POST-BUDGET MEMORANDUM 2010

Direct Taxes

THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA, NEW DELHI

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INTRODUCTION

1.0 The Council of the Institute of Chartered Accountants of India considers it a privilege to submit this Post-Budget Memorandum to the Government.

1.1 Every year, the Institute organizes a workshop on the Union Budget in which the senior officials from the Central Board of Direct Taxes participate and give appropriate clarifications. Accordingly, a workshop on the Union Budget 2010-11 was organized by the Institute on 23rd March, 2010. The Workshop was devoted to discussion of the direct tax proposals. Senior Officials of the Central Board of Direct Taxes (CBDT) participated and gave appropriate clarifications on various issues. In this memorandum, we have suggested certain amendments to the proposals contained in the Finance Bill, 2010 which would help the Government to achieve the desired objectives. We have also suggested certain incidental amendments to remove hardship to the assessees.

1.2 We have noted with great satisfaction that the suggestions given by the Committee in the past have been considered very positively. Certain representations made in the post-budget memorandum of earlier years have formed the basis of amendments proposed in the current Finance Bill. In formulating our suggestions in regard to the Finance Bill 2010, the Direct Tax Committee of the ICAI has considered in a balanced way, the objectives and rationale of the Government and the practical difficulties/hardships faced by taxpayers and professionals in application of the Income Tax Act. We are confident that the suggestions of the Direct Tax Committee given in this Memorandum shall receive positive consideration. The representations made by the Direct Tax Committee of the ICAI in the last couple of years which have resulted in legislative changes are given below to illustrate the positive outcome of such suggestions –

Sl. No.	**In relation to Finance Bill**	**Relevant Issues –** ***Suggestions of ICAI***	**Action taken**
1.	2008	Computation of Book Profit u/s 115JB – *exclusion of deferred tax assets if credited to the Profit & Loss Account*	Considered in Finance Act, 2008
2.	2008	Liability of AOPs and BOIs for TDS u/s 194C – *only if the concerned AOPS are liable to Tax Audit u/s 44AB*	Considered in Finance Act, 2008
3.	2008	Notice deemed to be valid just because of the assessee's appearance or co-operation u/s 292BB – *if the assessee objects as regards validity of the Notice during the course of assessment proceedings, this section should not be applied*	Considered in Finance Act, 2008

4.	No.2 of 2009	Treatment of Advance FBT paid during the Financial Year 2009-10 in view of abolition of FBT – *Advance FBT should be treated as Advance income-tax paid*	Through Notification this has been implemented
5.	No.2 of 2009	Conversion of LLPs – *should not be considered as "transfer" for capital gains by inclusion in section 47*	Proposed in Finance Bill, 2010
6.	No.2 of 2009	Computation of deductible profit of SEZ unit u/s 10AA – *amendment to be made retrospective*	Proposed in Finance Bill, 2010
7.	No.2 of 2009	Capital expenditure incurred in the years prior to the year in which specific business has been commenced u/s 35AD – *capital expenditure incurred in earlier years should be considered for deduction in the year of commencement of specific business*	Considered in the Finance (No.2) Act, 2009
8.	No.2 of 2009	Deemed income u/s 56(2)(vii) – *this should be included in the definition of income u/s 2(24)*	Considered in the Finance (No.2) Act, 2009
9.	No.2 of 2009	Value considered for deemed income u/s 56(2)(vii) – *such deemed value should be considered as "cost of acquisition" u/s 49 for subsequently computing capital gains from transfer thereof*	Considered in the Finance (No.2) Act, 2009
10.	No.2 of 2009	Valuation as regards deemed income u/s 56(2) – *if assessee disputes the value the Assessing Officer should be able to make reference to Valuation Officer*	Proposed in Finance Bill, 2010

11.	No.2 of 2009	Deemed income u/s 56(2)(vii) – *trading assets should be excluded*	Proposed in Finance Bill, 2010 for exclusion of the property of the nature of trading assets of the receiver
12.	No.2 of 2009	Interest on Compensation u/s 56(2)(viii) – *wrong reference to section 145A(2) should be rectified to section 145A(b)*	Considered in the Finance (No.2) Act, 2009
13.	No.2 of 2009	Exclusion of anonymous donation from taxability u/s 115BBC – *instead of 5% of total income the relaxation should be of 5% of gross receipts*	By Finance(No.2) Act, 2009, it has been made 5% of total donations

1.3 In this memorandum, firstly an executive summary of our suggestions on the specific clauses of the Finance Bill, 2010 relating to income-tax have been given. The detailed suggestions are given thereafter.

