Mandatory Reporting and Certification for all Cross Border Payments

Section 195 of the Income-tax Act, 1961(hereafter referred to as the 'Act') was introduced with an objective of ensuring that the tax is collected at the earliest point of time (i.e. the point of incidence or payment of income) so that the income tax department (ITD) is not put to the hassles of recovering it from a non-resident whose connections with India may be transient or whose assets in India may not be sufficient to meet the tax liability at a later point of time. Any remittances to non-residents shall have to be complied with the provisions of the Act as well as the regulations of the Reserve Bank of India (RBI). Prior to the insertion of any specific provisions in the Act governing such remittances, tracking of manual information submitted by the Payers did not yield any results. Read on...

Moreover, monitoring the loss of revenue if any arising on account of non-furnishing of particulars of remittances made to non-residents had become a challenge for the ITD. In order to address these issues, the Revenue Authorities/ITD introduced e-filing of such information by way of insertion of new sub-Section 6 in Section 195 by the Finance Act, 2008. This Section stipulated filing of information in relation to remittances which were chargeable to tax. However, transactions were not reported to the extent envisaged by the ITD possibly because it failed to capture the remittances on which tax was deductible but not deducted.

(Contributed by Committee on International Taxation of ICAI. Comments can be sent to citax@icai.in.)

The Finance Act, 2015 has amended the provisions of Section 195 so as to include all remittances, whether taxable or not, within the reporting net. The amendment has elicited a lot of worries amongst the taxpayers. Firstly, it is not clear as to whether the payments made to non-residents, even if exempted under the existing provisions of the Act or *prima facie* non-taxable, would fall within the purview of reporting under Section 195(6) read with Rule 37BB? Secondly, will information about the transactions which were earlier specifically exempted from reporting requirements would also be required to be furnished? Lastly, it is also not clear as to what view should be taken when the law has already been enacted and the law requires compliance with provisions of the Statute, but the

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manner in which the compliance has to be done is not prescribed?

The above paragraph just gives an overview of the concerns raised/hardship caused to the Payers because of the aforesaid amendment. Detailed discussion shall follow in the ensuing paragraphs of this article.

Reporting of Remittances- The Journey So Far...

Prior to insertion of sub-Section (6) of Section 195 by the Finance Act, 2008 w.e.f. 1-4-2008, the person making the remittance ('Payer') was required to furnish an undertaking in duplicate accompanied by a certificate from a Chartered Accountant in a specified format. The undertaking along with certificate was required to be handed over to RBI or its authorised dealers, who in turn were required to forward the same to the ITD/Assessing Officer. In view of substantial increase in the number of foreign remittances and moreover the entire process being manual, the very intent to monitor and track the payments in a timely manner was becoming quite onerous.

In order to address these issues, the Finance Act 2008 proposed to introduce sub-Section 6 to Section 195 which mandated certification and reporting of information about remittance/payment to *'a person referred to in Section 195(1)'* of the Act in such form and manner as may be prescribed by the Central Board of Direct Taxes ('CBDT'). Section 195(1) of the Act specifies that any person responsible for paying any interest (other than interest referred to in Sections 194LB or 194LC or 194LD of the Act) or *any other sum chargeable to tax* (not being salary income) to a non-resident, not being a company, or to a foreign company, shall at the time of payment or credit of such sum, deduct tax at the rates in force.

Thereafter, Rule 37BB and Form 15CA/15CB were introduced vide Income Tax (Seventh Amendment) Rules 2009 w.e.f. 1st July 2009 which mandated e-filing of such information. Section 195(6) read with Rule 37BB requires a person responsible for making a payment to a non-resident of any sum chargeable to tax to furnish information in Form 15CA to the ITD. The form was required to be filed electronically with the tax authorities and a signed printout of it was to be submitted to the authorised dealer, prior to remitting the payment. Additionally, a certificate from an accountant was required to be obtained in Form 15CB before filing of Form 15CA.

