TAX NEWS

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E-filing of excise, service tax returns mandatory w.e.f. 01/10/2011

The finance ministry has made it mandatory for taxpayers to file their central excise and service tax returns electronically from October 1. E-filing through the Centre's online tax payment application ACES (Automation of Central Excise and Service Tax) will be a must not only for returns due after October 1, but also for returns of past periods which have not been filed yet or are to be revised.

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- Once the assessee opts to be taxed under the deeming fiction provided by S. 44BB (1), there is no scope for making any calculations or recalculations for computation of income taxable under the Act. An assessee who wishes to know which part of its income is taxable and to what extent must do so by opting for computation of income under S. 44BB(3).
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- Petition for waiver of interest under s. 220(2) can be filed even after payment of interest.
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Procedure for refund of tax deducted at source u.s 195 of the Act to the person deducting the tax.

Circular No. 7/2011 (Amendment in Circular No. 7/2007, dated 23-10-2007)

The Board had issued Circular No. 7/2007, dated 23-10-2007 laying down the procedure for refund of tax deducted at source u.s 195 of the Act to the person deducting tax at source from the payment to a non-resident where Para 2 of the Circular lists the circumstances under which the provisions of the said Circular shall apply. This paragraph does not cover a situation where the tax is deducted at a rate prescribed in the relevant DTAA which is higher than the rate prescribed in the Act. Since the law requires deduction of tax at a rate prescribed in the relevant DTAA or under the Act, whichever is lower, there is a possibility that in such cases, excess tax is deducted relying on the provisions of the relevant DTAA. Since in these cases as well, the resident deductor is put to genuine hardship, the Board has decided that the provisions of Circular No. 7/2007, dated 23-10-2007 shall also apply to those cases where deduction of tax at a higher rate under the relevant DTAA has been made while a lower rate is prescribed under the domestic law.

S. 44BB Vs. S. 44DA - Technical services provided in connection with extraction or production of mineral oils covered by S. 44BB. S.44DA applicable only where contract

with an Indian concern. Once the assessee has opted to be taxed under the deeming provisions of S. 44BB(1), splitting of revenues not permissible. Sub-section (1) & (3) cannot be applied simultaneously.

Western Gesco International Ltd., In re. (AAR, New Delhi)

Western Gesco, a British Virgin Island's company, engaged in the business of acquisition and processing of 2D & 3D seismic data for companies engaged in exploration and production of mineral oil, entered into a contract with an Australian Company for carrying out seismic services in oil and gas blocks located in India. On an application preferred before the AAR for determination of taxability of revenues received by Western Gesco under the said contract, it was held that:

i) Where the applicant is, indisputably engaged in the business of providing services or facilities in connection with extraction or production of oil, a mining activity, the services rendered in respect thereof, goes out of the purview of S. 9(1)(vii). The executive understanding of Explanation 2 to S. 9(1)(vii), explained in CBDT's Instruction No. 1862 also states similar interpretation.

ii) Even where profits arising from business, fall within the ambit of 'fees for technical services', S. 44BB being a specific and exclusive provision would prevail over S. 44DA.

iii) S. 44DA applies only where royalty or fees for technical services is received by a foreign company in pursuance of an agreement with an Indian concern.

iv) Once an assessee opts to come under S. 44BB(1), the provision itself deems its profits and gains at 10 per cent of the aggregate of the amounts paid or payable whether in or out of India to the assessee on account of services rendered in India. Therefore, in such a case there is no scope for splitting up the amount payable to the assessee. If the assessee wants to seek such a splitting up, it has to go under S. 44BB (3).

v) S. 44BB does not close its doors to an applicant who desires to know which part of its income accrues or arises in India and to what extent. However this right can be exercised only if the applicant opts to get its income taxed under S. 44BB (3) i.e. net basis.

vi) Sub-S (1) and (3) of S. 44BB cannot be applied simultaneously.

vii) Even if part of the income falls under 'Royalties' or 'Fees for technical services', there is no scope to assess such receipts under these heads, once it is held that the income is from its oil exploration and production activities as envisaged under S. 44BB.

Once the assessee opts to be taxed under the deeming fiction provided by S. 44BB (1), there is no scope for making any calculations or recalculations for computation of income taxable under the Act. An assessee who wishes to know which part of its income is taxable and to what extent must do so by opting for computation of income under S. 44BB(3).

