

TAX COLLECTION AT SOURCE – ELP NEWS ALERT

Tax collected at source (TCS) on sale of goods [Section 206C(1H)]

Analysis of the newly introduced provisions					
Effective date of applicability	October 1, 2020				
Persons liable to collect TCS	<p>Conditions required to be satisfied for applicability of TCS:</p> <ul style="list-style-type: none"> ▪ Seller is a person whose total sales, gross receipts or turnover from the business carried on by him exceed INR 10 crore during the Financial Year (FY) immediately preceding the FY in which the sale of goods is carried out; ▪ Seller is not a person notified by the Central Government; and ▪ Consideration received for sale of goods during the FY from the buyer is in excess of INR 50 lakhs 				
Exceptions	<ul style="list-style-type: none"> ▪ Goods covered under Section 206C(1) ▪ Export sales ▪ Sale of motor vehicles of value exceeding INR 10 lakhs ▪ Dealer for remittances under Liberalized Remittance Scheme (LRS) ▪ Sale of overseas tour package by tour operator ▪ Cases where the buyer is liable to deduct and has deducted TDS 				
Meaning of buyer	<p>A person who purchases any goods, but does not include:</p> <ul style="list-style-type: none"> ▪ Central Government, a State Government, an embassy, a High Commission, legation, commission, consulate and the trade representation of a foreign State; ▪ A local authority; ▪ A person importing goods into India; or ▪ Any other person notified by the Central Government. 				
Time of collection	Time of receipt of such amount from the buyer				
Rates of TCS	<table border="1"> <thead> <tr> <th>General cases</th> <th>Failure to furnish PAN or Aadhar number by buyer</th> </tr> </thead> <tbody> <tr> <td>0.1% of the sale consideration exceeding INR 50 lakhs*</td> <td>1% of the sale consideration exceeding INR 50 lakhs</td> </tr> </tbody> </table>	General cases	Failure to furnish PAN or Aadhar number by buyer	0.1% of the sale consideration exceeding INR 50 lakhs*	1% of the sale consideration exceeding INR 50 lakhs
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<p>*In view of the relaxations provided by The Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Bill, 2020, the above rate is reduced by 25% for the period from October 1, 2020 to March 31, 2021. The effective rate for such period would be 0.075%</p>					

ELP Comments

- **Liability to collect TCS:** Generally, any person responsible for collecting TCS under Section 206C of the Income-tax Act, 1961 (IT Act), who fails to collect the whole or any part of TCS shall be deemed to be an assessee in default. However, in case of Section 206C(1) and 206C(1C) of the IT Act, such person would not be treated as assessee in default if such buyer has appropriately discharged its liability of tax while computing its total income and filing return of income. The above exception

is not available in case of Section 206C(1H) of the IT Act and thus, discharge of liability by the buyer will not absolve the seller of his liability to collect TCS from the buyer.

