



**In other words, the payer withholds tax at the rate certified by the Chartered Accountant in form 15CB. It is only thereafter that the payer shall go to submit particulars of such payment and tax deducted thereon along with basis thereof on the online portal of the department and also submit hard copy thereof to the bank to further enable remittance to the payee.**

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The respective form 15CB and form 15CA contain the following declarations at the end:

15CB Declaration at the instance of the Chartered Accountant

#### **“Certificate of an accountant**

I/We have examined the agreement (wherever applicable) between Mr./Ms./M/s------(Remitter).....and Mr./Ms./M/s.------(Beneficiary).....requiring the above remittance as well as the relevant documents and books of account required for ascertaining the nature of remittance and for determining the rate of deduction of tax at source as per the provisions of Chapter XVII-B.

We hereby certify the following:-.....”

15CA Declaration at the instance of the Payer

#### **“Verification**

1. I/We,  (full name in block letters), son/ daughter of  solemnly declare that the information given above is true to the best of my/our knowledge and belief and no relevant information has been concealed.
2. I/We certify that a certificate has been obtained from an accountant, particulars of which are given in this Form, certifying the amount, nature and correctness of deduction of tax at source.
3. In a case where it is found that the tax actually deductible on the amount of remittance has not been deducted or after deduction has not been paid or not paid in full. I/we undertake to pay the amount of tax not deducted or not paid, as the

case may be along with interest due. I/We shall also be subject to the provisions of penalty for the said default as per the provisions of the IT Act, 1961.

4. I/We further undertake to submit the requisite documents for enabling the Income-tax Authorities to determine the nature and amount of income of the recipient of the above remittance as well as documents required for determining my/our liability under the Income-tax Act as a person responsible for deduction of tax at source.
5. I/We further declare that I/we am/are furnishing this information in my/our capacity as  and I/we am/are also competent to sign the return of income as per provisions of section 140 of the Income-tax Act, 1961 and verify it.”

#### **Karnataka High Court Ruling—Like Cake in the Tray**

The Karnataka High Court in *CIT vs. Filtrex Technologies (P) Ltd. (2016) 380ITR222/126DTR (Kar) 221* held that no penalty is leviable in regard to a disallowance under Section 40(a)(ia) where the assessee acting on the CA's advice did not deduct tax on payments to a non-resident. In this case the CA has given a certificate to the effect that the assessee is not required to deduct tax at source while making the payment to Singapore party. Dismissing the appeal of the revenue and drawing reference to *Dilip N. Shroff vs. Jt. CIT [2007] 291 ITR 519/161 Taxman 218 (SC)*, the High Court held (Page 224):

“In the matter on hand, as aforementioned, the Chartered Accountant has given a certificate to the effect that the assessee is not required to deduct tax at source while making the payment to M/s.Filtrex Holding Pte. Ltd., Singapore. Thus, the assessee acted on the basis of the certificate issued by the expert and hence the Commissioner of Income Tax (Appeals) and the Income Tax Appellate Tribunal have rightly



concluded that this is not a fit case to conclude that the assessee has deliberately concealed the income or furnished inaccurate particulars of the income. The assessee has filed Form 3CD along with the return of income in which the Chartered Accountant has not reported any violation by the assessee under Chapter XVII B which would attract disallowance under Section 40(a)(ia) of the Act.”

This decision from the Karnataka High Court is like serving a cake in the tray to the deductor and is clearly detrimental to the profession. Taking a clue from this decision an assessee can always get away from penalty by submitting a certificate of his Chartered Accountant. For instance, there may be non-submission/inaccurate submission to the CA to obtain the certificate. It could be anything like assuring the CA that the payee has no permanent establishment or the tax residency certificate is available. Likewise, he may give distorted facts in regard to a transaction to avail a certificate of NIL deduction at source or he may label a service payment as simple reimbursement. Again for instance he may claim that the services of non-resident do not make available any knowledge, skill or knowhow to him or that the services of non-resident are utilised for project outside India without producing ample evidence to the satisfaction of the Chartered Accountant due to some made up reasons as the CA is no statutory authority.

