GUIDELINES ISSUED BY THE BOARD UNDER SECTION 194-O(4) AND SECTION 206C(1-I) OF THE INCOME-TAX ACT, 1961

1. Background

Vide Finance Act, 2020, a new section 194-O was inserted in the Income-tax Act 1961 ('**the Act**') with effect from 1st October, 2020. These provisions mandate an e-commerce operator to deduct tax @1%[1] of the gross amount being paid to an e-commerce participant on account of sale of goods or provision of service or both, facilitated through its digital or electronic facility or platform. The said TDS is required to be deducted at the time of credit or payment, whichever is earlier.

Further, sub-section (1H) to section 206C of the Act was inserted with effect from 1st October, 2020 which mandates that a seller receiving any consideration for sale of goods of the value or aggregate of such value exceeding fifty lakh rupees in any previous year shall collect tax from the buyer a sum equal to 0.1%[2] of such consideration. The collection is required to be made at the time of receipt of such consideration.

Several practical difficulties and interpretational issues related to these provisions were expressed by various stakeholders. Addressing the same, the Central Board of Direct Taxes ('the Board'), in terms of powers conferred under sections 194-O(4) and 206C(1-I) of the Act, has issued Circular No. 17 of 2020 [F. No.370133/22/2020-TPL] dated 29th September, 2020 whereby certain guidelines for removing practical difficulties arising out of implementation of the aforementioned provisions have been provided.

2. Guidelines issued

The guidelines issued are analyzed as under:

(a) Exclusion of transactions carried through various Exchanges [section 194-O and 206C(1H)]

It has been clarified that sections 206C(1H) and 194-O shall not apply to transactions in securities and commodities transacted through recognised stock exchange, including those located in IFSCs and transactions in electricity, renewable energy certificates/ energy saving certificates traded through power exchanges.

Vaish Associates Advocates Comments:
Stock exchange and power exchange are conventionally well-regulated sectors. Even though technically they satisfy the definitions of 'electronic commerce' and 'e-commerce operator', there were practical challenges in applying the provisions relating to deduction/ collection of tax at source. Further, power exchanges also followed the concept of banking of power and it was not clear whether TDS/ TCS provisions shall also be applicable thereon.

Considering that in case of transactions carried through stock or power exchanges, there is no one-to-one contact between the buyers and sellers, in order to remove difficulties in withholding and/ or collecting tax, the Board has clarified that provisions of section 194-O and 206C(1H) of the Act would not apply to such transactions. This is a welcome clarification.

(b) Exclusion of withholding liability on payment gateways in certain cases[section 194-O]

[1]For the ongoing financial year 2020-21, the aforesaid rate has been reduced to 0.75% in view of the COVID related relaxations provided by the Government vide section 197B of the Act.
[2]For the ongoing financial year 2020-21, the aforesaid rate has been reduced to 0.075% as per section 206C(10A) of the Act

It has been clarified that payment gateways shall not be required to deduct tax under section 194-O of the Act on a transaction, if the e-commerce operator has deducted tax on such transaction while making payment to the e-commerce participant. The Circular further states that to facilitate proper implementation, the payment gateway may take an undertaking from the e-commerce operator regarding such deduction of tax.

Vaish Associates Advocates Comments:
The role of the payment gateways is to merely facilitate settlement of payment qua transactions entered through the digital platform of the e-commerce operator. The same is not to facilitate sale of goods or provision of services, and accordingly, at the first instance it is arguable that the provisions of section 194-O of the Act may, in itself, not apply on the payment gateways.

However, the clarification issued by the Board proceeds on the basis that in such cases, both the e-commerce operator as well as the payment gateway gets covered within the ambit of section 194-O of the Act, resulting in double deduction of tax in respect of same transaction. In order to obviate such double tax deduction, the Board has now clarified that 'payment gateways' shall not be required to deduct tax under section 194-O of the Act on a transaction, if tax has already been deducted thereon by the e-commerce operator.

(c) Restricted applicability on insurance agents or insurance aggregator [section 194-O]
The Circular provides that in any year subsequent to the first year, if the insurance agent/ aggregator has no involvement in transactions between the insurance company and the buyer of insurance policy, such agent/aggregator shall not be required to deduct tax under section 194-O of the Act.

It has, however, been clarified that tax would be required to be deducted by the insurance company on any commission paid to such insurance agent/aggregator for those subsequent years under other provisions of the Act.

