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To,
The Chairman,
Central Board of Direct Taxes,
North Block, Vijay Chowk,
New Delhi – 110001.

Sub: A case for relaxation in norms for levy of Penalty and compounding of offences pertaining to Tax Deduction at Source

Respected Sir,

I. Overview of Tax Deduction System

1. Tax deduction at source ('TDS') is a mechanism for quick and smooth collection of tax due to the tax authorities from a taxpayer. The objective of TDS is to ensure tax collection when income is paid / credited to a payee and that the payees are covered in the tax database.
2. Chapter XVII-B of the Income Tax Act, 1961 (the 'Act') casts several obligations on the payer for timely deduction and payment of TDS in the Government treasury.

II. Severe Consequences of non-compliance of TDS provisions

3. Non-compliance of Chapter XVII-B of the Act attracts severe consequences including interest, late fee, penalty and even prosecution in hands of payer in case of failure to deduct or deposit tax at source, as the case may be. It also entails disallowance of expenditure on which TDS is not paid (under section 40(a) /40(ia) of the Act) until the said amount is actually deposited in the Government treasury leading to increased outflow on account of higher self-assessment tax or non-filing of tax returns due to non-payment of self-assessment tax.
4. Even after depositing the TDS along with the applicable interest, late fee and penalty levied by the Tax Authorities, the Act empowers Tax Authorities to initiate prosecution proceedings under section 276B of the Act for delayed payment of TDS. **Of late, several prosecution cases have been launched against assesseees who have made delayed TDS deposits.**
5. In terms of the Central Board of Direct Taxes ("CBDT") Circular No. 24/2019 dated 9-9-2019, no prosecution under section 276B is to be initiated where non-payment of TDS amount is INR 25 Lakhs or below and the delay is less than 60 days from the due date.
6. In other cases where prosecution can be initiated, the taxpayer has an option to compound the offences at any time before or after the initiation of the prosecution proceedings in accordance with the extant guidelines dated 14 June 2019 issued by the CBDT [285/08/2014-IT (Inv.V)/147].

III. Compounding of TDS offences

7. The June 2019 Guidelines lays down the procedure for compounding, authority levels who can approve compounding, cases that can be compounded, charges for compounding, etc. Once the compounding is done, the compounding order is brought to the notice of the Court, where the prosecution complaint was filed / or the complaint is pending immediately through prosecution counsel.
8. As per the said Guidelines, TDS offences can be compounded by making a payment of compounding fee varying from 2% to 5% per month calculated from date of deduction of TDS to the date of deposit thereof depending on whether an assessee is applying suo moto or upon detection by the department, first or subsequent occasion of compounding, etc.

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9. The financial outflow for compounding of a TDS offence is very severe, which can be best understood from the example given below:
- Assume that TDS of INR 100 lakhs was deposited belatedly say after 24 months, the severe financial consequences of this delay would be as under:

Particulars / Section	Provision / Guidelines	Amount (INR in Lakhs)
201(1A) - Interest for delay in payment	Interest @ 1.5% on the amount deducted from the date it was due till the date of actual payment	36 lakhs [100 lakhs x 1.5% x 24 months]
221 - Penalty for delay in payment	The deductor will in most likelihood be held liable for penalty up to 100% of the tax deducted and failed to be deposited with the government.	100 lakhs
Compounding provisions as per the above Guidelines (to avoid prosecution)	A. <u>Compounding Fee</u>¹ (i) @ 2% per month or part of a month where the assessee files an application before any offence comes to the knowledge of the Department. (ii) 3% per month or part of a month in cases not covered above. (iii) In respect of any application for the subsequent occasion, the applicable rate for compounding will be 5% per month or part of a month.	48 lakhs (100 lakhs x 2% x 24 months) 72 lakhs (100 lakhs x 3% x 24 months)
	B. <u>Compounding charges</u> (i) Prosecution establishment expenses @ 10% of compounding fees (ii) Litigation expenses including Counsel's fees paid / payable by the tax department	4.8 / 7.2 lakhs (48 / 72 lakhs x 10%) 5 lakhs (Estimated counsel fees)

To summarize:

Particulars	Financial Outflow for Compounding of TDS default – suo motu by the assessee	Financial Outflow for Compounding of TDS default detected by the Department
Interest u/s 201(1A)	36 lakhs	36 lakhs
Likely levy of penalty u/s 221	100 lakhs	100 lakhs
Compounding of Offence		
– Compounding Fee	48 lakhs	72 lakhs
– Compounding charges	9.80 lakhs	12.2 lakhs
Total outflow on account of TDS default of INR 100 Lakhs	193.80 lakhs	220.2 lakhs
Total outflow in % on account of TDS default of INR 100 Lakhs	193.80%	220.20%

¹ In all cases where relaxation of time is allowed, the compounding charges shall be 1.25 times of the normal compounding charges.

10. Thus, a failure to deposit TDS of INR 100 lakhs within prescribed time limit but paid after 24 months can result into monetary implications ranging from ~ INR 193 to 220 lakhs depending on the period of default, whether it is subsequent occasion for compounding, etc. Also as these payments are not allowed as a deduction for income tax purposes, the effective cost is much higher.

