt with in this article.

Immovable Property Purchase

Section 194-IA of the Act provides for TDS from

payment of consideration to a resident, on transfer of certain immovable property, where it is not less than Rs. 50 lakh at the rate of 1%. Transfer of agricultural land is spared from TDS.

For taxation in the hands of transferee, any income from such transaction, Section per 43CA – where property is held as a stock in trade and 50C – where property is held as a capital asset, the stamp duty value is to be considered, if it exceeds the transaction value. Thus, TDS is from the amount of consideration paid by the transferee to the transferor without considering amount the stamp duty value of the





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immovable property. “Stamp duty value” for this purpose means the value adopted or assessed or assessable by any authority of the Central Government or a State Government for the purpose of payment of stamp duty in respect of an immovable property [Section 56(2) – Explanation (f)].

It is proposed to amend section 194-IA of the Act by providing that in case of transfer of an eligible immovable property, TDS should be made of sum paid or credited to the transferor or the stamp duty value of such property, whichever is higher. Where both the values are less than Rs. 50 lakh, then TDS under this section is not required.

This amendment will take effect from 1st April, 2022. Therefore, eligible property transactions entered into on or after April 1, 2021 shall be covered under the changed provision. Moreover, where part consideration has been paid for property purchase and part TDS has been made before April 1, 2022, the new

amendment shall apply for the balance of payment and TDS should be made with reference to stamp duty value, if it is higher than transaction value.

Immovable Property Rent

Any person, not being an individual or a Hindu undivided family, paying rent, to a resident is required under Section 194 I to make TDS therefrom, where the amount of rent exceeds Rs. 2,40,000 in a financial year. Rent should be for land; building (including factory building); land appurtenant to a building (including factory building); machinery; plant; equipment; furniture; or fittings.

Whereas, Section 194-IB of the Act requires TDS from payment of rent by an individual or Hindu undivided family, who is not required to make TDS from rent under section 194-I. Section 194-IB provides for TDS payment of any rent exceeding Rs. 50,000 for a month or thereof to a resident. Rate of TDS is 5%. Section 194 IB(4), inter alia, provides that where the TDS is required as per the provisions of section 206AB, such deduction shall not exceed the amount of rent payable for the last month of the previous year or that of the tenancy, as the case may be. Section 206AB calls for TDS at higher of twice of the normal rate of 5% for payment to specified non-filers of income-tax return.

It is proposed to amend the said sub-section (4) to omit the reference of section 206AB.

Business Perquisites

The Finance Minister explained her objective for rationalizing TDS provisions in paragraph

137 of her speech in the following words:

“It has been noticed that as a business promotion strategy, there is a tendency on businesses to pass on benefits to their agents. Such benefits are taxable in the hands of the agents. In order to track such transactions, I propose to provide for tax deduction by the person giving benefits, if the aggregate value of such benefits exceeds Rs. 20,000 during the financial year”.

For the purpose of computation of income from ‘profits and gains of business or profession’, Section 28 of the Act provides that:

The following income shall be chargeable to income-tax under the head “Profits and gains of business or profession”

- (i)
- (ii)
- (iii)
- (iv) *the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession;*
- (v)
- (vi)



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Thus, section 28 of the Act requires value of perquisites to be included in taxable income of a person carrying on business or profession in his income from 'profits and gains of business or profession'.

However, in many cases, as noticed by the CBDT, recipient businessmen do not report the receipt of benefits in their return of income, leading to furnishing of incorrect particulars of income. There is no mechanism to receive particulars of perquisites enjoyed or instituted by any businessman or any other person.

In order to track transaction relating to business perquisites and thereby to widen and deepen the tax base, Clause 58 of the Finance Bill, 2022 proposes a new section 194R in the Act. The new provision relating to TDS on benefit or perquisite in respect of a business or profession. The proposal requires a person responsible for providing to a resident, any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession by such resident, shall, before providing such benefit or perquisite, as the case may be, to such resident, ensure that tax has been deducted in respect of such benefit or perquisite. Rate of TDS is 10% of the value or aggregate of value of such benefit or perquisite.

It is further proposed to provide that in a case where the benefit

or perquisite, as the case may be, is wholly in kind or partly in cash and partly in kind but such part in cash is not sufficient to meet the liability of deduction of tax in respect of whole of such benefit or perquisite, the person responsible for providing such benefit of perquisite shall, before releasing the benefit or perquisite, ensure that tax has been paid in respect of the benefit or perquisite.

It is also proposed to provide that the provision of the said section shall not apply in case of a resident where the value or aggregate of value of the benefit or perquisite provided or likely to be provided to such resident during the financial year does not exceed Rs. 20,000.