Vaish Associates Advocates Comments:
In several cases, the insurance agents/ aggregators are involved in selling an insurance policy in the first year but have no involvement in subsequent years wherein the renewal premium is paid directly by the customer to the insurance company. On a reading of the provisions of section 194-O of the Act, liability to deduct tax under the said section could have arisen in the hands of insurance agents/ aggregators even in subsequent years where they are not involved. This difficulty has now been removed by the Board by exempting insurance agents/ aggregators from the obligation to withhold tax on transaction of sale of insurance policy in the subsequent years.

(d) Calculation of threshold for the financial year 2020-21

(i) Under section 194-O:

In respect of individual/ HUF e-commerce participants, section 194-O is applicable if gross amount of sale or services during a financial year exceeds Rs.5 lakhs. It has been clarified that to check the above threshold of Rs.5 lakhs, the value of sale of goods/ services undertaken between 1st April 2020 to 30th September 2020 shall also be considered.

In other words, if the gross amount of sale or services or both facilitated during 1st April to 30th September 2020 exceeds Rs. 5 lakhs, the provisions of section 194-O shall be applicable on the entire amount paid/ credited by e-commerce operator on or after 1st October 2020.

(ii) Under section 206C(1H):

Section 206C(1H) requires tax to be collected at source on receipt of sale consideration in excess of Rs.50 lakhs. It has been clarified that in order to check the threshold condition of Rs.50 lakhs, the sums received between 1st April 2020 to 30th September 2020 shall also be considered.

In other words, if the gross amount of sales consideration received during 1st April to 30th September 2020 exceeds Rs.50 lakhs, the seller shall be required to collect tax on all payments received from the said buyer on or after 1st October 2020.

(iii) Under section 206C(1H):

It has further been clarified that since section 206C(1H) applies on receipt of sale consideration, the same shall not be applicable on any sale consideration received before 1st October, 2020. It has also been clarified that the provisions shall be applicable on all sale consideration (including advances) received on or after 1st October, 2020, even if the sale was carried out before 1st October, 2020.

Vaish Associates Advocates Comments:

On a bare perusal of the language of section 206C(1H) of the Act, tax is required to be collected by a seller, "who receives any amount as consideration for sale of any goods" and the further requirement is to collect the same "at the time of receipt of such amount". The expression "such amount" in the latter part of the section apparently refers to the amount received as "consideration for sale of any goods". Since the provisions are applicable from 1st October 2020 onwards, section 206C(1H) should only apply to receipt of consideration exceeding Rs. 50 lakhs in respect of sale concluded on or after 1st October 2020.

Further, advance, at the stage of receipt, is merely a liability in hands of the recipient which may be appropriated, at a later stage, against consideration for actual sale of goods. Therefore, collection of tax at the stage of receipt of advance, without there being any corresponding sale, would result in mismatch between the year/ date of collection of tax at source and corresponding income being recognized on sale of goods.

CBDT, in its clarification, has, however, linked the applicability of section 206C(1H) to receipt of consideration on or after 1st October, 2020, irrespective of the fact whether sales were effected before or after that date. Consequently, even in respect of sales effected prior to 1st October, 2020, if consideration is received on or after that date, the seller shall have to additional collect TCS.

The aforesaid are explained as under:

Example 1: If receipt of sale consideration during the period from 1st April to 30th September, 2020 is Rs.1 crore and receipt of sale consideration in October, 2020 is Rs.10 lakh, then, on entire Rs.10 lakhs, TCS shall have to be collected.

Example 2: If in the aforesaid example 1, receipt of sale consideration during the period from 1st April to 30th September, 2020 is Rs.45lakhs and receipt of sale consideration in October, 2020 is Rs.10 lakh, then, TCS shall have to be collected on Rs.5 lakhs i.e. amount received over and above the monetary threshold of Rs.50 lakhs.

Example 3: If receipt of sale consideration during the period from 1st April to 30th September, 2020 is Rs.45 lakhs and receipt of sale consideration in October, 2020 is Rs.10 lakh and advance consideration is Rs.15 lakhs, then, TCS shall have to be collected on Rs.20 lakhs i.e. amount received over and above the monetary threshold of Rs.50 lakhs.

(e) Applicability on sale of motor vehicles [section 206C(1H)]

Sub-section (1F) to section 206C of the Act is a specific provision applicable to sale of 'motor vehicles' of value exceeding Rs.10 lakhs. The said provision is only applicable to B2C (Business to Consumer) sales and not to B2B (Business to Business) sales from manufacturers to dealers/ distributors [refer Board Circular No. 22/2016].

Sub-section (1H) to section 206C, provides that the said provision shall not be applicable on sale of goods covered under sub-section (1F) (i.e., motor vehicles).