1.4 In case any further clarifications or data is considered necessary, we shall be pleased to furnish the same. The contact details are:

Chairman, Direct Taxes Committee: Mobile No: 9322133027

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Post Budget Memorandum - 2010

Executive Summary

I Suggestions on proposals contained in the Finance Bill, 2010

Index

1. Clause 4 – Amendment in section 9 – Substitution of *Explanation* below section 9(2) with retrospective effect from 1st June, 1976

(a) The amendment to section 9 may be made applicable only to pending assessments and it should not affect completed assessments.

(b) *Section 195 should not be invoked for past years, since the reason for failure to deduct tax is that the income was treated as not liable to tax in India, following the law as pronounced by the Supreme Court. For the current year also, section 195A should also not apply if TDS amount is paid by deductor.*

(c) *Section 40(a)(i), providing for disallowance of the expenditure for failure to deduct tax at source, should not be made applicable to payments made without deduction of tax pursuant to the ruling of the Supreme Court.*

2. Clause 18 – Insertion of clause (xiiib) in section 47

(a) *In order to provide exemption in the hands of shareholders on conversion of a company into a LLP, the words "Notwithstanding anything contained in section 46(2)" may be added at the beginning of clause (xiiib) of section 47.*

(b) *The benefit of exemption/deduction available to the predecessor-company under sections 10A, 10AA, 10B, 10C, 35A, 35AB, 35D, 35DD, 80-IA, 80-IB, 80-IC, 80-ID, 80-IE etc. may be allowed to successor-LLP, on such conversion, for the unexpired period.*

(c) *Clause (b) of the proviso to section 47(xiiib) may be amended to substitute "equity shareholders" in the place of "shareholders".*

(d) *In clause (d) of the proviso to section 47(xiiib), it may be provided that shortfall from the prescribed percentage of 50%, resulting consequent to death or disqualification of a partner, may be permitted.*

(e) *The limit under clause (e) of the proviso to section 47(xiiib) should be suitably enhanced so that more closely held family companies are encouraged to avail the benefit of conversion to LLP.*

(f) *The conversion of a firm into a LLP should be included in the list of transactions not considered as a transfer under section 47.*

3. Clause 21(a) - Amendment to section 56(2)(vii)

Clause (d) of the Explanation below section 56(2)(vii) may be amended to separately include rural agricultural land within the definition of property.

4. **Clause 21(b) – Insertion of new clause (viia) in section 56(2)**

(a) ***The proviso to section 56(2)(viia) may be amended to provide that the clause shall not apply to any such property received by way of a transaction not regarded as transfer under clause (iv) or clause (v) or clause (via) or clause (vic) or clause (vicb) or clause (vid) or clause (vii) of section 47.***

(b) ***Clause (viia) of section 56(2) should be amended to cover only receipt of property as a capital asset, being shares of a company not being a company in which the public are substantially interested.***

(c) ***The scope of section 56(2)(viia) may be extended to cover transfer of shares to any person, other than an individual or HUF.***

5. **Clause 3(a) – Amendment in section 2(15) – Insertion of second proviso to section 2(15)**

(a) ***Only income from such commercial activity may be taxed in the hands of the trust, in case such income exceeds Rs.10 lakh, and not the entire income of the trust.***

(b) ***In the alternative, a trust should not lose recognition under section 12AA even if the receipts from business, trade etc. exceed Rs.10 lakh in a year.***

A three-year time period may be given before cancelling registration of trust under section 12AA due to the application of the proviso.

6. Clause 12 – Amendment of section 40(a)(ia)

(a) ***Disallowance under section 40(a)(ia) should not be attracted in cases where tax has not been deducted during the previous year but the same has been deposited before the due date of filing of return.***

(b) ***For this purpose, if tax is so paid by the payer without deduction in the said period, the provisions of 195A requiring grossing up should not be made applicable. It may be sufficient if the payer deducted the amount from the payee in subsequent transactions.***

(c) ***Further, a clarification may be given, either by way of a circular or an amendment in the Act, regarding the year of deductibility of expenditure incurred during the previous year 2008-09, in respect of which tax has been deducted during that year between April, 2008 and February, 2009, but paid in the following year (P.Y.2009-10) before the due date of filing the return.***

7. Clause 10 – Amendment in section 35AD(5)

Clause (aa), to be inserted in sub-section (5), should read as follows –

"(aa) on or after 1st day of April, 2010, where the specified business is in the nature of building or operating or building and operating a new hotel of two-star or above category as classified by the Central Government; and".

