



Applicability of time limit for proceedings under Section 201 of the Income-tax Act for non-compliance of TDS provisions

Background

Recently, the Allahabad High Court in the case of *Mass Awash Private Limited*¹ (the taxpayer) held that since no time limit has been prescribed for Tax Deducted at Source (TDS) proceedings under Section 201(1) and 201(1A) of the Income-tax Act, 1961 (the Act), it can be executed at any time, especially when the law of limitation is not there. If time period is not prescribed for exercise of power, a reasonable time would depend upon the facts of each case and cannot be quantified or prescribed like a period of limitation. While exercising power of judicial review, it would be appropriate to consider whether power has been exercised by competent authority within a reasonable period and whether delay is unjust, arbitrary, and whimsical or it is for valid reasons. If Court finds that delay in exercise of power is for valid and bonafide reasons, alleged delayed exercise of power cannot be held invalid.

The High Court observed that the tax department has first explored possibility of recovering entire tax from the person ultimately liable to pay tax. It is only when the aforesaid probability was explored and failed, the tax department exercised power under Section 201(1) and 201(1A) of the Act.

Facts of the case

- The taxpayer purchased land from five co-owners/vendors of land for a sale consideration of INR 30.45 million. The taxpayer was not aware that any of the sellers was non-resident Indian (NRI) at the time of execution of sale deed. For Assessment Year (AY) 2006-07, the taxpayer filed return of income disclosing factum of purchase of aforesaid property vide sale deed dated 14 June 2005.

- During the course of assessment proceedings also there was no indication that one of the seller was an NRI. The factum of purchase of land in question vide sale-deed dated 14 June 2005 came to the knowledge of the Assessing Officer (AO) through return of income filed by the taxpayer. The AO passed an order for AY 2006-07, on 30 December 2008.
- An NRI seller neither filed a return of income nor paid capital gains tax. Reassessment notice under Section 148 of Act was issued to NRI seller on 26 July 2008 i.e. even before passing assessment order dated 30 December 2008. Thereafter, AO passed assessment order dated 26 December 2009 under Section 144 read with Section 147 of Act for the AY 2006-07 in respect of NRI seller.
- The appeal filed before the Commissioner of Income-tax (Appeals) [CIT(A)] by NRI seller was allowed and the AO's order was set aside on the ground that in respect of another co-owner an order issued/passed under Section 163 was already set aside. The CIT(A) directed the AO under Section 150 of Act to exercise power of jurisdiction to begin fresh proceedings under Section 161/163 of Act or to make direct assessment of NRI seller by arranging to serve notice at her U.K. address through CBDT. The CIT(A) also directed AO to explore possibility of recovering tax from purchaser of property since TDS was liable to be made under Section 195 where the payment was received by an NRI.

¹ *Mass Awash Private Limited v. CIT* (Misc. Bench No. 1088 of 2016) – Taxsutra.com

- The tax department challenged the order of CIT(A) before the Tribunal. Subsequently, the Tribunal confirmed CIT(A)'s order by dismissing appeal. The Tribunal, however, left it open to the tax department to pursue any other remedy.
- Subsequently, after almost 10 years from the date of execution of sale-deed dated 14 June 2005, and about 6 and ½ years from the date of assessment order dated 30 December 2008, the AO served a notice dated 12 August 2015 upon the taxpayer under Section 201(1) and 201(1A) of the Act holding that it has not deducted TDS on payment of sale consideration to two holders/sellers of land in Financial Years (FY) 2003-04, 2004-05 and 2005-06. The AO held that one seller of land was an NRI and being 1/5th shareholder in the property. As per Section 195 of Act, principal officer of the taxpayer was responsible for deducting TDS at 10 per cent, which it has failed.
- In the notice issued to the taxpayer, the AO states that the taxpayer was required to show-cause why it should not be treated as 'assessee in default' and why proceedings for default by non-deduction of TDS may not be initiated for FYs 2003-04, 2004-05 and 2005-06 against the taxpayer.
- Aggrieved by the AO's order, the taxpayer filed a writ petition before the High Court.

