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Tax is deductible at source on year-end provisions created for ascertained liabilities

Tax is required to be deducted if payee is identified, methodology to calculate amount is available and there is a liability to pay due to existing contract/ customs.

The Delhi Income-tax Appellate Tribunal (the ITAT / the Tribunal) held in the case of Inter Globe Aviation Ltd¹ (the Company) for the AY 2010-11 and 2011-12, that tax should be deducted under section 194C of the Income-Tax Act, 1961 (the Act) on passenger service fee payments and on the provision for expenses created at year-end for ascertained liabilities. However, the Tribunal held that tax is not required to be deducted on credit card gateway facility fee.

Facts of the case:

TDS on passenger service fee

- The Company collects passenger service fees (PSF) from the customers in the ticket and pays it to Airport Owner/ operator.
- There are two components of PSF of security and facilitation. Security component is utilised for expenditure in respect of aviation security force deployed at the airport and facilitation is for services provided to the passenger at the airport.
- No tax was deducted at source by the Company on payment of the security component of PSF as the payment was made to the Central Industrial Security Force (CISF), a government undertaking which is a central armed police force in India. Tax was deducted at source on facilitation component paid to the airport.
- According to the tax officer (TO), tax should have been deducted on both components u/s 194J of the Act. The Company was treated as "assessee in default" in terms of section 201 of the Act.
- The first appellate authority [CIT(A)] held that tax should have been deducted u/s 194C of the Act on the total payment.

TDS on Provision for ascertained liabilities

- The Company had created provisions for ascertained expenses at year-end on which tax was not deducted at source. Tax is deducted by the Company on receipt of bills in the next year when the provisions are reversed.
- The Company submitted that no tax is required to be deducted as they are not responsible for making payments since the parties are not identified.
- Both the TO and CIT(A) held that tax is required to be deducted at the time of creating the provision for expenses. The TO held the Company as "assessee in default" in terms of section 201 of the Act.

¹ ITA No.5347/Del/2012 (Assessment Year: 2010-11) ITA No.4449/Del/2013 (Assessment Year: 2011-12)

TDS on Provision for credit card gateway facility fee

- For online booking of tickets by passengers using credit cards, the Company has entered into an agreement with various banks and other entities to avail credit card gateway services under a non-exclusive agreement.
- Amount of airfare paid by the passenger through credit card is received by banks and the banks deduct their service fee and pay balance amount to the Company.
- The TO passed an order stating that the Company should have deducted tax under section 194H of the Act on such service fees deducted by the banks.
- The CIT(A) allowed the Company's appeal and held that banks actually made that payment to the appellant after retaining their fees and the liability to deduct tax, if any, was that of the bank and not the Appellant.

Decision of Delhi ITAT:

TDS on Passenger service Fee

- The ITAT relied on various judicial precedents and held that the payment of PSF fees are not in the nature of fees for technical services and so TDS under section 194J of the Act is not applicable, nor is it in the nature of rent and so the provisions of section 194I of the Act does not apply.
- The ITAT held that the security services are to be provided by the airport owners and operators and that the Company does not pay any amount directly to the CISF.
- The ITAT thus upheld the CIT(A) order and held that tax under section 194C of the Act should be deducted at source on the payment of PSF to airport owners/operators in India.
- The ITAT, relying on various court decisions that the first proviso under section 201 of the Act applies retrospectively, directed the Company to submit requisite details as per Rule 31ACB, that the recipient has offered this payment in its return of income, in which case the Company should not be an assessee in default of the tax amount and the tax officer to verify the documents in accordance with law.

TDS on Provision for ascertained liabilities

- The ITAT held that tax should be deducted at source on the year-end provision for expenses, as the same were ascertained liability.
- The ITAT held that amount of expenditure can be determined if the recipient is identified, methodology to calculate amount is ascertained and there is a corresponding liability arising out of a contract or custom.
- Even though there is a lag in receiving bills from service providers, it does not absolve the liability of deduction of tax at source.
- The Company did not make provisions on ad hoc basis but the provision was made under specified head on certain basis thereby ascertaining the amount.
- The ITAT also held that benefit of the proviso to section 201 of Act should be granted to the Company and directed the Company to fulfill requisite conditions to avail the benefit.

TDS on Provision on credit card gateway facility fee

- ITAT had referred to the central government notification dated 31 December 2012 under section 197A of the Act, whereby no deduction of tax were notified on specified payment *inter alia* including payments with respect to the credit card commission for transaction between the merchant establishment and the bank (other than foreign banks).
- Even though the notification is prospective in nature, it lays down the principle that tax is not required to be deducted on credit card commission.
- The ITAT relied on decision in the case of Spicejet Ltd² wherein it was held that tax was not required to be deducted on charges retained by bank and credit card agencies out of the same consideration of ticket booked through credit/debit cards.
- Hence, the ITAT held that Company was not an 'assessee in default' and dismissed Revenue's appeal.

Observations:

The ITAT with respect to year-end provision for expenses observed that the expenses cannot be said to be accrued if any ingredient of ascertained liability is not satisfied.

The Central Government has issued a Notification No. 47/2016 dated 17 June 2016 in supersession of the Notification No S.O. 3069 (E) dated 31 December 2012 but the relief on credit card / debit charges continue.

² ITA number 6103/del/2015 for assessment year 2012-13



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