Tax News

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In this issue...

INCOME TAX

Reminder For May 2011

Action Due	Due Date
TDS/TCS for the month of April 2011	07-05-11
PF for the month of April 2011	15-05-11
ESI for the month of April 2011	21-05-11
Form 16/ 16A	31-05-11
TDS Return 24Q/27Q/26Q	15-05-11

SERVICE TAX

Action Due	Due Date
Service Tax for the month of April 2011 in case of company	05-05-2011
Service Tax for the month of April 2011 in case of a company for which e-payment is mandatory.	06-05-2011

INCOME TAX

Important Circular/ Notification

- With effect from April 1, 2011, the Central Board of Direct Taxes (CBDT) has amended the rules in Income Tax Act, 1962, which shall be called the Income-tax (3rd Amendment) Rules, 2011. The main changes pertain to naming and applicability of the various Income Tax Return forms. The details are given in *Notification No. 18 /2011/ F.No.142/02/2011 - TPL dated April 5, 2011.*

The CBDT has issued the detailed Explanatory Notes to the Provisions of the Finance Act 2010. The details are in its *Circular no. 01/2011 dated April 6, 2011.*

Supreme Court / High Court Judgments

Classification of Lease business The assessee-company was engaged in business of hire-purchase and leasing activities. It had not been filing return under the Act. On perusal of its income-tax return, the Assessing Officer observed that it was engaged in the financial activities and had shown income from net hire purchase charges, lease charges and bill discounting charges apart from other income. In that view of the matter, the Assessing Officer held that the assessee was taxable entity for purpose of the Act and issued notice to the assessee. On appeal, the assessee contended that it was neither a 'credit institution' nor a 'finance company', and as such, was not taxable under the Act. The Commissioner (Appeals) disallowed the contention of the assessee. On further appeal, the Tribunal held that the assessee was neither a financial company nor a credit institution in terms of section 2(5B) and as such was not a taxable entity for purpose of the Act. The Tribunal held that for deciding principal business of a taxable entity under the Act, only receipt from business is criteria and other parameters such as turnover, capital employment, head-count of persons employed in each line of business activity are not relevant.

On the revenue's appeal to the High Court, it was held that:

(1) It was an accepted position that the assessee could be treated as credit institution only if it fitted into the description of a 'finance company' as mentioned in sub-clause (iv) of section 2(5B).

(2) it was necessary to determine as to whether lease business in question was that of financial leasing or operational leasing and in the event it was a financial lease, the case could be covered under sub-clause (iv).

(3) matter would have to be referred back to the Assessing Officer to decide as to whether the lease agreement entered into by the assessee with the lessee were financial leases or operational leases or both and in that case, how much charges were to be apportioned as income from financial lease and how much was to be assigned as income from the operational lease. *[2011] 10 taxmann.com 212 (Delhi).*

Transfer of NRNR deposits: The assessee, as a non-resident Indian, made deposits in Indian bank with convertible foreign exchange under Non-Resident Non-Repatriable Scheme (NRNR). Later, the assessee became a resident of India and he transferred the NRNR accounts from the banks in which original deposits were made to other scheduled banks. The Assessing Officer held that the assessee was not entitled to concessional rate of tax under section 115H read with section 115E for the reason that transferred NRNR deposits had ceased to be foreign exchange assets. The revenue's case was that once NR deposits were closed from banks, the subsequent deposits were only deposits of Indian rupee

made by a resident, which could not be termed as a foreign exchange asset under section 115C(*b*) for availing concession rate under sections 115E and 115H. On appeal, the Tribunal, however, held that the assessee was entitled to concessional rate of tax under section 115H, read with section 115E, on the interest received from the bank deposits maintained by the assessee.

On revenue's appeal, the High Court held:

(1) It is clear from the latter part of section 115H that the foreign exchange asset ceases to be so only when it is transferred or converted into money. The transfer or conversion into money applies only to specified assets like shares, debentures and the like, and the same cannot be applied to specified assets in the form of bank deposits. In the instant case, the NRNR deposits were transferred by the assessee from one bank to another. Though that had happened after the assessee ceased to be non-resident, still the deposits retained character as a foreign exchange asset because asset, namely, the deposit, was acquired with convertible foreign exchange.