Further levying of penalty for non-submission/inaccurate submission of the prescribed information came as a penal provision incorporated in Section 271-I by the Finance Act, 2015 to create a responsibility on deductor to assure complete compliance but the Karnataka High Court decision came as a redeemer to deductor’s accountability. Now he can eat the cake and walk free. In other words, now, an assessee who may have defaulted to deduct tax on payment to non-resident can safeguard itself against penalty just by being in possession of a certificate from a Chartered Accountant. It would be like getting a license to default in the worst scenario.

Even though it is respectful for the profession that a Chartered Accountant is empowered to provide guidance in the matter of determination of rate of deduction of tax at source and that a certificate issued under his signatures is considered to be vital evidence in penalty proceedings, at the same time, it is bound to have serious implications for the profession. If courts were to delete penalty



solely on the basis of certificate the assessee’s will then be encouraged to obtain false certificate of NIL deduction at source and that would make the profession infamous in no time.

### Dilip N Shroff Decision—On a Different Stroke

In the decision rendered by the Apex Court in *Dilip N. Shroff v. Jt. CIT [2007] 291 ITR 519/161 Taxman 218*, the subject involved a disagreement on the valuation of property in the process of determination of capital gains. While the assessee in this case obtained a report of registered valuer of the valuation of property as on 1st April 1981, the Assessing Officer went for an independent valuation too and as the two differed the assessee was subjected to penalty in addition to tax on the difference. Reversing the High Court decision in this case, the Supreme Court in this case held:

- i) that the methods of valuation might be different. A registered valuer was supposed to know which method or mode should be adopted for the purpose of valuing a particular land or a building having regard to the large number of factors involved therein. The tax on capital gains did not envisage that the valuation must be the true and exact market value. Even the market value of a property might be found to be different having regard to the locale thereof. The authorities did not arrive at a finding that the consideration amount fixed for the sale of the property was wholly inadequate. The authorities also did not indicate what were the particulars furnished by

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the assessee. Nor did they state what should have been the accepted principles of valuation.

- ii) That a reference under section 55A to the Valuation Officer was optional and was for the purpose of making an estimate. Such reference would be made, if in the opinion of the Assessing Officer the value of the assets as claimed by the assessee in accordance with the estimate made by the registered valuer was less than its fair market value. Clause (b) also indicated that the assessee had two options: to get the value prepared through the index value or to take any other known mode of valuation. The registered valuer had arrived at his opinion on a certain basis and while making the valuation report disclosed all the particulars. He disclosed that he had chosen the index value method. He did not rely upon any sale instance. He might have referred to the valuation of property as mentioned in a local newspaper. But he did not furnish the particulars. Nor had he enclosed the sheet showing sale instances, but nothing turned upon it as he had not relied upon any sales instances. There could be a genuine difference of opinion between two experts. A duty might be enjoined on the assessee to make a correct disclosure of income but if such disclosure is based on the opinion of an expert, who was otherwise also a registered valuer having been appointed in terms of a statutory scheme, only because his opinion was not accepted or some other expert gave another opinion, that would not by itself be sufficient for arriving at the conclusion that the assessee had furnished inaccurate particulars.

- iii) That, therefore, the penalty was not exigible. Clearly therefore, the Karnataka High Court reference to this case is not proper as it evoked a different stroke. In this case, there were two different opinions from two experts, one hired by the assessee and the other by the department so that there was reason enough to delete the penalty. Moreover, the penalty was not deleted because the assessee had lent reliance on the report of registered valuer but because of the fact that there existed difference of opinion among the experts. In the scheme of deduction of tax at source, there are no provisions similar to Section 55A empowering the assessing officer to obtain a certificate or advice from an independent expert on the appropriate rate of tax applicable to a given transaction.