Siem Offshore Inc., In re (AAR, New Delhi)

Siem Offshore, the Applicant, is a company incorporated in Cayman Island. January 2010 onwards the control got transferred to Norway and accordingly the applicant became a tax resident of Norway. The applicant is owner and operator of model support vessels for global oil and gas service industry and provides a wide range of services from its vessels, equipments and experienced onshore and offshore personnel. During the year 2009, the applicant alongwith three other companies ['Consortium'] entered into a contract with ONGC. The agreement specifically defined the scope of work to be executed by each of the Consortium members. Also ONGC was to make direct payments to each of them. Under the said agreement, applicant was required to provide sea logistics services. On an application preferred before the AAR, it was held:

i) The services to be rendered by the applicant under the contract, being transportation of cargo, material and personnel required at the rig in addition to ensuring marine logistics support in the event of any operational exigency does not involve providing of any technical service.

ii) Since the applicant is engaged in the business of providing service or facilities in connection with extraction or production of oil, a mining activity, the income derived by the applicant from the subject contract does not fall within the ambit of S. 9(1)(vii) and must be brought to tax under S. 44BB.

iii) Where during a particular year, the control and management of the applicant got transferred to Norway, the applicant is liable to be assessed under the more beneficial provisions laid down in Article 23 of India - Norwegian treaty for the following part of the year.

iv) S. 44BB provides for ascertainment of a fictional income for the purpose of taxation which has been fixed at 10 per cent of the gross sums received for rendering services or provision of facilities. The section does not speak of any deduction in that behalf. It is open to those who want to claim exemptions and exclusions in assessment to opt to proceed under S. 44BB(3)

v) But once an assessee opts to come under S. 44BB(1), there appears to be no scope for any calculation or recalculation of the amount shown as payable in the contract. The very object of introducing the fiction, namely, to avoid all complications in determining the liability of an assessee coming under that provision otherwise, would itself be defeated, if an exercise is to be undertaken in each case to ascertain the liability of an assessee as if in the course of a regular assessment. Such an exercise is not warranted or permissible on the scheme of S. 44BB.

vi) Therefore, the service tax said to be included in the sums received by the applicant from ONGC must also be taken into consideration while calculating the gross receipts for services rendered and deemed profit rate be applied on said amount.

Off-shore supplies not taxable despite composite contract & PE's role in clearance.

LS Cable limited, In re. {AAR- New Delhi}

L.S. Cables, the Applicant, a Korean company, engaged in business of manufacturing electric wire and cable for power distribution, entered into three separate contracts with an Indian company, namely, DTL for supply, laying, jointing, testing and commissioning of certain projects in India. Scope of work of applicant under said contracts for all these projects included (a) offshore supply contract, on CIF basis; (2) onshore supply contract; and (3) onshore service contract.

In connection with offshore supply contract property in goods to be supplied from Korea was to pass outside India in favour of DTL, sale was to be concluded outside India and payment to be received outside India in foreign currency. The applicant preferred an application before the AAR for determination of the scope of income taxable in its hands in respect of its offshore supply contract.

Considering the facts of the present case and relying on the earlier pronouncement of the authority in the case of ***Hyosung Corpn. v. DIT, International Taxation [2009],*** the AAR held;

i) The clauses in the offshore supply contract agreement regarding the transfer of ownership, the payment mechanism in the form of letter of credit which ensures the credit of the amount in foreign currency to the applicant's foreign bank account on receipt of shipment advice and insurance clause, would go to establish that the transaction of sale and the title took place outside Indian territory.

ii) The ownership and property in goods passed outside India.

iii) The transit risk borne by the applicant till the goods reach the site in India is not necessarily inconsistent with the sale of goods taking place outside India. The parties may decide between them as to when the title of the goods should pass. As the consideration for the sale portion is separately specified it can well be separated from the whole as is held in the case of **Ishikawajma - Harima Heavy Industries Ltd. (SC) [2007].**

iv) Nothing in law prevents the parties to enter into a contract which provides for sale of material for a specified consideration, although they are meant to be utilized in the fabrication and installation of a complete plant.

v) Even if a PE is involved in carrying on some incidental activities such as clearance from the port and transportation, it cannot be said that the PE is in connection with the offshore supplies. Accordingly, the applicant is not liable to tax in respect of offshore supplies as per the Act.

Liaison office would be a fixed place PE under Article 5(1) of the DTAA. Activities related to material management, merchandising, production management, quality control and administration support cannot be said to fall within the exclusionary clause (3) to Article 5 of the Indo-US DTAA.

