21st August 2018

Shri Sushil Chandra,
Chairman,
Central Board of Direct Taxes,
Ministry of Finance,
Government of India,
North Block,
New Delhi – 110 001.

Respected Sir,

Sub: Revised Tax Audit Report in Form 3CD for AY 2018-19 – recommendations soliciting immediate intervention

This communication is with reference to Notification No. 33/2018 dated 20th July 2018 wherein several amendments to the Tax Audit Report in Form 3CD have been notified.

At the outset, an important issue that is required to be addressed is the need for distinction between a "report" and a "certificate"; and in the above context, also the distinction between an audit report to be issued by the CA fraternity, an investigation report, as also a "certificate". Conceptually, there is an unfortunate mix up of these three very different aspects while enacting amendments to Form 3CD from time to time. While issuing an audit report, the auditor verifies the accounts and the particulars forming part of the report so as to opine that the details provided therein are true and correct to the best of his knowledge. On the other hand, an investigation report would entail an in-depth enquiry into the details with one of the objectives being discovery of issues that may not have been reported or which are not easily ascertainable. Since Form 3CD (an annexure to Form 3CA) is merely verified by the tax auditor, it cannot be continually amended so as to stretch the role of the tax audit professional to that of an investigator who passes value judgments on matters like impermissible avoidance arrangements and income chargeable to tax under section 56(2)(x) of the Income-tax Act, 1961 ('ITA').

We understand that representations on this front have also been made by various other organisations and therefore, to avoid duplication and with due respect for your valuable time, we have only covered the key issues that require immediate action.

1. Timeliness of the Notification/ amendments

Before providing suggestions regarding the amendments notified, we would like to highlight that the notification has been issued on 20th July 2018 (almost 4 months into the Assessment Year) introducing a host of major amendments and reporting disclosures for

AY 2018-19. Your Honour would appreciate that the time available to implement the revised Form 3CD is quite less so to enable the tax audit professionals to perform their obligations in a timely and effective manner. Even the Delhi High Court, in the case of Avinash Gupta vs Union of India ([2015] 378 ITR 137), had directed the CBDT/ Government to ensure that the forms prescribed for the audit report are made available on 1st April of the assessment year.

In view of the above, it is suggested that the amendments introduced by Notification No. 33/2018 (subject to the suggestions provided in the ensuing paragraphs) should be made applicable to AY 2019-20 instead of AY 2018-19.

2. Broadening the role and responsibility of tax audit professionals

As explained in the preamble, the role of a tax audit professional is to verify and certify the verifiable (numerical) particulars presented in Form 3CD and thereby, indirectly assist the revenue authorities in determining the taxable income of the tax payer. However, it would not be appropriate for tax audit professionals to pass value judgments on matters which is the prerogative of the revenue authorities.

It is suggested that the revised form be appropriately modified in consultation with the stakeholders.

Further to the above-mentioned high-level recommendations, suggestions regarding specific amendments have been covered below.

3. Insertion of Clause 30C – regarding "impermissible avoidance arrangement" ('IAA') referred to in section 96 of the ITA

Clause 30C requires determination of whether the tax payer has entered into an IAA and reporting of the nature of and tax benefit arising from such arrangement.

An IAA would attract General Anti-Avoidance Rules where such arrangements are purposefully designed with the intention of tax avoidance. Given the limited scope of work in the purview of tax audit professionals, it would not be possible for them to certify the existence of any such arrangement without a detailed investigation, and would result in unreasonable burden on the tax audit professionals. Moreover, it would be a subjective judgment and cannot be determined by a tax audit professional. In fact, considering that even an Assessing Officer would be required to approach the Approving Panel in order to characterise an arrangement as impermissible avoidance agreement, it would be practically impossible for a tax audit professional to comment on the same. Here, it may not be out of place to mention that an Approving Panel would be headed by a High Court judge. This being the case, it would be appreciated that a tax auditor would be expected to match the expertise of a judge in the context of passing a judgement on a highly subjective matter.

With respect to disclosure relating to provisions of GAAR, there are no objective criteria laid down in law to determine whether a transaction would be subject to GAAR and thus, there is lot of subjectivity involved therein. Further, the tax auditor not only has to determine the tax benefit arising to the tax payer but also has to determine the tax benefit

arising to all parties involved in the arrangement. It is very likely that the tax auditor would not have any professional connection with the other parties and the said parties could even be located in other countries. Therefore, in such cases, it would not be possible for the tax auditor to report these details.

We are happy to note that the CBDT has already deferred this clause upto 31st March, 2019. However, mere deferment will not ease the problems faced by tax auditors. It only serves as a temporary respite.

It is suggested that Clause 30C be appropriately modified so as to require the tax auditor to only report objective information that would be helpful for the revenue authorities in determining whether a particular arrangement falls within the purview of section 96.

