

Instruction No. 1/2017
[F.NO.500/5/2016-APA-II],
Government of India
Ministry of Finance
Department of Revenue
(Central Board of Direct Taxes)
New Delhi the, 4th January 2017

To,

All The Principal Chief Commissioners of Income-tax

Subject: Double Taxation Agreement - India-Sweden Convention for Avoidable of Double Taxation and Prevention of Fiscal Evasion - Suspension of Collection of Taxes During Mutual Agreement Procedure (MAP)

Attention is invited to Article 26 of the India - Sweden DTAC, which provides for Mutual Agreement Procedure (MAP) between the Competent Authorities of India and Sweden for avoiding taxation which is not in accordance with the Convention. During the pendency of MAP, recovery of tax demand could lead to potential hardships for the taxpayers as tax demand is yet to attain finality. Considering the hardship faced by the taxpayers during the pendency of MAP, as well as for efficient management of collection of revenue, the Competent Authorities of India and Sweden have signed a Memorandum of Understanding (MoU) regarding suspension of collection of taxes during the pendency of MAP. In terms of the MoU, the collection of outstanding taxes in case of a taxpayer whose case is pending in MAP before the Competent Authorities of India and Sweden, would be kept in abeyance for a period of two years (extendable to a maximum period of five years through mutual agreement between the Competent Authorities of India and Sweden) subject to furnishing of a bank guarantee of an amount equal to the amount of tax under dispute and interest accruing thereon, as per the provisions of the Income-tax Act.

2. On receipt of a formal request for suspension of collection of outstanding tax from a taxpayer who is a resident of Sweden and where MAP has been invoked through the Competent Authority of Sweden, the Assessing Officers are required to keep the enforcement of collection of outstanding taxes in abeyance for a period of two years in respect of such taxpayers subject to fulfilment of the following conditions:

(i) the Foreign Tax and Tax Research I (FT&TR I) Division of the Central Board of Direct Taxes confirms the pendency of MAP; and

(ii) the taxpayer furnishes a bank guarantee to the Assessing Officer in the model draft format annexed to the MoU for an amount calculated in accordance with the manner indicated therein.

3. Further, the provisions of the MoU shall also apply to an Indian resident taxpayer in cases involving transfer pricing adjustments, where MAP has been invoked by the resident of Sweden through the Competent Authority of Sweden.

4. The effect of the MoU is that the furnishing of the bank guarantee should be treated as sufficient arrangement for exercising discretion by the Assessing Officer for extension of time limit for payment of taxes in terms of sub-section (3) of Section 220 of the Income-tax Act. The extension, however, shall subsist only for two years from the date on which communication from FT&TR I Division about the invocation/pendency of MAP is received by the Assessing Officer. This period of two years may be extended through mutual agreement between the Competent Authorities of India and Sweden and any such extension will be communicated to the Assessing Officer by FT&TR I Division of the CBDT. However, in no case shall the aggregate periods for which collection is suspended exceed five years.

5. In case the Competent Authorities of India and Sweden agree that there is no resolution possible, an intimation to this effect shall be given to the Assessing Officer who shall, thereafter, be entitled to enforce recovery of the taxes (including interest and penalty, if any). If the taxpayer fails to pay the taxes (including interest and penalty, if any), the Assessing Officer shall be entitled to invoke the bank guarantee. In case the time limit of two years has expired and no communication has been received from FT&TR I Division about MAP resolution, the Assessing Officer, before proceeding to making recoveries or invoking the bank guarantee, shall seek inputs from FT&TR I Division about the status of MAP in such cases. Recovery of taxes (including interest and penalty, if any) may only be proceeded with after getting confirmation from FT&TR I Division that no extension beyond two years has been granted through mutual agreement between the Competent Authorities of India and Sweden.

