Tax News

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In this issue…

INCOME TAX

Reminder For July'09

Action Due	Due Date
TDS/TCS for the month of June'09	07-07-09
PF for the month of June'09	15-07-09
ESI for the month of June'09	21-07-09
Form 24 C for the first quarter ending on 30.06.09	15-07-09
Last date of filling of Income tax return (except Company and others whose A/cs are required to be audited)	31-07-09

Vital Notifications / Changes 1
Recent decisions of Supreme Court / High Courts 2
Recent decisions of Tribunal 4
Advance Rulings 7

SERVICE TAX

Reminder For July'09

Action Due	Due Date
Service Tax for the month of June'09 in case of company	05-07-2009
Service Tax for the month of June'09 in case of a company for which e-payment is mandatory	06-07-2009
Service tax for the Quarter ending on 30th June'09 in case of assessee other than company who makes payment electronically	06-07-2009
Service tax for the Quarter ending on 30th June'09 in case of assessee other than company, who does not makes payment electronically.	05-07-2009

Recent decisions of CESTAT 8

INCOME TAX

Vital Notifications / Changes

- **New stock exchange notified for sec. 43**:

The Central Government notified MCX Stock Exchange Ltd. as a recognized stock exchange for the purpose of section 43 of the Income Tax Act for speculative transactions. The Exchange shall maintain data regarding all transactions registered in the system in which client codes have been allowed to change. This data shall be available for periodic inspection by the Director-General of Income-tax (Investigation), having jurisdiction over such exchange.

Notification No. 46/2009, dated 22-5-2009.

Recent decisions of SC/HCs

- **Payment u/s 43 B**:

It was held that furnishing of bank guarantees is not actual payment of tax or duty in cash. It is just a guarantee for payment at the occurrence of some event, so it is not allowed as deduction u/s 43B as this section requires actual payment.

McDowell & Co. Ltd. v. CIT (2009)118 TTJ 2 (Breaking News).

- **Deduction of business expenses in case of slump period**:

The assessee was a non resident company, having its office in France. It entered into a contract with ONGC for the drilling operation in oil exploration. It finished its contract and after that did not get fresh one for six years. In this slump period, assessee got only interest income on income tax refund. The assessee filed its return claiming administrative expenses as deduction out of this interest income. Now the question was whether these expenses would be allowed as deduction u/s 71 of the IT Act, in this slump period when the assessee was not doing any business. The High court ruled that:

a. In this lull period, doing correspondence with ONGC from assessee's Dubai office could not be said that it was doing business in India.

b. Although 'lull in business' does not mean that the assessee has ceased its business, but in the absence of permanent office or any other office in India, and no contract in execution during the relevant period, it cannot be said that they were in business in India. So, it cannot be said that assessee was entitled to set off administration expenses claimed by it under Section 71 of the Act.

c. Permanent establishment can not be considered as equivalent to business connection.

2009-TIOL-310-HC Uttaranchal-IT ***'Income Tax'.***

- **DTAA between India and Sweden:**

Assessee, a non resident, entered into an agreement with VSNL to render consultancy services in implementation of India-UAE Submarine Cable System Project. Part (a) of the said agreement related to planning and technical studies prior to placing turnkey contract with the Submarine System manufacturers and part (b) of the agreement related to supervising installation of all terminal equipments and the cables in the terminal buildings and also to supervise the overall testing and commission activities. Now the question arose whether supervision charges received by the assessee for the part (b) of the agreement could be treated as technical service fee which is exempt from income tax as per the provisions of DTAA between India and Sweden. The court held that

- As per the provisions of Article III (3) of DTAA 1958, the management charges are not to be treated as commercial profits. Therefore, the management charges received by the assessee, whether relating to the business management or technical management would be outside the scope of DTAA 1958.

- As per the agreement between the assessee and VSNL, the assessee was not only to render technical consultancy services under clause (a) of the agreement, but also to supervise installation of all terminal equipments and the cables in the terminal buildings as well as

supervising the overall testing and commissioning activities as per part (b) of the agreement. The fees payable in respect of the above activities are nothing but the management fees which are specifically excluded from the purview of industrial & commercial profits as per Article III (3) of DTAA 1958.