Columbia Sportswear Co., In re. (AAR, New Delhi)

Columbia Sportswear, the applicant is a company incorporated under laws of USA and is engaged is in the

business of manufacturing and selling outerwear and sportswear of its own design and made with material chosen by it. In 1995, the applicant established a liaison office in India in connection with purchase of goods. Besides coordinating purchase of goods from India, liaison office of applicant in India was engaged in vendor identification, review of costing data, vendor recommendation, quality control and up loading of material prices into internal product data management system of applicant. Moreover, liaison office was responsible for monitoring vendors for compliance with its policies, procedures and standards related to quality delivery, pricing and labour practices. The applicant's contention was that all these activities of liaison office were concerned with purchase of goods in India however, none of the final products were sold by it in India via the said liaison office. Accordingly it was not liabel to be taxed in India. Further, it was the applicant's contention that even if section 9 was to be taken into consideration, exemption contained under Explanation 1(b) to section 9(1)(i) relating to activities of purchase would make activities of liaison office fall outside the ambit of taxation in India.

With a view to seek determination of this question of law, the applicant preferred an application before the AAR. After considering the facts of the case, the AAR held;

i) A portion of the income of the business of designing, manufacturing and sale of the products imported by the applicant from India accrues to the applicant in India.

ii) The applicant has a business connection in India being its liaison office located in India.

iii) The activities of the liaison office in India are not confined to the purchase of goods in India for the purpose of export.

iv) The Income taxable in India will be only that part of the income that can be attributed to the operations carried out in India. This is a matter of computation.

v) The Indian liaison office involves a fixed base PE for the applicant under article 5.1 of the DTAA.

vi) In terms of article 7 of the DTAA only the income attributable to the liaison office of the applicant is taxable in India.

S. 245R – Procedure on receipt of application seeking advance ruling – bar on entertainment of application.

This proposition has been laid down by the AAR in two rulings.

SEPCOIII Electric Power & Construction Corporation, In re. (AAR, New Delhi)

The applicant, a Chinese company entered into an offshore supply contract with SEPL. With respect to financial year 2010-11, an application under section 197 was filed seeking determination of appropriate withholding tax rate. An order was passed by the concerned officer. A revision under section 264 was filed in which the matter was remitted to the AO. On 9-9-2010, afresh order was passed by the AO. A notice was issued to the applicant under section 263 on 24-1-2011. Meanwhile, assessment proceedings for the assessment years

2007-08 to 2009-10 were initiated and were also pending before the concerned Assessing Officer.

On 18-11-2010, the applicant filed the application u/s 245R, seeking an advance ruling on the question whether the amounts received/receivable by it from SEPL upon execution of offshore supply contract are liable to tax in India in view of the provisions of the I.T. Act and the relevant DTAA. An objection was raised by the revenue to the effect that application could not be entertained *as proceedings u/s 197 were already pending and the question sought to be raised was the subject-matter of revision under section 263 at the time of filing of the application; and that regular assessment proceedings had been commenced against the applicant concerning the assessment years 2007-08 to 2009-10 even before the instant application was filed*.

In this background the AAR, rejecting the application of the assessee, held;

i) Mere pendency of a proceeding under section 195 or 197 or the revision therefrom u.s 263 or even a final order thereon does not stand in the way of an application for advance ruling being entertained.
ii) Where a return of income is furnished and the proceedings for assessment are going on, it cannot be claimed by the person that the income returned by him or one of the items of income returned by him is not taxable in this country has not arisen for consideration by the AO or that it is not pending before him.
iii) The power of the Authority to exercise discretion in deciding not to give a ruling even when one of the conditions of the proviso is not satisfied, is part of the general discretion that is vested with any such authority as recognized by the Authority, in the Microsoft Operations Pte. Ltd., In re [2009] 178 Taxman 328 (AAR - New Delhi). But, once one of the bars is found to exist, this Authority is enjoined, by the very statute that created it, to decline jurisdiction to give a ruling.

Foster Pty. Ltd., In re. (AAR, New Delhi)

The applicant, an Australian company, entered into a contract with a Singaporean company, ROS, for provision of services in connection with the business of oil and gas exploration and production. ROS, alongwith others, had, in turn, entered into a production sharing contract with the Government of India for the exploration, development and production of mineral oil and gas in the ROS Field. The applicant submits that ROS was not deducting tax on payments made by it to the applicant under the belief that such payments were not chargeable to tax in India. In this context, the applicant has approached the authority with the instant application seeking an advance ruling on the question whether the consideration received/receivable by it under the terms of the agreement with ROS is liable to tax as royalty as defined in article 12 of the Double Taxation Avoidance Agreement between India and Australia.

In its application the applicant disclosed that the revenue authorities while completing the assessment on the tax return filed by ROS disallowed the payments made by it to the

applicant by invoking s. 40(*a*)(*i*) on the ground that ROS had not withheld any tax on such payment. ROS has filed appeal against assessment order and same is pending.

