

TDS on purchase of immovable properties could lead to all around confusion – Apr 24, 2012

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By S Sivakumar, CA

IN terms of Section 194LAA of the Income tax Act, as proposed in the Finance Bill, to take effect from October 1, 2012, any person responsible for paying any sum to a resident transferor by way of consideration for transfer of any immovable property (other than agricultural land), shall have to deduct at source, an amount of 1% of such consideration, as income tax thereon. It has been further provided that, no deduction is required to be made where such consideration is less than Rs 50 lakhs in cases where such property is located in 'specified urban agglomeration areas' or is less than Rs 20 lakhs in cases where such property is located in any area other than specified areas. Specified Areas' include metro cities and other areas. It has also been provided that, where such consideration is less than the value adopted for registration by the appropriate authority (eg. Sub-Registrar) for levying stamp duty, the value adopted for stamp duty would be deemed to be the consideration, for purposes of this provision. Immovable property has been defined to mean any land (other than agricultural land) or any building or part of a building.

The proposal to introduce the TDS (i.e tax deduction at source) provisions on purchase of immovable properties is likely to cause a lot of confusion. The Section talks of levying TDS on the consideration towards transfer of immovable property. Whether TDS is to be effected on the construction value of the apartment/house remains totally unclear. In most parts of the country, as is well known, Developers enter into two agreements, viz. one for the sale of the undivided portion/interest of the land and the other, for the construction of the apartment. Typically, it is the undivided interest in land which is registered as the immovable property with the Sub-registrar and hence, the reference to immovable property in Section 194LAA can be taken only to refer to land. If this view is taken, the entire purpose of bringing in this proposal would perhaps get defeated, as the value of land is very unlikely to be more than Rs 50 lakhs even in metro cities, in most cases.

Moreover, the relationship between the Developer and the apartment buyer is one of service provider-service receiver till such time the transfer is registered and in cases where the land is not owned by the Developer, the transferor is the Land Owner and not the Developer. Even in cases where the Developer is also the owner of the land, he would become the transferor only at the time of registration of the apartment, by which time, a significant portion of the amounts

towards construction and sale of undivided portion of the land would already have been paid by the apartment buyer, i.e. the transferee. The usage of the word 'transferor' could create some confusion in these cases, in as much as, while the transferor would be the Land Owner in most cases, the amounts would be paid by the apartment buyer (i.e. the transferee) to the Developer.

It would seem that this proposal can only work in cases where the Developer enters into a single agreement of sale of the apartment and even here, a lot of practical problems could arise, in as much as, in most States, it is the land which is registered as immovable property, for purposes of payment of stamp duty under the State Stamp Acts.

A lot of confusion could arise when a single instalment is paid by the apartment buyer which is apportioned by the Developer towards the cost of land, cost of construction, etc. It is not clear if the apartment buyer/transferee is required to effect TDS on the portion of the amount attributable to the land value... an impossible feat to be accomplished given the fact that, it is the Developer who bifurcates the amount received from the apartment buyer towards land, etc.

This proposal could prove to be another big operational issue for Developers, especially, given the fact that individuals who are buyers of immovable properties would have to be effect the TDS every time a payment is made to the Developer, despite that, it is provided that individual transferees are not required to obtain TAN, etc.

Before parting.....

The implementation of this Section, in the form in which it presently stands, could create a lot of issues and could create all around confusion, especially given the fact that, the Sub-Section (4) of Section 194LAA provides that, " no registering officer shall register any such document, unless the transferee furnishes the proof of deduction of income-tax in accordance with the provisions of this section and payment of sum so deducted to the credit of the Central Government in the prescribed form". It is anybody's guess as to how the Sub-Registrars who are not well-versed with the income tax provisions, would interpret and implement this Section.

The Section also states that, in cases where the consideration for the transfer of the immovable property is less than the value adopted for payment of stamp duty, then, the value adopted for stamp duty shall be deemed to be the value of the immovable property for purposes of this Section. Take a practical situation. Assume that, a buyer is purchasing an immovable property for Rs 45 lakhs in a 'specified urban agglomeration area'. Since the consideration is less than Rs 50 lakhs, the transferor would not have deducted tax at source. Let's assume that, the construction activity is happening over a two year period. Let's further assume that, at the time

of registration of the transfer, the State Government has increased the minimum value to, let's say, Rs 60 lakhs, bringing this transaction within the ambit of Section 194LAA. How would it be possible for the purchaser to comply with the requirements of Section 194LAA, in as much as, he would be required to deduct tax at source, on the basis of a future event that would happen at the time of the registration of the transfer? This would be a typical case wherein the 'doctrine of impossibility' can be invoked.

It is not clear as to the legal remedies available to the purchasers of immovable properties, in cases where the Sub-Registrars refuse to register the transfers, citing Section 194LAA.

There is a need to exempt transactions involving individuals, as transferors and transferees of immovable properties.

This Section 194LAA, in its present form, is bound to create a lot of confusion. One would expect the CBDT to come out with a circular clarifying the issues involved.

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