

## Section 206AB - The Constitutional Questions

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CHAPTER - XVII-B of the Income Tax Act deals with tax deduction at source. The ostensible objective of TDS provision is twofold. The first is to collect taxes in advance through the method of withholding and the second is to identify the assesses from whom tax has been deducted at the time of payment of such assesses and to collect the applicable income taxes from such assesses through assessment machinery under the Act. A decade ago Section 206AA was introduced which mandated furnishing of PAN to the deductor failing which higher rates of TDS as specified in the provision would apply. The system stabilized and it is now quite routine for every business to insist on copies of PANs from vendors / contractors / service providers. The deductor also files the TDS return reflecting the PAN of the recipient of payment. This is more than adequate for the Income tax department to check whether the vendor / contractor / service provider is furnishing his income tax return and paying applicable taxes. Non-provision of PAN results in a prohibitive rate of withholding which is even more than the profits of a contractor or service provider.

### New Section 206AB

The Income Tax Act is full of provisions which can compel a person to file a return and pay taxes that are due. Section 142, Section 143 Section 144, and Section 147 are more than adequate to compel filing of returns and payment of applicable taxes that are legitimately due. With the luxury of data provided by the deductors in terms of PAN of the recipients there is absolutely no necessity or need for the new section 206AB introduced by the Finance Act, 2021 which is to come into force from 01.07.2021.

Section 206AB is applicable to the provisions under Chapter XVII B, other than Section 192, 192A, 194B, 194BB, 194LBC or 194N.

The IT Department collects enormous data through withholding of taxes; through filing of annual information reports apart from the information it gathers through Survey and Data Analytics. It has an army of officials across the country and specified departments to administer the Income Tax Act. Despite all these, the new Section 206AB has done three things. Firstly, it concedes that the huge machinery and resources deployed by the Government for income tax administration is not enough and the Government prefers the easier route of tax deduction at higher rates which would be the result of the mandated new provision. Secondly it violates the rights of privacy of various persons since to avoid a higher rate of TDS (say double the applicable rate), the recipient of the payment has to demonstrate that he has filed his IT returns for both of the two assessment years relevant to the two previous years immediately prior to the previous year in which tax is required to be deducted for which the time limit for filing return has expired and the aggregate TDS / TCS is Rs.50,000 or more in each of those two years. It's a violation of privacy since a contractor or Chartered Accountant or Lawyer or lessor or other service providers is required to give this confidential data to the deductor. Thirdly, it has unleashed an era of interpretation and additional conditions being imposed by corporates and businesses who in their zeal to comply with Section 206AB are calling for copies of IT returns; sending

questionnaires to be filled up in the context of the tax history of assessee and all these communications have a uniform threat to the effect that if no response is received, higher TDS would be done. Companies have shot these letters to all their suppliers / vendors / service providers without even examining the threshold applicability.

### Right to Privacy

The Supreme Court in the case of ***K.S. Puttuswamy (2017) 10 SCC 1*** has held that

(i) Privacy protects the individual from the searching glare of publicity in matters which are personal to his or her life;

(ii) Privacy constitutes the foundation of all liberty because it is in privacy that the individual can decide how liberty is best exercised. Privacy has both positive and negative content. The negative content restrains the state from committing an intrusion upon the life and personal liberty of a citizen. Its positive content imposes an obligation of the state to take all necessary measures to protect the privacy of the individual.

(iii) Right to privacy is certainly one of the core freedoms which is to be defended; it is a part of liberty within the meaning of its expression in Article 21.

In the ***Aadhaar case (2019) 1 SCC 1***, a Five Member Bench of the Supreme Court affirmed the decision of the Supreme Court in ***Binoy Viswam (2017) 7 SCC 59*** [\[TS-5131-SC-2017-O\]](#) which had upheld Section 139AA which mandated linking of PAN card with Aadhaar. The court recognized the objective to remove bogus PAN card by linking with Aadhaar and thereby curb the menace of black money, money laundering and tax evasion. No objectives can be perceived or even suggested for Section 206AB to justify the collection of personal data in violation of privacy rights.

In the Aadhaar judgment, the Supreme Court also held that State must bring in a viable data protection regime which recognizes, respects, protects and enforces informational privacy both against State and non-State entities. While India is yet to bring a law for data protection, the new provisions contemplate, private and sensitive data should be shared with non-State entities with huge possibilities for data profiling/ data theft/ leakage.

The Supreme Court after going through the Aadhaar structure based on the presentation by UIDAI observed that the process is quite regulated and the data is encrypted and the Aadhaar Acts prohibits sharing and disclosure of biometric data. While the Aadhaar Act was upheld only on these limited safeguards, there is no safeguard whatsoever in the private domain when personal data such as income tax details have to be compulsorily shared with another business entity just to avoid higher TDS rates.

Even in the ***Binoy Viswam's*** case, the Supreme Court observed that a large section of citizens feel concerned about possible data leak even when many of those support linkages of PAN with Aadhaar. This is a concern, which needs to be addressed by the Government. It is important that the aforesaid apprehensions are assuaged by taking proper measures so that confidence is instilled among the public at large and that there is no chance of unauthorized leakage of data whether it is done by tightening the operations of the contractors who are given the job of enrolment or through severe penalties on those found guilty of leaking details.