- Therefore, the technical supervision charges received by the assessee being management charges, are not commercial profits, and are therefore excluded from the provisions of the DTAA. Thus, Revenue's appeal was allowed.

2009-TIOL-309-HC-MUM-IT in 'Income Tax'.

Tribunal Judgements

- **Deduction u/s 80HHC and 80IA**:

It was held that in case where assessee was entitled to deductions u/s 80HHC as well as u/s 80IA, then deduction claimed u/s 80-IA was to be deducted from the profits on which deduction u/s 80HHC was to be computed.

2009-TIOL-405-ITAT-DEL-SB in Income Tax.

- **TDS**:

The assessee came out with two Euro issues, and appointed a non-resident as its lead manager for the first issue. As per the subscription agreement, assessee paid commission and some out of pocket expenses to the non-resident. Assessee did not deduct any tax out of the payment made to the non-resident. Some of the issues which were decided in this case are as follows:

a. In the definition of 'such person' u/s 201(1) of the Income Tax Act, not only the person who deducts tax and failed to pay it to the government, but also the person who was responsible for paying but failed to deduct tax, is considered in default.

b. Person responsible for payment of tax may not be considered to be in default, either if the recipient of the payment pays tax, or if the recipient was not liable to tax. However, such person may be liable for the payment of interest u/s 201(1) of the Income tax act.

c. No time limit has been specified in the Act to initiate the proceedings u/s 201(1), but it was held that it should be done within reasonable time, at par with the time available for assessment or reassessment under the Act. The proceedings initiated u/s 201(1) have to be completed within one year from the end of financial year in which proceedings were initiated (sec.153(2)).

d. Retention of commission amount by the non-resident while remitting the issue proceeds to the Indian party is equivalent to making payment or crediting the non resident's account by the assessee. Therefore the commission retained is liable to TDS u/s 195.

e. Underwriting commission or expenses reimbursed, in respect of both issues, were not fees for technical services. However it would be covered under business profits as per DTAA between India and UK. Since there was no permanent establishment of the non resident in India, the reimbursement could not be taxed in the hands of non resident and hence assessee was not liable for deducting TDS u/s 195 of IT Act.

Mahindra and Mahindra Ltd. v. DCIT (Mumbai)(2009)313 ITR 263.

- **DTAA between India and USA**:

Assessee was engaged in business of operation of aircrafts and there was interest income from FDR. It was held that interest income can not be said to be related to the business of operation of aircrafts, therefore interest earned thereon is not exempt under article 8(5) of DTAA between India and USA. It was also held that under article 8 of DTAA between USA and India, the activity related to transportation of passengers or any other activity related to international traffic is exempt as far as it is done by assessee itself as owner/ lessee/ charter of aircraft and not by any other airline.

Delta Airlines Inc. v. ADIT (Mum)(2009)123 TTJ 266.

- **Permanent Establishment**:

The assessee was a non-resident foreign company incorporated in South Korea. During the year under consideration, the assessee executed contracts with M/s ONGC, and some other companies. While working out the taxable income, the AO took into account whole of the revenue earned from India. The assessee argued that since it did not have a permanent establishment (PE) in India, so under the provisions of the DTAA between India and South Korea, the revenue in respect of some projects was not taxable. The assessee claimed that because the duration of some projects lasted less than 10 months, therefore, their revenue was not assessable in accordance with Article 5(3) of DTAA which specified the period of the project so as to hold existence of the PE. It was held that Article 5(3) of the DTAA, being a more specific provision would override Article 5(2) thereof.

Regarding the Mumbai office of the assessee, the CIT(A) observed that the RBI had granted the Mumbai office, a project specific approval to render coordination activity. As per Article 5 of the DTAA, the basic requirement for a PE was the existence of a fixed place of business through which business of the enterprise was carried out. The AO had not established that the assessee's Mumbai office was its fixed place of business. So, it was held that a project office cannot be treated as a PE. Also, it was held that for AY 1995-96, where the PE of the assessee came to exist in India after fabrication of the plant had been done, but before its installation in India, the profits relating to fabrication in South Korea were not taxable.
2009-TIOL-394-ITAT-DEL in 'Income Tax'.