The AAR rejecting the assessee's application observed that;

i) In the regular assessment against the payer, it was open to the payer to contend that the amount it pays to the applicant herein was not taxable under the Act or the DTAA in this country and, consequently, the payer had no obligation to make a deduction under section 195 and, hence, no disallowance in terms of section 40(a)(i) could be made. That means, in the assessments, whether the amount paid by the payer to the payee is taxable in India, is directly and substantially in issue before the AO and now before the appellate authority.

ii) Thus, where the question raised by applicant in advance ruling application is already pending before an appellate authority, though not at instance of applicant, but at instance of payer, application cannot be entertained in view of proviso to s. 245R(2).

To treat a person as an agent of non-resident, it is to be proved that such person has business connection with non-resident and from or through such a person, non-resident is in receipt of income, whether directly or indirectly.

WSA Shipping (Bombay) (P.) Ltd. Vs. ADIT (IT), {ITAT – Mumbai}

The company was engaged in business of cargo consolidation. It was registered as multimodal transport operator with the Ministry of Shipping. Its major business activity was to receive cargo from various shippers of part for shipments to various destinations worldwide. The AO noticed that the assessee had made payment to the non-resident during the relevant assessment years on which no tax was deducted at source at the time of making payment and treated the assessee as a agent of non-residents u.s 163 of the Act. Further, the AO held that to treat a person as an agent under s. 163, what is required is to prove that the representative assessee has business connection with the non-resident and from whom or through whom the non-resident is in receipt of any income, whether directly or indirectly. Both these facts had not been disputed by the assessee. On appeal to ITAT by assessee, it was held the assessee fairly conceded that identical issue in the assessee's own case in respect of certain other non-residents, in respect of whom the assessee was considered as an agent under s. 163(1), on identical facts had come up for consideration before the Tribunal and the Tribunal upheld similar order of the CIT(A). The Tribunal also held that there was a business connection between the assessee and the non-residents and that the assessee was covered by the provisions of s. 163(1)(b) . Further it has been held that the assessee satisfied the criteria laid down in s. 163(1)(c), the assessee was a person from or through whom the non-resident was in receipt of any income whether directly or indirectly. For the aforesaid reasons, the order of the CIT(A) was upheld and appeal filed by the assessee was dismissed.

Domestic tax

Procedure for regulating refund of excess amount of TDS deducted and/ or paid. – Modification of circular No. 2/2011, Dated 27-04-2011.

Circular No. 6/2011, dated 24-08-2011.

The CBDT has through this circular, modified Circular No. 02/2011, dated April 27, 2011, which had prescribed the procedure for regulating refund of amount paid in excess of tax deducted and/or deductible in respect of TDS on resident covered u.s 192 to 194LA of the Act. In partial modification of Circular No. 2/2011, dated April 27, 2011, it has now been provided that:

"The refund claims pertaining to the period upto march 31, 2009 may be submitted to the AO (TDS) upto December 31, 2012."

S. 80CCF of the Act – Deduction in respect of subscription to long term infrastructure bond.

Notification No. 50/2011, dated 9-9-2011

In exercise of the powers conferred by s. 80CCF of the Act, the Central Government has notified long term infrastructure bonds issued in the financial year 2011-2012 by IFCI, LIC, IDFCL, IIFCL and a Non –banking Finance company as Long term Infrastructure Bonds for the purpose of deduction u.s. 80CCF of the Act. The notification further specifies certain conditions relating to limit on issuance, tenure of the bond, yield of the bond, end use of the proceeds and reporting or monitoring mechanism. Further, it shall be mandatory for the subscriber to furnish their PAN to the issuer.

Exemption- Union Public service Commission, allowances and perquisites paid to chairman/ retired chairman or any other member/ retired member.

Notification no. 49/2011, dated September 6,2011

In exercise of the powers conferred by s. 10(45) of the Act, the Central Government has through this notification, notified certain allowances and perquisites for serving Chairman and members of Union Public Service Commission namely, the value of rent free official residence, conveyance facilities, sumptuary allowance and leave travel concession. The said notification also notifies allowances and perquisites for retired Chairman and retired members of Union Public Service Commission which are as follows:

a) A sum of maximum Rs. 14,000 per month for defraying the service of an orderly and meeting expenses incurred towards secretarial assistance on contract basis.

b) The value of a residential telephone free of cost and the number of free calls to the extent of Rs.1,500 pm (over and above free calls allowed).

Where authorized share capital of assessee-company was Rs. 1 lakh, without there being increase in said authorized share capital, assessee-company could not receive Rs. 1

crore in cash under garb of share application money.

