Tax News

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In this issue…

INCOME TAX

Reminder For August'09

Action Due	Due Date
TDS/TCS for the month of July'09	07-08-09
PF for the month of July'09	15-08-09
ESI for the month of July'09	21-08-09

Vital Notifications / Changes 1
Recent decisions of Supreme Court / High Courts 2
Recent decisions of Tribunal 3
Advance Rulings 5

SERVICE TAX

Reminder For August'09

Action Due	Due Date
Service Tax for the month of July'09 in case of company	05-08-2009
Service Tax for the month of July'09 in case of a company for which e-payment is mandatory	06-08-2009

Vital Notifications / Changes 6
Recent decisions of Supreme Court / High Courts 7
Recent decisions of CESTAT 8

INCOME TAX

Vital Notifications / Changes

Procedure for sick companies to represent before BIFR:

Superceding all previous circulars of the CBDT issued on the above subject, CBDT prescribes the following procedure to be followed before the BIFR and AAIFR (Appellate Authority for Industrial and Financial Reconstruction) in respect of granting Income tax reliefs/concessions to sick companies for their rehabilitation under the Sick Industrial Companies (SICA) Act, 1985 :

1. The Director General Income Tax (Administration), [DGIT (Admn.)] will be the Nodal agency for co-ordination between the BIFR and the CBDT and between the AAIFR and the CBDT.
2. It will be the responsibility of DGIT (Admn) to represent CBDT before BIFR and AAIFR in every case in which Income Tax relief is sought under the Draft Rehabilitation Scheme or in the Sanctioned Scheme circulated by BIFR/AAIFR.
3. The DGIT (Admn) will consider each case of Income Tax reliefs/concessions under the Direct Tax Laws on merits of each individual case. In cases where the company and the assessing officer have quantified the Income tax reliefs, the DGIT (Admn) will communicate the consent or denial of consent to BIFR at the time of hearing itself after obtaining the approval of CBDT. Where the information from the company and the assessing officer is incomplete, the DGIT (Admn.) will obtain the necessary information from the concerned parties and put up the file for the consideration of CBDT and subsequently intimate the BIFR.
4. It is the responsibility of DGIT (Admn) to obtain the approval of CBDT in every case in which Income tax relief/concessions is sought and to communicate the approval of CBDT to BIFR and the concerned assessing officer. The decision thus communicated by the DGIT (Admn.) on behalf of the CBDT is binding on all assessing officers.
5. The assessing officer should give the Income Tax relief to sick companies only after obtaining the approval as mentioned above. In cases where BIFR/AAIFR is taking a different view from that of the CBDT, it will be the responsibility of DGIT (Admn) to file appeal before the appellate authority (AAIFR) or before the Delhi High Court as the case may be. It is also hereby clarified that in cases where the sick companies file appeals against the order of BIFR/AAIFR in any of the High Court other than Delhi High Court, it will be the responsibility of concerned Chief Commissioner of Income Tax (Administration) to defend the case in the respective High Court. *Circular No. 5/2009, Dated 2-7-2009*.

- **New guidelines for remittance of payment to non-resident**:

A new guideline has been issued which allows remittances to non-residents without insisting on a no objection certificate from the Income Tax Department, if the person making the remittance furnishes an undertaking (addressed to the Assessing Officer), accompanied by a certificate from an Accountant in a specified format. The certificate and undertaking are to be submitted (in duplicate) to the Reserve Bank of India / authorised dealers, who in turn are required to forward a copy to the Assessing Officer concerned. The purpose of the undertaking and the certificate is to collect taxes at the stage when the remittance is made as it may not be possible to recover the tax at a later stage from non-residents. *Circular no. 04/2009, Dated 29-6-2009*.

Recent decisions of SC/HCs

- **Responsibility of the deductor of TDS**:

It was held that it is not the responsibility of the employer to collect and examine the evidence supporting the claim of the deduction availed at the time of deducting TDS. Tax deduction at source could not be the stage of final determination of the liability of the deductee.

Larsen and Toubro Ltd. v. CIT (2009)313 ITR 1 (SC).