It has now been clarified that the provisions of section 206C(1H) would be applicable in the following cases:

1. Receipt of sale consideration from a dealer (B2B Sales), if such sales are not subjected to TCS under section 206C(1F);

2. In case of sale to a consumer (B2C sale), if value of a motor vehicle is less than Rs.10 lakhs but aggregate receipt of sale consideration from such consumer during the financial year exceeds Rs.50 lakhs.

Vaish Associates Advocates Comments:
There were differing views whether section 206C(1H) covers sale of motor vehicle since there was a specific sub-section (1F) dealing with sale of motor vehicle. Accordingly, Circular clarifies that section 206C(1H) shall apply to B2B sales.

Circular further clarifies that even B2C sales, where value of a motor vehicle is less than Rs.10 lakh (i.e., not covered by sub-section (1F)) but total sale consideration from repetitive sale to the same customer exceeds Rs.50 lakhs, then, provisions of section 206C(1H) shall apply. This may lead to practical challenges inasmuch as every dealer shall be required to track cumulative sale every year to each customer.

Clause (2) above seeks to cover repetitive B2C sale of vehicle of less than Rs.10 lakhs to the same customer. Once section 206(1F) specifically covered B2C sale above a particular threshold, application of section 206C(1H) to B2C below the threshold shall only lead to more complication and compliance burden in the hands of the dealers.

Further, applicability of TCS provisions to B2B transactions may result in tax being collected at multiple levels in the supply chain structure consisting of various entities. This would result in tax being collected multiple times in the same supply chain. Collection of tax at multiple entity levels increases the administrative compliance burden, transaction costs and may lead to overall cash blockage.

(f) Adjustment for sales return, discount or indirect taxes [section 206C(1H)]
It has been clarified that since collection of tax under section 206C(1H) of the Act is made with reference to actual receipt of sale consideration, for collection of tax, no adjustment is required to be made in respect of:

1. sales return;
2. discount;
3. indirect taxes including GST

Vaish Associates Advocates Comments:
At the outset it appears that the clarification issued by the Board for not adjusting sales return, discounts or indirect taxes while collecting TCS creates more doubts rather than clarifying the position. On a careful reading of the clarification given by the Board, one may argue that the intention of the Board is to state that TCS is to be collected based on the actual consideration received and accordingly the sale returns and discounts given post collection of the consideration are to be ignored. However, sale returns and discounts, prior to receipt of consideration may be considered for the purposes of collection of TCS since the actual net consideration is yet to be received. Therefore, if advance is received from a customer and the sale invoice is raised and subsequently there are sales returns or discount, TCS is triggered on receipt of advance and, hence, no adjustment can be made for subsequent sales returns or discount. This is based on the fact that the Board in its reasoning has made reference to receipt of amount of sale consideration as being the base on which TCS is collected.

The clarification of not adjusting of sales return or discounts on sale of goods could have been explained with examples to clear confusion arising for sellers, who have, for administrative convenience, in majority cases, opted to pay TCS on raising of sales invoices instead of waiting till receipt of consideration.

Further, the Board has clarified that TCS is required to be collected on the amount of sale consideration including indirect taxes like GST. This seeks to clarify the position sought to be taken by the Revenue considering that contrary position was being taken in various judicial precedents.

In Ramjee Prasad Sahu and others v. UOI: 202 ITR 800 (Pat), the Court held that the wholesaler of liquor was not liable to collect TCS under section 206C(1) from the retail vendor on the amount of excise duty deposited by them directly to the Government. Thereafter, in a later decision, in the case of Vinod Rathore v. UOI: 278 ITR 122 (MP) a contrary position was taken, wherein it was held that if the purchase price is inclusive of excise duty, TCS will be recoverable under section 206C of the Act on actual price paid by the buyer, inclusive of tax and excise duty.

In case of applicability of TDS provisions, the Board vide Circular No. 23/2017 dated 19th July, 2017, however, clarified that there is no requirement to withhold tax at source on the component of "GST on services" comprised in the amount payable to a resident that is indicated separately on the invoice.

Vide the present Circular, the Board has deviated from its earlier position and now intended to apply TCS even on the GST component of the value of goods.

The aforesaid clarification, however, is not applicable to section 194-O of the Act. In marketplace models including e-commerce industry, providing discount, guaranteed returns, cash backs, etc., are common features. The actual sale price after allowing discount could therefore be significantly lower than the gross value of sale of goods or services. Further, there could also be an option for the buyer to return goods purchased through online platforms. In such cases, determination of "gross amount" for purpose of section 194-O of the Act shall depend upon facts of each case.

(g) Fuel supplied to NR airlines [section 206C(1H)]

The Board has clarified that provisions of section 206C(1H) shall not apply on the sale consideration received for fuel supplied to non-resident airlines at airports in India.

For any further clarification, please write to:

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