NEWSLETTER

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Tax Residency Certificate (TRC)

Background:

The Finance Act, 2012 has introduced new sections 90(4) and 90A (4) to the Income Tax Act. According to these sections, a non-resident is not entitled to benefit of Double Tax Avoidance Agreement (DTAA) with India unless a Tax Residency Certificate (TRC) with the prescribed details is obtained from the Government of that foreign country.

Objective:

It was observed that the taxpayers who were not resident of the contracting country also claimed benefit of the DTAA with that country. A third party resident claimed benefit of DTAA with the country which has favorable tax treaty with India. To deny such undue benefit, these sections were introduced.

The section states "An assessee, not being a resident …. shall not be entitled to claim any relief under such agreement (DTAA) unless a certificate, of his being resident in any country outside India, … is obtained by him from the Government…"

Applicability:

The requirement applies to all individuals, Companies, LLPs, Partnership firms etc regardless of the quantum of relief sought. However the requirements apply only if relief under Tax Treaty is sought to be obtained.

Effective date:

Sections 90(4) and 90A (4) have been made effective from Assessment Year 2013 -14. However the relevant rules in respect thereof have been notified on 17th September 2012. If it is interpreted that the relevant rule 21AB is effective from Assessment Year 2013 – 14 then it would be impossible for a tax payer to obtain TRC for the period 1st April 2012 to 16th September 2012.

Therefore, a more prudent interpretation of the rule 21AB is that the rule should become applicable from Assessment Year 2014 – 15. However, a clarification from CBDT would be welcome on this.

CBDT notification - Rule 21AB:

The prescribed Rule 21AB does not provide for any standard format for TRC to be obtained by the non residents. However it does require that the TRC should contain the following particulars;

a)Name of the Tax payer

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b)Status of the Tax payer (Individual, Company etc.)

c)Nationality

d)Country of Incorporation or Registration

e)Tax payers' Tax Identification Number in his country

f)Residential Status for the purpose of Tax

g)Period for which certificate is applicable

h)Address of the applicant

The above certificate shall be verified by the Government of the country of which the tax payer is resident for the purpose of tax.

Resident to obtain TRC from Indian Government:

Rule 21AB also prescribes residents to obtain TRC from the respective AO in specified forms. The Indian resident shall make an application before the AO in form 10FA to obtain TRC. The application shall contain the following information:

a)Full Name and Address of the assessee

b)Status

c)Nationality (in case of individual)

d)Country of Incorporation/registration

e)Address of the assessee during the period for which TRC is desired

f)Email id

g)Permanent Account Number/ Tax Deduction Account Number

h)Basis on which the status of being resident in India is claimed

i)Period for which TRC is applicable

j)Purpose of obtaining TRC

k)Any other detail

cont.

TAX RESIDENCY CERTIFICATE *(cont.)*

On receipt of this application and on being satisfied as regards the particulars mentioned therein, the AO shall issue TRC to the resident Indian in Form 10FB. The Rule does not specify any time limit for the AO to issue such TRC.

It is pertinent to mention here that in various treaties signed by India, there was no such requirement to obtain TRC by the non residents claiming any treaty benefit. The question is whether it is fair for the Government of India to unilaterally impose such requirement from the non residents to be eligible to claim treaty benefit?

Compiled by: Mr. Malay Damania

DIRECT TAX

DDIT v Mitchell Drilling International (ITA No 698/Del/2012)

Service Tax collected from customer does not form part of receipt for computing presumptive income u/sec. 44AB of I T Act.

Facts:

The assessee was a Company incorporated in Australia. It was engaged in the business of supply of equipments on hire and manpower for exploration and production of mineral oils and natural gas. The assessee offered income @ 10% of the gross receipts under presumptive income provision of Section 44BB (1) of The I T Act. The Company did not include service tax it collected from customer in the gross receipt. The Company contended that it collected service tax from the customer as an agent of Government and it was held in trust on behalf of Government. Therefore, it cannot be added to its receipts for the determination of presumptive profit u/sec. 44BB of I T Act.

Delhi Tribunal decision:

The Tribunal held that Service Tax should not form part of gross receipt for the purpose of computation of presumptive income u/sec. 44BB of I T Act. It relied on its earlier decision of Sedco Forex International Drilling Inc.

Kotak Securities Ltd - Mumbai Tribunal

Commission paid to bank for issue of Bank Guarantee is not liable for TDS under section 194H of the I T Act.

Facts:

The assessee Company was a member of BSE and NSE and was engaged in the stock broking business. It issued bank guarantee in lieu of margin deposits to BSE and NSE. In consideration for issue of bank guarantee, bank charged a fee which is termed as bank guarantee commission. The Company did not deduct TDS on such guarantee commission. The AO observed that the tax ought to have been deducted under section 194H and accordingly raised demand u/s. 201(1A).

Mumbai Tribunal held:

The Tribunal held that every definition in the I T Act must depend upon the context n which the expression is set out. In this case, the common parlance meaning of the expression 'commission' must remain restricted to a payment in consideration for effecting sales or business transactions etc. It does not extend to a payment which is in the nature of fees for a product or service.

The inclusive definition of the expression 'commission or brokerage' in explanation to Section 194H is nothing but normal meaning of the expression 'commission or brokerage'. An inclusive definition does not always extend the meaning of an expression.
Principal agent relationship is a sine qua for invoking provisions of Section 194H. In the present case, there is no principal agent relation between bank and the Company. When bank issues bank guarantee, on behalf of the Company, all it does is to accept commitment of making payment to the beneficiary on behalf of the Company. In consideration of this commitment, it charges a fee which is customarily termed as 'guarantee commission'. While it is termed a guarantee commission, it is not in the nature of 'commission' in the context of Section 194H. This is not a transaction between Principal and Agent and is outside the purview of tax deduction requirement of Section 194H.

BOB Cards Ltd. – Mumbai Tribunal

TDS borne by the Company as a part of its liability under an agreement is an allowable expense under section 37 of the I T Act.

Facts:

The assessee Company engaged in the business of credit card operations and financing payments. It paid certain payment to Master card and Visa card which were subject to TDS. It paid TDS of Rs. 21.61 Lacs on such payments which were non-reimbursable from the recipients and were borne by the assessee Company. This arrangement was in line with the agreements entered into by the assessee Company with Visa and Master International. The AO disallowed these payments stating that they were not incurred wholly and exclusively for business.

Mumbai Tribunal held:

It was held that the amount paid by the assessee Company for discharging a liability undertaken in terms of an agreement entered into with its collaborator forms part of consideration for the agreement relating to know how and therefore is an allowable expense. Madras High Court decision in the case of Standard Polygraph Machines P. Ltd. was relied upon.

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