ITO, New Delhi Vs. Nandi Promoters (P.) Ltd. (ITAT – New Delhi)

The company was engaged in the business of real estate. 'GG' and 'UG' were two directors and also shareholders of the Company. The company had constructed a building during the previous year. During the assessment proceedings the AO discovered that the investment in said property was claimed to be share application money which amounted to Rs. 1.34 crores from 'GG' and out of alleged share application money a sum of Rs. 1 crore was received by assessee in cash and remaining Rs. 34.75 lakhs was received through bank account. However that said sum was paid directly to parties from whom construction material was purchased. It was also found that authorized share capital of the company was Rs. 1 lakh only and that the share capital had not been increased till the assessment order was passed. On such findings, the AO observed that the assessee could not have received the money in cash under the garb of share application money. It was also observed that the assessee did not bother the compliance of provision u.s 269SS and took the money in the shape of loan/deposit in cash. The ACIT imposed a penalty of Rs.1 crore u.s 271D of the Act. The ITAT held that the directors had not intended to increase the authorized share capital. If assessee was to receive share capital then it ought to have applied for increase in the authorized share capital. The amount of Rs. 34.70 Lakhs was directly paid to the parties from whom construction material was purchased. That factor indicated that the company had took the money from the directors, according to its requirement for the construction of the building and, when at the end of the year it was caught on the wrong side of law, that it had not received the money in accordance with the provision of the Act, then it branded the same as share application money.

Therefore, it was held that the assessee had not received share application money. It had received the loan/deposit in contravention of s. 269SS of the Act and the penalty was upheld.

Merely because a liability is pending for many years it cannot be said to have ceased to exist and charged to tax u.s 41(1) of the Act.

ITO Vs. Maharashtra State Co-operative, Consumers Federation Ltd.(ITAT- Mumbai)

The AO at the time of assessment proceedings observed that the apex body had shown liability of Rs. 10,85,531/- which was pending for more than 5 years and the same had not been claimed by the creditors therefore, he presumed that liability to pay creditors had seized. Thus, he added this amount to total income of the assessee. The CIT while observing that there was no proof of assessee obtaining any benefit in respect of these creditors, the liability had not been written back by the assessee, there was no remission of liability and following the decision of the Supreme Court in the case of CIT v. Sugauli Sugar Works (P.) Ltd. [1999] 236 ITR 518/102 Taxman 713 deleted the addition.

The Revenue filed an appeal to Tribunal and it was held that in the absence of any contrary materials placed on record by the revenue to show that no such liability existed in the books

of account or the assessee has obtained any benefit by cash or in any manner during the current year, it was held that merely because the said liability was more than 5 years old does not mean that there is a cessation or remission of the liability in view of the provisions of s. 41(1). Following the ratio of the above decision in Sugauli Sugar Works (P.) Ltd. the ITAT held that the CIT(A) was fully justified in deleting the addition of Rs. 10,85,531/- made by the AO u.s 41(1) of the Act.

Where due to amendment assessee became liable to pay advance tax u.s 115JB on book profit deemed to be total income whereas it had paid advance tax on total income, interest could not be charged u.s 234B and 234C of the Act.

CIT Vs. Jupiter Bio-Science Ltd. (Karnataka – High court)

The assessment of the company was completed by applying the principles of s.115JB of the Act and the interest was charged u.s 234B and 234C of the Act. The assessee filed an application for withdrawal of the interest charged u.s 234B and 234C on the ground that the aforesaid provisions were not applicable for these assessment years in appeal. The assessee's appeal came to be allowed and the interest charged was deleted. Then revenue filed an appeal to Tribunal and it was held that:

(a) The assessee is liable to pay advance tax as per the amended provisions of s. 115JB for the relevant period. However, he is not liable to pay interest on the amount due as per the amended provision.

(b) If he has not paid the advance tax as per the provision existing prior to amendment, he is liable to pay interest on the said amount.

(c) He has no liability to pay interest on the difference in the tax paid.

Accordingly, the appeal was partly allowed and the matter was remanded back to the Assessing Authority to recompute the interest payable.

Petition for waiver of interest u.s 220(2) of the Act can be filed even after payment of interest.

Jewellers Om Prakash Vs. CCIT (High Court- New Delhi)

The assessee's residential and business premises were subjected to search and seizure operation u.s 132 of the Act at that time jewellery was also seized vide having panchnama of the same date. An order u.s 132(5) of the Act was passed, prima facie determining the undeclared income. Accordingly, an order was also passed for retaining and not returning the aforesaid jewellery. The assessee filed return of income for the assessment year 1993-94 declaring certain income and requested the department that the jewellery seized should be sold and the tax demand be set off against sale proceeds thereof. However, the department did not proceed to sell the jewellery. The assessee was also liable to pay interest u.s 234A, 234B and 234C. The interest demanded u.s 220(2) had also been paid.