If these were the stringent directions that were required for Section 139AA to pass muster there is no way Section 206AB can be justified since private businesses would be collecting private data because of a mandate of Income Tax Act in violation of Article 21 and with no guarantee for protection against unauthorized use or data profiling or data leaks or anything which can compromise the life and liberty of the citizen.

### Going beyond Income

When Section 206C provided for tax collection at source, the Supreme Court in the case of **CIT Vs. Sanyasi Rao (1996) 219 ITR 330** [\[TS-5022-SC-1996-0\]](#) upheld the provision on the ground that it is only by way of collection of tax as income tax and permissible under Entry 82. When the entry is on tax on income what Section 206AB does is that it artificially imposes a higher rate of tax through withholding mechanism on a recipient who is unwilling to share personal data with a client. To illustrate, a company could have engaged a contractor firm for some civil work. Assuming the contractual payment is Rs.1 crore, Section 194C provides for TDS at 2%. In many cases, the contractors do not have that amount of income tax liability. In the given example, the TDS would be Rs.2 lakhs whereas the profits could be say 5% and the income after all deductions would be 2%. Even with an assumed 30% tax rate, the tax liability is at 0.6% while TDS is at 2% before Section 206AB. After 206AB, the TDS would be 4% and will thus wipe away the contractor. A contractor who wants to protect his privacy would soon be compelled to close business or would end up compromising his privacy and expose himself to all risk and danger of data loss to just live with the earlier system. Thus, Section 206AB goes beyond income and can run foul of Entry 82, Union List, Seventh Schedule, Constitution of India.

### No mechanism

Section 206AB has thrown the deductors into the sea without a lifeboat and each person has come up with their own solution to ensure compliance. If the Government was keen to ensure that people should be filing their IT returns where tax has been deducted then using data analytics the Government could have required truant assesseees to file their returns. It is also a fact that many assesseees are filing returns and claiming refunds because the TDS is more than their actual tax liability.

When these assesseees are already struggling with their money locked up in refunds not forgetting the cashflow pressures on account of TDS, any arbitrary higher rates through the mechanism of Section 206AB would only be counter protective and wipe away businesses which are already reeling under Covid-19. If a statute requires a specific compliance point failing which there are serious consequences in terms of prohibitive rates then the statute should provide for a mechanism for compliance without violating privacy of citizens. On account of newly created solutions adopted by companies through strongly worded letters, gullible assesseees would be sharing their valuable income data. Further, since the return also discloses various sources of income and assets of the assesseees in certain cases the financial profile of a person which would normally be given to banks for loan purposes or insurance companies to demonstrate capability of paying premiums is being given on a platter to persons who have no business to collect such data. Further, there is every risk of data loss, data leaks, information getting shared in social media, which can completely compromise the privacy, safety and security of the citizen. Since the mechanism has not been provided for implementing the provision without violating privacy rights of the recipients, the section, itself would fail. The Supreme Court in the case of **TataSky Ltd. Vs. State of M.P. and Others (2013) 60 VST 1 (SC)** has held that if a collection machinery provided under the Act cannot be applied to an event it follows that the event is beyond the charge created by the taxing statute. In the said case, collection mechanism under the M.P. Entertainments Duty and Advertisement Tax Act was based on the revenue stamps struck to the tickets. The Supreme Court held that this machinery for tax collection has no application to DTH. In the instant case, higher rates have been mandated through non-obstante provisions for specified persons who despite having PAN have not filed IT returns, but there is no mechanism in the Section 206AB or in the IT Rules for determining whether the specified person has filed his returns.

### Way Forward

If the Government still wants this provision, it should be done in a non-invasive, non-obtrusive manner whereby a mere self-declaration that returns have been filed should suffice and the Government can also specify such a self-declaration through the Rules.

Alternatively, there must be a rule which enables a functionality through a portal whereby

when payments are to be made where the Section 206AB thresholds are applicable on keying in the PAN of the specified person, the portal should show just the filing status of the said specified person without any other data. Needless to say, the portal must be error free and glitch free and provide accurate data.

The Finance Minister had to tweet a very senior person of an IT vendor regarding complaints about the non-functioning of the new IT portal. Meetings have been organized to sort out the issues. The current status is that acknowledgement of IT return cannot be downloaded. If this is the state of affairs, then the first step of the Government should be to postpone the implementation of Section 206AB; The second step should be to re-examine whether Section 206AB in any manner contributes to ease of doing business. A corporate entity with 2000 vendors and service providers will have to spend their entire time examining the applicability of thresholds and waste countless hours in trying to comply with the provisions through their solutions. Cash starved MSME's, even large businesses and all service providers will face cash crunch due to higher rates of TDS if they are unwilling to share the personal data. India has climbed up the ranks in the ease of doing business thanks to some of the steps taken in the Customs front. Unfortunately, whatever gained could be lost if provisions like Section 206AB are implemented.