- **Taxability of technical service fees received by a Sweden company**:

It was held that management charges, whether related to business management or technical management, would not be covered under exemption as provided in Article III of DTAA between India and Sweden.

Swedish Telecoms International AB v. CIT, (2009)(Bom.)119 ITD 3(Breaking News).

- **Excise duty refund in case of Sec. 80-IB**:

It was held that excise duty refund should be included in profits while calculating the profits eligible for deduction u/s 80-IB.
Dharam Pal Prem Chand Ltd. v. CIT (2009)180 Taxman 557 (Delhi).

- **TDS on landing and parking charges in case of aircraft**:

It was held that as soon as wheels of the aircraft touches the land of the airport, it would be considered as use of the land of airport and so, the charges paid for landing and parking of the aircraft would be liable for TDS u/s 194-I (TDS on rent).

Japan Airlines Co. Ltd. v. CIT (2009)180 Taxman 188.

Tribunal Judgements

- **Taxability of repayment of loan by a third party**:

The assessee, a US company, had 49% of its shares held by Motorola. The assessee borrowed Rs.7 crores from Bank of America and Motorola gave the guarantee for that. Motorola entered into a contract with third party 'A' to transfer its shareholding in the assessee company. In exchange, A had to repay the loan of the bank. The amount paid by 'A' was transferred by Motorola directly to the assessee. It was held that this proceed which was transferred to assessee company would not be liable to tax.

Smartalk Pvt. Ltd. v. ITO (2009)313 ITR (AT)96.

- **Section 10A**:

In case the assessee had given FDRs to the bank to obtain credit facility, then interest earned on these FDRs would be eligible for sec. 10A as it had nexus with the business of the undertaking of the assessee.

Livingstones Jewellery (P) Ltd. v. DCIT (2009)118 ITD 3

- **Validity of notice issued u/s 148**:

It was held that notice u/s 148(1) could be issued even if the proceeding is pending u/s 143(2) of the Income Tax Act. It was also held that by issuing an acknowledgment as a token of accepting the return, the proceeding is considered as terminated, and no proceeding remains pending.

Kailash Auto Finance Ltd. v. ACIT (2009)180 Taxman 7

- **Reconstruction of business u/s 80-IB**:

It was held that in case a company is already running an industrial unit and it sets up another industrial unit, then this new unit would not lose its separate and independent identity. Hence, it would not be covered under reconstruction of business as given in section 80-IB.

Shamrock v. DCIT (2009)180 Taxman 9

- **Taxability of waiver of loan to subsidiary**:

Assessee was in the business of mining. It lent some amount as a loan to its subsidiary for the purpose of constructing a jetty. Subsidiary suffered losses and could not pay the whole amount of loan. Assessee wrote off the balance amount in the P&L a/c and claimed it as deduction. It was found that money was lent to its subsidiary to construct a jetty which was a capital asset of the subsidiary. This loss is in the nature of capital loss, so deduction would not be allowed.

Salem Mangnesite Pvt Ltd vs CIT (2009) 180 Taxmann 545(Bombay).

- **DTAA between India and Germany**:

Assessee was a German firm. It received royalty and fees for technical services from an Indian company. Assessee filed its return declaring an income of approx. Rs 3 crores and claimed lower rate of tax under India–Germany DTAA. Assessee paid trade tax in Germany. Question arose whether assessee could be considered as 'resident' in terms of article 4 of the DTAA agreement to get the benefit of reduced rate of tax under DTAA? Assessing officer pointed out that assessee was a 'limited partnership' in Germany which is not taxable there, and paying trade tax would not be equivalent to income tax proceedings, since such tax was a tax on turnover not on profits. Therefore DTAA provisions were not applicable and assessee should be liable to tax in India u/s 9(1) read with section 44D of the IT Act @ 20% tax.

