KPMG

#KPMG josh

TAX FLASH NEWS

27 May 2022

Amendment to provisions treating assessee-in-default for non-deduction of tax on payment to a non-resident is retrospective in nature

Executive Summary

Recently, the Panaji Bench of the Income-tax Appellate Tribunal (the Tribunal) in the case of Shree Balaji Concepts[1] (the taxpayer) dealt with the retrospective applicability of the amendment made to Section 201(1)[2] which provides that the deductor cannot be treated as assessee-in-default when the non-resident payee has declared its income in its return of income. The Tribunal held that such benefit has to be given retrospective effect since the said amendment was brought into the statute only to remove the anomaly which was created in the statute. Thus, the taxpayer cannot be considered as assessee-in-default for failure to deduct tax at source under Section 195 of the Income-tax Act, 1961 (the Act) since non-resident payees had disclosed the sale consideration in their respective tax returns.

Facts of the case

During the Assessment Year 2012-13, the taxpayer (a firm) had purchased an immovable property from non-residents (two sellers) and did not deduct tax as per the provisions of Section 195. The payees i.e., non-resident sellers of the property, had disclosed the consideration received from the taxpayer in their respective return of income filed by them before the tax authorities. The Assessing Officer (AO) observed that the taxpayer was required to deduct tax under Section 195. On account of the non-deduction of tax, the AO held the taxpayer was an assessee in default and levied tax liability under Section 201(1) and interest liability under Section 201(1A). The Commissioner of Income-tax (Appeals) [CIT(A)] upheld the order of the AO.

Tribunal decision

It was not disputed that the taxpayer had made payments to two non-residents and did not deduct tax as per the provisions of Section 195. The taxpayer contended that the payees i.e., the two non-resident sellers of the property, had disclosed the consideration received from the taxpayer in their respective return of income filed by them before the tax authorities. Thus, the taxpayer could not be treated as assessee-in-default as per the first proviso to Section 201[1][3], although it was applicable to the resident payee as it stood on that particular date. The said beneficial relaxations allowed to the resident payees should also be considered and be applied to the non-residents as well.

The legislature, in its wisdom, had thought about discrimination between the resident payee and non-resident payee and vide the Finance Act (No. 2), 2019 extended the benefit of the proviso to Section 201(1) even to the non-residents. The said benefit was extended to the non-residents from 1 September 2019. However, the said benefit has to be given retrospective effect since the said amendment has been brought into the statute only to remove the anomaly which was created in the statute.

It was observed that the payees in the instant case had filed their return of income and disclosed the consideration in their respective returns and had duly complied with the amended provisions of Section 201(1). Thus, the taxpayer cannot be treated as an assessee in default. Accordingly, the demand raised by the AO and confirmed by the CIT(A) under Section 201(1) was deleted.

Our comments

Section 201 provides relief from treating a deductor as an assessee-in-default in respect of payments made to residents. In case of similar failure on payments made to a non-resident, such relief was not available to the deductor and to that extent there was a discrimination between the resident and the non-resident taxpayer.

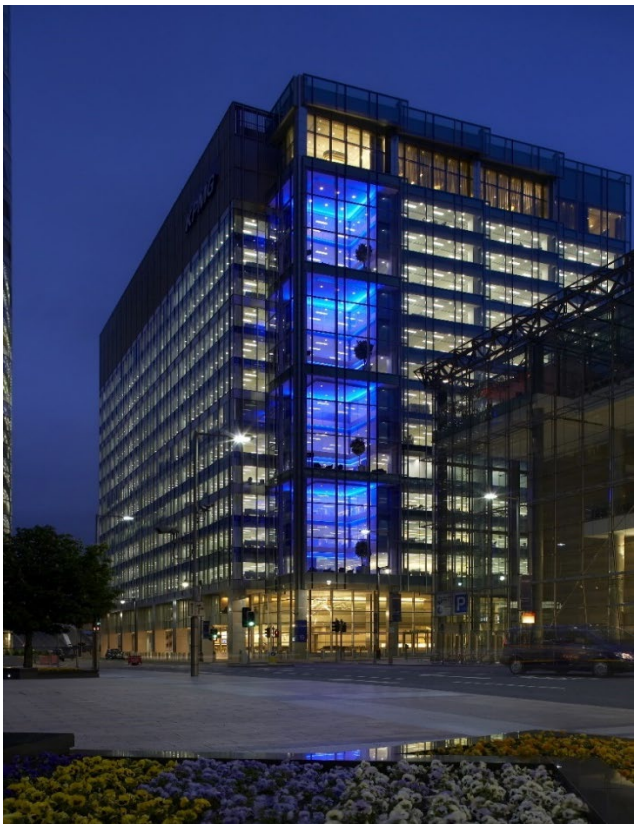
---

[1] Shree Balaji Concepts v. ITO (ITA No. 73/PAN/2018) – Taxsutra.com

[2] Deductor to be treated as an assessee-in-default if it does not deduct or does not pay, or after so deducting fails to pay, the whole or any part of the tax

[3] In a case when the payee is a resident and declares its income in its return of income, the taxpayer cannot be held as an assessee in default as per the first proviso to Section 201(1).