Every person except individual and HUF shall be liable to make TDS. Further, individual or HUF, whose total sales, gross receipts or turnover exceeds Rs. 1,00,00,000 in the case of business or Rs. 50,00,000 in the case of profession, during the financial year immediately preceding the financial year in which such benefit or perquisite, as the case may be, is provided by such person are made liable to make TDS.

"Person responsible for providing" means the person providing such benefit or perquisite, or in case of a company, the company itself including the principal officer thereof.

This amendment will take effect from 1st July, 2022 and accordingly perquisites provided

from that date shall attract TDS. In a present-day context, it is worthwhile to know that waiver of loan cannot be brought to tax under section 28(iv). The reason is, for applicability of section 28(iv) of the Act, the income should arise from the business or profession and that the benefit which is received has to be in some other form rather than in the shape of money. [*CIT v. Mahindra & Mahindra Ltd.* 255 Taxman 305, 404 ITR 1 SC, Essar Shipping Ltd. v. *CIT* [2020] 117 taxmann.com 389 (Bombay)]. Incidentally, it is held that Section 41(1) will not apply to waiver of loan since waiver of loan does not amount to cessation of trading liability, loan amount was never claimed as expenditure [*PCIT v. SICOM Ltd* 116 taxmann.com 410 (Bombay), *PCIT v. Gujarat State Financial Corporation* [2020] 122 taxmann.com 101 (Gujarat)]

On similar grounds, Difference between sales tax loan amount and amount paid on Net Present Value basis as per sales tax deferral scheme was not a revenue receipt and was not to be considered as income as per



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section 28(iv) [CIT v. Wheels India Ltd 123 taxmann.com 36 (Madras)]

Special discount or free quantity i.e., one free for one, etc. are not covered in the realm of expenditure.

The Medical Council of India (MCI) brought in Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 to bar any member giving or soliciting or receiving or offering to give any such gift. The Delhi High Court in writ petition Nos.1334 of 2013 dated 10.01.2014 in the case of *Max Hospital v. MCI* has observed that the MCI regulations are meant only for medical practitioners and not for pharmaceutical companies. However, now proposed insertion of Explanation 3 to section 37 will make such expenditure disallowable. In any case, new provisions under section 194R will call for TDS compliance.

Business promotion tours, gifts, benefits for attaining sales targets or otherwise for the dealers and business associates will be covered under the new TDS Section 194R.

A personal gift for personal qualities of assessee and as token of personal esteem and veneration cannot be subjected to tax as perquisite income arising out of business, profession or vocation [Dilip Kumar Roy v. CIT 94 ITR 1 (Bombay)].

There may be instances of expenses where part element

resulting into perquisite and the balance is not a perquisite. For example, in a conference to explain salient features of a new product, conference expenses need not constitute business perquisite, however, any excretion tour or gifts offered can take colour of perquisite. One should be sceptical in understanding such a facet and analysing and quantifying amount of perquisite.

Virtual Digital Assets

The Bill has introduced a new system for taxation of virtual digital asset transactions. In this new system, profit from a transaction shall be taxed at the rate of 30% and no benefit for loss arising in virtual digital asset transaction.

In order to capture information, new section 194S is proposed that requires TDS from payment on transfer of virtual digital asset. The proposed provision provides that any person responsible for paying to a resident any sum by way of consideration for transfer of a virtual digital asset shall make TDS at the rate of 1% of such sum. TDS should be at the time of credit of such sum to the account of the resident, by whatever name called including 'suspense account' etc. or at the time of payment of such sum by any mode, whichever is earlier.

It is possible that consideration for transfer of virtual digital asset is --

- (a) wholly in kind or in exchange of another virtual digital asset, where there is no part in cash; or



Business promotion tours, gifts, benefits for attaining sales targets or otherwise for the dealers and business associates will be covered under the new TDS Section 194R.

- (b) partly in cash and partly in kind but the part in cash is not sufficient to meet the liability of deduction of tax in respect of whole of such transfer.

In such circumstances, the person responsible for paying consideration should ensure that tax has been paid in respect of such consideration before releasing the consideration.

It is proposed that provisions of sections 203A and 206AB shall not apply to a specified person.

There is exemption from making TDS in case of a person, being an individual or a HUF: (a) whose total sales, gross receipts or turnover from the business carried on by him or profession exercised by him does not exceed Rs. 1 crore in case of business or Rs. 50 lakh in case of profession, during the financial year immediately preceding the financial year in which such virtual digital asset is transferred; (b) not having any income under the head "Profits and gains of business or profession" – such person being referred to as a "specified person" - the value or aggregate value of such consideration does

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not exceed Rs. 50,000 during the financial year; and the consideration is payable by any person other than a “specified person”, the value or aggregate value of such consideration does not exceed Rs. 10,000 during the financial year.