High Court's decision

- No period of limitation is prescribed under Section 201 of the Act to exercise power thereunder. In various decisions² it was observed that if no time-limit has been prescribed, a power of *suo motu* revision should be exercised within a reasonable time and any unreasonable delay may effect its validity. What a reasonable time would be, depends upon facts of the each case.
- In various cases³ it has been held that since no specific period has been prescribed under Section 201 and 201(1A) of the Act, reasonable time limit has to be adopted for initiating action thereunder. In the case of NHK Japan Corporation, the Delhi High Court observed that the liability of the deductor is a vicarious liability and, therefore, he cannot be put in a situation which would prejudice him to such an extent that the liability would remain hanging on his head for all times to come in the event the tax department decides not to take any action to recover the tax either by passing an

order under Section 201 of the Act or through making an assessment of the income of the deductee. Subsequently, the Supreme Court⁴ has left the question of limitation vis-à-vis Section 201(1) and 201(1A) open.

- In the case of U. B. Electronics Instruments Limited⁵, the Telangana and Andhra Pradesh High Court has also taken a view of four years of initiation of proceedings under Section 201(1) and 201(1A) of the Act. The High Court observed that there was an obligation on the taxpayer and also any person including principal officer of company to deduct TDS on any amount of payment to another. Failure to effect such deduction and remittance of same to the tax department exposed them to the obligation, not only for payment of same on demand, but also to pay interest.
- The Calcutta High Court in the case of Bhura Exports⁶ held that if no period of limitation is prescribed in the statute for taking action thereunder, neither Limitation Act, 1963 would apply nor any bar of limitation would be imported unless there is a contrary intention expressed in the Statute. The Calcutta High Court relying on the decision of Supreme Court in Uttam Namdeo Mahale⁷ and Ishar Singh⁸ held that in applying provisions of Section 201 of Act, when previous bar of limitation was lifted by amendment, and there was no period of limitation fixed for exercise of power at the relevant point of time, it would not be justified and legal to invoke limitation in the form of reasonable period. It also expressed its disagreement with decision of the Delhi High Court in the case of N.H.K.Japan Broadcasting Corporation⁹.
- In the case of Mahindra and Mahindra Limited¹⁰ the Bombay High Court has held that though Section 201 of the Act does not prescribe any limitation period for the taxpayer being declared as 'assessee in default', yet, the tax department will have to exercise the powers in that regard within a reasonable time. In such circumstances it has been observed that Tribunal's order in this case does not suffer from any error of law.

² State of Orissa v. Debaki Debi AIR 1964 SC 1413, S. B. Gurbaksh Singh v. Union of India (1976) 2 SCC 181 and CST v. Halari Store (1997) 7 SCC 715, State of Punjab and others v. Bhatinda District Cooperative Milk Producers Union Limited (2007) 11 SCC 363

³ CIT v. Hutchison Essar Telecom Limited [2010] 323 ITR 230 (Del), CIT v. NHK Japan Broadcasting Corporation [2008] 305 ITR 137 (Del)

⁴ CIT v. NHK Japan Corporation (SLP No. 24913-24919/2012, decided on 11 August 2014)

⁵ CIT v. U. B. Electronics Instruments Limited [2015] 371 ITR 314 (T & AP)

⁶ Bhura Exports Ltd v. ITO [2014] 365 ITR 548 (Cal)

⁷ Uttam Namdeo Mahale v. Vithal Deo and others (AIR 1997 SC 2695)

⁸ Ishar Singh v. Financial Commissioner and others (AIR 1984 SC 1719)

⁹ CIT v. N. H. K. Japan Broadcasting Corporation (Delhi High Court)

¹⁰ DIT v. Mahindra and Mahindra Limited [2014] 365 ITR 560 (Bom)