8. Clause 46 - Amendment of section 245C

It is suggested that the "group" concept be introduced for settlement cases. If the average additional tax payable by the entities in the 'group' subjected to search exceed the threshold limit of Rs. 50 lakh /Rs.10 lakh, then the application of all entities being part of the 'group' may be treated as a single Settlement application and be proceeded with.

9. Clauses 35 to 41 - Increase in threshold limits under sections 194B, 194BB, 194C, 194D, 194H, 194I and 194J

In order to bring section 194A in line with other changes proposed, the limit under section 194A may be increased from Rs.10,000 to Rs.25,000.

10. Clause 9 – Amendment to section 35

The weighted deduction under section 35(1)(iia), in respect of amount paid to a company registered in India, which has as its main object the scientific research and development, may be suitably increased.

II Other Incidental Issues referred to:

- ***Simplification of procedure for approval under section 35(2AB)***
- ***Simplification sought regarding PAN of non-resident payees***
- ***Cumulative effect of Circulars and Rules regarding perquisite valuation***
- ***Clarification regarding contribution to approved superannuation fund.***

POST- BUDGET MEMORANDUM – 2010

I Suggestions on proposals contained in the Finance Bill, 2010

1. Clause 4 – Amendment in section 9 – Substitution of *Explanation* below section 9(2) with retrospective effect from 1st June, 1976

The *Explanation* below section 9(2) is proposed to be substituted with retrospective effect from 1.6.1976 to clarify that income by way of fees for technical services, interest and royalty, from services rendered outside India, but utilized in India would be deemed to accrue or arise in India in case of a non-resident and be included in his total income.

The Supreme Court had, in *Ishikawajima-Harima Heavy Industries Ltd. v. Director of Income-tax (2007) 288 ITR 408*, observed that in order to tax the income of a non-resident assessee under section 9(1)(vii), relating to fee for technical services, the income sought to be taxed must have sufficient territorial nexus with India i.e., the fees paid for technical services provided by a non-resident cannot be taxed in India unless the services were utilized in India and rendered in India. Since this observation was not in consonance with the source rule spelt out in the law and stand taken by India in the bilateral treaties with different countries, the Finance Act, 2007 had clarified that such income by way of interest, royalty or fee for technical services which is deemed to accrue or arise in India by virtue of clauses (v), (vi) and (vii) of section 9(1), shall be included in the total income of a non-resident, whether or not the non-resident has a residence or place of business or business connection in India.

However, even after insertion of the *Explanation* giving the clarification, the issue has not been resolved. Recently, the Karnataka High Court, in *Jindal Thermal Company Ltd. V. DCIT (TDS) 182 Taxman 252*, observed that the criteria of rendering services in India and utilizing the services in India, as laid down by the above Supreme Court judgment would continue to hold good even after insertion of the Explanation.

We appreciate the point made that this *Explanation* is made retrospective since it is stated to give effect to the legislative intent. It is also understood that such retrospective effect is desired with a view to strengthening the country's position in bilateral treaty negotiations. However, one cannot lose sight of the fact that a Supreme Court ruling is the law of the land. Therefore, many non-resident assessees may have treated such income as exempt based on the above Supreme Court ruling in the year 2007. Therefore, taxpayers should not be penalized for non-compliance of section 195 and accordingly, section 40(a)(i) should not be applied. Therefore, substitution of the

Explanation with retrospective effect from 1.6.76 should not adversely affect those assessees who have followed the ruling of the Hon'ble Supreme Court, which is the law of the land.

Suggestions

(a) ***This amendment may be made applicable only to pending assessments and it should not affect completed assessments.***

(b) ***Section 195 should not be invoked for past years, since the reason for failure to deduct tax is that the income was treated as not liable to tax in India, following the law as pronounced by the Supreme Court. For the current year also, section 195A should also not apply if TDS amount is paid by deductor.***

(c) ***Section 40(a)(i), providing for disallowance of the expenditure for failure to deduct tax at source, should not be made applicable to payments made without deduction of tax pursuant to the ruling of the Supreme Court.***

2. Clause 18 – Insertion of clause (xiiib) in section 47

Section 47 lists out the transactions not regarded as transfer for the purpose of levy of capital gains tax. Clause (xiiib) is proposed to be inserted in section 47 to provide that conversion of certain private companies and unlisted public companies into

LLPs would not be treated as a transfer (subject to fulfillment of certain conditions) and therefore, would be excluded from capital gains tax. This clause has been introduced to facilitate conversion of small companies into LLPs.

