

## **Draft Direct Tax Code 2009 hints at amendment of the Right to Information Act**

**August 22, 2009**

Dear all,

Readers may remember the wide publicity received for the news about the release of the Draft Direct Taxes Code, 2009 (the Draft Code) by the Finance Ministry on 12th August 2009. This Draft Code seeks to replace the Income Tax Act of 1961. The Draft Code along with a discussion paper that explains its new proposals have been uploaded on the website of the Ministry. The UPA Government has commendably sought to consult with people regards the draft proposals before introducing the Draft Code in Parliament during its winter session (November 2009). Readers may access the Draft Code and the discussion paper at: <http://finmin.nic.in/DTCCode/index.html>. You may send your comments electronically to the Ministry by accessing: <http://finmin.nic.in/DTCCode/query.asp>.

Many of us salaried employees in the public, private and social sector have cheered the Draft Code's proposals that seek to widen the income slabs for the purpose of calculating taxes. The limit on savings that will attract tax deductions is also sought to be raised much to everyone's glee. Ok, now that the champagne bottles have run dry, it is time to check whether or not the Draft Code is compliant with the provisions of the Right to Information Act (RTI Act).

The discussion paper attached to the Draft Code states as follows:

### **"K) Disclosure of information relating to assessee**

*19.19 The tax administration receives a large volume of information relating to an assessee furnished by him and by third party sources. These information, essentially, relate to his financial and commercial transactions. It is part of his right to privacy. However, the Right to Information Act enables a person to obtain commercially sensitive and private information relating to any other person which may have the effect of causing financial, commercial or personal injury to such other person. The disclosure of such information to third parties/competitors also inhibits full compliance with tax laws.*

*19.20 Internationally, countries prohibit the disclosure of information furnished to, or obtained by, the tax administration, regardless of the law relating to the right to information. However, the information is allowed to be shared with other enforcement agencies to the extent it is necessary in public interest.*

*19.21 Steps will, therefore, be taken to amend the Right to Information Act prohibiting disclosure of information relating to any assessee to any third party except in the circumstances provided under the Code." (pages A 59-60)*

### **Comment on the paras relating to disclosure**

#### **RTI Act protects confidentiality of assessee-related information:**

The assertion that the RTI Act enables any person to obtain commercially sensitive or private information relating to any other person shows an awkward ignorance of section 8(1)(d) which guarantees protection for commercial and trade secrets of third parties (an assessee would be a third party to a request received by the IT Dept.). These paras display a similar ignorance of the protection provided to information whose disclosure may invade the privacy of an individual under section 8(1)(j). To the best of my knowledge the Central Information Commission (CIC) has not ordered till date the disclosure of IT returns filed by any individual or company. However a single member bench of the CIC has ordered disclosure of the IT returns (minus PAN number) of political parties in April 2008 . Even though there is a public interest override in section 8(2) to the best of my knowledge it has never been used to order disclosure of IT returns of individuals or corporate companies. (Readers may please correct me if I am wrong.) **Give these arguments it is difficult to**

**understand why the Ministry of Finance seeks to amend the RTI Act. The RTI Act provides adequate protection for information about individual and corporate assesseees.**

**Non-disclosure of information is not so universal a phenomenon:**

While to a large extent it is true that information about IT assesseees is not ordinarily disclosed publicly in a large number of countries, this is not as universal a practice as the discussion paper makes it out to be. For example, in Norway the IT law was changed in 2002 to allow public disclosure of tax-related information about assesseees. In 2005 these records were put online on the website of the tax assessing authorities. Expectedly many assesseees (mostly celebrities and high income earners) objected to such public disclosure. The practice now is to disclose assessee-related information publicly on websites for a period of 3 weeks in October every year. There is protection against misuse of the information, but the media can report on who is earning how much and paying how much tax, by studying these tax lists. After this period of proactive disclosure, any person can make an application and obtain information about any assessee from the tax authorities. For more information please click on: <http://www.the-link.lu/news/Public%20Tax%20Records-1384.html>. I believe countries like Finland, Sweden and Norway also allow public disclosure, but this needs to be verified. We will get back to you when we have more details.

In 2008 the outgoing Romano Prodi Government approved a proposal to make public tax-related information about all tax-payers in Italy. The actual publication on the government website happened under the Silvio Berlusconi Government and the concerned Minister approved the move. However the records were removed after a major uproar from celebrities and companies. There is talk of a tax law from 1973 which requires tax authorities in Italy to display hard copies of assessee-related information on notice boards in towns councils and municipalities. As the text of the law is not available easily on the Internet we are unable to provide more information. For more information about the Italian RTI adventure click on: <http://news.bbc.co.uk/2/hi/europe/7376608.stm> This research will continue.