Thereafter the assessee moved an application to the CCIT for waiver of interest u.s 220(2), 234A, 234B and 234C. However, by written communication filed subsequently, the assessee informed the CCIT, that it was not pressing for waiver of interest under sections 234A, 234B and 234C but pressed its petition for waiver of interest u.s 220(2A). The CCIT disposed of the petition as infructuous on the ground that in the written communication, the assessee had not prayed for waiver of interest. On filing a writ petition by the assessee it was held that the CCIT was incorrect in rejecting the petition for waiver of interest u.s 220(2) on the ground that the assessee had nowhere mentioned that it was facing genuine hardship, whereas this was specifically claimed, highlighted and stated. Genuineness of the hardship during the period of delay was required to be examined. S. 220(2A) is applicable and the petition for waiver can be filed even after interest has been paid. Further, the interest was paid after the assessee had filed the petition for waiver of interest. It should also be kept in mind that the value of the jewellery has gone up due to passage of time and due to increase of value of gold. The aforesaid amount of Rs. 2,25,000 should be waived or refunded to assessee within a period of six weeks from the date, the order is communicated/received in department's office. In case the payment is not made within six weeks, the assessee will be entitled to interest @ 10 per cent on the said amount till the payment is made from the date of the order. Similarly, jewellery, if not already returned, should be returned within one month of the receipt of the order, failing which the revenue will be liable to pay damages of Rs. 10,000 per month till the jewellery is returned.

Excise duty paid need not be added in valuation of closing stock when items of stock continue to lie with assessee.

CIT- Bangalore Vs. Indian Telephone Industries (High Court – Karnataka)

The appeal was filed by the revenue being aggrieved by the order passed by the ITAT, Bangalore reversing the order of the Appellate Commissioner confirming the order passed by the Joint Commissioner of Income-tax (Asst.), Special Range-II, Bangalore. The substantial question of law that arises for determination as per the appellants is as to whether the excise duty actually paid by the assessee need not be added in the valuation of the closing stock as per section 145A of the Act when the item of stock continued to lay with the assessee during the assessment year.

The assessee filed a return of income for the assessment year 1997-1998 and in valuing the closing stock, had not taken into consideration the excise duty and assessment order was passed by the AO. JCIT by holding that the excise duty leviable on the finished goods should be taken into consideration for computing the closing stock as per the judgment of the Hon'ble Supreme Court in the case of CIT v. British Paints India Ltd. [1991]. The Appellate Commissioner by order upheld the finding of the AO. Being aggrieved by the same, appeal was filed by the assessee before the Tribunal and the Tribunal held that the excise duty actually paid by the assessee need not be added in the valuation of the closing stock as per section 145A of the Act when the item of stock continued to lie with the assessee during the assessment year.

The impugned order of the Tribunal was justified as the question of law is answered against the revenue. However, the department submitted that this appeal was filed only on the apprehension that the amendment has been made to the Act by inclusion of s. 145A of the Act by the Finance (No.2) Act of 1998 with effect from 01-04-1999. The said apprehension is unfounded as in the instant case, the assessment pertains to the year 1997-1998

and the amendment brought to the Act by inserting s. 145A of the Act was applicable to the assessment year 1998-1999. Accordingly the appeal was dismissed.

Payment made outside India for services rendered outside India is not taxable in India and, consequently, no disallowance could be made invoking s. 40(a)(i) of the Act.

ITO Vs. Kirtilal Kalidas Diamond Exports {ITAT – Mumbai}

The assessee deals in the business of export of cut & polished diamonds for which it has to import rough diamonds. It had imported rough diamonds from Diamond Trading Company Ltd., U.K after availing the services of non-resident M/s. Bonas & Co., U.K for which the assessee paid commission in respect of the purchases of rough diamonds made through the said non-resident Company. However, no tax was deducted against such payments. The claim of the assessee before the AO was that services were rendered outside India and the payment was also made outside India and therefore, the income of non-resident was not chargeable to tax particularly when the said non-resident company had no establishment in India. But AO was of the view that the assessee was required to deduct the tax at source u.s 195 of the Act. Since the assessee failed to deduct such tax, the provisions of s.40 (a)(i) of the Act were attracted. The matter was carried in appeal before the learned CIT(A). It was submitted that a non-resident had no establishment in India and therefore, no tax was payable in view of the Indo-UK Treaty. The CIT (A) accepted the contention of the assessee and consequently deleted the disallowance made by the AO. Aggrieved by the same, the revenue filed an appeal before the Tribunal that ITAT held no income accrued to the assessee in India. Even assuming that income accrued it was to be considered as 'Business Profits' under the Indo-UK Treaty and could not be charged to tax in India in the absence of any permanent establishment. The appeal filed by the revenue was dismissed.