(a) However, it may be noted that the exclusion applies only to the company and not to the shareholders. Under section 55 read with Schedules 3 and 4 of the Limited Liability Partnership Act, the company will be deemed to have been liquidated on its conversion into an LLP. Consequently, the provisions of section 46(2) and section 2(22)(c) levying tax on the shareholder on distribution of assets on liquidation of the company would become applicable.

Therefore, it may be provided that when the account of the shareholder is credited in the books of the LLP on such conversion, the provisions of section 46(2) and 2(22)(c) levying tax on the shareholder on distribution of assets on liquidation of a company will not apply.

Suggestion

For this purpose, the words "Notwithstanding anything contained in section 46(2)" may be added at the beginning of clause (xiiib) of section 47.

(b) On such conversion, the successor LLP would be allowed to carry forward and set-off the business loss and unabsorbed depreciation of the predecessor company. For this purpose, sub-section (6A) is proposed to be inserted in section 72A.

However, there is no provision for carrying forward the benefit of exemptions and deductions, available to the predecessor company under the Act, by the successor-LLP.

Suggestion

The benefit of exemption/deduction available to the predecessor-company under sections 10A, 10AA, 10B, 10C, 35A, 35AB, 35D, 35DD, 80-IA, 80-IB, 80-IC, 80-ID, 80-IE etc. may be allowed to successor-LLP, on such conversion, for the unexpired period.

(c) One of the conditions for exemption of such conversion is that all shareholders of the company, immediately before the conversion, should become partners of the LLP.

This condition should be made applicable only in respect of equity shareholders and not preference shareholders, since preference shares are primarily in the nature of debt and not equity.

Suggestion

Clause (b) of the proviso to section 47(xiiib) may be amended to substitute "equity shareholders" in the place of "shareholders".

(d) Another condition for exemption of the conversion is that the aggregate of the profit sharing ratio of the shareholders of the company in the LLP shall not be less than 50% at any time during the period of five years from the date of conversion.

However, this condition should not apply in case involuntary transfers such as dilution resulting from death or disqualification of a partner.

Suggestion

In clause (d) of the proviso to section 47(xiiib), it may be provided that shortfall from the prescribed percentage of 50%, resulting consequent to death or disqualification of a partner, may be permitted.

(e) The benefit of exemption of capital gains on conversion is restricted to those companies, whose total sales, turnover, gross receipts in business in any of the three previous years preceding the previous year in which the conversion takes place does not exceed sixty lakh rupees.

By introducing a cap on the sales, turnover or gross receipts, the purpose of the LLP Act to encourage conversion of existing companies into LLPs may be diluted.

Suggestion

> ***This limit should be suitably enhanced so that more closely held family companies are encouraged to avail the benefit of conversion to LLP.***

(f) Under section 55 read with Schedule 2 of the Limited Liability Partnership Act, it has been provided that on conversion of a partnership into LLP, the partnership shall be deemed to have been dissolved.

Although the Explanatory Memorandum to the Finance (No.2) Bill, 2009 has clarified that the conversion from a general partnership firm to an LLP will have no tax implications if the rights and obligations of the partners remain the same and there is no transfer of any asset or liability after conversion, no specific provision granting exemption on such conversion has been provided in the Act. Consequently, there is a possibility that capital gains tax under section 45(4) may be attracted on dissolution of firm on account of its conversion into LLP.

Suggestion

The conversion of a firm into an LLP should be included in the list of transactions not considered as a transfer under section 47.

3. Clause 21(a) - Amendment to section 56(2)(vii)

The Finance (No.2) Act, 2009 had inserted clause (vii) in section 56(2) w.e.f. 1.10.2009 to include within its scope, in addition to any sum of money, the value of any property received without consideration or for inadequate consideration.

Now, it has been clarified that the definition of "property" under section 56(2)(vii) would include only capital assets and not assets held as stock-in-trade.