4. Insertion of Clause 29A and Clause 29B – reporting on income chargeable under section 56(2)(ix) and section 56(2)(x) of the ITA

Clause 29A requires the auditor to certify whether any amount received is in the nature of income from other sources under section 56(2)(ix) or section 56(2)(x) of the ITA. In terms of section 56(2)(ix), which refers to forfeited sum of money, it would only be possible for the tax auditor to report the transaction in the year of forfeiture (and not the year of receipt) and even that would not be possible without using investigative techniques which would entail analysing every long-term outstanding.

In case of section 56(2)(x) of the ITA, given that the provisions are already ambiguous and subject to a host of varied views and interpretations, requiring a tax audit professional to determine whether a particular receipt is income chargeable under section 56(2)(x) is akin to expecting the tax auditor to pass value judgment on such transactions.

It is suggested that these clauses be modified so as to require only objective reporting of transactions.

5. Insertion of Clause 30A and Clause 43 – reporting required in cases where the time limit expires *after* the time limit for issuing tax audit report

Clause 30A requires reporting regarding a primary adjustment that may have been made in the previous year (i.e. FY 2017-18) in case of a tax payer. One of the reporting requirements is to confirm whether any excess money has been repatriated to India within the prescribed time limit i.e. 90 days from the end of filing the tax return (where the adjustment is made *suo motu* by the tax payer or as per the APA) or 90 days from date of assessment or appellate order (if accepted by the tax payer). In no case would the time limit of 90 days have expired for an adjustment made in FY 2017-18 before the time limit for issuing tax audit report. At best, the details can be provided regarding an adjustment made in FY 2016-17.

Similarly, Clause 43 requires reporting regarding the country-by-country report to be furnished under section 286 of the ITA in respect of international groups. One of the requirements is to confirm whether the said report has been furnished and the date of doing so. However, the time limit for furnishing the said report as per section 286(2) is 12 months from the end of the reporting accounting year. Thus, for reporting of accounting

year 2017-18, the time limit would expire only on 31 March 2019, which is after the due date for furnishing the tax audit report.

It is suggested that the clauses should be modified to correctly reflect the year in which the reporting is to be made.

6. Modification of Clause 34(b) – details of statement of TDS/ TCS

Prior to the amendment, Clause 34(b) only required reporting of whether a statement of TDS/ TCS has been furnished within the prescribed time limit. However, the modified form requires a very detailed reporting of all the statements of TDS/TCS, whether or not filed within the prescribed time limits. Moreover, it also requires a list of details/ transactions that may not have been reported in the statements filed. Such a requirement is impossible to be complied with by a tax auditor in cases where large quantum of transactions is involved. In any case, details of the transactions are provided in the TDS returns filed by the tax payers and therefore, repetition of such information is not warranted.

It is suggested that the amendment made to Clause 34(b) requirement be withdrawn and the earlier requirement be reinstated.

7. Insertion of Clause 44 – GST reconciliation of total expenditure

Clause 44 is a very detailed reporting requirement for break-up of total expenditure of entities, registered or not under the GST Act. Your Honour would appreciate that a tax auditor is required to conduct the tax audit based on the income-tax provisions in view of the auditing and taxation aspects. Reporting on matters pertaining to the GST law, which itself is in an evolving stage, would require specialised knowledge on the law. Every tax audit professional may not be in a position to certify such details given the limited time as well as expertise of the GST law.

In any case, GST Audit is provided under the law which will get underway soon but is expected to be completed only after Dec'18. In the interim, it is not prudent to expect the Tax Auditor to conduct audit of GST related figures.

Moreover, there are other discrepancies regarding the reporting period (since GST was introduced only in July 2017). For example, whether total expenditure is to be reported or an item-wise break up is required and whether capital expenditure is also to be included, etc.

We are happy to note that the CBDT has already deferred this clause upto 31st March, 2019. However, mere deferment will not ease the problems faced by tax auditors. It only serves as a temporary respite.

In view of the above, it is suggested that the reporting required under Clause 44 should form part of the GST audit and therefore, the said Clause should be deleted.

We humbly request your Honour to resolve the above issues at the earliest in order to avoid unnecessary hardship being caused to the taxpayers and the tax audit professionals.

Thanking you,

Yours sincerely,

Raj Nair
President,
IMC Chamber of Commerce and Industry

Sunil Gabhawalla
President,
Bombay Chartered Accountants' Society

CA. Chintan M. Doshi
President,
Chartered Accountants Association Ahmedabad

Rasesh Shah
President,
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Raghavendra Shetty
President
Karnataka State Chartered Accountants' Association

Gyanesh Verma
President
Lucknow Chartered Accountants' Society