A transaction in respect of which TDS has been made under this section, such transaction is not be liable for TDS under any other provision of the Chapter XVII of the Act.

The provision is proposed to be operative from the 1st day of July, 2022.

This provision will enable capturing by taxman, transactions in virtual digital assets, profit from which was always taxable.

Certain difficulties can arise while dealing with this TDS. In case of loss from the transaction, TDS is required. So, where there is no income, no advantage of set off of loss against income, TDS will be made, which will block funds.

Moreover, thousands of transactions taking place

within a span of one hour will be exposed to the challenge of TDS compliance. Transactions of exchange i.e., exchange of one category of virtual asset say, crypto currency for another one will require TDS at either end and associated issues of valuation of virtual asset in rupees and mechanism for ensuring payment of tax by the payee.

The Government expects Rs. 1,000 crore from this TDS. This provision proposes to track transactions in the market and widen the tax-base. It is stated in an interview from the Finance Ministry that the provision should not be read to giving any legitimacy to crypto currency. Since, virtual assets is going to be future and as such, attempt to capture trail of such assets.

Interest on TDS Payment Default

Section 201 (1A) of the Act provides that if any person who is liable to make TDS:

- (i) does not deduct it or
- (ii) after so deducting fails to pay the TDS to the credit of the Government,

then, he shall be liable to pay simple interest at the specified rates.

Interest is not ‘Penal’ but ‘compensatory in nature’. In *Bennet Coleman & Co. Ltd. v. V.P. Damle*, Third ITO [1985] 21 Taxman 131 / [1986] 157 ITR 812 (Bom.), the Court has held that the payment of interest under Section 201(1A) is not a penal provision

and therefore, no question of waiver off of such payment on the basis of that default was not intentional or on any other basis.

It is, now, proposed to provide that where an order is made by the Assessing Officer for the default referred to in sub-section (1), the interest shall be paid by the person in accordance with such order.

Similar interest liability for defaults in making payment, etc. of TCS, section 206C(6A) has made provision. In this case also, proposed similar amendment provides that interest shall be paid by the defaulting person in accordance with the order made by the Assessing Officer in this regard.

This amendment will take effect from the 1st day of April, 2022 and in case of continuing default, in my view, order can cover period prior to that date.

Interest is not appealable, however, for these two sections, the right of appeal has been expressly provided under section 246A of the Act, while additionally, for calculation, etc. errors, application for rectification can be preferred.

Additional TDS & TCS from Non-Filers

Sections 206AB and 206CCA of the Act provide for deduction and collection of tax at source respectively, in case of non-filers called in the section as “specified persons” at higher rates specified therein.

Meaning of the term “Specified person” is a person who has not

filed the returns of income for both the two assessment years relevant to the two previous years immediately preceding the financial year in which TDS/TCS is to be made and for which the time limit for filing return of income under section 139(1) has expired and the aggregate of TDS/TCS in his case is Rs. 50,000 or more in each of these two previous years. Online utility to taxpayers to check whether the person is a specified person or not has been made available.

A person in whose case significant amount of TDS / TCS do furnish their return of income, it is proposed to reduce two years requirement to one year by amending sections 206AB and 206CCA of the Act.

However, in order to reduce the additional burden on individual and HUF covered under section 194-IA, 194-IB and 194M of the Act for whom simplified tax deduction system has been provided without requirement of TAN, it is proposed that the provisions of section 206AB be applicable.

Erroneous use of terms “deductor” and “collectee” has been ironed out. Following e-era, in place of ‘filing’ of return, the term ‘furnishing’ of return will be substituted.

These amendments will take effect from 1st April, 2022. Delay in payment of interest is a continuing default. Therefore, where the default commencing from a period prior to 1st April, 2022, however continues on

that day or thereafter, it will be covered by the proposed amendment.

It needs to be noted that provisions of section 206AB are not applicable in relation to transactions on which tax is to be deducted under sections 192, 192A, 194B, 194BB, 194LBC or 194N of the Act.

Non-Resident TDS Refund

In contract with enterprises from countries beyond India, they are reluctant to bear Indian tax. Therefore, consideration payable to foreign enterprise is contracted ‘net of tax’. In such cases, local vendor bears the tax. In case TDS from supplies by non-residents is paid and later it is realised that it was not payable, procedure for claiming refund is cumbersome.