IV. Circumstances leading to TDS defaults

11. Over the past several years, due to various business constraints and peculiar circumstances (including global meltdown, recessionary trends, ongoing pandemic like Covid-19, etc.), there have been regular delays in deposits of TDS by a large number of businesses especially in the infrastructure and related sectors. In most cases, this happens due to genuine and bona-fide business reasons such as:

- Delays in project completion due to several operational / regulatory challenges;
- Slump in demand causing inventory overhang;
- Severe liquidity constraints;
- Cost escalation and operational losses;
- Inordinate delays in receiving payments from customers where payments are linked to specific milestones etc.;
- Long gestation period / adverse working capital cycle in the initial years of project;
- Provision of expense in the books of accounts leading to deduction of TDS irrespective of payment of expenditure. Thus, TDS liability is fastened even where payment for expense is not made.

The above factors and many other factors have entrapped several businesses in a prolonged cash crunch loop forcing one to prioritize deployment of monies for continuing essential business operations as free cash flows can be generated only from business operations.

12. Several businesses are plagued with the above problems at some point in time or the other causing delays in discharging even their own business liabilities including that towards TDS. In most cases, TDS amount gets deposited along with necessary interest, late fees, etc. when funds are available from business operations or some other non-operational funds are available to take care of these compliances.

V. Need for introducing a One-time Voluntary Compliance Window

13. To encourage voluntary compliance

Taking into account the difficult circumstances in which many businesses have operated and survived, there is a need to sympathetically consider a one-time window for waiver of any penalty / prosecution action on payment of outstanding TDS dues by a particular date along with certain reasonable charges / levies so that the uncertainty regarding penalty / prosecution action is laid to rest in the minds of the businessmen thereby enabling businesses to focus on their businesses and consolidate / expand scales of operations. This will only result into more tax collections over a period of time and also contributing to the economic growth of our country.

14. The window should broadly apply if the following is complied with within a defined time frame, viz.,
 - TDS defaults are made good with payment of tax and interest (both for non-deduction / delays in deposit with government treasury etc)
 - TDS has already been deposited with applicable interest in full.
15. The CBDT may consider giving a one-time waiver of penalty under section 221 of the Act or grant substantial waiver thereof. Further where even prosecution is launched under section 276B of the Act, taxpayers be allowed to compound their non-compliance by paying a much lesser compounding fee and charges as against the amount payable as per extant compounding guidelines.

16. Needless to add, those who still do not avail this window of opportunity, they can be visited with the severe financial and other consequences as per the extant law.
17. Even in the past, the CBDT had issued a Circular No. 685 dated 17 June, 1994 wherein complete relief from penalty and prosecution proceedings was provided by the Government to employers who had defaulted in deducting TDS or defaulted in depositing the same with the Government on time as required under section 192 if they voluntarily come forward and pay whole of the tax and interest up to 6 years to avoid penalty and prosecution proceedings. Relevant extract of the Circular is enclosed as **Annexure 1**.
- 18. Delay in Conviction / Low success in Conviction**
Though prosecution can be statutorily initiated for delayed payment of TDS, it takes several years before matters can be finally disposed off. Further prosecution gets upheld only if there is no “reasonable cause”. Several High Courts across the country have repeatedly held that financial constraints, huge business losses, paucity of funds etc. would constitute a reasonable cause under section 278AA. [*Sequoia Construction Co. v. PP Suri, ITO* [1985] 21 taxman 13 (Delhi HC), *Income-tax officer v. Roshni Cold Storage (P.) Ltd* [1999] 106 taxman 318 (Madras HC)]
19. Further as can be seen from the below table, only in about 2.85% (364 / 12,794) cases a taxpayer actually gets convicted and that too, in most of the cases, the conviction is further challenged before the higher judicial forums thereby only prolonging the adjudication process and adding to Court’s backlog.

Financial Year	Prosecution proceedings launched during the year	Convictions during the year	Acquitted during the year
2011-12	209	14	182
2012-13	283	10	50
2013-14	641	41	62
2014-15	669	34	42
2015-16	552	28	30
2016-17	1252	16	30
2017-18	4527	75	33
2018-19	3512	105	49
2019-20	1149	41	91
Total:	12,794	364	569

Note: The above data has been collated from information available in public domain. The above numbers are relating to overall prosecution proceedings under the Income-tax Act and not specific to TDS defaults.

20. Reduction of litigation in line with National Litigation Policy

The National Litigation Policy, 2010 proposed to reduce Government litigation so that court’s time can be spent in resolving other pending cases. Having a one-time compliance window will only facilitate in achieving the Goal of the National Legal Mission to reduce average case pendency from 15 years to 3 years. The one-time voluntary window will help de-clogging the judiciary.