**What does the Indian Income Tax Act, 1961 say about the disclosure of information about assesseees?:**

Until 1964 there was no provision in the Income Tax Act (IT Act) for disclosing information about an assessee. The IT Act was amended to allow disclosure of information to other officials for the purpose of enforcement of this Act and other laws relating to taxes and financial transactions. In addition to this a cryptic clause was introduced to empower the Chief Commissioner in public interest to entertain an application for disclosure and make a decision to disclose in public interest. This has ordinarily been interpreted to mean disclosure to courts during litigation. However courts have maintained that they have the power to summon such records even in the absence of disclosure provisions in the specific law. Administration of justice is an important public interest that must be protected. The text of the provision is given below (to access the complete text of the IT Act click on: <http://law.incometaxindia.gov.in/TaxmannDit/DisplayPage/dpage1.aspx>):

***"[Disclosure of information respecting assesseees.***

**138.***[(1)(a) The Board or any other income-tax authority specified by it by a general or special order in this behalf may furnish or cause to be furnished to*

*(i) any officer, authority or body performing any functions under any law relating to the imposition of any tax, duty or cess, or to dealings in foreign exchange as defined in section 2(d) of the Foreign Exchange Regulation Act, 1947 (7 of 1947) ; or*

*(ii) such officer, authority or body performing functions under any other law as the Central Government may, if in its opinion it is necessary so to do in the public interest, specify by notification in the Official Gazette in this behalf,*

*any such information [received or obtained by any income-tax authority in the performance of his functions under this Act], as may, in the opinion of the Board or other income-tax*

authority, be necessary for the purpose of enabling the officer, authority or body to perform his or its functions under that law.

(b) Where **a person** makes an application to the [Chief Commissioner or Commissioner] in the prescribed form for any information relating to any assessee [received or obtained by any income-tax authority in the performance of his functions under this Act], the [Chief Commissioner or Commissioner] may, if he is satisfied that it is in the public interest so to do, furnish or cause to be furnished the information asked for [\*\*\*] and his decision in this behalf shall be final and shall not be called in question in any court of law.]

(2) Notwithstanding anything contained in sub-section (1) or any other law for the time being in force, the Central Government may, having regard to the practices and usages customary or any other relevant factors, by order notified in the Official Gazette, direct that no information or document shall be furnished or produced by a public servant in respect of such matters relating to such class of assessee or except to such authorities as may be specified in the order.]" **[emphasis added]**

#### **What does the Draft Code say about the disclosure of information about assessee?:**

The Draft Code introduces an element of ambiguity even though it is closely modelled on the provisions of the IT Act. The wording about disclosure to tax officials in order to conduct their legitimate work is better than the IT Act. However the provision regards disclosure in public interest actually implies that any information about any assessee may be disclosed to any person in the public interest by the Chief Commissioner. The replacement of the term '**a person**' mentioned in the IT Act with the term '**any person**' in the Draft Code compels this interpretation (see underlined portions above and below). There is no separate definition of the term 'erson' in this chapter of the Draft Code. The general definition of the term 'person' given on page B-178 will be applicable. So it is not clear whether the discussion paper has it wrong or the Draft Code has not understood the intention of the paper. The relevant provisions of the Draft Code are give below:

" **146**(1) No information in respect of any assessee shall be provided to any person by,- (a) the Board;

(b) any officer, authority or executive and ministerial staff, in the secretariat, attached office or sub-ordinate office of the Board; or

(c) any person, agency or authority engaged in any manner in the administration of this Code.

(2) However, the Board, or any person specified by it by an order in this behalf, may furnish, or cause to be furnished, any information in respect of an assessee to any other person performing any functions under-

(a) any law relating to the imposition of any tax, duty or cess, or to dealings in foreign currency; or

(b) any other law as the central Government may, if in its opinion it is necessary so to do in the public interest, specify by notification in the Official Gazette in this behalf.

(3) The information referred to in sub-section (2) shall be only such information which fulfills the following conditions-

(a) the information is received or obtained by the Board, or any person specified by it by an order under that sub-section, in the performance of its or his functions under this Code; and

(b) the information is, in the opinion of the person furnishing the information, necessary for the purpose of enabling the other person receiving the information to perform the functions under the laws referred to in that sub-section.

(4) The Chief Commissioner or Commissioner may furnish, or cause to be furnished, **to any person** any information relating to any assessee received or obtained by any income-tax authority in the performance of his functions under this Code, if-

(a) the person makes an application to the Chief Commissioner or Commissioner in the prescribed form; and

(b) the Chief Commissioner or Commissioner is satisfied that it is in the public interest so to do.

(5) The decision of the Chief Commissioner or Commissioner under sub-section (4) shall be final and shall not be called in question in any court of law.

(6) The Central Government may, regardless of anything to the contrary contained in this section, direct by order notified in the Official Gazette that no information shall be furnished under sub-section (2) or sub-section (4) in respect of such matters relating to such class of assesseees, or to such authorities, as may be specified in the order." **[pages B93-94, emphasis added]**

As this is an issue that needs discussion we have not issued an action alert yet. Please tell us what you think about these issues soonest. The window of opportunity to make submissions on the Draft Code may close soon. The Finance Ministry has not issued any deadline for submission to the best of my knowledge.

***What we urgently need is a mechanism in Parliament and all State legislatures to vet all new Bills and amendment Bills for compatibility with the RTI Act (including Jammu and Kashmir where a similar exercise must be carried out in relation to the State's RTI Act). While this may be possible through the mechanism of Standing Committees in Parliament, few State legislatures have established similar bodies. The only option is to send such Bills to a select committee which may or may not be a champion of openness. This is a sorry state of affairs for the world's largest democracy.***

***Oh! by the way, if you are interested in how much Mr Barack Obama and his wife earned and paid in taxes before he became the President of the USA, please click on: [http://obama.3cdn.net/b689982572ef6e7ad4\\_mlbzaoxb2.pdf](http://obama.3cdn.net/b689982572ef6e7ad4_mlbzaoxb2.pdf) He chose to make public his tax records as well as those of his wife during the election campaign in 2008. These documents have remained publicly accessible since then.***

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Thanks

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