Since this clause was introduced as an anti-avoidance provision, it is suggested that the value of rural agricultural land received without consideration also be included in the definition of property, even though it is not a capital asset.

Suggestion

Clause (d) of the Explanation below section 56(2)(vii) may be amended to separately include rural agricultural land within the definition of property.

4. **Clause 21(b) – Insertion of new clause (viia) in section 56(2)**

New clause (viia) is proposed to be inserted in section 56(2) to provide that the transfer of shares without consideration or for inadequate consideration would attract the provisions of section 56(2), if the recipient is a firm or a company. However, the provisions of section 56(2)(viia) would not apply in the case of transfer of shares -

(i) of a company in which the public are substantially interested; or

(ii) to a company in which the public are substantially interested.

(a) Certain transactions are exempted from the application of the provisions of this clause, namely, transactions covered under the following sections:

Section	Transaction
47(via)	Transfer of shares held in an Indian company, in a scheme of amalgamation, by the amalgamating foreign company to an amalgamated foreign company.
47(vic)	Transfer of shares held in an Indian company, in a scheme of demerger, by the demerged foreign company to a resulting foreign company.
47(vicb)	Transfer of shares held in the predecessor co-operative bank, in a business reorganization,

	in consideration of the allotment of shares in the successor co-operative bank.
47(vid)	Transfer or issue of shares by the resulting company, in a scheme of demerger, to the shareholders of the demerged company in consideration of demerger of the undertaking.
47(vii)	Transfer by a shareholder, in a scheme of amalgamation, of shares in the amalgamating company in consideration of allotment to him of shares in the amalgamated Indian company.

However, transfer of shares by a holding company to its 100% subsidiary company or *vice versa*, under sections 47(iv) and 47(v), respectively, where the transferee company is an Indian company, have not been excluded from the applicability of section 56(2)(viia). Since these transactions are also genuine business transactions, they may be excluded from the applicability of section 56(2)(viia).

(b) The rationale for excluding stock-in-trade from the provisions of section 56(2)(vii) is that transactions entered into in the normal course of business or trade, the profits of which are taxable under a specific head of income, should not be brought to tax again under section 56(2)(vii).

This rationale for excluding stock-in-trade from the provisions of section 56(2)(vii) should be applied to section 56(2)(viia) also. Therefore, transfer of unlisted shares, held as stock-in-trade, without consideration or for inadequate consideration, to a firm or a company should not attract the provisions of section 56(2)(viia).

(c) Further, since this clause is in the nature of an anti-avoidance provision, it may be further extended to cover transfer of unlisted shares to any person, other than an individual and HUF, and not only be restricted to transfer to firms and companies.

Suggestions

(a) ***The proviso to section 56(2)(viia) may be amended to provide that the clause shall not apply to any such property received by way of a transaction not regarded as transfer <u>under clause (iv) or clause (v)</u> or clause (via) or clause (vic) or clause (vicb) or clause (vid) or clause (vii) of section 47.***

(b) ***Clause (viia) of section 56(2) should be amended to cover only receipt of property <u>as a capital asset,</u>***

being shares of a company not being a company in which the public are substantially interested.

(c) The scope of section 56(2)(viia) may be extended to cover transfer of shares to <u>any person, other than an individual or HUF</u>.

After incorporating the above suggestions, section 56(2)(viia) would read as follows –

"where <u>any person, other than an individual or HUF</u>, receives, <u>as a capital asset</u>, in any previous year, from any person or persons, on or after the 1st day of June, 2010, any property, being shares of a company not being a company in which the public are substantially interested, –

(i) without consideration, the aggregate fair market value of which exceeds fifty thousand rupees, the whole of the aggregate fair market value of such property;

(ii) for a consideration which is less than the aggregate fair market value of the property by an amount exceeding fifty thousand rupees, the aggregate fair market value of such property as exceeds such consideration:

Provided that this clause shall not apply to any such property received by way of a transaction not regarded as transfer under <u>clause (iv) or clause (v)</u> or clause (via) or

clause (vic) or clause (vicb) or clause (vid) or clause (vii) of section 47.”

5. Clause 3(a) – Amendment in section 2(15) – Insertion of second proviso to section 2(15)

A second proviso is proposed to be inserted in section 2(15) to provide that “advancement of any other object of general public utility” would continue to be a “charitable purpose”, if the aggregate value of the receipts from any activity in the nature of trade, commerce or business, or any activity of rendering any service in relation to any trade, commerce or business do not exceed Rs.10 lakh in the previous year.

