

FAST FACTS BULLETIN

■ Vol. 3

■ Issue 5

■ May 4, 2007

■ Pages 8

■ Price Rs. 5

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Applicability of Secondary and Higher Education Cess.

The Finance Act 2007 has introduced an additional surcharge, called the "Secondary and Higher Education Cess", for the purposes of the Union. The rate of this surcharge is one per cent of income-tax and surcharge (not including the Education Cess on income-tax).

This additional surcharge is to be levied in cases

- where tax has to be deducted at source,
- advance tax is to be computed
- or income-tax is to be charged in certain cases during financial year 2007-2008.

The budget provisions become applicable

- on the passing of the Budget date.
- they shall be effective from the dates as specified in the Act thereon
- and shall be in force after the Finance Act gets the Presidential ascent.

The interpretation of the enactment of Act becomes crucial in case of retrospective amendments.

Effective date of applicability

The budget is passed before the first instalment of advance tax becomes due, hence there is no confusion as to the rates. The problem happens in deducting tax at source, which starts from 1st April itself.

This situation has given rise to the question as to whether the "Secondary and Higher Education Cess", is applicable for the Tax Deduction At source between April 1, 2007 and the presidential ascent to the Finance Act 2007.

- If you carefully go through the provision and interpret the law it is clear that "Secondary and Higher Education Cess" is applicable w.e.f. 1-4-2007.
- Firstly the explanatory statement to the Finance Bill 2007 is very clear that "Secondary and Higher Education Cess" is applicable for the Financial year 2007-08, as it is evident from the notes on clauses which says "is to be computed or income-tax is to be charged in certain cases during financial year 2007-2008."
- The Finance Bill Chapter II says that the "Secondary and Higher Education Cess" is applicable for all rates of taxes for the Assessment year 2008-09. Clause 12 which says: "The amount of income-tax as specified in sub-sections (4) to (10) and as increased by a surcharge shall be also increased by an additional surcharge for purposes of the Union, to be called the "Secondary and Higher Education Cess on income-tax", calculated at the rate of one per cent of such income-tax and surcharge" The clauses

mentioned are the rates of taxes which are applicable for the whole of the financial year.

- If we go back to the history we can find that when the surcharge was introduced in 2002 Finance Bill, there was a specific provision that the same is applicable w.e.f. 1-6-2002. In the current case there is no mention as to when the "Secondary and Higher Education Cess" is applicable. When there is nothing in the contrary the applicability shall be for the whole financial year.

Different scenarios

What if not considered till presidential ascent

- Let us analyse the cases where "Secondary and Higher Education Cess" is not deducted on the payments between April 1, 2007 and the presidential ascent of the Finance Act 2007.
- In such case you are not absolved of the liability of deducting tax at source when the Act becomes applicable for the whole assessment year.
- Only one alternate left with you shall be to deduct the difference. This is possible only in case of running parties, not in case of one off transaction. In such case the payer shall be in default for short deduction of tax at source.

What if the cess is removed

- One more question that may arise is as to what happens in the event of "Secondary and Higher Education Cess" is deleted in the Finance Act, 2007?
- In such an unlikely event there is a case of excess deduction of tax
- The Assessee shall not be considered in default if excess tax is deducted at source.

Applicability on service tax

Comparing the TDS with Service Tax will lead to more confusion. In the case of Service Tax you are required to collect the Service Tax at the rates in force on the day of providing service. Unless the Act is passed "Secondary and Higher Education Cess" does not become the rates in force in that case. This applicability has nothing to do with the Assessment year as in the case of Income Tax Act.

