

## Legal Opinion on TDS deductions

### Background

That our client in the instant case were employees of a Company that had defaulted in making deposits of TDS (Tax Deducted at Source) with the Income Tax Authorities. The justification sought by the employer Company herein was the resignation and retirement of employees. However, on perusal of the documents and deduction in employee salaries indicated a far different picture and it was in this regard assessed that the payment of TDS once deducted was squarely the employer Company's prerogative and the justification given by the employer Company in respect of non-payments of amount already deducted at source as TDS would hold no good. In the communication shared between the Official Liquidator and the employer Company, it was apparent that in certain cases, amount was deducted from the salary of the employee, however wasn't deposited with the Income Tax Authorities.

### Queries

In light of the above facts, the Querists raised the following queries -

- A. Whether the Company/ Employer can be liable to pay TDS that is already deducted from the salaries of employees to the income tax department? If not, whether can the Income Tax Department seek to recover TDS amount from the employees of the Company/ Employer for non-deposit of TDS deducted on the salary of the employees by the Company/ Employer?
  
- B. Whether the employees are entitled for seeking tax deduction on the amount of TDS deducted by the Company /Employer on their salary from the Income Tax Department under the Provisional Form 16A issued by the Company or Employer or without Form 16A under the provisions of the Income Tax Act?

### Analysis

In responding to the aforementioned queries, it was categorically noted that legal obligation for payment of TDS as per Section 192 of the Income Tax Act, 1961 (the "Act"), was on the Company and person making the payment of salaries i.e. the employer. Such a person is therefore called the deductor and the company/person receiving the refund of benefits are called the deductee. It was therefore pertinent to note that it is the deductor's responsibility to deduct TDS before making the payment

and deposit the same with the government. TDS is deducted irrespective of the mode of payment—cash, cheque or credit—and is linked to the PAN No. of the deductor and deductee.

Further, the failure in making such payments of TDS post deductions was brought under the ambit of Section 201 of the Act, whereby, such a default by such Company was liable to payment of simple interest at the rate of 12% p.a. on the TDS amount from the date on which such tax was deductible up to the date on which such tax is actually paid to the Central Government.

It is further pertinent to note that as per Section 205 of the Act, 1961 the assessee shall not be called upon to pay the tax to the extent tax has been deducted from his income where the tax is deductible at source under the provisions of Chapter XVII. Further it has also been clarified by Central Board of Direct Taxes vide circular bearing no. 275/29/2014-IT-(B) dated 01.06.2015 that the Income Tax Act, 1961 puts a bar on direct demand against the assessee in such cases and that the demand on account of tax credit mismatch cannot be enforced coercively. In this regard, all assessing officers were notified that the assesses are not put at any inconvenience on account of default of deposit of tax into the Government account by the deductor.

Reliance was placed on the cases of *Yashpal Sahni v. Rekha Hajarnavis* 2007(109) Bom LR1537 and *Income Tax International Taxation v. Maersk Co. Ltd* (2011) 334 ITR 79 in concluding that the Employer alone is responsible for the payment of TDS on salaries paid and tax deducted at source by the employer, to the Central Government and the Employees wouldn't be held liable for any non-payment thereby.

Furthermore, on the non-payment of TDS the Employer is liable to rigorous imprisonment for a term which shall not be less than three months but which may extend to seven years and with fine under section 276B of the Act, in case it persists to fail in paying the credit to the Central Government.

Further, in respect of the second query raised by the client we note that in absence of TDS certificate being issued to the employee's, the tax credit of the employee's will be reflected in their Form 26AS and, hence, the employees can claim the credit of the tax accordingly. It is necessary to note that the claim of TDS to be made in the return of income by the employee should be strictly as per the TDS credit being reflected in Form 26AS. The credit granted by the Income-tax Department will be as per Form 26AS.

However, the fact that the employer had not issued the TDS certificate to the employee does not mean the employer's liability ended. The liability to pay income tax, if deducted at source, was on the employer. And, even if the credit of the TDS amount was not available to the employee for want of the TDS certificate, the fact that the tax

had been deducted at source from his salary would be sufficient to ensure the department could not recover the amount with interest from him again.

### **Legal Advice**

In light of the above we advised as below -

- a. That the employees are entitled for seeking tax deduction on the amount of TDS deducted by the Company /Employer on their salary from the income tax department under the Provisional Form 16A issued by the Company/ Employer/Deductor or without Form 16A under the provisions of the Income Tax Act.
- b. Further, that the Employees are entitled to seek the benefit of tax at source by the Company/Employer from the Income Tax Department for the relevant financial years by preserving their monthly pay slips till at least the time the employees get Form 16 for the year from the Company/ Employer. In case, Form 16 is not received from the Company/ Employer, then the employees can file their returns on the basis of their pay slips and further, the employees can get credit for the TDS if deducted, even if Form 16 is not available from the Company/Employer.