

Non deduction of TDS may disallow expenditure

Introduction

Apart from consequences like Interest, penalty and prosecution for Non Deduction or Nonpayment of TDS after deduction, there is another consequence for assessees getting profits and gains from business or profession - Disallowance of Expenditure under section 40(a)(i) and 40(a)(ia) of Income Tax Act, 1961.

Section 40(a)(ia) – Payments made to residents

Any interest, commission or brokerage, rent, royalty, fees for professional services or fees for technical services payable to a resident, or amounts payable to a contractor or sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work), on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid on or before the due date specified in sub-section (1) of section 139,—

“Provided that, where in respect of any such sum, tax has been deducted in any subsequent year, or during the previous year but paid after the due date specified in sub-section (1) of section 139, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid.”

Amendment made by Finance act 2012

The amendment to section- 40 (a) (ia) reads that, disallowance of business expenses payable to resident payee due to non-deduction of TDS will not be made if the payer is not considered as an “assessee in default” under first provision in section 201(1) of the Income Tax Act.

The first proviso to section 201(1) states that, if a payer who fails to deduct TDS from the amount paid to a resident or on the amount credited to the account of a resident shall not be deemed to be an “assessee in default”, if such resident: (conditions)

- has furnished his return of income under section 139;
- has taken into account such sum for computing income in such return of income;
- has paid tax due on the income declared by him in such return of income and;
- if the tax payer furnishes a certificate to this effect from an accountant in such form as may be prescribed.

In such a case, it shall be deemed that the payer has deducted and paid the tax on the date of furnishing of return of income by the resident payee.

Related Case Laws

- In the case of R. S. Suriya vs. Dy. CIT 21 ITR 746 the Chennai ITAT held that Payment made by actor to person for managing call sheets, cannot be called payment for professional services and hence cannot be disallowed under section 40(a)(ia).
- Expenditure claimed by the assessee as interest accrued on debentures without deducting the TDS could not be allowed in view of specific provisions of section 40(a)(ia). Refer, Dy. CIT vs. Umang Dairies Ltd, 36 SOT 383.

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- Provisions of section 40(a)(ia) can be invoked only in the event of non-deduction of tax at source but not for lesser deduction of tax - [2012] 17 LNIN 158 (Mumbai - Trib.)

Section 40(a)(i) – Payments made to non- residents

Any interest (not being interest on a loan issued for public subscription before the 1st day of April, 1938), royalty, fees for technical services or any other sum chargeable under this Act, which is payable,—

- outside India; or
- in India to a non-resident, not being a company or a foreign company,

on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid during the previous year, or in the subsequent year before the expiry of the time prescribed under sub-section (1) of section 200 :

Provided that where in respect of any such sum, tax has been deducted in any subsequent year or, has been deducted in the previous year but paid in any subsequent year after the expiry of the time prescribed under sub-section (1) of section 200, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid.

Explanation.—For the purposes of this sub-clause,—

- "royalty" shall have the same meaning as in Explanation 2 to clause (vi) of sub-section (1) of section 9;
- "fees for technical services" shall have the same meaning as in Explanation 2 to clause (vii) of sub-section (1) of section 9;

Differences in Section 40(a)(ia) and 40(a)(i)

Particulars	Section 40(a)(ia)	Section 40(a)(i)
Payments to	Resident assessee	Payment made to Non residents in India or payments outside India
Nature of payment	Any interest, commission or brokerage, rent, royalty, fees for professional services or fees for technical services or payments made to contractor or subcontractor for carrying out work.	It is an inclusive definition which includes royalty and fees for technical services.
Due date	As mentioned in section 139(1) i.e. due date of filing of return of income	As mentioned in section 200(1) i.e. due date of payment of TDS, which is within 7 days of the following month.
When allowed	The expenditure so disallowed will be allowed in the year when tax deposited but if paid within the due date will be allowed in the same financial year. However through the latest amendment in this section as mentioned above it can still be allowed if the conditions are met.	The expenditure so disallowed will be allowed in the year when tax is deposited but if paid within the due date will be allowed in the same financial year.

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Section 40(a)(iii) – Salaries to non- residents

Any payment which is chargeable under the head "Salaries", if it is payable—

- outside India; or
- to a non-resident,

and if the tax has not been paid thereon nor deducted there from under Chapter XVII-B.

Conclusion

Thus if the assessee pays salaries to non residents without deduction of tax, it will fall under section 40(a)(iii) but not section 40(a)(i), as this section is more specific. There are many more disallowances under Section 40 which will be explained in the next articles. These disallowances are made only when TDS has not been deducted, or after deduction has not been paid during the previous year.