Conclusion

To conclude the "Secondary and Higher Education Cess" should not be confused with any other provisions, and all are advised to deduct tax at source at applicable rates including "Secondary and Higher Education Cess". ■

Issue: Deduction u/s80IB in respect of housing Project

Laukik Developers v. DCIT, circle-3, Thane (W) { 105 ITD 657(Mum)}

In this case, assessee developed housing cum commercial project in the A.Y.2002-2003. The tribunal noted that local authority approved the project as housing cum commercial project since it constructed 3,143 S.Ft. for shops in the project. Hence It did not meet the condition as pure housing project and deduction u/s80 IB was denied to the assessee. Even Tribunal refused to allow proportionate deduction relating to the residential area constructed for the reason that project needs to be housing project only.

Issue:- Taxability of Goodwill

Alankar Business Corporation Ltd., v. DCIT, Company Circle I(3)Chennai { 105 ITD 629(Chennai)}

The company entered into agreement to sell goodwill on 28-2-1999 and received the consideration. However it was shown as advance payment in view of the fact that other business was sold by agreement dated 27-7-1999 and the same was confirmed by the appropriate authority later on. Hence "A" offered the capital gain on sale of goodwill in the A.Y.2002-2003. The Dept did not accept the contention and taxed it in the year of receipt of amount. The Tribunal ruled that substance of the agreement needs to be looked into and not the form of agreement. The advance receipt of amount was crystallized once other assets were sold hence assessee has rightly offered the income in the year in which other assets were sold.

Issue: Deductibility of expenses u/s14A

ACIT v. Tamil Nadu Silk Producers Federation Ltd.{ 105 ITD 623(Chennai)}

The Tribunal held that department can not deny deduction of expenses incurred on income which is eligible for deduction under chapter VI-A (Section 80A to 80U) in as much as such income goes in to computation of total income thereafter deduction under chapter VIA is allowed. Whereas Section 14A speaks about restriction of expenses incurred in relation to exempt income that does not go into the computation of total Income.

Issue: Maintainability of order u/s 263

Colorcraft Kashmirira Ceramic Compound v.ITO ward-4(4) Thane{ 105 ITD 599(Mum)}

In this case , the Tribunal observed that if CIT issued show cause notice to invoke section 263 for any order being erroneous and prejudicial to the interest of the revenue, he ought to have passed order on the points covered in the show cause notice. If he deviates from the show cause notice and passes order on different issues, that order is not sustainable under law.

However Tribunal endorsed the view of dept. that mere supply of information by assessee would not debar CIT for not exercising the provision of section 263 of the Act. If A.O. did not make enquiry on the materials furnished before him by the assessee in order to assess as to whether the claim of the assessee is correct or not. The

CIT is empowered to pass order u/s 263 of the Act.

Issue: Rejection of books of Accounts u/s145 of the Act

ITO, Ward 2(5),Rajkot v. Girish M. Mehta { 105 ITD 585 (Rajkot)}

In his case, Tribunal held that before rejecting books of accounts, department has to prove that accounts are unreliable, incorrect or incomplete. When accounts are regularly maintained in the ordinary course of business, duly audited under the provisions of the Act and free from any qualification from auditors , should be taken as correct . If department needs to enhance the gross profit margin , first it should need to satisfy the conditions of section 145 with regard to specific defects in the accounts . In the absence of any proof of the falsity or defects in the accounts, department. can not make addition on account of lower G.P. Margin declared by the assessee.

Issue: Slump Sale u/s 50B, Disallowance of Interest u/s14A

Zuari Industirs Ltd., v. ACIT, Circle-2, Margao{ 105 ITD 569(Mum)}

The Tribunal decided that net worth of undertaking in case of slump sale can either be positive or nil in case of liabilities exceeds depreciable values and book value of other assets. The Members did not accept the contention of department that negative net worth ought to be added in the sale consideration in case of slump sale of undertaking.

As regards disallowance of interest in view of investment made in shares whose dividend income thereof is tax free. The Tribunal held that onus is on the department. to prove that any expenditure was incurred for earning tax free income. If department can not prove by identifying the nexus between the borrowed fund and investment thereof in investment which generates tax free income, the same can not disallowed u/s14A of the Act.

Issue: Deemed Dividend u/s 2(22) (e) of the Act.