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Yet again recently in the case of *Smt. Aishwarya Rai Bachchan vs. Addl CIT (2016) 68taxmann.com324 (Mum)*, the Authorised Representative in referring to the certificate of the CA. submitted that on the basis of certificate issued by the CA., assessee was under bonafide belief that tax was not required to be deducted at source on the remittances made to the nonresident. In this case before the Tribunal in quantum proceedings, she had accepted that she was required to deduct tax at source. And the Mumbai Tribunal is found to have been flattered with the CA certificate and it thus wrote:

“As is evident, assessee’s CA., had issued a certificate opining that tax is not required to be deducted at source on the remittances to Ms. Simone Sheffield, as the payment is made to a non-resident having no P.E. in India that too, for services rendered outside India. It is a well accepted fact that every citizen of the country is neither fully aware of nor is expected to know the technicalities of the Income Tax Act. Therefore, for discharging their statutory duties and obligations, they take assistance and advise of professionals who are well acquainted with the statutory provisions. In the present case also, assessee has engaged a chartered accountant to guide her in complying to statutory requirements. Therefore, when the CA. issued a certificate opining that there is no requirement for deduction of tax at source, assessee under a bonafide belief that withholding of tax is not required did not deduct tax at source on the remittances made.”

### **Chennai Bench Decision – Right Approach**

In *Rattha Citadines Boulevard Chennai (P.) Ltd. (2015) 63taxmann.com 89*, the assessee, who had not commenced its business filed a revised return of income claiming loss as against 'Nil' income in the original return. It did not challenge the disallowance of loss but went on to challenge the penalty. In its defense it was stated that merely because the assessee had claimed the expenditure, which claim was not

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accepted that by itself would not attract penalty under Section 271(1)(c) of the Act. The assessee had filed the Return of Income claiming loss on account of expenditure incurred during the year as revenue expenditure allowable under Section 30 to 37 of the Income-tax Act, as the assessee has already taken steps to commence its activities and also the expenses are mainly comprising of interest payment to the bank of ₹1,25,30,730/- on the loan borrowed and other regular administrative expenses of ₹2,97,275/- which was disallowed by the Assessing Officer under the contention that the assessee has not commenced its business operations holds good in assessing the income of the assessee but not for levy of penalty under Section 271(1)(c) of the Act. Further before the Tribunal, the assessee held the explanation that for making this claim for deduction, in respect of entire amount incurred towards administrative and finance charges, is admittedly because of the Auditors Report for the assessment year concerned, and as such it was a bona fide mistake on the part of the assessee to have claimed the deduction.

In viewing such explanation as fantastic though but unacceptable, the bench held the view that Auditors report obtained by the assessee cannot override Income Tax provisions and more particularly held:

“ 18. A plain look at the profit and loss account shows that statutory auditor has opined that the assessee has incurred loss for the year ended on 31.03.2010. There cannot indeed be any quarrel with this proposition, but then this Auditors Report does not deal with the provisions of Income Tax Act. As per Income Tax Act expenditure incurred during pre-commencement period cannot be allowed as deduction while computing the income of the assessee. There was thus no reason for assessee to deviate from the provisions of Income Tax Act, when admittedly the assessee has not commenced its business activities

in the assessment year under consideration. The onus is on the assessee to prove that the explanation is bona fide but there is nothing from the assessee to even indicate, leave aside proving, that there was any reason to believe that the expenditure is allowable. The Auditor's report did not deal with this aspect at all. One can perhaps even understand ignorance about a legal provision, but once the assessee is on record not only being aware about this provision but also preparing the income tax return in the light of the said provision, there cannot be any justification about assessee ignoring the clear mandate of the provision. Such an action on the part of the assessee, in our considered opinion, cannot be said to be bona fide. In our humble understanding, the explanation of the assessee is not acceptable and we reject the same. In any case, Auditors report obtained by the assessee cannot override Income Tax provisions and just because the assessee's claim is supported by a chartered accountant's opinion, this fact per se cannot absolve the assessee from penalty under section 271(1)(c).”

Since the subject matter of deduction of tax on payments to non-residents is a continuous exercise involving infinite amount and scale of transactions on a daily basis, it is not proper to delete penalty only because of the assessee possessing a Certificate from a Chartered Accountant as if he holds a license against penalty unlike the one off circumstance of more than one opinion scenario as that in *Dalip N Shroff (supra)*. In fact because of this controversy raised by the Karnataka High Court and the Mumbai Bench, perhaps the Central Board of Direct Taxes may draft an amendment in Section 195 or elsewhere on the lines of Section 142A empowering the Assessing Officer to seek an independent certification from an empanelled expert on the rate of tax deduction at source on payments to non-residents. ■