The Finance Act, 2015 has brought about an amendment in the provisions of section 195(6) to provide that that any person responsible for paying any sum, *whether chargeable to tax or not*, to a non-resident shall be required to furnish the information of the remittances in the prescribed form and manner.

While introducing this amendment, the Explanatory notes to the Memorandum to Finance Bill 2015 stated that obtaining of information only in respect of remittances which the remitter declared as taxable defeats one of the main principles of obtaining information for foreign remittances i.e. to identify the taxable remittances on which tax was deductible but was not deducted. The proposed amendment has been introduced with an objective of ensuring submission of correct information in respect of remittances made to non-residents.

The reference to *'the person referred to in Section 195(1)'* has been omitted from the amended provisions of Section 195(6) and resultantly all payments made to the non-residents have been brought under the reporting compliances with effect from 1st June 2015. By reading the amended provisions of Section 195(6) in isolation, one would certainly reach a conclusion that all remittances to non-resident shall have to be reported in the prescribed form and manner. However, it may be pertinent to note that the existing Rule 37BB is not in line with the amended provisions of Section 195(6) because it still requires the payer to furnish information of transactions which are 'chargeable to tax 'in India.

New Penal Provisions for Non-Compliance with Section 195(6)

The existing provisions of the Act did not stipulate any penalty for non-reporting of particulars or

reporting of inaccurate particulars in respect of remittance to non-residents. The Finance Act, 2015 has now inserted Section 271-I to ensure that accurate information is furnished in respect of all remittances, irrespective of, whether the same are chargeable to tax or not. The section imposes a penalty of ₹1,00,000/- for non-furnishing of information or furnishing of incorrect information under Section 195(6) except in the case where it is proved that there was reasonable cause for non-furnishing or incorrect furnishing of such information.

There have been apprehensions amongst the Payers in relation to levy of penalty as to whether it shall be levied for each default or on an annual basis. While one may take a view that the penalty is cumulative, since the Memorandum or the section does not state specific levy for each default, the view certainly would not be bereft of litigation. In our view, penalty of ₹1,00,000/- may be levied for each default for two reasons. Firstly, the expression 'such information' as used in Section 271-I implies that penalty is for default in furnishing information as prescribed in Section 195(6). Secondly provisions of Section 195(6) in turn refers to the furnishing of information relating to 'such sum' paid to a non-resident. On a combined reading of provision of Section 195(6) and 271-I of the Act, it may be inferred that information of each remittance to non-resident needs to be accurately furnished and in case of failure to do so, penalty shall be levied for each such default.

Corresponding amendments have also been made in provisions of Section 273B of the Act, which provides that no penalty shall be imposed on any person for any failure provided he proves that there was reasonable cause for the said failure.

Reporting of Import Payments- A Cause of Concern

There is a lot of ambiguity as to whether remittances for imports would require reporting under Section 195(6). There is no blanket rule determining the taxability of imports in India and it is necessary to examine the underlying factors governing its taxability. The factors which determine taxability of imports are illustrated as under:

- Whether the income element in the import is effectively connected to a business connection in India?
- Whether the income is effectively connected to a permanent establishment?
- Whether the contract is entered within India or Outside India?
- Whether the delivery is on FOB basis or CIF basis?
- Whether the transaction is entered between parties on principal to principal basis on arm's length basis?
- Whether the risk/property in goods passes outside India?

There is no express provision which clearly states that imports are exempted from tax in India and the same has to be analysed in light of provisions of Section 5(2) and Section 9(1) of the Act.

CBDT *vide* Notification No. 58/2013 dated 5th August 2013 amended Rule 37BB and specified 39 items for which no information was required to be submitted. These items were subsequently reduced to 28 items *vide* Notification No. 67/2013 dated 2nd September 2013. Advance payments against imports and payments towards import settlement of invoices were amongst the 11 items which were excluded from the exemption list. It appears that the intent of the Board for not mentioning the imports in the exclusion list could possibly be that even the department wanted to analyse and monitor the remittances made to non-residents for import transaction and verify whether the same is taxable or not.