ACIT. Circle I(1), Trichur v. Smt. Lakshmikutty Naryan { 105 ITD 558(Cochin)}

The tribunal observed that if there is an outflow of money from the company to shares holders who holds more than 10% shares therein, and merely book entry is passed and debited his accounts. In this event, there is no tax liability with regard to deemed dividend u/s2 (22) (e) of the Act.

Issue: Speculation loss u/s73

ACIT, circle 4(3) Mumbai v. Sucham Fin.&Investment(1) Ltd.{ 105 ITD 353(Mum)}

The "A" was engaged in the only business of purchase and sale of shares. The " A" disclosed certain loss on trading of shares where delivery was not taken and certain profit on trading of shares where delivery was taken. The Tribunal held that entire business will fall within the ambit of explanation to section 73 of the Act. Therefore entire profit and loss will be merged and resultant profit after set off loss of non delivery based transaction will be liable for taxation. ■

New Tax Return Forms for AY 2007-08

The Central Board of Direct Taxes is introducing new series of forms for filing of income tax return for the assessment year 2007-08

The Forms for Return of Income are assessment year specific. For the assessment year 2007-08, the eight Return Forms under a new series are :

Individuals

ITR-1	Having only salary and interest income
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Individuals / HUFs

ITR -2	Having income from any source except income from business or profession
ITR -3	Partners in Firms and not having proprietary business or profession
ITR -4	Having proprietary business or profession

Firms/AOP/BOI

ITR -5	Combined form of return of income and fringe benefits
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Companies

ITR -6	Combined form of return of income and fringe benefits
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Charitable trusts, political parties and other non-profit organizations.

ITR -7	Combined form of return of income and fringe benefits
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Standalone return of FBT

ITR -8	for persons who are not liable to file return of income but are liable to file return of fringe benefits
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Return Verification Form

ITR V	Where the data of the Return of Income/Fringe Benefits in Form ITR-1, ITR-2, ITR- 3, ITR-4, ITR-5, ITR-6 & ITR-8 transmitted electronically without digital signature]
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Annexure less forms

- All these Forms (except Form ITR-7) have been designed as annexure-less so as to make them amenable for electronic filing.
- The only exception is ITR-7 which will have annexures.

Mandatory electronic filing

- Since last year, electronic filing has been made compulsory for corporate tax-payers.
- For assessment year 2007-08, it would be mandatory for firms liable to tax audit under section 44AB to file their returns electronically.
- Corporate taxpayers and such firms may either file their return electronically under digital signature or may transmit the data of the return electronically and thereafter submit a one page verification Form ITR-V which contains a summary of the return transmitted electronically.
- All other categories of taxpayers (other than charitable trusts, institutions, etc.) will have the option to file the return in a paper form or electronically, as mentioned above, or in a bar-coded return form.

Other Important Points

- Last year, the Government had introduced a cash flow statement for Individuals and HUFs. However, in response to representations against the cash flow statement, the same has been withdrawn.
- In the new form, assesses will not be required to file any annex, including Form 16 issued by the employer, which had become an integral part of filing tax returns
- The new forms also incorporate details of Tax Return Preparer. This scheme was recently launched.
- Individual and HUF taxpayers would now be required to furnish only information with regard to transactions which are reported through Annual Information Returns (AIR).
 - Cash deposits of over Rs 10 lakh in savings accounts
 - credit-card payments of over Rs 2 lakh,
 - purchase of mutual funds worth Rs 2 lakh,
 - purchase of company bonds and debentures worth over Rs 2 lakh,
 - purchase of shares of company worth over Rs 1 lakh,
 - purchase of property worth over Rs 30 lakh and
 - purchase of RBI bonds by an individual worth over Rs 5 lakh in the financial year

Formal Notification awaited

- The new forms are available on the Income Tax Department's website <http://www.incometaxindiaefiling.gov.in>.
- Government proposes to take the views of the Institute of Chartered Accountants of India on these forms. In the meanwhile taxpayers have been advised to familiarize themselves with the new forms. ■