- **Credit of TCS:** As per Rule 37-I of the Income-tax Rules, 1962, credit for TCS shall be available in the assessment year in which the income is assessable to tax. However, in case of TCS under Section 206C(1G) and Section 206C(1H), credit for TCS shall be available in the assessment year relevant to the previous year in which such tax is collected.
- **Interplay between Goods and Services Tax (GST) and TCS:** As discussed above, the seller is required to collect TCS @ 0.1% on the amount of consideration received from the buyer. This raises an ambiguity as to whether the TCS should be calculated on the price inclusive or exclusive of GST. In this regard, reference may be drawn to the Frequently Asked Questions (FAQs) issued by the Central Board of Direct Taxes (CBDT) on the erstwhile TCS provisions under Section 206C(1) of the IT Act, wherein it was clarified that TCS would be collected on the amount inclusive of GST. Additionally, where the intent of the legislature is to exclude any specific element while computing the levy/tax prescribed under the IT Act, specific notifications/circulars are issued by the authorities to that extent, such as CBDT vide circular No. 23/2017 dated July 19, 2017 had clarified that GST component should be excluded while computing withholding taxes. Accordingly, TCS should be calculated inclusive of GST.
- **Sale to Special Economic Zone (SEZ) Units/Export Oriented Units (EOUs):** Since export of goods is excluded from the ambit of TCS under Section 206C(1H) of the IT Act, a question arises whether sales made to EOUs/SEZs would be deemed as exports and will be exempt from TCS? Upon bare reading of the provision of Section 206C(1H), goods being exported outside India have been excluded from the levy of TCS and accordingly, only actual exports out of India may be excluded from the levy of TCS and sales made to EOUs/SEZs although deemed as exports may fall under the purview of TCS. In this regard, reference can also be drawn to a Gujarat High Court ruling in case of Essar Steel Limited¹ wherein Court held that unit located in SEZ is one located within India and therefore, supplies made to such a unit cannot be considered as goods exported from India.
- **Scope of the term 'Goods':** Section 206C(1H) of the IT Act is applicable on sale of 'Goods'. However, the term 'Goods' has not been defined in the IT Act and accordingly, applicability of TCS on sale of capital goods, stock, securities, etc. may lead to divergent views. Reference may be made to the definition of 'Goods' under different legislatures. However, there are different inclusions and exclusions within scope of 'goods' under various laws. For instance, definition of goods under Sale of Goods Act includes 'stock and shares' but definition of goods under GST laws excludes securities. In the past, courts have referred to the Sale of Goods Act, 1930 to arrive at the meaning of 'Goods' for the purposes of Section 80HHC of the IT Act. However, a clarification in this regard by the CBDT is much required to avoid practical difficulties, especially in case of transactions in shares and securities.
- **Return of goods:** Issues may arise in case where TCS is already collected by the seller in a particular FY and the buyer returns certain goods in the subsequent FY. While the seller may adjust the additional TCS paid against future levies, however, absence of any specific rules in this regard may lead to complications.
- **Recovery of bad debts:** Another issue which may arise is on applicability of TCS when the seller treats whole or any part of the sale as bad debt and subsequently recovers some portion of that bad debt. Since the amount realized from bad debt recovery formed part of sales consideration, the seller may be required to collect TCS thereon.
- **Applicability in specific cases:**
 - **Composite supply of goods and services:** There is an ambiguity on the amount on which taxes would be required to be collected in case of composite supply of goods and services. For instance, in case of sale of equipment with installation under composite invoice; OR contract for repairs and maintenance to machinery which involve both service and components sale. In such cases, where the buyer deducts TDS, the seller may not be liable to collect TCS as per second proviso to Section 206C(1H). In this regard, if a conservative view is adopted by the seller then this may lead to

¹Special Civil Application No. 9656 Of 2008

possible overlapping of both TDS and TCS where buyer deducts TDS on such composite contracts and seller also collects TCS on such contracts.

- **Goods sold on CIF basis:** Whether while determining the taxable value, sale value to be considered as inclusive of CIF? The sale value inclusive of CIF is adopted while charging GST. Accordingly, similar view may be adopted wherein the TCS may be levied on value inclusive of CIF.
- **Sale of software:** From the bare reading of the provisions, it is unclear whether TCS would apply on sale of software. Applicability of TCS provisions on sale of software would depend on the fundamental nature of transaction and whether it can be treated as goods. In this regard, following are the possible arguments:
 - o The tax authorities may argue that the term 'goods' has not been defined under income-tax. Therefore, the meaning of the word has to be understood in common parlance. Supreme Court in case of Tata Consultancy Services² in the context of sales tax held that software incorporated on a media, would be goods and therefore, liable to sales tax.
 - o However, as a counter, one may argue that computer software is treated as royalty for the purpose of Section 9(1)(vi) of the IT Act and hence, it shall fall within the ambit of TDS under Section 194J of the IT Act. Considering that TCS under Section 206C(1H) is not applicable in cases where the buyer is liable to deduct and has deducted TDS, such provisions may not apply in case of software sale where the buyer withheld appropriate TDS while making payment for software sale to the seller.

A clarification in this regard by CBDT would be welcome.

- **Tri-patriate agreement for sale of goods:** Sale of goods under tri-patriate agreement involves three parties i.e., the seller, the buyer and a third party. In such a case, goods are sold and shipped by the seller to the buyer, whereas the sale consideration may be received by the seller from the third party that makes payment on behalf of the buyer. From bare reading of Section 206C(1H) of the IT Act, it appears that for TCS provisions to apply, the following conditions need to be satisfied:
 - o There should be sale of goods;
 - o Consideration should be received by the seller for sale of goods; and
 - o Such consideration should be received from the buyer.

Given the above, one may contend that the TCS collection mechanism fails in case of tri-patriate agreement considering the fact that the buyer and the person making payment are not the same.

