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Slip up in Proviso to Section 201(1) and Form 26A



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In a case of transaction of purchase of immovable property from a non-resident it is mandatory to deduct tax on the value consideration paid to such non-resident in the absence of any lower deduction certificate. The bench of the Tribunal in *Nitesh Estates Ltd. v. Asstt. DIT (International Taxation)* [2023] 30 ITR (Trib.)-OL 134 (Bang. -- Trib.) while ruling in favour of the department declined to buy the argument of the company purchaser that they had no knowledge of the NRI status of Mahesh Bhupathi, the ace tennis player who was seller of the property in question as well as did not buy the argument that the amount of capital gains are already offered by him in his return and that eventually no tax was payable by Mr. Mahesh Bhupathi on the said transaction in terms of the return filed by him. The bench held that the Legislature incorporated provisions such as section 195 to prevent non-resident Indians from taking away the entire money abroad without paying the due tax thereon and over which money the Indian tax authorities will have no control once the money is stashed away. It is immaterial that the vendor does not have positive income in the assessment year under consideration; when the payment in question is chargeable to tax, the person making the payment is obliged to deduct tax at source.

Proviso to sub-section (1) of section 201

W.e.f. 1-7-2012 a relaxation proviso has been placed under sub-section (1) of 201 whereby the payer can manage from a resident payee his proof of furnishing a return of income and further could demonstrate that a sum paid has been considered as part of income tax return and tax thereon is paid on such income declared. Further w.e.f. 1-9-2019 a additional amendment made to provide for such relaxation even with respect to payments made to a non-resident u/s 195.

The proviso reads as under:

"Provided that any person, including the principal officer of a company, who fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter on the sum paid to a resident or on the sum credited to the account of a resident shall not be deemed to be an assessee in default in respect of such tax if such resident—

- (i) has furnished his return of income under section 139;
- (ii) has taken into account such sum for computing income in such return of income; and
- (iii) has paid the tax due on the income declared by him in such return of income,

and the person furnishes a certificate to this effect from an accountant in such form as may be prescribed"

Clause (iii) on plain reading of the text requires that tax should be paid on income declared by him in such return and income declared could be from different sources and not just from capital gains. The clause does not talk about negative income. There is no provision what if there is income from capital gains but loss from other sources making the total income non-taxable. This is a flaw and **seems contrary to the intent** of the legislation. **Even in Form 26A, the accountant needs to mention "amount of taxable income under the head of income under which the receipt is accounted for" and in case of immovable properties the head of income is "Capital Gains" and nowhere it warrants total income in the return being positive. In Nitesh Estates Ltd.'s case (supra), it is held,**

"It is immaterial that the vendor does not have positive income in the assessment year under consideration; when the payment in question is chargeable to tax, the person making the payment is obliged to deduct tax at source."

Thus, it's the new finding and there is no clarificatory circular on this from CBDT previously. Thus, the proviso may be read as **"tax should be paid by him on such sum included in computing total income in such return"**.

As it is, this law entitles the payer to escape TDS liability for any failure to deduct tax by submitting a certificate in Form 26A from an accountant with proof of filing of return of income of the payee irrespective of his residential status. Proviso to sub-section (1) of section 201 provides a legal escape route. However, if no return is filed then the payer has to also bear the tax amount not withheld from payment to non-resident.

Now whether or not a payee has filed the return of income in the relevant assessment year in terms of relaxation proviso is an information already with the department so that it is an unusual requirement under the law to expect the payer to gather it from the payee as even otherwise it may be practically impossible for any payer to secure a copy of return from the non-resident.

Shift of Onus with Certificate in Form 26A

It is a gigantic obligation bestowed upon the accountant. Form 26A is split into two parts. In the front page the payer makes a declaration of amount paid to non-resident and append in the annexure a certificate from a Chartered Accountant certifying that the payee has fulfilled all the conditions mentioned in the first proviso to sub-section (1) of section 201 of the Income Tax Act, 1961 viz.,

- (i) has furnished his return of income under section [139](#);
- (ii) has taken into account such sum for computing income in such return of income; and
- (iii) has paid the tax due on the income declared by him in such return of income.

Over and above in the annexure the Chartered Accountant is to incorporate facts in regard to the nature of payments, tax deductible and tax deducted coupled with details of filing of income tax return, head of income under which the receipt is accounted for, gross receipt under the head of income under which the

receipt is accounted for and amount of taxable income under the head of income under which the receipt is accounted for. **(but not the particulars of tax paid on income in consideration)**. After including these details the Chartered Accountant is to provide the following certificate:

1. It has been ensured that the information furnished is true and correct in all respects and no relevant information has been concealed or withheld
2. Neither I, nor any of my partners, is a director, partner or an employee of the above mentioned entities or its associated concerns
3. I/we fully understand that any statement made in this certificate, if proved incorrect or false, will render me/us liable for any penal or other consequences as may be prescribed in law or is otherwise warranted.

The words 'will render me/us liable for any penal or other consequences as may be prescribed in law or is otherwise warranted' suggests that the accountant can be held liable for even upto the amount of tax not deducted at source in the event of false statement. Moreover, to provide such statement of details of transaction it is desirable for the accountant to have access to the books of account along with the audit trail. These two impediments will make the proviso a little of an eyewash given the consequences which are far reaching and to have access to books of accounts of the non-resident which may be an impossible thing. Anyways, to have an access to the computation of income and other related documents of the payee, the accountant will have to move through the payer only and the reliability of such documents is highly questionable. Thus the entire onus of the transaction lies on the shoulders of the accountant. The payee gets away without any deductions of taxes payable in India and payer absolves himself to be "assessee in default" on obtaining 26A from accountant, nothing more nothing less but for the loss of revenue by corresponding income not being taken into account in computation of taxable income in the hands of the recipients of the payments, if falsely declared, accountant will be caught within the web and be held responsible for any penal or other consequences as may be prescribed in law or is otherwise warranted. Words "**otherwise warranted**" could entail anything even if it's not prescribed. No doubt they are trained professionals but would it be justified to penalise the professional de hors the transaction in such cases. Given the ambiguity in the proviso and harsh consequences thrusted on the accountant, call in question is, in case of information being false, will the provisions of section 276C be attracted for payer as he has already got the status of "assessee not in default" and passed the buck to accountant.

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