It was held by the Tribunal that assessee was a 'person' within the meaning of article 3(d) under 'any other entity', therefore provisions of

DTAA would be applicable on the assessee and it had rightly subjected itself to taxation at a reduced rate of 10% as per DTAA. It was also held that since assessee was a non resident, therefore every payment made to it would be subjected to TDS u/s 195. Hence assessee had not committed any default in not paying advance taxes and no liability of interest u/s 234 B arose on it.
Chiron Behring Gmbh & Co. v. ADIT (International Taxation) (2009)314 ITR 59 (Mumbai).

- **Default in case of non issue of formal approval for time extension**:

Assessee was engaged in export of computer software and claimed deduction u/s 10A, but it did not receive some of the sale proceeds in convertible foreign exchange within six months from the end of previous year. Assessee got the extended time for remittance of foreign exchange under FEMA from RBI, but RBI had not issued a formal letter for it. It was held that benefit of section 10A could not be denied because of this reason that assessee had not received a formal letter for extention of time for remittance of foreign exchange.
Morgan Stanley Advantage Services (P) Ltd. v. ITO (2009)30 SOT 1(Mum).

- **TDS on salary to employees outside India**:

It was held that TDS on salary to outside employees is to be deducted only at the time of actual remittance of salary and if this condition is fulfilled then deduction of salary expenditure can be claimed u/s 40(a)(iii).
Citigroup Global Markets India (P) Ltd. v. DCIT (2009)29 SOT 326 (Mum).

- **DTAA between India and Singapore**:

Assessee was a company in Singapore. Assessee earned income from ship operation. Assessee was approached by an agent of a cargo-owner to find a suitable vessel for shipping the cargo from India to Vietnam. In this process, Tribunal held that assessee had not carried actual transportation of goods by itself but was acting as one of the agents between cargo owner and transporters. Therefore assessee could not claim the benefit of the provisions of Article 8 (profits derived by an enterprise from Shipping and Air Transport operations) of the DTAA between India and Singapore.
Thoresen Chartering Singapore (Pte) Ltd. v. DDIT (International Taxation)(2009) 118 ITD 416 (Mum).

- **Transfer Pricing**:

Assessee was engaged in manufacture and sale of passenger car. It entered into international transaction with associated enterprises by importing raw materials. Assessee followed TNMM method and CUP method to arrive at arm's length price. The assessing officer made a reference to TPO and asked assessee to furnish all the comparables considered. TPO rejected assessee's comparables for want of further information or that those are well established companies but assessee was a new entrant. TPO adopted four comparables and computed arm's length price. The Tribunal held that as this is the first year of the assessee's operation it had imported 98.55% of raw materials while the comparables chosen by the TPO imported between 26% and 56.83%. Therefore, no comparison could be possible between assessee and comparables chosen by TPO. Hence the matter was remanded back to TPO for fresh judgment.
Skoda Auto India (P) Ltd. v. ACIT (2009)30 SOT 319 (Pune).

- **Advance tax is not required when income is liable for TDS**:

The assessee, an American company, was engaged in advertising of products. The considerations were remitted by the Indian agent to the assessee after collecting amount from various parties. It was held that since the payment was liable for TDS u/s 195 and it was the liability of payer to deduct TDS, assessing officer could not levy interest u/s 234B for non payment of advance tax, as this payment was not subjected to advance tax.

Turner Broadcasting System Asia Pacific Inc. America v. ADIT (2009)30 SOT 248 (Delhi).

Advance Rulings

- **Status of a liaison office**:

It was held that liaison office can not be regarded as permanent office, as the liaison office activities are restricted to preparatory or auxiliary activities only.

K.T.Corporation, In re (2009)(New Delhi)180 Taxman 5.

- **Liability of TDS from fees payable to American Institute**:

It was held that 'teaching', as given in Indo-US treaty, need not be restricted to only class room teachings or practical demonstrations provided to students. It is extended to seminars, workshops, video conferencing etc, in which students are primarily associated.

Sri Ramachandra Educational and Health Trust, In re (2009)180 Taxman 5

SERVICE TAX

Vital Notifications / Changes

Exemption from service tax:

The Central Government has exempted the taxable service, referred to in sub-clause (zzg) of clause (105) of section 65 of the Finance Act 1994, in relation to management, maintenance or repair of roads, from the whole of the service tax leviable thereon under section 66 of the Finance Act.