It is suggested that appropriate guidelines be issued at the earliest to clear the existing apprehensions and bring in the much desired clarity. It has been reported in the post budget discussion not all cases would have to be reported and has been conveyed that only that 'information' which may be 'prescribed' would have to be furnished.

Some Challenges Pursuant to the Amendments

- There are certain payments which have been expressly **exempted** under the provisions of the Act *viz.* dividend payments, life insurance maturity proceeds *etc.* If this information is now required to be given, it cannot be comprehended as to what could be the intention behind seeking information about such transactions.
- **Personal remittances** like payments for travel, education, maintenance of family abroad *etc.* are not liable for tax deduction. Since the source

of such income is in India and the income is being expended after it has suffered taxation, mandatory reporting of such transactions may go beyond the stated intent i.e., reporting transactions on which tax was deductible but was not deducted.

- **Capital Account transactions** *viz.* investment by a resident in foreign securities, repayment of loan from foreign banks *etc.* which fall outside the ambit of provisions of Section 4, Section 5 and Section 9 of the Act.
- Remittances made by **one non-resident to another** is being reported only if the same is chargeable to tax in India. As per the amended section, all payments (whether chargeable to tax or not) should be reported. The CBDT should come up with a clarification on this issue, otherwise the literal interpretation may be that all payments, shall have to comply with such onerous compliances.
- The amendment mandates reporting of even the **non-taxable transactions**. Since the number of foreign remittances in organisations (having extra-territorial operations) are usually voluminous, reporting of each and every transaction along with obtaining an accountant certificate would be extremely cumbersome and an expensive proposition. This will considerably increase the number of certificates that would be required to be taken by the Payer thereby increasing the compliance cost without any impact in the Revenue in this regard.
- There is an apprehension amongst the Payers whether the transactions as mentioned in the 'Specified List' would now require reporting under the amended provisions.
- The new Form 15CA as substituted by IT (Fourteenth Amendment) Rules, 2013 w.e.f. 1-10-2013 requires the verification to be signed by the person who is competent to sign the tax return of the payer under Section 140 of the Act. In case of a payer being an Indian company, the person competent to sign the tax return is the Managing Director or in his absence any other Director (on the Board) of the company. This requirement on the part of the Managing Director/Directors to get involved in the day to day payments has proved to be very cumbersome even when the taxable transactions were reported. If as per the amended provision each and every remittance to non-resident is required to be reported, it shall certainly pose significant practical challenges in terms of availability of directors for signing large number of forms for certifying even the routine payments.
- The existing forms (Form 15CA and Form 15CB) are applicable where the payment made to the non-resident is chargeable to tax under the Act. The new forms have not yet been notified to support the amendment posing practical difficulties to the tax payer in reporting such transactions. It is our understanding that the authorised dealer are insisting for these forms for all remittances.

It is learnt that this matter has been taken up with CBDT for amendment of Rule 37BB. The Payers are hopeful that the Board would take urgent note of the same and shall come out with guidelines at the earliest which shall not only clear the ambiguity but at the same time provide guidance on the way forward.

Concluding Remarks

Amendments in Section 195(6) proposed by Finance Bill, 2015 has been enacted and has become a law with effect from 1st June'15. It requires the payer to furnish information regarding all foreign remittances in the prescribed format. However, the procedure or the form in which the information is to be furnished is not yet notified. More so, absence of any clarity regarding exact nature of information to be furnished has left the affected persons in a confused state.

It is suggested that appropriate guidelines be issued at the earliest to clear the existing apprehensions and bring in the much desired clarity. It has been reported in the post budget discussion not all cases would have to be reported and has been conveyed that only that 'information' which may be 'prescribed' would have to be furnished. However, absence of revised Rules and corresponding changes in Form 15 CA/15 CB even after the amended provision being made effective, has caused unintended hardship to the Payers.

It is learnt that this matter has been taken up with CBDT for amendment of Rule 37BB. The Payers are hopeful that the Board would take urgent note of the same and shall come out with guidelines at the earliest which shall not only clear the ambiguity but at the same time provide guidance on the way forward. ■