The legislative intent to provide relief to small NGOs is well appreciated. However, this amendment could affect the registration of trusts and the manner in which accumulated income is to be utilised where a trust has decided to accumulate income, since the application of the second proviso may result in a situation where the trust is eligible for exemption in one year and not eligible in another year. The status of the entity would keep changing from year to year. This can cause significant problems in applying the provisions of sections 11 to 13 and/or income from business or income from other sources in subsequent years.

Suggestions

(a) ***Only income from such commercial activity may be taxed in the hands of the trust, in case such income exceeds Rs.10 lakh, and not the entire income of the trust.***

(b) ***In the alternative, a trust should not lose recognition under section 12AA even if the receipts from business, trade etc. exceed Rs.10 lakh in a year.***

A three-year time period may be given before cancelling registration of trust under section 12AA due to the application of the proviso.

6. Clause 12 – Amendment of section 40(a)(ia)

The time limit for depositing tax deducted during the entire year is proposed to be extended up to the due date of filing return of income to ensure compliance with the statutory requirement to avoid disallowance of expenditure under section 40(a)(ia). This amendment is proposed to be made effective from A.Y.2010-11.

The benefit of deduction of expenditure in the same assessment year should be made available even if an assessee deposits the tax before the due date of filing of return of income, though he has inadvertently failed to deduct the same.

It may be noted that for the F.Y.2008-09, only tax deducted during March 2009 was allowed to be paid upto the due date for filing return of income for avoiding disallowance of expenditure. The tax deducted between April 2008 and February 2009 had to be deposited by 31st March, 2009 to avoid disallowance of expenditure in the F.Y.2008-09. If such tax has been deposited after 31st March, 2009, then the expenditure would be allowed as deduction in the year in which it was so deducted and paid.

From a plain reading of section 40(a)(ia), as it is now proposed to be amended, it appears that in a case where tax has been deducted in the F.Y.2008-09 (April, 2008 to February, 2009) and deposited in the following year (i.e., F.Y.2009-10) before the due date of filing of return, no deduction would be available in respect of the related expenditure, either during the F.Y.2008-09 (due to the erstwhile provision) or during the F.Y.2009-10 (due to the proposed amendment). Such a situation would be contrary to the real intention of the legislature, since the benefit would not be available even in the year in which tax is deposited. A clarification is required to be issued in this regard.

Suggestions

(a) ***Disallowance under section 40(a)(ia) should not be attracted in cases where tax has not been deducted during the previous year but the same has been deposited before the due date of filing of return.***

(b) ***For this purpose, if tax is so paid by the payer without deduction in the said period, the provisions of 195A requiring grossing up should not be made***

applicable. It may be sufficient if the payer deducted the amount from the payee in subsequent transactions.

(c) ***Further, a clarification may be given, either by way of a circular or an amendment in the Act, regarding the year of deductibility of expenditure incurred during the previous year 2008-09, in respect of which tax has been deducted during that year between April, 2008 and February, 2009, but paid in the following year (P.Y.2009-10) before the due date of filing the return.***

7. Clause 10 – Amendment in section 35AD(5)

It is proposed to extend the benefit of investment-linked tax incentives under section 35AD to the specified business of building and operating a new hotel of two-star category and above anywhere in India w.e.f. A.Y.2011-12. The intent of giving an investment-linked incentive to hotel industry is appreciated.

However, from a plain reading of the proposed amendment to section 35AD, it appears that the benefit under the section would not be available in case the person building the hotel is different from the person operating the hotel. This does not seem to be in harmony with the objective. The benefit should be made available to the specified business of building or operating or building and operating a new hotel of two-star category anywhere in India.

Therefore, a clarification is required as to the real intent of the legislature.

Suggestion

Clause (aa), to be inserted in sub-section (5), should read as follows –

"(aa) on or after 1st day of April, 2010, where the specified business is in the nature of building or operating or building and operating a new hotel of two-star or above category as classified by the Central Government; and".

8. Clause 46 - Amendment of section 245C

Section 245A is proposed to be amended to provide that the proceedings for assessment or reassessment resulting from search/requisition to fall within the definition of a "case" which can be admitted by the Settlement Commission.