Notification No. 24/2009-Service Tax dated 27th July 2009.

Recent decisions of SC/HCs

- **Clearing and forwarding**:

Assessee entered into an agreement with a company to provide services relating to handling and distribution of that company's products. For these services assessee was entitled to receive commission at an agreed percentage of sales figure, and to get reimbursement of recurring expenses. The high court held that as the assessee had been entrusted with the job of receiving and storing the products from the principal, and distributing them to the distributors or stockists, there was no clearing activity done directly by the assessee from principal's premises. To fall under the category 'clearing and forwarding agent', the assessee should carry out all activities in respect of goods, right from the stage of their clearance from the principal's place to its storage and delivery to the customers. Therefore assessee is not chargeable to service tax under this category.

Kulcip Medicines (P) Ltd. (2009)20 STT 264 (Punj. & Hra.).

- **Sale of SIM card**:

The high court held that SIM card is a computer chip having its own SIM no. on which telephone no. could be activated, and through it customers get connection from mobile tower. Unless it is activated, service provider can not provide service connection to the customers. Therefore SIM card is an integral part of providing mobile services to customers. Hence sale of SIM card is not goods sold, rather it forms part of taxable services provided by the service provider, and so service tax is payable.

Idea Mobile Communication Ltd. v. CCE&C (2009)20 STT 19 (Ker.).

- **Renting of Immovable property**:

The question was whether renting of immovable property for use in the course of business, is a service or not. In the present case the high court observed that service tax is a tax on value addition. There is no value addition in renting out the immovable property for use in the course of business, therefore it cannot be regarded as service. But if there is some other service such as air conditioning service provided along with renting of immovable property, then it would be covered under section 65(105)(zzzz).

Home solution Retail India Ltd. v. UOI (2009)20 STT 129 (Delhi).

Recent decisions of CESTAT

- **CENVAT credit of service tax paid on goods transport service**:

In the present case it was held that all the conditions required to be fulfilled to claim CENVAT credit on service tax, paid on goods transport service, have been fulfilled as follows:

i) ownership of goods is to remain with the seller of goods till the delivery of goods at the door step of the customer - this condition was fulfilled as goods supplied by the assessee to its customer was 'FOR destination'.

ii) seller of goods bore risk of loss or damage to goods during the transition period to destination- this condition was fulfilled as the transportation was with the insurance cover taken by the assessee.

iii) Freight charges should be integral part of excisable goods- this condition was also fulfilled as the delivery of goods was 'FOR destination' price.

Therefore CENVAT credit of service tax paid on goods transport service would be allowed.

ABB Ltd. CCE&ST (2009)20 STT 1

- **Availment of CENVAT credit**:

It was held that in case assessee has not paid the service tax on which credit has been claimed, then credit would not be allowed.

Ahmednagar Merchants Co-operative Bank Ltd. v. CCE (2009) 21 STT 1

- **Operation and Maintenance of power plant**:

Assessee entered into an 'operation and maintenance contract' with the owner of the power plant, to operate the entire power plant and maintain it. It was held that in this case assessee was not rendering any service to the owner of the plant, therefore no service tax is attracted to the assessee.

GVK Power & Infrastructure Ltd. v. CCE&C (2009)21 STT 4

- **Technical testing and analysis service**:

Assessee was a manufacturer of cement. It obtained a licence from BIS for licensing ISI mark on bags and paid annual licence fee to BIS. Assessee claimed that service tax is not leviable on marking fee under the category of 'technical testing and analysis services'. It was held that charges collected by BIS towards marking fee were part and parcel of cost of services rendered by the agency. Therefore marking fee would be included in taxable services.

Grasim Industries Ltd. v. CCE (Chennai) 21 STT 128.

- **Taxability of activities related to laying of pipelines**:

It was held that laying of pipelines for drinking water supply projects, prima facie would not attract service tax under the category of Commercial or Industrial Construction Service.

2009-TIOL-1156-CESTAT-BANG in 'Service Tax'.

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