For out of non-resident TDS refund, Section 248 of the Act lays down the procedure. For claiming refund of TDS under section 195 of the Act, one may appeal to the Commissioner (Appeals) [CIT(A)] for a declaration that no tax was deductible on such income, if he claims that such tax is to be borne by him since no tax was required to be deducted on such income. However, appeal can be filed only after making TDS payment to the Government. Under section 249, such an appeal claiming TDS refund can be filed within 30 days of making payment of TDS to the Government. Of course, the CIT(A) holds power to condone delay for just reasons. However, this provision does not cover TDS from interest.

To obtain a refund in above case, any person has no recourse to approach the Assessing Officer. Preferring appeal before the CIT (A) is the only available remedy. In this process, facts in this behalf did not reach the record of the Assessing Officer [AO] or affording him any examination thereof.

To address these limitations, a new section 239A is sought to be introduced. New section provides that such a person, who has made TDS from income paid to any non-resident under section 195 under such an agreement or arrangement and borne the tax liability, when no TDS was required, can approach the AO. He is allowed file an application to the AO for refund of TDS under section 195.

Where he is aggrieved by the order of the AO, option of appeal against such order before the CIT (A) is available under section 246A of the Act.

These amendments will be operative from 1st April, 2022. As such, provisions of section 248 will not apply in cases where the date of tax payment,



Sections 206AB and 206CCA of the Act provide for deduction and collection of tax at source respectively, in case of non-filers called in the section as “specified persons” at higher rates specified therein.

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to the credit of Central Government is on or after 01.04.2022.

Penalty for Laxity in Compliance

Administrative provisions relating to TDS and TCS cast responsibility of timely furnishing of statement of TDS made or TCS collection, issuing TDS, TCS certificates to deductee or sellers. Based on these statements, Income tax Department gets informed about receipt by a person and tax collection on his behalf. Therefore, these provisions carry great importance.

Section 272A of the Act provides for penalty for certain failure, etc. The following clauses of sub-section (2) provide penalty for administrative lapses:

- (c) to furnish in due time any of the returns, statements or particulars mentioned in section 133 or section 206 (TDS quarterly statements) or section 206C (TCS quarterly statements) or section 285B;
- (f) to deliver or cause to be delivered in due time a copy of the declaration mentioned in section 197A;

- (g) to furnish a certificate as required by section 203 or section 206C;
- (h) to deduct and pay tax as required by sub-section (2) of section 226;
- (i) to furnish a statement as required by sub-section (2C) of section 192;
- (j) to deliver or cause to be delivered in due time a copy of the declaration referred to in sub-section (1A) of section 206C;
- (k) to deliver or cause to be delivered a copy of the statement within the time specified in section 200(3) or the proviso to section 206C(3);
- (l) to deliver or cause to be delivered the statements within the time specified in section 206A(1);
- (m) to deliver or cause to be delivered a statement within the time as may be prescribed under section 200(2A) or section 206C(3A).

For these defaults, prescribed penalty is Rs. 100 for every day during which the failure continues. There is an upper cap on the amount of penalty for default for failures in relation to a declaration mentioned in section 197A, a certificate as required by section 203 and returns under sections 206 and 206C and statements under section 200(2A) / (3) or the proviso to under section 206C (3)/(3A). Moreover, no penalty shall be levied for the failure referred to in clause (k), if such failure relates to a statement referred to in section 200(3) or the proviso to section

206C(3) which is to be delivered or caused to be delivered for TDS/TCS, as the case may be, on or after the 1st day of July, 2012.

Section 272A ensures seamless flow of tax credit and indication of receipt as such non-compliance and acting as a deterrent. Therefore, the low penalty of Rs. 100 had been commented upon by the CAG, which is not increased since 1999 and fails to have deterrence value.

In this background, it is proposed to increase the amount of penalty for failures listed under section 272A(2) by 500% i.e., to Rs. 500 from Rs. 100 for each day of non-compliance.

This amendment will take effect from 1st April, 2022. Therefore, delay and lapses in administrative compliances relating to TDS or TCS on or after that date shall attract penalty at a higher rate.

Of course, there is provision for not charging penalty if there was a reasonable cause for any non-compliance.

No doubt, the proposed substantial increase in quantum of penalty will be biting to the erring assessee. However, it will certainly bring in discipline in this arena.

Summing up

From the proposals in the arena of TDS and TCS, one can easily decipher that the Tax Department is affording significant importance to TDS and TCS in tax collection process. Lapses in this behalf attract more stringent consequences. It is necessary for stakeholders to observe the TDS and TCS obligations with utmost care and caution. ■■■



Section 272A ensures seamless flow of tax credit and indication of receipt as such non-compliance and acting as a deterrent.