Section 245C is proposed to be amended to provide that the additional amount of income-tax payable on income disclosed in the application should exceed Rs.50 lakh, for an application to be made before the Settlement Commission in such cases. In other cases, the additional amount of income-tax payable on income disclosed in the application should exceed Rs.10 lakh, for an application to be made before the Settlement Commission.

In practice, search is generally carried out on more than one assessee, say, on all members of a family, or on all entities under the same management etc. These assessees may be part of the same search action owing to many reasons, like say, having a common source of undisclosed income or the premises searched being the same. In such cases, litigation arises as to whose hands the assets seized are taxable. For this purpose, full disclosure of undisclosed income and co-operation of all the assessees who are part of the same search action would be required to comply with the requirements in regard to settlement.

It is, therefore, suggested that considering the ground realities, the concept of group of applications may be introduced, wherein, a group of assessees, (say, family members, in case of an individual assessee) may prefer to file a joint application.

In such a case, if the average additional tax payable by the entities in the 'group' subjected to search exceed the threshold limit of Rs. 50 lakh /Rs.10 lakh, then the application of all entities being part of the 'group' may be treated as valid and be proceeded with.

Suggestion

It is suggested that the "group" concept be introduced for settlement cases. If the average additional tax payable by the entities in the 'group' subjected to search exceed the threshold limit of Rs. 50 lakh /Rs.10 lakh, then the application of all entities being part of the 'group' may be treated as a single Settlement application and be proceeded with.

9. Clauses 35 to 41 - Increase in threshold limits under sections 194B, 194BB, 194C, 194D, 194H, 194I and 194J

The threshold limits for attracting TDS provisions are proposed to be increased with effect from 1st July, 2010, in order to reduce compliance burden and provide for inflation adjustment.

However, there is no increase proposed under section 194A on interest other than interest on securities.

In order to bring section 194A in line with the other increases, the limit under section 194A may be increased from Rs.10,000 to Rs.25,000.

Suggestion

In order to bring section 194A in line with other changes proposed, the limit under section 194A may be increased from Rs.10,000 to Rs.25,000.

10. Clause 9 – Amendment to section 35

A substantial increase in the percentage of weighted deduction under section 35(1)(ii), 35(2AA) and 35(2AB) has been proposed, as detailed hereunder -

Section	**Dealing with**	**Increase in % of weighted deduction**
35(1)(ii)	Amount paid to a research association for undertaking scientific research	125% to 175%
35(2AA)	Amount paid to National Laboratory, or a University or an IIT or specified person for undertaking scientific research	125% to 175%
35(2AB)	Expenditure on scientific research on in-house research and development facility incurred by a company	150% to 200%

However, no increase is proposed under section 35(1)(iia) in respect of amount paid to a company registered in India, which has as its main object, scientific research and development. The weighted deduction currently available in respect of such payment is 125%. This percentage may be suitably increased in line with the increase in weighted deduction under sections 35(1)(ii) and 35(2AA) in respect of amount paid for scientific research and weighted deduction under section 35(2AB) in respect of expenditure on in-house scientific research.

Suggestion

***The weighted deduction under section 35(1)(iia), in respect of amount paid to a company registered in India, which has as its main object the scientific research and development, may be suitably increased*.**

II Suggestions on Rules and other incidental suggestions

1. Clause 9(iii) - Weighted deduction u/s 35(2AB) – In house Research and Development facility.

The weighted deduction for companies carrying on scientific research on approved in-house research and development facility is proposed to be raised from 150% to 200%.

This is a welcome proposal. However, the procedure for obtaining the weighted deduction is what needs to be streamlined. The Department of Scientific and Industrial Research, Government of India, which is the prescribed authority, first approves the R&D facility, as per its own procedure and grants a certificate to that effect.

http://www.dsir.gov.in

A. R&D Recognition: Industrial R&D Promotion Programme (IRDPP)

A: Application for recognition (Annexure A)

The said certificate further mentions that the procedure and eligibility under the direct taxes has to be separately effected.

B. Guidelines for approval of in-house R&D centres and reporting of expenditure – May 2009. This refers to the Income Tax Rules, which prescribe that

a. the eligible company applies to the said authority vide form 3CK alongwith the requisites mentioned therein.
b. On scrutiny of the same, the Secretary DSIR will issue a report to DG(IT) Exemptions vide Form 3CL
c. Thereafter, Secretary DSIR will issue of Order of Approval, vide form 3CM, which will entitle the company to the weighted deduction.

