Tax News

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INCOME TAX

Reminder For September'09

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

SERVICE TAX

Reminder For August'09

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

INCOME TAX

Vital Notifications / Changes

As of the date of this report, no Notification or Circular for this month has been issued by the department.

Recent Decisions of SCs/HCs

- **Defective Return**:

It was held that if return of income is not signed by the person who is authorized to do it as per law, then it would be considered a mistake, defect or omission, but by virtue of sec. 139(9) of the IT Act, this defect or omission can be rectified.

Prime Securities Ltd. v. Varinder Mehta, ACIT (Inv)(2009) 181 Taxman 3 (Breaking News).

- **Taxability of expense on replacement of machinery**:

Assessee had a textile mill. It was held that each machine is an independent asset and replacement of this old machine with a new one would constitute the bringing in of a new asset in place of an old one. Thus, it could not be allowed as deduction as this expense is capital in nature.

Sri Mangayarkarasi Mills (P) Ltd. v. CIT (2009) 181 Taxman 2 (Breaking News).

Tribunal Judgements

- **Arm's length price**:

The assessee was engaged in business of import and export of rough diamonds. The assessee maintained the details of its import and export of rough diamonds. The assessing officer compared the trading results shown by another concern in same business and by invoking sec 92, made addition of 1% of total sales to the gross profit, on a/c of low gross profit reported by the assessee. It was held that, as the assessing officer failed to record any discrepancy in sales or purchase document, it is not correct to estimate the results of a particular year based on the trading results shown in preceding or succeeding year.

Fabula Trading Co. Pvt. Ltd. v. ITO (2009)314 ITR 272 (Mum).

- **Slump Sale**:

It was held that to be classified as slump sale it is required to transfer the whole undertaking, and not only the individual assets and liabilities comprising the business activity.

Duchem Laboratories Ltd. v. ACIT (2009)ITD119 (1) Breaking News.

- **Taxability of income from offshore supply of equipment**:

It was held that in case a non-resident supplies equipment from outside India to an Indian party, it does not mean that the non-resident has any business connection in India. Even if there is any business connection of the non-resident in India, the income which is attributable to operations in India would be deemed to accrue or arise in India.

Xelo Pty Ltd v. DDIT (2009) SOT 31 7(Breaking News).

- **Arm's length Price method's complexity**:

It was held that a method of arm's length pricing could not be rejected because of the reason that the method is complex. Transaction method should be applied only when standard or traditional methods are incapable of being correctly applied.

MSS India (P) Ltd. v. ACIT (2009) 119 ITD 10 (Breaking News).

- **Taxability of prepaid mobile services**:

It was held that in case the assessee admitted that TDS u/s 194H was applicable for post-paid services rendered through its distributors, then assessee would have to prove that prepaid services through its distributors are exempt from the operation of section 194H. It is very unlikely that post paid service is liable for TDS u/s 194 H, but prepaid service is not.

Vodafone Essar Cellular Ltd. v. ACIT (2009) 119 ITD 1 (Breaking News).

- **Credit of TDS**:

It was held that in case date of payment is not mentioned in TDS certificates then the benefit of TDS could not be allowed to the assessee on the only ground that TDS has not been paid to the Central Govt.

Ahluwallia and Associates v. ITO (2009) 123 TTJ 972 .

Advance Rulings

- **Deduction of Tax at source**:

The Assessee was an Indian Co. which was engaged in the business of providing international long distance and domestic long distance telecommunication services in India. It proposed to enter into an agreement with its UK-based group company, to provide end to end international long distance communication services and other services, to the Indian customer of the assessee, using the UK company's international infrastructure and equipment. The assessee would carry the calls and data within India, and UK company would further carry those calls and data to the recipient outside India. For these services assessee had to pay fees to its UK company. The ruling was sought for:

o Whether fees paid by the assessee would be in the nature of 'Fees for technical services' within the meaning of Explanation 2 of clause (vii) of sec 9 - It was held that carrying a signal does not result in providing any managerial or technical or consultancy services.

o Whether it would be considered as 'fees for technical services' or 'royalty' in terms of article 13 of DTAA - It was held that for technical services , it should make available technical knowledge, skill, know how, or consist of transfer of technical plan or design. In this case assessee would not be rendering any technical service or would not transfer any technology. Also, as the assessee would not be paying for any exclusive service, so the payment would not be considered as royalty income in the hands of the UK company.

o Whether UK company would be treated as having a permanent establishment in India as per article 5 of DTAA - It was held that the assessee and the branch office of Cable and Wireless India Ltd. would be treated as separate legal entities which are providing different types of telecom services. UK company had no basis for deputing its technical personnel for providing maintenance and support of the applicant. The applicant had entered into contract with its customers on an independent basis, and UK company was not a party to it. Similarly, the UK company had entered into contract with its customers on a principal-to-principal basis, and Indian co. was not a party to it. Therefore, there was no Permanent establishment of the UK company in India as per the Article 5 of DTAA.

o Whether there would be liability of TDS u/s 195 - It was held that the payment made by the Indian company would be considered as Business profits and as there was no Permanent establishment of UK company in India, it would not be taxable in India at all, and therefore no liability of TDS u/s 195 would arise.