- **TDS u/s 195**:

The assessee was a company engaged in manufacturing motor vehicles. It entered into a contract with the Austrian firm to provide technical assistance, to provide designs, drawings and consultancy in the development of engines. As per the agreement, assessee had to reimburse expenditure towards air fare, accommodation and subsistence cost for the personnel deputed by the Austrian firm to India, in addition to expenditure for technical know-how. It was held that since reimbursements were made in the process of executing the agreement, such expenditure being part and parcel of technical advice, the amount of reimbursement would attract TDS u/s 195 of the Income Tax Act.
Ashok Leyland Ltd. v. DCIT (Chennai)(2009)313 ITR 191.

- **Partly taxable payment**:

The assessee made certain payments towards charter hire charges, base boat charges, management fees and service charges in foreign currency to non resident companies for taking drilling units. Assessee deducted tax only on base boat charges. Assessing officer held that TDS should have been deducted from the gross amount paid to non resident. It was held by the Tribunal that in case an assessee finds that only part of payment is taxable in India, then it should apply to the concerned officer to determine that appropriate portion, and deduct tax accordingly.
Frontier Offshore Exploration (India)Ltd. v. DCIT (Chennai) (2009) 118 ITD 494.

- **Taxability of transfer of marketing rights and non compete fee**:

It was held that when the amount is received by the assessee towards an asset which is generating income, then it would be treated as capital receipt, but if amount is received towards loss of income, then it would be treated as revenue receipt liable for taxation.
BASF India Ltd. v. ACIT (2009)118 TTJ 4 (Breaking News).

- **Deduction u/s 80HHC**:

It was held that supporting manufacturer gets an independent right to claim the deduction u/s 80HHC once a disclaimer certificate from the export house was issued to it and there were no other conditions prescribed in the section 80HHC.
Shamanur Kallappa & sons v. ACIT (2009)118 TTJ 3 (Breaking News).

- **Penalty**:

It was held that in case there is an omission of surrendered income from the return of an item of receipt, it would not be treated as concealment of income. It was also held that, during the proceedings, only asking of a question or raising an enquiry about any loan or gift does not conclude to detection of concealment.

Prem Chand Garg v. ACIT (New Delhi)(2009) 30 SOT 1 (Breaking News).

- **Depreciation**:

It was held that in case some optical fibre lines or connection lines have been laid on the road, it would not convert the road into a plant. Even if the assessee constructed some restaurant or provided some other facility, the assessee could claim depreciation as per the Act, but still, it would not convert the road into a plant.

Tamil Nadu Development Co. Ltd. v. ACIT (Chennai)(2009)118 ITD 2 (Breaking News).

- **Business Expenditure:**

It was held that expenditure would be treated as revenue expenditure if it is incurred for enhancing efficiency and no asset is created. It was also held that 'Router' is integral part of computer system and is entitled to depreciation at rate of 60%.

2009-TIOL-371-ITAT-DEL in 'Income Tax.

- **Rectification of an order passed by Tribunal**:

It was held that if the Tribunal has passed the order after taking due care and elaborate reasons were given, but assessee had some different opinion or it was not satisfied with the decision, then it could not be said that there is any mistake in the order of the Tribunal. Hence, not eligible for rectification u/s 254(2) of the IT Act.

Amadeus Global Travel Distribution S.A. v. ADIT (2009)180 Taxman 3(Breaking News).