Service tax

Mandatory Electronic Return of Service Tax

{Notification No. 43/2011 –ST dated 28th August 2011.}

Service Tax Rules, 1994 have been amended to provide that all assessee will have to submit half yearly service tax return electronically, irrespective of the amount of service tax paid in the preceding financial year .The amendment would be effective from October 1,2011.

At present electronic filling of service tax return is mandatory for the assessee who have paid service tax of Rs 10 lakh or more including the amount of service tax paid by utilization of CENVAT credit in the preceding financial year.

Consulting engineers to pay service tax on receipt basis.

{Notification No. 41/2011 ST dated 27th June 2011.}

Rule 7 of point of Taxation Rules 2011, has been amended to provide that point of taxation in case of taxable consulting engineer's service would be the date on which payment is received or made. However, if the payment is not made within a period of six month of date of invoice, the provision of this rule would not apply.

Exempt Service provided by certain association of dying unit from whole of service.

Club or association service provided by an association of dying unit in relation to specified project has been exempt from service tax. The specified project means common facility set up for treatment and recycling of effluents and solid waste discharged by dying units with the financial assistance from the central or state government.

Value of SIM cards sold by mobile telecommunication operators to subscribe is included in taxable service u.s 65(105)(zzzx) which provide for levy of service tax on telecommunication service and it is not taxable as sale of goods under Sales Tax Act.

Idea Mobile communication Ltd Vs CCE&C

A SIM card or subscriber identity module is a portable memory chip used in cellular telephone . It is a tiny encoded circuit board which is fitted into cell phone at the time of signing on as a subscriber security data and to store personal number and its store information which help the networks service provider to recognize the caller Kerala High court , in Escotel Mobile communication ltd Vs Union of India and others(2002) has held that a transaction of selling SIM card to the subscriber is also the part of service rendered by service provider to the subscriber.The Charges laid by the subscriber for procuring a SIM card are generally processing charges for activating the cellular phone and consequently the same would necessarily be included in the value of SIM card SIM Cards which on its own but without the service would hardly have any value at all. Thus the value of SIM Card forms parts of the activation charges as no activation is possible without a valid function of SIM card and the value of taxable service is calculate on the gross total received by the operator from the subscriber . The sales tax authority understood the aforesaid position that no element of sale is involved in the present transaction. Therefore the value of SIM card sold by the appellant to their mobile subscribers is to be included in taxable service u. 65(105)(zzzx) and not taxable as sale of goods under the Sales Tax Act.

Applicability of Service Tax on Taxable Service provided by Non resident or a person located outside India to a recipient in India.

Instruction [F. NO. 276/8/2009-CX-8A], DATED 26-9-2011

Kind attention is invited to vide instruction F No. 275/7/2010-CX-8A, dated 30-6-2010, wherein the Board had communicated its view that services tax on a taxable service received in India, when provided by a non-resident/person located outside India, would be applicable on reverse charge

basis with effect from 1-1-2005, and that the ratio of judgment in Indian National Shipowners Association (INSA) v. Union of India [2009] 18 STT 212 (Bom.) would not apply to such cases. Further, direction was issued to field formations to defend the levy of service tax on such services for the period on or after 1-1-2005, as post INSA judgment, it has been held by the High Courts/Tribunal in a large number of cases, applying ratio thereof, that service tax on such services is leviable only w.e.f. 18-4-2006. However, the appeals filed by the department before the Hon'ble Supreme Court, for defending the levy of service tax on such services w.e.f. 1-1-2005, have been dismissed recently (subsequent to the issuance of said instruction dated 30-6-2010) in the following cases.

(i) SLP (C) No. 29539 of 2010 in CCE v. Bhandari Hosiery Exports Ltd.

(ii) SLP (C) No. 18160 of 2010 in CST v. Unitech Ltd.

(iii) SLP (C) No. 34208/09 of 2010 in UOI v. S R Batliboi & Co.

Further, Review Petition No. 1686 of 2011 filed in the case of Bhandari Hosiery has also been dismissed by the Hon'ble Supreme Court vide order dated 18-8-2011.