- In the case of Bharat Hotels Limited¹¹ the High Court observed that when there is no period of limitation prescribed for taking action under any provision of law, the same should be taken within a reasonable period, which would depend upon the facts of the case and the provisions of the Act under which action has to be taken. Similar ratio was also laid down in the case of various decisions¹².
- In respect of the matters where passage of time has resulted in accrual of certain rights to a person, such rights cannot be divested by exercising power at any indefinite period of time and in such case, if power is not exercised within reasonable period, it can be held barred and not exercisable. In the case of Sharda Devi, the Supreme Court held that what a reasonable period in such case would depend on the facts and circumstances of each case. In the case of State of Punjab and others, the Supreme Court said that what a reasonable period would be, it will depend on the nature of statute, rights and liabilities thereunder and other relevant factors.
- The facts of the present case indicates that the tax department first explored possibility of recovering entire tax from the person ultimately liable to pay tax since the taxpayer was only an 'assessee in default' by not deducting TDS on the payment made to one seller, an NRI, but actual liability of payment of tax was on that seller. It is only when the aforesaid probability was explored and failed, the tax department has exercised power under Section 201(1) and 201(1A) of the Act.
- It cannot be said that the tax department is guilty of undue and unreasonable delay on its own in as much as since when factum of one seller, being an NRI, came to its notice. The NRI has continuously prosecuted the matter, which has remained pending from one authority to another and after completion of such proceedings against the person. The said person was liable to pay tax and having failed to realise any amount of tax from her, power has been exercised under Section 201(1) and 201(1A) of Act.
- It becomes difficult to hold that period consumed by the tax department in prosecuting matter against main payee would have resulted in accrual of a right upon the taxpayer so as to deprive tax department from proceeding under Section 201(1) and 201(1A) of the Act, though, admittedly, taxpayer has committed default by not complying Section 195 by non-deduction of TDS on the amount paid to NRI seller.
- Defence of the taxpayer that it was misrepresented by seller by not disclosing by any of them that she was an NRI would equally be available to the tax department also for explaining delay. The tax department has made all possible efforts to recover entire amount of tax from person liable to pay tax and as a last resort they have sought to exercise power under Section 201(1) and 201(1A) against the taxpayer.
- The view taken by Delhi High Court¹³ that period of limitation of four years, as applicable for making assessment under Section 147, should be made applicable for exercising power under Section 201(1) and 201(1A) is not acceptable. The High Court find it difficult to subscribe such view as we do not impose a fixed time and prescribe a period of limitation, which has not been prescribed by Legislature in its wisdom.
- Such legislative action, by way of judicial precedent, would not be appropriate exercise of judicial review under Article 226 of Constitution. As it has already been discussed above, even Supreme Court says that if time period is not prescribed for exercise of power, a reasonable time would depend upon the facts of each case and cannot be quantified or prescribed like a period of limitation.
- In the case of Uttam Namdeo Mahale, the Three Judge Bench of the Supreme Court has held that in the absence of any specific limitation, necessary implication is that the general law of limitation provided in the Limitation Act stands excluded. The Supreme Court correctly held that no limitation has been prescribed and it can be executed at any time, especially when the law of limitation for the purpose of this appeal is not there. Where there is statutory rule operating in the filed, the implied power of exercise of the right within reasonable limitation does not arise.
- It has been observed that the Bombay High Court¹⁴ has taken a different view in the matter of prescribing limitation and the Calcutta High Court¹⁵ has declined to prescribe any such limitation.

¹³ NHK Japan Corporation (Del)

¹⁴ DIT v. Mahindra and Mahindra Limited [2014] 365 ITR 560 (Bom)

¹⁵ Bhura Exports Ltd v. ITO [2014] 365 ITR 548 (Cal)

¹¹ CIT (TDS) v. Bharat Hotels Limited [2015] 64 taxmann.com 325 (Kar)

¹² Sharda Devi v. State of Bihar and another (2003) 3 SCC 128, Mohamad Kavi Mohamad Amin v. Fatmabai Ibrahim (1997) 6 SCC 71, Ibrahimpatnam Taluk Vyavasaya Coolie Sangham v. K.Suresh Reddy and others (2003) 7 SCC 667

- The dictum laid down by Supreme Court in the cases referred above is very clear. While exercising power of judicial review, it would be appropriate to consider whether power has been exercised by competent authority within a reasonable period and whether delay is unjust, arbitrary, and whimsical or it is for valid reasons. If Court finds that delay in exercise of power is for valid and bonafide reasons, alleged delayed exercise of power cannot be held invalid. Therefore, the High Court unable to agree with the taxpayer that proceedings initiated by the tax department under Section 201(1) and 201(1A) is bad being barred by period of limitation.