Advance Rulings

- **DTAA between India and Singapore**:

Delhi Airport Authority (DIAL) appointed L&T as the EPC Contractor for the new Passenger Terminal Building (PTB). L&T appointed the assessee, a Singapore based company, as a sub-contractor for the structural steel work of Terminal 3 at PTB, and for the Fore Court (FC). As per the Agreement, the scope of work comprised (a) offshore supplies (consisting of overseas fabricated items) from outside India; (b) on-shore supplies from India; (c) and design, detailing, painting and erection of steel structures for PTB and FC in India. According to the applicant, it further subcontracted the work related to on-shore supplies, and FC, to Geodesic Techniques Pvt. Ltd (GTPL), Bangalore, with the consent of L&T and DIAL. Thus, the scope of work to be carried out by the applicant was now confined only to off-shore supplies and PTB.

The applicant shared its project office with GTPL in New Delhi. This project office merely received communications and handled the calls. It was contended that the project office was not a permanent establishment and it had not played any role in connection with off shore supplies from out of India. The applicant also pointed out that it had no business connection in India, out of which any income accrued or arose. It sought advance ruling on two questions:

(1) In the case of offshore sale of goods by a non-resident to a resident, if the consideration for sale is received abroad and the property for the goods passes hands outside India, whether the income is deemed to accrue to the non-resident in India?

(2) In case of sale of goods, by the non-resident to an Indian resident as a part of a composite contract involving various operations within and outside India, whether the income from such a sale of goods by the non-resident (off shore) shall be deemed to accrue to the non-resident in India?

To the above two questions, the Authority observed that:

1. The sale of goods took place outside India, the title to the goods passed at the port of shipment and the consideration was also received outside India, so it can be said that the income does not accrue in India to the non-resident.

2. The second question pre-supposes that there is a composite contract involving various operations, both within and outside India. If there is no 'permanent establishment' in India to which the Indian operations can be attributed, then, under the provisions of the DTAA, even that portion of the business profits would not be liable to be taxed.

The Tribunal further held that it was the claim of the applicant that there was no permanent establishment in India. However, from the main Agreement, it was not clear as to who the exporter was and what role the applicant had played in the export of over-seas fabricated items. The precise modalities of the transaction were not clear. The basic claim of the applicant that it effected high-sea sale of the over-seas fabricated equipment and received the payment in Singapore dollars thus remained unsubstantiated. The 'main contract' was not filed and some other relevant documents were also not made available to the Authority. Thus the Authority dismissed the application for lack of information to determine its tax liability.

2009-TIOL-15-ARA-IT in 'Income Tax.'

SERVICE TAX

Recent decisions of CESTAT

Advertising agency:

Assessee entered into a contract with a manufacturer of aerated water, who sold aerated water through dealers, for collection of sales proceeds from the dealers in certain states. Assessee was paid certain percentage of the sale proceeds as commission. The manufacturer debited this commission under the head 'advertisement and sales promotion expenses'. It was held that by mere debiting the amount under the head 'advertisement and sales promotion', does not conclude that assessee had rendered services as advertising agency.

H.K.Associates v. CCE (New Delhi)(2009)20 STT 449.

- **Custom House Agent**:

Assessee was a custom house agent. It claimed a deduction of wharfage charges out of its taxable value, as wharfage charges are statutory dues. Deduction was denied on relying upon the circular issued in 1997, which stated that tax should be charged on the lump sum receipt. If wharfage charges are excluded, then amount could not be said as lump sum receipt. It was held that the circular had clarified that statutory levy is not be included while calculating the service tax on custom house agent. Therefore deduction of wharfage charges should be allowed.

Alvares & Thomas v. CCE (Bang)(2009)20 STT 466.

- **Limitation period**:

Assessee was engaged in activities of 'management consultancy service'. It had taken over the operation of two proprietary firms in the relevant year. Assessing officer invoked the extended period of limitation and levied penalties on the above said activities. Assessee contended that these two firms were not in the business of management consultancy and therefore the reimbursements claimed by it as deduction were not liable to service tax, and that there was no suppression of facts. It was held that reimbursements were not liable to service tax and on the basis of balance sheet and other documents it could not be said that assessee had any intention to suppress the facts and evade the payment of duty. Therefore longer period of extension could not be invoked.

Rolex Logistics (P) Ltd. v. CST (Bang) (2009)20 STT 431.