This procedure is beyond the control of the assessee company and therefore, though all procedures and eligibility is complied with, the weighted deduction is not allowed to the assessee company.

Suggestion

The procedure needs to be streamlined, in as much as the approval by DSIR itself should entitle the company to the weighted deduction, as the expenditure etc. is already subject to scrutiny by the Assessing Officer during assessment. This is with a view to avoid repetitive procedures and loss of time

for the assessees without any consequential dilution of regulatory supervision.

2. Requirement of furnishing PAN of non-residents under section 206AA

Last year, with a view to strengthening the PAN mechanism, section 206AA was inserted by the Finance (No.2) Act, 2009 to be made effective from 1.4.2010. This section requires that any person whose receipts are subject to deduction of tax at source i.e. the deductee, shall mandatorily furnish his PAN to the deductor, failing which the deductor shall deduct tax at source at higher of the following rates –

(1) the rate prescribed in the Act;

(2) at the rate in force i.e., the rate mentioned in the Finance Act; or

(3) at the rate of 20%.

This provision will also apply to non-residents where tax is deductible on payments or credits made to them.

Further, the CBDT has issued a press release dated 20.1.2010, clarifying that such provisions will also apply to all non-residents in respect of payments/remittances liable to TDS. All deductees, including non-residents having transactions in India liable to TDS, have been advised to obtain PAN by 31st March, 2010 and communicate the same to their deductors before tax is actually deducted on transactions after that date.

Practically, it would be very difficult to obtain the PAN of non-residents, especially in case of sporadic or one-time transactions. However, non-furnishing of PAN of non-resident would also attract deduction of tax at a higher rate.

While appreciating the underlying administrative and systemic compulsions, we feel that this may lead to operational difficulties. It is, therefore, suggested that PAN of representative assessees/agents of non-resident may be accepted where PAN of non-resident is not available and the same may be treated as compliance with the provisions of section 206AA.

Suggestion

> ***PAN of representative assessees/agents of non-resident may be accepted where PAN of non-resident is not available and the same may be treated as compliance with the provisions of section 206AA.***

3. Cumulative effect of Circulars and Rules regarding perquisite valuation

TDS on Salaries and Valuation of perquisites – Rules notified on 18-12-2009

There is gross inequity in the case of motor car perquisite valuation in respect of employer owned cars and employee owned cars. The notification was sought to be amended vide Corrigendum dated 12-1-2010, but the effect is not forthcoming.

In the circular under section 192 issued on 11.1.2010, all perquisites were not considered, particularly, motor car expenses borne by employer.

Where the cars are owned or hired by the employer and used by the employee for official and personal purposes, the value of perquisite is prescribed at Rs.1800 p.m. However, in the case of employee owned cars the value of the perquisite is the expenditure incurred by the employer less Rs. 1800 p.m.

Further, even the corrigendum to the circular under section 192 issued on 20.1.2010 does not include any correction in respect of car perquisite. Thus, this issue needs clarification.

Suggestion

Lack of clarity may lead to different interpretations and therefore, result in default or unequal tax being deducted on a month to month basis. It is, therefore, suggested that -

(a) No interest under section 201 may be levied for year ended 31-3-2010.

(b) Master Circular may be issued, effective from 1-4-2010, ironing all corrigendum and giving clear instructions to Principal Officers.

4. Clarification regarding contribution to approved superannuation fund.

When FBT provisions were introduced, the contribution to Superannuation Fund was subjected to FBT in the hands of the employer. After a year, it was revised and the amount subjected to tax was only the contribution in excess of Rs.1 lakh per employee per year. With the withdrawal of FBT, the taxability has again shifted back to the employee and thus, the contribution of amounts exceeding Rs. 1 lakh is now being subjected to tax in the hands of the employee. The employee is, thus, taxed in respect of an amount which he does not receive in hand. Further, on retirement, when the annuity is taken, the same would again subject to tax. Therefore, in effect, the same income is being taxed twice. Since the intent of the legislature cannot be to tax the same income twice, this position requires to be considered favourably.

Suggestion

In view of the above difficulty, the position to prior to FBT regime may be restored i.e., the contribution to Superannuation Fund should not be taxed in the hands of the employee and pension is to be taxed as and when received.

In the alternative, contribution to approved Superannuation Funds should be restricted to only Rs. 1 lakh per employee.