Cable and Wireless Network India (P) Ltd, In Re (2009) 315 ITR 72 (AAR).

Vital Notifications / Changes

SERVICE TAX

- **Service tax on commission paid to Managing Director/ Directors by the company**:

It has been clarified by the Board that (i) Some companies make payments to Managing Director/Directors (Whole-time or Independent), terming them as 'commissions'. Such payments, even if termed as 'commission', are not the 'commission' that is within the scope of business auxiliary service and hence, service tax would not be levied on such amount. (ii)The Managing Director/ Directors (Whole-time or Independent) being part of Board of Directors perform management function rather than consultancy or advisory function. The definition of management consultant service makes it clear that what is envisaged from a consultant is advisory service, and not the actual performance of the management function. The payments made by companies, to Directors cannot be termed as payments for providing management consultancy service. Therefore, it is clarified that the amount paid to Directors (Whole-time or Independent) is not chargeable to service tax under the category 'Management Consultancy service'. However, in case such Directors provide any advice or consultancy to the such service would become chargeable to service tax.

In view of the above, it is clarified that remunerations paid to Managing Director/ Directors of companies, whether whole-time or independent, when being compensated for their performance as Managing Director/Directors would not be liable to service tax.

Circular No. 115/09/2009 – ST, dated 31st July 2009.

- **Applicant for Advance Ruling**:

It has been clarified that Applicant includes public sector company, and public sector company shall have the same meaning as given in sec. 2 of IT Act.

Circular No. 115/09/2009 – ST dated 20th Aug. 09.

- **Effective date of provisions of Finance Act 2009**:

It was held that provisions of Finance Act 2009 shall be effective from 1st Sept. 2009.

Notification no. 26/2009 dated 19th Aug 2009.

- **Amendment in Export of service rules 2005**:

The following amendment has been made in Export of service rules 2005:

  - o These Rules may be called as Export of service rules 2009.
  - o In Rule 3 the following explanation shall be substituted : " For the purpose of this rule "India" includes the installations, structures and vessels in the continental shelf of India and the exclusive economic zone of India".

Notification no. 25/2009 dated 19th Aug. 2009.

Recent decisions of CESTAT

- **Incorrect detail in ST-3**:

The assessee was engaged in providing various taxable services. It was found that incorrect figure of taxable value was entered in ST-3 by the staff of the assessee. ST-3 return showed a figure including service tax in place of the taxable value, and therefore, short payment of service tax was found. The AO raised a demand. Variations were found in the figures supplied by the assessee and as shown in ST-3. Therefore, it was held that the earlier order of the AO be set aside and matter should be remanded for fresh judgment.

Sify Technologies Ltd. v. CST (2009) 21 STT 292 (Chennai).

- **Cenvat Credit**:

Assessee had office in Dubai but no branch office in India. Assessee provided consulting engineer's service in India to 'R' an Indian company. It also received input services from GE which were used to render the output service to 'R', and claimed credit of service tax paid by GE as input service tax credit. It was found that invoices were issued to Dubai office and payment was also made from Dubai. It was held that cenvat credit should be allowed as the output service had been rendered in India and input service rendered in India, although invoices were raised in the name of Dubai office, and payment was also made from there.

General Electric International Inc. v. CCE (2009) 21 STT 335 (New Delhi).

- **Denial of Cenvat credit**:

The assessee claimed credit of input service on the basis of debit note issued by the service provider. AO denied the credit saying that debit note is not a prescribed document under the rules. Assessee contended that debit note contains all the information that are required to be given as per the provisions of the Act, only the document is titled as 'Debit Note'. It was held that only because the document is titled as Debit note, credit could not be denied, and there should be waiver of pre deposit requirement of taxes.

Chemplast Sanmar Ltd. v. CCE (Chennai)(2009) 21 STT 283.

- **Credit of non business input service**:

It was held that if a manufacturer pays security charges for the security of a place, or for a purpose, unconnected with the business activities of the assessee, then these charges would not be allowed as credit, because such services would not qualify as 'Input service' for the purpose of cenvat credit.

Ultra Tech Cement Ltd. v. CCE (2009)21 STT 1(Breaking News).

- **Taxability of Stevedoring activity**:

It was held that service tax would not be levied on stevedoring activity under the category of 'Port Services' as undertaken by the holders of stevedoring licence holders.

South India Corp. (Agencies) Ltd. v. CCE (2009) 21 STT 4(Breaking News).

- **Taxability of a Company acting as a market intermediary**:

It was held that as the assessee was not involved in sale and purchase of securities, and also as per its Article of Association, the assessee could not undertake any dealings in securities in its own account, so it was acting just as a market intermediary. Therefore, assessee could not be considered as a 'Stock Broker'. Hence demand against assessee could not be sustained.

Madras Stock Exchange Financial Services Ltd. v. CCE (Chennai) (2009) 21 STT 9 (Breaking News).

- **Classification of services under BAS or SSBC**:

Once it is confirmed that the assessee rendered services which fulfill the statutory definition of 'Support services of business or commerce (SSBC)', then demand could not be raised to the assessee under the category of 'Business Auxillary services (BAS)'.

Fifth Avenue v. CST (Chennai)(2009) 21 STT 10 (Breaking News).

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