2. In view of the aforementioned judgments of the Hon'ble Supreme Court, the service tax liability on any taxable service provided by a non-resident or a person located outside India, to a recipient in India, would arise w.e.f. 18-4-2006, i.e., the date of enactment of section 66A of the Finance Act, 1994. The Board has accepted this position. Accordingly, the instruction F No. 275/7/2010-CX-8A, dated 30-6-2010 stands rescinded.

Snippets

MC Joshi New CBDT Chairman.

MC Joshi took over as the Chairman of Central Board of Direct Taxes on 1st August 2011. 1974 batch IRS officer, Joshi has also served as the CCIT, Uttarakhand.

More high-value deals likely to be on IT radar.

The government plans to monitor high-value savings and investments more closely to net tax evaders. High-value share market transactions in the secondary market, insurance premiums, bank accounts and debit card payments may all come under the tax department's watch. The finance ministry is also debating whether to reduce the limit on property deals to be monitored by the income tax department.

Investments via Mauritius in focus again.

The recent decision of the Bombay High Court in the case of Aditya Birla Nuvo Ltd (ABNL) once again seeks to lift the corporate veil and tax gains in the hands of the 'beneficial owners' of Indian investments that are held through Mauritius investment vehicles. The decision effectively distinguishes the Supreme Court's decision in the case of the Azadi Bachao Andolan, where a valid tax residency certificate issued by the tax authorities in Mauritius was considered as sufficient proof of residency and ownership, to avail of the benefits of the India-Mauritius tax treaty. The Indo Mauritius tax treaty essentially exempts from tax in India, any capital gains income arising from the transfer of shares of an Indian entity

by a Mauritius tax resident. Besides this ruling, the Government of India has been aggressively pursing the Government of Mauritius to re-negotiate the Tax Treaty.

These developments underline the need for rethinking international holding structures for multinational companies investing in India through the Mauritius route.

Double Taxation Avoidance Agreement (DTAA) with the Oriental Republic of Uruguay.

India and Uruguay have signed a Double Taxation Avoidance Agreement (DTAA) on 8th September, 2011.

DTAA signed between India and Georgia.

India has also signed an Agreement for Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital (DTAA) with Georgia.

E-filing of I-T returns jumps 140%.

THE e-filing of income-tax returns has lead to a 140 per cent jump in the number of filings till July 31, as compared to the same period in 2010-11. The figures released by the income tax department reveal that 5.3 million returns had been filed electronically for assessment year 2011-12 till July 31, as compared to 2.2 million filed during this period last year.

Names of Tax Defaulters to be Made Public FM.

The Finance Minister Pranab Mukherjee has said that the government was working on a number of strategic initiatives to curb generation of black money and for its detection, including the feasibility and methodology of putting the names of chronic tax defaulters in public domain.

New accounting regime for taxation soon.

The Finance Ministry has initiated work on developing a new set of accounting standards which would be compliant with the International Financial Reporting Standards (IFRS) and shall also be capable of accurately estimating tax liability under the Direct Tax Code.

Delhi HC dismisses corporate tenants challenge to service tax.

A division bench of the Delhi high court has dismissed a large number of writ petitions challenging the constitutional validity of s.65(105)(zzzz) of the Finance Act, 1995 and s. 66 as amended by the Finance Act, 2010 which deal with the applicability of service tax on commercial properties. The petitions challenged the power of Parliament to pass a law which dealt with property. It was the contention of the petitioners that it is the state which has the power to deal with renting of immovable property as it is a tax on lands and buildings which came within Entry 49 of List II of the 7th of the Constitution. The division bench has dismissed various petitions filed in this regard.

Statutory Compliance calendar

- Deposit TDS from Salaries paid for September, 2011- ***October 07, 2011***
- Deposit TDS from Contractor's Bill, Payment of Commission or Brokerage, Rent, Professional/ Technical Services bills/ Royalty made in September, 2011 ***- October 07, 2011***
- Pay Service Tax in Form TR-6, collected during September 2011 by persons other than individuals, proprietors and partnership firms - ***October 5, 2011***
- Pay Central Excise duty on the goods removed from the factory or the warehouse during September, 2011 ***– October 5, 2011***
- Payment of Monthly Employees' Provident Fund (EPF) dues -***Within 15 days from close of every month***
- Payment of Monthly Employees' State Insurance (ESI) dues -***Within 21 days from close of every month***
- Monthly return of Provident Fund for the previous month (other than international workers) - ***Within 15 days from close of every month***
- Monthly return of Provident Fund for the previous month w.r.t. international workers - ***Within 15 days from close of every month***

Disclaimer

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