- **B2B transactions:** There is no exemption from the applicability of TCS provisions under Section 206C(1H) for B2B transactions. This will cause hassle in normal trade in case of companies that deal with large number of dealers. Systems will have to be upgraded to ensure appropriate controls to track buyers to whom sales exceed INR 50 Lakhs in a year.
- **Accounting and invoicing issues:** TCS liability arises at the time of receipt of consideration. However, practically, the seller is required to indicate the amount of TCS on invoice in order to collect it from the buyer. This may lead to practical difficulty while raising the invoice and booking the accounting entry under accrual system of accounting.
- **Transitional provisions:** Practical challenges in threshold calculations in transactional FY 2020-21
- The TCS provisions are applicable with effect from October 1, 2020. The threshold of INR 50 lakhs is with respect to the previous year and accordingly, the threshold for applicability of TCS (i.e. consideration in excess of INR 50 lakhs) is to be computed from April 1, 2020. However, TCS will be required to be collected on consideration received post October 1, 2020. Tabulated below are few illustrations on applicability of TCS under Section 206C(1H) of the IT Act.

² [2004] 141 Taxman 132 (SC)

Consideration received till September 2020	Consideration received from October 2020 onwards	Applicability of TCS provisions
INR 60 lakhs	INR 10 lakhs	Yes (applicable on INR 10 lakhs)
INR 30 lakhs	INR 10 lakhs	Not applicable as consideration received during the FY is less than INR 50 lakhs
INR 35 lakhs	INR 20 lakhs	Yes. TCS to be collected on INR 5 lakhs (in excess of the threshold i.e. INR 50 lakhs)

TCS on Authorized dealer making remittances under LRS and overseas tour operators [Section 206C(1G)]

Analysis of the newly introduced provisions	
Effective date of applicability	October 1, 2020
Persons liable to collect TCS	<ul style="list-style-type: none"> ▪ Authorized dealer making remittance under LRS: Every person being an authorized dealer receiving an amount from the buyer who remits any amount or aggregate of the amounts exceeding INR 7 lakh in a FY out of India (towards any purpose other than purchase of overseas tour program package) under the LRS of the Reserve Bank of India (RBI) ▪ Overseas tour operator: Every person being a seller of an overseas tour program package receiving an amount from the buyer who purchases such overseas tour program package
Exceptions	<ul style="list-style-type: none"> ▪ Amount received by the authorized dealer for remittance not exceeding INR 7 lakh in a FY and towards any purpose other than purchase of overseas tour program package ▪ Amounts on which TCS has been collected by the seller ▪ Cases where the buyer is liable to deduct and has deducted TDS ▪ Cases where the buyer is the Central Government, a State Government, an embassy, a High Commission, a legation, a commission, a consulate, the trade representation of a foreign State, a local authority or any other notified persons
Time of collection	Earlier of: <ul style="list-style-type: none"> ▪ Time of debiting the amount payable by the buyer; or ▪ Time of receipt of such amount from the said buyer, by any mode

Rates of TCS	Person	Amount towards	General cases	Failure to furnish PAN by buyer
	Authorized dealer	Remittance of loan from a financial institution for the purpose of pursuing any education	0.5% of the amount or aggregate of the amounts in excess of INR 7 lakh remitted by the buyer in FY	5% of the amount or aggregate of the amounts in excess of INR 7 lakh remitted by the buyer in FY
		For other purposes	5% of the amount or aggregate of the amounts in excess of INR 7 lakh remitted by the buyer in a FY	10% of the amount or aggregate of the amounts in excess of INR 7 lakh remitted by the buyer in a FY
Overseas tour operator		5% of the amount received from the buyer	10% of the amount received from the buyer	
Meaning of authorized dealer	A person authorized by the RBI under Section 10(1) of the Foreign Exchange Management Act, 1999 (42 of 1999) to deal in foreign exchange or foreign security			
Meaning of overseas tour programme package	Any tour package which offers visit to a country or countries or territory or territories outside India and includes expenses for travel or hotel stay or boarding or lodging or any other expenditure of similar nature or in relation thereto			

ELP Comments

- **Liability to collect TCS:** As discussed in case of Section 206C(1H), discharge of liability by the buyer will not absolve the seller of his liability to collect TCS from the buyer.
- **Increase in investment cost:** The levy of TCS on foreign remittances may impact Indian resident investors who are investing in overseas stocks, bonds and property as it increases the overall costs of overseas investing.
- **Non-applicability in certain cases:** Since the LRS is applicable to residents, all transactions undertaken by the NRIs, such as NRO to NRE, repatriation, purchase of foreign currency by NRIs during their visit in India etc., should not fall under TCS. Additionally, the LRS scheme is not available to corporates, partnership firms, HUFs and trusts and hence, TCS provisions in relation to remittance outside India shall not apply to them.
- **Threshold:** The limit of INR 7 lakh is applicable per Authorized dealer and such Authorized dealer must keep track of the transactions per buyer. The buyer may be permitted to purchase foreign exchange from various dealers and take benefit of the threshold of INR 7 lakh for transactions undertaken with each dealer independently. The buyers may utilize the above loophole to their advantage.