6. In cases where a resolution of dispute is arrived at by the Competent Authorities of India and Sweden after mutual consultation, the taxes (including interest and penalty, if any) payable by the Indian taxpayer shall be determined by the Assessing Officer in terms of such resolution, as per the procedure laid down in Rule 44H of the Income-tax Rules, 1962. After the revised notice of demand is sent to the taxpayer, the amount shall be recoverable from the taxpayer. In case the taxpayer fails to pay the demand, the bank guarantee so furnished shall be invoked after seeking the consent of the Indian Competent Authority, which shall grant the same after intimating its counterpart in Sweden.

7. The Assessing Officers as well as their controlling officers are advised to keep a close watch on the limitation of the bank guarantee furnished under the MAP. For this purpose, a control register should be maintained in the office of the Assessing Officers and the same may be periodically inspected by the jurisdictional Additional or Joint CIT and/or the jurisdictional Principal CIT or CIT.

8. A copy of the MoU, along with its Annexure containing the model draft format of the bank guarantee, is enclosed.

9. These instructions are issued under section 119 of the Income-tax Act and the same may be brought to the notice of all the officers in your charge.

MEMORANDUM OF UNDERSTANDING BETWEEN *THE COMPETENT AUTHORITY OF INDIA AND THE COMPETENT AUTHORITY OF SWEDEN* REGARDING SUSPENSION OF COLLECTION OF TAXES DURING MUTUAL AGREEMENT PROCEDURE

The Competent Authority of India

and

The Competent Authority of Sweden

Having regard to the hardship faced by the taxpayers during the pendency of a *Mutual Agreement Procedure*, under Article 26 of the Convention between the Government of the Republic of India and the Government of the Kingdom of Sweden for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on *income* and on *capital*, which was signed on 24th June, 1997 (the "Convention");

Having determined and agreed that efficient processing of Mutual Agreement Procedure ("MAP") cases will be facilitated by suspending collection of any amounts of tax, including also any related interest or penalties, for any taxable years which are the subject of MAP proceedings;

WHEREAS:

(A) The Competent Authorities have arranged and desired to agree that with regard to amounts of taxes covered under Article 2 of the Convention and potentially payable to the Government of India, the Assessing Officer will suspend collection in accordance with this Memorandum;

and

(B) The Competent Authorities have arranged and desired to agree that with regard to amounts of taxes covered under Article 2 of the Convention and potentially payable to the Government of Sweden, the Swedish Tax Authority will suspend collection in accordance with this Memorandum.

NOW THEREFORE, in consideration of the premises, covenants and conditions herein contained and in implementing this arrangement:

(1) The tax authorities of India and Sweden shall retain the right to demand security in appropriate cases, as deemed fit and necessary to avoid prejudicing the interests of their respective governments.

(2) In India, as security, a taxpayer shall provide an irrevocable Bank Guarantee issued by any scheduled bank, or by an Indian branch of a foreign bank approved by the Reserve Bank of India to carry out banking business in India, as per Annexure 'A' to this Memorandum.

(3) In Sweden, as security, a taxpayer shall, upon demand, provide an irrevocable Bank Guarantee issued by a bank that is authorized by the Swedish Financial Supervisory Authority or any other form of security deemed adequate by the Swedish Tax Authority.

(4) The amount, if any, for which security is demanded under paragraph (2) or (3) above, as the case may be, shall not exceed the amount of additional tax demanded by the tax authority requiring the security (aggregated for all the periods pending before the Competent Authorities), and, if applicable, as adjusted by the Assessing Officer in accordance with domestic laws, and subject to further adjustment for interest on these amounts calculated at the statutory rate on non payments.

(5) Collection of any interest or penalty levied from the concerned taxpayer, in relation to amounts suspended from collection under this Memorandum, shall also be suspended subject to paragraph (A). For the avoidance of doubt, interest, if appropriate, will continue to run while the collection is suspended.

(6) The Competent Authorities shall endeavour to either resolve or close the case within a period of two years from the date on which one Competent Authority notifies the other that the application from the Taxpayer(s) for assistance under the MAP has been received.

(7) The maximum period for which collection can be suspended under this Memorandum shall be two years unless extended by mutual consent by both the Competent Authorities. However, in no case shall the aggregate

periods for which collection is suspended exceed five years.