Our comments

The issue with respect to initiation of TDS proceedings under Section 201(1) and 201(1A) of the Act has been a matter of debate before Courts/Tribunal. The issue pertains to the pre-2010 period since there was no time limit prescribed. However, with effect from 1 April 2010, Section 201(3) has been amended by the Finance Act, 2014 to provide that any order treating a person as a taxpayer-in-default for not deducting tax on payments made to a resident, could be passed at any time within seven years from the end of the financial year in which the payment is made, or credit given.

It is pertinent to note that the current provisions under Section 201 of the Act provide a time limit in case of deduction of tax from payments made to residents only. However, it did not provide any time limit in the case of deduction of tax where the payment is made to non-resident. The fear of proceedings will always loom over the resident taxpayer in the case of non-compliance of TDS provisions where the payment is made to non-resident. Further, uncertainty will also be there for how long should the resident deductor continue to maintain relevant documents i.e. income-tax returns, books of accounts, etc. in relation to the transaction entered with non-resident. This may cause undue hardship to the resident deductor.

It is pertinent to refer to the Delhi High Court decision in the case of *Bharti Airtel Ltd*¹⁶ where it has been held that in the absence of any limitation period for passing TDS order under Section 201(1) of the Act in respect of payments to non-residents, TDS proceedings could be initiated within reasonable time.



¹⁶ *Bharti Airtel Ltd v. Union of India* [2017] 245 Taxman 80 (Del)

www.kpmg.com/in

Ahmedabad

Commerce House V, 9th Floor,
902 & 903, Near Vodafone House,
Corporate Road,
Pralhad Nagar,
Ahmedabad – 380 051
Tel: +91 79 4040 2200
Fax: +91 79 4040 2244

Bengaluru

Maruthi Info-Tech Centre
11-12/1, Inner Ring Road
Koramangala,
Bengaluru – 560 071
Tel: +91 80 3980 6000
Fax: +91 80 3980 6999

Chandigarh

SCO 22-23 (1st Floor)
Sector 8C, Madhya Marg
Chandigarh – 160 009
Tel: +91 172 393 5777/781
Fax: +91 172 393 5780

Chennai

No.10, Mahatma Gandhi Road
Nungambakkam
Chennai – 600 034
Tel: +91 44 3914 5000
Fax: +91 44 3914 5999

Gurugram

Building No.10, 8th Floor
DLF Cyber City, Phase II
Gurugram, Haryana – 122 002
Tel: +91 124 307 4000
Fax: +91 124 254 9101

Hyderabad

Reliance Humsafar, 4th Floor
8-2-618/2, Road No.11, Banjara Hills
Hyderabad – 500 034
Tel: +91 40 3046 5000
Fax: +91 40 3046 5299

Jaipur

Regus Radiant Centres Pvt Ltd.,
Level 6, Jaipur Centre Mall,
B2 By pass Tonk Road
Jaipur, Rajasthan, 302018.
Tel: +91 141 - 7103224

Kochi

Syama Business Center
3rd Floor, NH By Pass Road,
Vytilla, Kochi – 682019
Tel: +91 484 302 7000
Fax: +91 484 302 7001

Kolkata

Unit No. 603 – 604,
6th Floor, Tower – 1,
Godrej Waterside,
Sector – V, Salt Lake,
Kolkata – 700 091
Tel: +91 33 4403 4000
Fax: +91 33 4403 4199

Mumbai

Lodha Excelus, Apollo Mills
N. M. Joshi Marg
Mahalaxmi, Mumbai – 400 011
Tel: +91 22 3989 6000
Fax: +91 22 3983 6000

Noida

Unit No. 501, 5th Floor,
Advant Navis Business park
Tower-B, Plot# 7, Sector 142,
Expressway Noida, Gautam Budh Nagar,
Noida – 201305
Tel: +91 0120 386 8000
Fax: +91 0120 386 8999

Pune

9th floor, Business Plaza,
Westin Hotel Campus, 36/3-B,
Koregaon Park Annex, Mundhwa Road,
Ghorpadi, Pune – 411001
Tel: +91 20 6747 7000
Fax: +91 20 6747 7100

Vadodara

iPlex India Private Limited,
1st floor office space, No. 1004,
Vadodara Hyper, Dr. V S Marg
Alkapuri, Vadodara – 390 007
Tel: +91 0265 235 1085/232 2607/232 2672

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