

Initiation of proceedings under section 201 of the Act valid even after 10 years in case of non-residents, if delay in exercise of power is for valid and bona fide reasons

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In brief

The Allahabad High Court (HC), in a recent case, upheld the principle that a show cause notice needs to be issued within a reasonable time in the absence of any limitation in section 201 of the Income-tax Act, 1961 (the Act). However, the HC has held that a reasonable time would depend upon the facts of each case and could not be quantified or prescribed by judiciary, which has not been prescribed by the legislature in its wisdom.

In detail

Background

- In this case¹, the taxpayer, a resident company, purchased an urban land from the vendors (there were five co-owners of the property purchased) by executing a sale deed in financial year 2005-06.
- One co-owner of the property was a non-resident Indian (NRI). As the NRI had not disclosed the status of residence, no tax was deducted by the taxpayer on the sale consideration paid to the NRI vendor.
- The taxpayer filed the return of income disclosing

aforesaid purchase of the property. During the course of assessment proceedings of the taxpayer, the Tax Officer (TO) observed that one co-owner of the property was an NRI and liable to pay capital gain. Accordingly, a notice under section 148 was issued to such NRI.

- The TO passed the assessment order under section 144 read with section 147 of the Act in respect of the NRI taxpayer. The taxpayer preferred an appeal before Commissioner of Income-tax (Appeal) [CIT(A)], which was allowed by the CIT(A). However, the

CIT(A) also directed the TO to explore the possibility to recover tax from the purchaser of property, as tax was required to be withheld under section 195 of the Act while making payment to the NRI taxpayer.

- On subsequent appeal to the Income-tax Appellate Tribunal (Tribunal), the order of the CIT(A) was confirmed and left it open for the revenue authority to pursue any other remedy.
- In view of the above, after almost 10 years from the date of execution of sale deed and six and half years from the date of assessment

¹ Misc. Bench No. - 1088 of 2016 (Allahabad HC)

order, the TO issued a show cause notice to the taxpayer under section 201(1) and 201(1A) of the Act, alleging non-withholding of tax under section 195 of the Act on the payment of sale consideration.

- Aggrieved, the taxpayer filed a writ petition before the HC.

Issues before the High Court

- Whether the notice issued by the TO was patently without jurisdiction and renders all subsequent proceedings also without jurisdiction.
- Whether there was any limitation of period that could be applied in respect of proceedings under 201(1)/ (1A) of the Act.

Taxpayer's contention

- Section 201 does not prescribe a time limitation for initiating the proceedings in the case of non-resident deductee and deeming the deductor to be a "taxpayer in default". However, the proceedings should have been initiated within a reasonable time period, and which should not have been beyond four/ six years prescribed in case of 147 proceedings for reassessment.
- The taxpayer also placed reliance on the Delhi HC ruling in the case of NHK Japan Broadcasting Limited² wherein it was held that if there was a time limit for completing the assessment, then the time limit for initiating the proceedings under section 201 of the Act must be the same, if not less.

Revenue's contention

- The limitation, if not

prescribed in statute, could not be read therein, particularly when it could not be said that some right had been accrued to the taxpayer and exercise of power under section 201 would result in unsettling those rights. Hence, it was not a case where this enabling power, if exercised by Revenue, must be denied on the ground of limitation when in the nature of power, the legislature had not provided for the same.

High Court's ruling

- The HC referred to the various decisions of the Apex Court and HCs, wherein the court considered the absence of any limitation period in respect of payments to non-residents, for the purpose of section 195 read with section 201, held that proceedings could be initiated within reasonable time.
- The facts of the case under consideration show that Revenue first explored the possibility of recovering the entire tax from the person ultimately liable to pay tax, as the taxpayer was only a "taxpayer in default" by not withholding tax on the payment made to the NRI, but the actual liability of payment of tax was on the NRI. It was only when the aforesaid probability was explored and failed did Revenue exercise their power under section 201 (1) and 201(1A).
- It could not be said that Revenue, in this case, was guilty of undue and unreasonable delay. It has continuously prosecuted the

matter, which has remained pending from one authority to another and after completion of such proceedings against the NRI and having failed to realise any amount of tax, power has been exercised under section 201(1) and 201(1A) of the Act.

- With regard to reliance by the taxpayer on the Delhi HC decision², HC stated "we do not impose a fixed time and prescribe a period of limitation, which had not been prescribed by the legislature in its wisdom. Such legislative action, by way of judicial precedent, in our view, would not be appropriate exercise of judicial review under Article 226 of the Constitution".

The takeaways

As there is no time limit prescribed under section 201 of the Act in case of payments made to non-residents specifically, this ruling has the potential to stir a debate on the fixation of time for limitation period, as against the earlier court rulings providing guidance on time limitation in case of non-residents.

The principle laid by this ruling may be applied depending upon the peculiar facts of the case as it states that the limitation period would depend upon the facts of the each case and cannot be quantified.

Let's talk

For a deeper discussion of how this issue might affect your business, please contact your local PwC advisor

² CIT v. NHK Broadcasting Limited [2008] 305 ITR 137 (Delhi)

Our Offices

Ahmedabad

1701, 17th Floor, Shapath V,
Opp. Karnavati Club,
S G Highway,
Ahmedabad – 380051
Gujarat
+91-79 3091 7000

Hyderabad

Plot no. 77/A, 8-2-624/A/1, 4th
Floor, Road No. 10, Banjara Hills,
Hyderabad – 500034,
Telangana
+91-40 44246000

Gurgaon

Building No. 10, Tower - C
17th & 18th Floor,
DLF Cyber City,
Gurgaon – 122002
Haryana
+91-124 330 6000

Bengaluru

6th Floor
Millenia Tower 'D'
1 & 2, Murphy Road, Ulsoor,
Bengaluru – 560 008
Karnataka
+91-80 4079 7000

Kolkata

56 & 57, Block DN.
Ground Floor, A- Wing
Sector - V, Salt Lake
Kolkata – 700 091,
West Bengal
+91-033 2357 9101/
4400 1111

Pune

7th Floor, Tower A - Wing 1,
Business Bay, Airport Road,
Yerwada, Pune – 411 006
Maharashtra
+91-20 4100 4444

Chennai

8th Floor
Prestige Palladium Bayan
129-140 Greams Road
Chennai – 600 006
Tamil Nadu
+91 44 4228 5000

Mumbai

PwC House
Plot No. 18A,
Guru Nanak Road (Station Road),
Bandra (West), Mumbai – 400 050
Maharashtra
+91-22 6689 1000

For more information

Contact us at
pwctrs.knowledgemanagement@in.pwc.com

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