(8) Any draw-down upon a Bank Guarantee referred to in paragraph (2) or (3) above will be done after notification by one Competent Authority to the other about the completion of the Mutual Agreement Procedure, or of the time limit under paragraph (7), whichever earlier.

(9) In the event of a lapse of security under paragraph (2) or (3), the taxpayer shall be permitted to substitute another form of security under such paragraph, provided such substitution takes effect not less than 30 days prior to the lapse of the prior security. Such substitution will relieve the bank which provided the first Bank Guarantee from its obligations to the concerned Government of India or Sweden under that first security.

(10) The terms of this Memorandum may be reviewed by the Competent Authorities at anytime in the future upon the request of either party.

(11) This Agreement shall enter into force on the thirtieth day after the notification in writing by the Competent Authority of Sweden to the Competent Authority of India of the completion of the procedures required by its law for the entry into force of this Agreement. AVE AGREED as follows:

Dated at Stockholm, 7 February, 2013

For the Competent Authority of Sweden

For the Competent Authority of India

Annexure 'A'

To

The President of India acting through and represented by

[Designation],

Income Tax Department,

Ministry of Finance,

Government of India, New Delhi.

Bank Guarantee

Bank guarantee as security for keeping the recovery of Tax Demand in abeyance during the pendency of Mutual Agreement Procedure (MAP)

[Applicable in case of non-resident assesses, and Indian companies and other entities affiliated with Swedish companies, who have invoked the Mutual Agreement Procedure]

This Deed of Bank guarantee made this day of 20. . . , by [INSERT: Name and Address of Guaranteeing Bank] (hereinafter called "the Bank", which expression shall, unless excluded by or repugnant to the context, include its successors and assignees) to the President of India acting through and represented by [Designation], Income Tax Department, Ministry of Finance, Government of India, New Delhi (hereinafter called "the Government").

WHEREAS the Government has agreed that [INSERT: Name, Address, and permanent account number of the Assessee] (hereinafter called "the Assessee", which expression shall, unless excluded by or repugnant to the context, include its successors and assignees) shall furnish a Bank Guarantee in respect of a demand of Rs. [INSERT: Amount of Tax in dispute] for the assessment year(s) in lieu of which the recovery of

any part of such demand shall not be enforced until 30 days after the Assessing Officer receives written notice of the MAP Agreement between the Competent Authorities of the Governments of India and Sweden, and the Assessee will not be treated as in default for the above assessment year (s);

AND WHEREAS THE Bank has at the request of the Assessee agreed to execute these presents:

NOW THEREFORE THIS DEED WITNESSES AS FOLLOWS

In consideration of the Government agreeing to treat the Assessee as not in default for Rs. [INSERT: Amount of Tax in dispute, plus interest specified in paragraph (1) below] for the assessment year(s)

1. The Bank irrevocably guarantees and undertakes, for the term provided in paragraph (2) below, that the Bank shall indemnify and keep indemnified the Government to the extent of the said sum of Rs [INSERT: Amount of Tax in dispute] (Rupees [written text]) and interest accruing at the rate specified in the Income-tax Act of 1961 as amended from time to time, for non-payment of taxes on this amount after [INSERT date from which recovery could otherwise be made] or any amount as adjusted by the order of the Assessing Officer which may be passed after the furnishing of the guarantee. On advice from the Government that the Assessee has failed and neglected to observe any of its obligations to the Government with regard to the terms and conditions of the agreements between the Assessee and the Government that may underlie this Bank Guarantee, the decision of the Government as to whether any amount should be paid out by the Bank to the Government hereunder shall be final and binding.