21. Maximization of Revenue in line with C&AG Report

Such a one-time compliance window would help mop-up substantial revenue while significantly de-clogging the judiciary at the same time. Attention is also drawn to the Report of the C&AG for the year ended March 2012 on **Performance audit on administration of Penalty and Prosecution** wherein the C&AG has, at page 63, suggested that the **Ministry may like to ensure that every opportunity to settle disputes and collect due revenues be explored in all cases, if otherwise not prohibited under the law or against public interest, so that resources of the Income-tax department and of the judiciary are relieved with more important activities.**

22. De-criminalization of tax defaults

The Company Law Committee [2021] made recommendations to the Government, inter-alia, on decriminalization of certain compoundable offences under the Companies Act, 2013 as a part of improving the ease of doing business. The thrust was on de-clogging the courts from offences which are technical or procedural in nature.

23. Prosecution casts social stigma and persons making delayed payment of TDS for valid reasons ought not to be treated at par with fraudsters / criminals. Providing an affordable opportunity to taxpayers to get bring an end to multiple and protracted litigation on penalty levied / prosecution launched will help taxpayers in focusing better on their business which in turn will help the Government in boosting the economy.

24. Government support and ease of doing business

In addition to the regular liquidity crunch / issues faced by the businesses, the Covid-19 pandemic has ushered in an unprecedented solvency and financial crunch touching all businesses irrespective of its size. This crisis has caused an exponential surge in non-compliance and defaults in statutory payments under the Act. As is publicly known, infrastructure businesses in India are extremely leveraged and heavily indebted to banks and financial institutions. Any additional cash burden will only add further pressure on the already tightened finances of such businesses saddling them with enormous debt. This will severely affect ability of businesses to service debt thereby triggering a repayment crisis. Large number of NPAs, cases under Insolvency and Bankruptcy Code, etc. will exponentially rise causing domino effect on the entire economy.

25. The arrest of the Promoters for such non-compliances where TDS, interest, etc has already been paid will only exacerbate the stressful situation and will defeat all the efforts taken by Promoters to stay afloat and salvage their business so that the interests of all stakeholders including employees, suppliers, contractors, labourers, their families, etc. are protected.

The Government, in recent years, has vigorously pushed for business promoting initiatives like “Ease of Business”, “Make in India” and the like. These steps are to push business and promote growth. Presently, the TDS provisions and defaults have consequences that are very harsh, onerous and burdensome which fails to recognize ground level realities of business. A fresh start and / or one-time measure is the need of the hour to enable a clean slate reboot for businesses and other entities who

26. have duly paid TDS along with applicable interest. This would help in easing compliance in India and also lessen the burden on the administrative and judicial infrastructure.

Significant benefits to Taxpayers and Revenue

Taxpayers

- Clean up of TDS related defaults by duly depositing tax along with applicable interest;
- Obviate high penalty leviable up to 100% under section 221 / section 271C by paying prescribed minimum penalty;
- Utilization of productive time and efforts in carrying out business / increased activity as against utilizing the same in defending long drawn litigations.

Revenue

- Expeditious collection of outstanding TDS dues along with interest and token penalties / fees;
- Utilisation of productive time of resources of Income-tax department and judiciary in ongoing assessments rather than past cases;
- Unclogging of the judicial system (Criminal Courts, Tribunals, High Courts, etc.) where such penalty / prosecution cases are pending;

- Freeing up time from defending multiple litigation would lead to increase economic activity, thereby increasing tax collections and create additional employment opportunities.

VI. Prayer

27. Considering the fact that the benefits clearly outweigh any other considerations, it is submitted that the Government should consider introducing a one-time voluntary window as part of "Vivad Se Vishwas" scheme for TDS payment and also on the lines of that was introduced vide Circular No. 685 dated 17 June 1994 wherein upon payment of TDS along with interest within the prescribed time limit, penalty and prosecution proceedings were dropped / not initiated.
28. Under the same Scheme, where Penalty and Prosecution proceedings have already commenced, it is humbly requested that one-time payment calculated at the rate of 5% of the defaulted TDS amount in lieu of Penalty / Compounding fees / Compounding Charges be levied and proceedings of penalty / prosecution be dropped, provided the entire defaulted amount with interest has been paid before an appointed date under the scheme.
29. The following lower / reduced penalties and Compounding Fee and Compounding Charges may be considered:

Particulars	Amount
Penalty u/s 221 and Compounding Fee and Compounding Charges	One time 5% of the TDS amount Defaulted
Time limit for making compounding application	All cases to be covered irrespective of any time limit (present time limit is 12 months from the date of filing compounding application). Due mechanism to be provided for covering cases where prosecution has already been instituted and pending before the Courts at various stages where once the taxpayer opts for the one-time window by paying tax arrears with interest/ and one-time settlement amount, the proceedings for levy of penalty and prosecution is dropped.

Thanking you,

Yours sincerely,
For CREDAI-MCHI



Domnic Romell
President



Dhaval Ajmera
Hon. Secretary

CC:

(1) Shri Ajay Seth (I.A.S.), Secretary, Department of Economic Affairs, Ministry of Finance
Government of India, North Block, New Delhi-110001

(2) Dr. Vivek Joshi (I.A.S.), Secretary, Department of Financial Services,
Jeevan Deep Building, Sansad Marg, New Delhi, - 110001