- **Tour operator**:

It was held that assessee should comply with the requirements as mentioned in the Central Motor Vehicle Rules of a tourist vehicle. Merely holding of contract carriage permit would not make it liable for tour operator service.

Ghanshyam Travels v. CCE (Ahd.)(2009)20 STT 281.

- **Transport of goods by road service**:

Assessee was a manufacturer and transported goods to its buyer on its own vehicle. For this activity assessee was collecting transportation charges. The assessing officer demanded the service tax from the assessee on the freight received by it but CIT(A) set aside the matter and remanded the case. It was held that as per the rules, it is the buyer who was liable to pay service tax on the freight amount paid, therefore CIT(A) was correct in setting aside the matter. However, the matter should not be remanded as the assessee had no liability at all to pay the service tax.

MSPL Ltd. v. CCE (Bang)(2009) 20 STT 384.

- **Imposition of Penalty**:

Assessee was a Co-operative Bank registered as a service provider under the category of "Banking & Other Financial

Services". It was paying service tax on commission received from customers and availing the Cenvat credit facility on service tax paid on telephone bill, courier charges, computer maintenance bills and commission paid to other Banks. In respect of commission paid to other Banks, it had availed Cenvat credit on the basis of work sheet enclosed with ST-3 return without any documentary proof, such as invoice, bill or challan etc. and utilized it for payment of service tax.

There were two issues which the assessee contended. First, whether the Bank can avail service tax credit on the basis of documents issued by other banks, when no such service tax is separately shown. Second, whether the Order-in-Original confirming a demand of service tax and penalty thereon, is just and proper, particularly when the show-cause Notice alleges wrong availment of credit of service tax under the Cenvat credit rules.

It was held that important information and material particulars required for availing credit of service tax were not available in the document viz. daily summary sheet, and hence the credit had been rightly denied. For the second issue, it was held that since the availment of credit was incorrect, therefore, order for recovery of the credit availed is correct.

Also, on the issue of whether CIT(A) rightly reduced the amount of penalty, the Bench held that since u/s 80 of the Act, there is a discretion to impose the penalty, therefore, discretion is also there to lessen the penalty. *2009-TIOL-989-CESTAT-MUM in 'Service Tax'.*

- **Scientific and Technical Consultancy**:

The assessees were manufacturers of medicaments. They decided to transfer trade mark of some brands to Cadila Health Care Ltd.(CHCL). Assessees entered into two separate agreements with CHCL, one for transfer of know-how of the formulations, and the second for transfer of know-how for bulk drugs. The assessees were paid consideration for both the agreements. At the request of CHCL, the assesses also entered into a Marketing Assistance Agreement to (a) provide product promotion service, (b) assist CHCL in formulating marketing strategies, (c) formulate customer service, and (d) establish pricing policies. The CESTAT after consideration of the submissions observed –

- The assesses were working as a single organization.

- As per Rule 65A of the service tax rules, 1994, it is possible for a service to be classifiable under two different categories. Thus, even though the service regarding transfer of intellectual property was introduced w.e.f. 10.9.2004, it does not mean that the service would not be covered under any other category earlier, even if it was covered under the definition of a new service.

- In any case, the applicants having transferred the trade marks on a permanent basis to CHCL are not covered by the new service relating to transfer of intellectual properties introduced w.e.f. 10.9.2004.

- A perusal of services as mentioned in marketing assistance agreement, reveals that these were nothing but the services of a market research agency as it involved the assessees to conduct market research in relation to their product 'Aten' as also for the new dosage forms and strengths of the product proposed to be introduced during the year.

On the question of time bar, it was held that once suppression or mis-declaration is established, the time limit available to the Department for raising the demand is 5 years from the relevant date. The issue of an earlier SCN will not wipe out or obliterate the suppression/mis-declaration. The applicants have not been able to make a strong case for total waiver of pre-deposit of the amounts demanded from them. Therefore, they were asked to pre-deposit the service tax demand and report compliance. *2009-TIOL-894-CESTAT-MUM in 'Service Tax.*

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