2. The Bank further agrees that the guarantee herein contained shall remain in full force and effect for a period of 3 years from the date hereof, i.e., till [INSERT: date]; and further agrees to renew this guarantee for another 3 years on the following terms: the Bank will provide the Government with written notice no later than 60 days prior to the expiration date of this Bank Guarantee if the taxpayer has not renewed the agreements between the Assessee and the Bank that underlie this Bank Guarantee for an additional period of 3 years. If the Government does not receive a renewal of this Bank Guarantee or a substitute Bank Guarantee for the amounts of tax and interest in dispute prior to 30 days before the expiration date of this Bank Guarantee, the Government may instruct the Bank to pay the guaranteed amounts prior to expiration of the Bank Guarantee.

Provided further that, notwithstanding any other things contained herein, the liabilities of the Bank shall be limited to the maximum of the guaranteed amount of Rs. [INSERT: Amount of tax in dispute]

(Rupees [INSERT: written text]), as increased by interest pursuant to paragraph (1) during the term of this Bank Guarantee; and unless a claim in writing is lodged with the Bank, or action to enforce the claim under the guarantee is filed or initiated against the Bank, within six months from the date of expiry of the guarantee period fixed hereunder or where such period is extended under the terms of this guarantee from the date of such extended period as the case may be, all the rights of the Government under this guarantee shall be forfeited and the Bank shall be relieved and discharged from liabilities hereunder.

3. The obligations of the Bank to the Government under this Bank guarantee will terminate upon the occurrence of any of the following for the taxable years in question:

(i) the payment by the Bank or the Assessee to the Government of the guaranteed amounts;

(ii) the payment by the Assessee to the Government of all amounts owed, as agreed to by the Competent Authorities in a MAP Agreement;

(iii) a MAP Agreement by the Competent Authorities that the Government will not seek to recover any part of the previously demanded amounts; or

(iv) the Assessee furnishes to the Government similar security from another Bank.

4. The guarantee herein contained shall not be discharged or affected by any change in the constitution either of the Assessee or of the Bank.

5. The Government shall have the fullest liberty without affecting the guarantee to postpone for any time, or from time to time, any of the powers exercisable by it against the Assessee, or to either enforce or forbear any of the terms and conditions under this guarantee or under the Income-tax Act and Income-tax Rules, and the Bank shall not be released from its liabilities under this guarantee by any exercise by the Government of the liberty with reference to the matter aforesaid or by reasons of time being given to the Assessee, or by any other act of forbearance or enforcement on the part of the Government, or by any indulgence by the Government to the Assessee, or by any other matter or thing whatsoever which under the law relating to sureties would but for these provisions have the effect of so releasing the Bank from its such liability. The Bank hereby agrees and undertakes that any claim which the Bank may have against the Assessee shall be subject and subordinate to the prior payment and performance in full of all the obligations of the Bank hereunder and the Bank will not without prior written consent of the Government exercise any legal rights or remedies of any kind in respect of any such payment or performance so long as the obligations of the Bank hereunder remain owing and outstanding, regardless of the insolvency, liquidation or bankruptcy of the Assessee or otherwise howsoever. The Bank will not counter claim or set off against its liabilities to the Government hereunder any sum outstanding to the credit of the Government with it.

6. This Bank Guarantee shall be governed by and construed in accordance with the laws of the Republic of India (without regard to its principles of conflict of laws).

7. The Bank undertakes not to revoke this guarantee during its currency except with the previous consent of the Government in writing.

8. Notwithstanding anything stated above, liability of the Bank under this guarantee is restricted to Rs. [INSERT: Amount of Tax in dispute, plus interest specified in paragraph (1) above] (Rupees [written text]) and is valid for the period(s) described in paragraph 2 above. Unless a demand or claim under this guarantee is lodged with the Bank on or before [INSERT: date, as established in paragraph (2) above], all rights of the Government under the said guarantee shall be forfeited and the Bank shall be relieved and discharged from all liabilities thereunder whether or not this document shall have been returned to the Bank.

IN WITNESS WHEREOF, the Bank, through its duly authorized representative, has set its hand stamp on this day of at

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| Witness | For and on behalf of the Bank |
| (Signature) | (Designation with Bank Stamp) |
| Name | (Attorney as per power of Attorney No.) |
| | Date |