In order to remove this anomaly, the Finance (No. 2) Act, 2019 amended the proviso to Section 201(1) to extend the benefit of this proviso to a deductor, even in respect of failure to deduct tax on payments made to non-residents. The Memorandum to Finance (No. 2) Bill, 2019 specifically states that the amendment has been made to remove the anomaly.



The issue with respect to the retrospective applicability of this amendment has been a subject matter of debate before the Courts. The Delhi High Court in the case of Ansal Land Mark Township (P.) Ltd[4] dealt with the retrospective application of the second proviso to Section 40(a)(ia) introduced by the Finance Act, 2012. Even though the amendment was made effective from 1 April 2013, it was held that the amendment was declaratory and curative in nature and, therefore, had retrospective effect from 1 April 2005.

Further, the Supreme Court, in the case of M.M. Aqua Technologies Ltd.[5] has laid down three golden rules for the interpretation of legal provisions viz. first rule is that the purpose of the amendment is to be looked into. If the amendment is to plug a loophole, then it cannot affect bona fide transactions made prior to the amendment. The second rule is that an amendment, if it alters or changes the law as it earlier stood, it cannot be presumed to be retrospective even if the words 'for the removal of doubts' is used by the legislature. The third rule is that any ambiguity in the language should be resolved in favour of the taxpayer.

The Tribunal, in the present case, has held that the amendment made by the Finance (No. 2) Act, 2019 extending the benefit contained in the proviso to Section 201(1) for the sum paid to a non-resident will apply retrospectively since the said amendment was brought into the statute only to remove the anomaly which was created in the statute.

---

[4] CIT v. Ansal Landmark Township (P.) Ltd. [2015] 61 taxmann.com 45 (Del)
[5] M.M. Aqua Technologies Ltd. v. CIT [2021] 436 ITR 582 (SC)

KPMG in India addresses:

Ahmedabad
Commerce House V, 9th Floor,
902, Near Vodafone House, Corporate Road,
Prahlad Nagar,
Ahmedabad – 380 051.
Tel: +91 79 4040 2200

Bengaluru
Embassy Golf Links Business Park,
Pebble Beach, 'B' Block,
1st & 2nd Floor,
Off Intermediate Ring Road, Bengaluru – 560071
Tel: +91 80 6833 5000

Chandigarh
SCO 22-23 (1st Floor),
Sector 8C, Madhya Marg,
Chandigarh – 160 009.
Tel: +91 172 664 4000

Chennai
KRM Towers, Ground Floor,
1, 2 & 3 Floor, Harrington Road,
Chetpet, Chennai – 600 031.
Tel: +91 44 3914 5000

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

Hyderabad
Salarpuria Knowledge City,
6th Floor, Unit 3, Phase III,
Sy No. 83/1, Plot No 2, Serilingampally Mandal,
Ranga Reddy District,
Hyderabad – 500 081.
Tel: +91 40 6111 6000

Jaipur
Regus Radiant Centre Pvt Ltd.,
Level 6, Jaipur Centre Mall,
B2 By pass Tonk Road,
Jaipur – 302 018.
Tel: +91 141 - 7103224

Kochi
Syama Business Centre,
3rd Floor, NH By Pass Road,
Vytilla, Kochi – 682 019.
Tel: +91 484 302 5600

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

Mumbai
2nd Floor, Block T2 (B Wing), Lodha Excellus, Apollo Mills Compound, N M Joshi Marg, Mahalaxmi,
Mumbai- 400011
Tel: +91 22 3989 6000

Noida
Unit No. 501, 5th Floor,
Advant Navis Business Park,
Tower-A, Plot# 7, Sector 142,
Expressway Noida,
Gautam Budh Nagar,
Noida – 201 305.
Tel: +91 0120 386 8000

Pune
9th floor, Business Plaza,
Westin Hotel Campus, 36/3-B,
Koregaon Park Annex,
Mundhwa Road, Ghorpadi,
Pune – 411 001.
Tel: +91 20 6747 7000

Vadodara
Ocean Building, 303, 3rd Floor,
Beside Center Square Mall,
Opp. Vadodara Central Mall,
Dr. Vikram Sarabhai Marg,
Vadodara – 390 023.
Tel: +91 265 619 4200

Vijayawada
Door No. 54-15-18E,
Sai Odyssey,
Gurunanak Nagar Road, NH 5,
Opp. Executive Club, Vijayawada,
Krishna District,
Andhra Pradesh – 520 008.
Tel: +91 0866 669 1000

---

home.kpmg/in

#KPMG josh

home.kpmg/in/socialmedia