In Brief

Income Tax

Clarification regarding new Form 16/ 16A

- Central Board of Direct Taxes had issued a Notification vide S.O. 455 (E) dated 26th March, 2007 prescribing new Form No.16 and Form No.16A for issuing TDS Certificate .
- One of the columns in each of these Forms requires mentioning 'Acknowledgement Nos. in respect of all Quarterly Statements of TDS under sub-section (3) of section 200 as provided by TIN Facilitation Centre or NSDL website'.
- It was pointed out that the deductor will not be able to give the Acknowledgement No. in respect of Quarterly Statements for the fourth quarter as the TDS certificates 16 for TDS on salaries and 16A for consolidated TDS certificate in respect of other TDS payments are issued by 30th April whereas Quarterly Statements for the last quarter, i.e. the fourth quarter, are allowed to be furnished on or before 15th of June.
- Now an explanation has been issued on April 25th mentioning that
 - o Wherever fourth quarter return has been submitted before issuing TDS certificate, the same should be mentioned. The reason being that fourth quarter return can be issued any time after 1st April and 15th June is the last date.
 - o Wherever the same is not submitted, it is suggested to mention "Not Available as the last Quarterly Statement is yet to be furnished"
- The explanation however is silent about monthly TDS certificate

Central Sales Tax

The Taxation Laws (Amendment) Act, 2007 has been notified and the same has taken effect from April 1.

Inter-state Sale with Form C

- The CST rate for inter-State sale to registered dealers has been reduced from 4 per cent to 3 per cent against Form C with effect from April 1.
- Section 8 has been amended to provide or issue of notification for reducing the tax rate. Hence from next year onwards, the Government will issue notifications for reduction of CST.

- There is no change in the position that if the local VAT rate in the State of the selling dealer is less than 3 per cent, then the local rate (2 per cent or 1 per cent) will apply to the inter-State sale transaction with Form C.

Inter-state Sale without Form C

- Until March 31, 2007, the CST rate for inter-State sale to persons other than registered dealers (or inter-State sale without Form C) was 10 per cent or the applicable local VAT rate, whichever is higher. Thus, the CST for sale to persons other than registered dealers was generally at a minimum of 10 per cent.
- The concept of minimum of 10 per cent CST has now been removed.
- On and from April 1, 2007, the CST for sale to persons other than registered dealers would be equal to the local VAT rate applicable to the goods in the State of the selling dealer which may be either 4 per cent or 12.5 per cent.

Form D removed

- Till March 31, 2007 the rate of CST on inter-State sale of goods to government/government departments was 4 per cent or the lower applicable local VAT rate, against issue of Form D.
- On and from April 1, 2007, there would be no special treatment for inter-State sale to government/government departments as the concept of issue of Form D by the Government has been removed.
- Section 6(2) of the CST Act has been amended to remove the facility of issue of Form D in an in-transit of sale transaction to the Government.

Reserve Bank of India

- The Reserve Bank of India (RBI) has doubled an individual's limit to remit abroad from \$50,000 to \$100,000 in a year.
- Besides making investment in shares, real estate, foreign currencies and commodities, Indian residents can also send their children for to study in foreign universities
- To discourage foreign exchange inflow, RBI has reduced the ceiling interest rate on FCNR(B) deposits by half a percentage points to London Inter bank Offer Rate (LIBOR) minus 75 basis points. ■

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Do you have a question about Investment instruments and investment related tax issues ?

Email your queries to nkja@rediffmail.com.

Selected queries will be replied by CA N K Jain in next issue of Fast Facts Bulletin.

Service Tax Updates

New service tax return form

A new service tax return form has been notified. The new form ST3 has replaced old form ST3 with effect from 2nd April, 2007. The new form requires certain additional details, some of these are:

- whether assessee is large tax payer unit
- Premises code No.,
- money equivalent of considerations received/(paid) and charged in a form other than money,
- amount received as/ (paid to) and charged as pure agent
- service tax rate wise break-up of taxable value,
- adjustment of excess amount paid earlier and adjusted in this period under Rule 6 (3) of ST Rules, etc.

