

Tax Audit Series 19 – S. Nos. 36A - 39

Compiled by
CA. PRAMOD JAIN
B. COM (H), FCA, FCS, FCMA, LL.B, DISA, MIMA

Namaste

In series - 19 we would discuss S. Nos. 36A to 39 of Form 3CD. Reporting under S. No. 36A has been inserted w.e.f. 20th August 2018.

S. No. 36A : Whether the assessee has received any amount in the nature of dividend u/ (22)(e)? If yes, give details.

This clause has been added w.e.f. 20th August 2018.

Various aspects of section 2(22)(e) needs to be understood to report under this clause, and it includes:-

- Payment should be made by closely held company i.e., a company in which public are not substantially interested (including unlisted public company).
- Payment should be by way of advance or loan or the payment should be on behalf, or for the individual benefit, of the shareholder.
- Shareholder must be a person who is the registered / beneficial owner of shares holding not less than 10% of the voting power or to a concern (Company / Firm / HUF / etc.) in which such shareholder is having substantial interest i.e. 20% or more. For this purposes shareholder as an individual is to be considered and not along with his / her relatives.
- Dividend is deemed to the extent to which the company possesses accumulated profits on the date of giving loan / advance.
- The dividend taxable u/s 2(22)(e) is restricted to accumulated profits on the date of payment. Thus, the accumulated profits have to be determined as on the date of the payment. Further, if at any time earlier any amount has been taxed under any of the clauses of section 2(22) including clause (e), the accumulated profits will have to be reduced by the amount so taxed.
- Where the loan or advance is made by the closely held company to a concern, it is chargeable to tax in the hands of the shareholder and not in the hands of the concern till AY 2018-19.
- S. 2(22)(e) does not include any advance or loan made to a shareholder or the concern by a company in the ordinary course of its business, where the lending of money is a substantial part of the business of the company. Some of the decisions have held that `substantial part' would indicate 20% i.e. where 20% or more funds have been deployed in the business of lending money the test of substantial part will be satisfied.
- Various courts have held that trade advances in the nature of commercial transactions would not fall within the ambit of the provisions of section 2(22)(e). The CBDT has issued Circular No. 19/2017 (F.No.279IMisc.1140/2015I1TJ) dated 12 June 2017 accepting this position. The circular gives various illustrations and

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citation of judicial decisions. Such cases need not be reported as dividend under this clause.

- Few cases have also held that inter-corporate deposits are not loans.
- There are various cases in favour of assessee taking loan due to commercial expediency, etc. which the auditor should be aware of.

The auditor should:

- Obtain list of all loans / advances received during the year by the assessee to test it for applicability of s. 2(22)(e). In case the assessee has not received any such amount during the year, no reporting may be required under this clause.
- Where the assessee has received any loan or advance from any company, the auditor should obtain its list of shareholders to test 10% / 20% test as discussed above..
- He should also obtain the financial statements of that company to ascertain its accumulated profits.
- The auditor may not be able to determine the accumulated profits of the closely held company making the payment for various reasons. He may not have access to the records of such closely held company, etc. In such a case the auditor should include appropriate remarks in clause (3) of Form No. 3CA or clause (5) of Form 3CB, as the case may be, about the methodology adopted by him, which could be as under:
 - The assessee could not provide appropriate information / details to determine accumulated profits to enable us to report that the loan / advance received by the assessee is deemed dividend or not u/s 2(22)(e).
- He should also obtain from the assessee a certificate containing list of closely held companies in which he is beneficial owner of shares carrying not less than 10% of the voting power and list of concerns in which he has substantial interest.
- He should also obtain a certificate from the assessee giving particulars of any loans or advances received by any concern in which he has substantial interest from any closely held company in which he is beneficial owner of shares carrying not less than 10% voting power.
- If reliance has been placed on any judicial decision, a reference of the same may be given by the auditor as observations in clause (3) of Form No. 3CA or clause (5) of Form 3CB, as the case may be.

It may be noted that any payment made after 1 April 2018 which satisfies the conditions of section 2(22)(e), would be subject to DDT u/s 115-O in the hands of the company making the payment. However for AY 2018-19 it is taxable only in the hands of the shareholder.

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S. No. 37 - Whether any cost audit was carried out, if yes, give the details, if any, of disqualification or disagreement on any matter/item/value/quantity as may be reported/identified by the cost auditor.

- The auditor should ascertain from the management whether cost audit was carried out and if yes, a copy of the same should be obtained from the assessee.
- He has to take notes of the details of disqualification or disagreement on any matter/item/value/quantity as may be reported / identified by the cost auditor.
- The auditor need not express any opinion in a case where such audit is applicable but has not been carried out.
- In cases where cost audit which might be applicable but is not completed by the time the auditor issues his report stating that since cost audit is not completed and the cost audit report is not available with the assessee.
- The auditor should examine the time period for which the cost audit if any has been required to be carried out. Information is required to be given only in respect of such cost audit report the time period of which falls within the relevant previous year.

S. No. 38 - Whether any audit was conducted under Central Excise Act, 1944, if yes, then give the details, if any, of disqualification or disagreement on any matter/item/value/quantity as may be identified/reported by the auditor.

- The auditor should ascertain from the management whether any audit was conducted under the Central Excise Act, 1944 and obtain the copy of report for the same. He is not required to make any detailed study of such report, he only has to mention if any disqualification or disagreement on any matter/value/quantity was identified or reported by the auditor.
- The auditor needs to express an opinion if any excise audit was required to be conducted but not carried out yet.
- In case if excise audit was ordered but was not completed by the time the auditor had to give his report, then the same fact needs to be disclosed properly by the auditor that report was not yet available with the assessee.
- The auditor should examine the time period for which the excise audit was carried out. Information regarding the time period which falls within the relevant previous year needs to be disclosed.

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S. No. 39 - Whether any audit was conducted u/s 72A of the Finance Act, 1994 in relation to valuation of taxable services, if yes, then give the details, if any, of disqualification or disagreement on any matter/item/value/quantity as may be reported/ identified by the auditor.

- The auditor should ascertain from the management whether any audit was conducted u/s 72A of the Finance Act, 1994 and obtain the copy of report for the same. He is not required to make any detailed study of such report, he only has to mention if any disqualification or disagreement on any matter/value/quantity was identified or reported by the auditor.
- The auditor needs to express an opinion if any service tax audit was required to be conducted but not carried out yet.
- In case service tax audit was ordered but was not completed by the time tax auditor had to give his report, then the same fact needs to be disclosed properly by the auditor that report was not yet available with the assessee.
- The auditor should examine the time period for which the service tax audit was carried out. Information regarding the time period which falls within the relevant previous year needs to be disclosed.

I hope this document is of use to you. I thank *Ms. Diksha Plaha, Ria Agarwal and Bhumika Gakher* in assisting me to compile this part of the series. Your suggestions and comments would be highly appreciated

Best Regards

CA. Pramod Jain

B. COM (H), FCA, FCS, FCMA, LL.B,

DISA (ICAI), MIMA, INSOLVENCY PROFESSIONAL