New form requires details of service tax computation of each category of taxable service to be given service wise but details of tax paid has to be given commonly for all taxable service.

Procedure for surrender of registration certificate

Commissioner of Service Tax Mumbai vide Trade Notice No. 3/2007 dated: 30th March, 2007 has clarified that, registered service provider who

- either opts for exemption of Rs. 8,00,000 or
- otherwise ceases to provide taxable services

may surrender his registration by furnishing an undertaking to the superintendent of Service Tax.

Abatement to tour operators

Vide Notification No. 15/2007 ST dated: 4th April, 2007 abatement of 60% has been provided to tour operator

- providing services in relation to transport of passengers from one place to another (other than services provided in relation to package tour)
- operating under a contract carriage permit issued by the appropriate transport authority
- for the period from 1st day of April 2000 and ending with the 4th day of February 2004

The abatement of 60% to such tour operator is already available from 5th February, 2004. ■

EMP Vs Bank FDRs

With the recent equity market volatility and rising interest rates, it is time to think and have an appropriate balance between equity and fixed income instruments consistent with one's risk profile and time horizon of the needs.

Fixed Maturity Plans (FMP)

FMPs are quite in fashion now a days - and they all tell you they're going to save you a lot more tax than bank fixed deposits (FDs). How?

FMPs are a kind of debt funds. Debt funds are simply those that invest in debt securities - like Govt. securities, corporate bonds, corporate rated deposits etc.

- Fixed Maturity Plans (FMPs) are debt funds that have a fixed term - usually 3 to 15 months, and
- are closed ended, meaning you can only buy in an NFO, not after that.

FMP Returns are not guaranteed, but usually indicative returns are reached. Why? Because they buy products at the same maturity level, and hold till maturity. So an FMP now may say indicative returns are 10% for a 370 day period, which involves them buying securities yielding 11% for the period, and holding till maturity. They charge you about 1% as management fees, so the return to you is 10%, pre tax.

Tax Advantage

Even if the interest rate goes up or down it doesn't change the yield for them (since they don't sell or buy the security). How do they give you lesser tax? Two ways:

1. Double indexation. The gains you make are indexed over two years (typical indexation rates are 5% a year) so that you make no gains according to the tax authorities. That involves buying, say, in March of one year and maturing in April of the next year. That gives you two financial years (since years are April-March) of holding, which means a typical indexation of 10%+ - so you make 10% or so on interest, and the government thinks you made nothing because of two years of inflation, so you pay no (or very little) tax.

2. Lower tax rate: All longer term debt fund dividends are taxed at 12.5% for individuals versus FD interest being at your marginal rate (say 30%). Note: short term debt that involves money market and call money is charged higher dividend rates. Also, capital gains for debt funds held over a year is only 10% (without indexation) or 20% with indexation.

Both these are significantly less taxing than FDs, where the interest is added to your income and taxed at your marginal rate.

Risk

What's risk with FMPs? Well, the interest rate is not fixed. You never know how much you'll eventually get. Second, there is usually some penalty for early liquidation (before maturity) that can actually erode your capital. If they put a 1.5% early exit load, and you want to exit in say a month, the NAV may not have moved enough to cover the exit load itself, so your capital also goes! This doesn't happen with FDs. ■

Checklist for Consumers

Some suggestions are given below for consumers, based on logical conclusion derived from the law and also from actual practice and trade norms. They can use these as a checklist for getting effective redressal of their grievances in the consumer court:

1. Always insist on bill/invoice for every purchase that is made. Cash payment, without bill/cash memo needs to be evidenced by a receipt of money. Payment made through account payee cheque or DD is a valuable piece of evidence of consideration for sale of goods or rendering of services. In today's scenario payment made through credit card is also documented.
2. Whenever a bill or cash memo is issued, read the instructions, if any, whereby the trader has tried to restrict his liability or obligation of receiving back returned goods.
3. The consumer should see that the goods supplied by the seller correspond with the description made by the seller in respect of its quantity, quality, measurement, specifications, number, as the case may be. If the sale is by sample, the goods should correspond to the sample in quality and standards. In case sale is by sample as well as description, the bulk should correspond to both. The consumer should also be vigilant against any tall claims and representations made by the seller for the purpose of promoting the sale of goods or services. These representations can take many forms such as falsely representing that goods are of a particular quality or standard or model when they do not possess the said characteristics or benefits or standard.
4. Ensure that all the warranty /guarantee certificates, instructions; terms and conditions and manuals are handed over by the seller at the time of sale.
5. Check the date of manufacture/packing and the date by which it will be "Best for Use" especially in food items. For medicines always check out for the expiry date. For canned foods see if the tin is bulging due to microbial infection.
6. Always insist on ISI marked goods. For food items like spices, flour, condiments etc. must be properly packed and sealed preferably with 'Agmark' certificate. Canned and bottled food like ketchup should bear the certification of Fruits Products Order (FPO). Consumer has a right to be protected from the invisible defects and even against goods purchased from govt. stores like FCI or the public distribution.
7. Ensure that the seller has title to sell the goods. For this it is advisable to purchase the goods from reputed shops.
8. Packed commodities have printed prices. Never pay any amount more than that.
9. If any food item is found adulterated, immediately approach the competent authorities for appropriate testing at the District, State and National Level.
10. In case of disputes, approach the District Forums with genuine, plausible, liquidated claims presented in brief but lucid manner supported by the documentary evidence.
11. On the date of admission of complaint, be prepared to answer all material questions related to the case.
12. Keep track of the dates fixed by the Forum.
13. Be punctual and attend all the dates in person, no matter a counsel is also engaged. Counsels have so many briefs to attend. There can be time constraint, be regular lest the complaint be dismissed in default or proceeded against *ex-parte*.
14. It is the evidence that is the basis of any judgment. Try not to load the court file with unnecessary paper and try to shorten the controversy with as much direct evidence available with you, in the first instance.
15. If you have to examine yourself as a witness, file an affidavit. For other witnesses it is better to take their consent prior to filing of complaint that they are going to support you, otherwise the witnesses may have to be summoned, and the trial delayed.

TRAI moves to curb unsolicited calls

As expected, Telecom Regulatory Authority of India (TRAI) has taken a step forward and released a finalised version of "The Telecom Unsolicited Commercial Communications Regulations, 2007."

These regulations are aimed at curbing the menace of unwanted calls from the telemarketers. However, these have not come into force as some clearance from RBI, Ministry of Communications and IT is awaited.

- TRAI proposes to set up a National Do Not Call (NDNC) Registry which will be a national database containing telephone numbers of the subscribers, who can opt not to receive Unsolicited Commercial Communications (UCC).
- The telecom service provider shall maintain a Private Do Not Call List, which will contain telephone nos. and other details of all such subscribers. Telephone nos. from this Private Do Not Call List shall be updated online by the operators to the NDNC.

- Telemarketers, who have been categorised as Other Service Providers (OSPs), will also have to register in the NDNC registry. They will submit online the calling list to the NDNC registry where the list will be scrubbed by excluding the numbers listed in the registry and scrubbed list will be online transferred back to the telemarketer for making calls.

On receipt of a complaint from a subscriber who has received a commercial call, though his number is registered in the NDNC registry, the Telecom Service Provider of the guilty telemarketer will be empowered to charge the higher tariff from the telemarketer who has made the call. This higher tariff can be Rs.500 to Rs.1000 per call. If a telemarketer violates the Regulation for the third time, the Telecom Service Provider shall be empowered to disconnect his telephone connections. Hopefully these Regulations will come into effect without any delay and provide the long-awaited relief to the consumers. ■



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