(2) Hence, the Tribunal's ruling that the assessee was entitled to concessional rate of tax on the interest earned from NRNR deposits under section 115H read with section 115E was correct. [2011] 10 taxmann.com 186 (Ker.)

Tribunal Judgments

Taxability of expenses incurred on promotion of Pace Foundation for Fast Bowlers of Cricket: The assessee was in the business of manufacturing tyres. Assessee incurred an expenditure relating to promotion of MRF Pace Foundation, as advertisement expenditure for the promotion of the company's brand image, and claimed as business expenditure. AO did not allow it as business expenditure but classified it as expenditure incurred for the sake of charity. The CIT (A) allowed the appeal of the assessee stating that the expenditure was not capital in nature and also not personal in nature, and it was incurred wholly and exclusively for the purpose of business.

The Tribunal held that the expenses in question were not for the sponsorship of cricket so as to get publicity through hoardings and media advertisements. The case of the assessee that it exports its products to 65 countries, out of which some are cricket loving countries, does not establish how promoting bowling activity in one country, could affect sales of tyres to other countries. Thus, the expenses could not be treated as business expenditure. *2011-TIOL-250-ITAT-MAD in Income Tax.*

India – UK DTAA: Assessee, a resident company and part of WNS group, entered into an agreement with another group company, WNS, U.K., for purpose of availing sale support and account handling services for itself in foreign markets. During relevant previous year, employees of WNS, U.K. visited India for more than 30 days and accordingly, such visits constituted service P.E. of WNS, U.K. in terms of articles 5(2)(k) of India-UK Tax Treaty. Assessing Officer held that services so rendered by WNS, U.K. were covered by provisions of section 9(1)(vii), read with Explanation 2 thereto as also article 13(4)(c) of DTAA between India and U.K. Thus, he directed assessee to deduct tax at source at rate of 15 per cent from remittance to WNS, U.K. On appeal, assessee contended that services rendered by WNS, U.K. did not 'make available technical knowledge, experience, skill know-how' to it and, as such, article 13(4)(c) had no application. The Tribunal held that as per article 12 of Indo-UK DTAA, technical services are treated as having been 'made available' only when recipient of such technical services is enabled to perform such services without recourse to service provider. Since services rendered by WNS, UK, did not meet aforesaid test, the remittances made by the assessee could not be taxed as fees for technical services.

The assessee, Jain Group, entered into an agreement with Gillette India Pvt. Ltd. (GIPL) to pool their resources and strengthen their business of manufacturing and marketing the writing instruments and stationery products in India. Subsequently, Gillette Group decided to transfer its writing instruments business worldwide to Newell. Initially Newell agreed to step into the shoes of Gillette to honour the terms of the agreement made between Gillette and the assessee, but later, Newell refused to acquire the

shares of Gillette in the assessee company and decided not to become party to the joint venture agreement. As a compensation, they paid substantial amounts to various members of Jain group including a sum of Rs. 4.86 million to the assessee.

It was held by the Tribunal that Newell intended to purchase the interest of Gillette group in the assessee company and obtained permission from the government of India, but later did not purchase the shares. If Newell had not withdrawn, the assessee company would have obtained advantage accruing as a consequence of association with a worldwide group. The possible result would have been increase in future profits by having access to Newell technology, brand name etc. This advantage was lost. The assignment agreement did not come into force as it would have happened only on transfer of shares by Gillette to Newell. The agreement did not speak of any special strengths of Newell or its management practices. Therefore, the compensation received was a case of enrichment of the assessee, which had happened without affecting its capital structure. Even if Newell had entered into the joint venture agreement, it could have withdrawn after a short period of two to three years. In these circumstances, it can only be held that the payment was made for any possible loss of future profits. Accordingly, the receipt was in the revenue nature. *2011-TIOL-232-ITAT-DEL in Income Tax.*

TDS on contractors: It was held by the Tribunal that fees shared by an operator of study center for carrying out respective obligations under a contract with its franchisees under a license agreement would not attract provision of section 194C. *[2011] 10 taxmann.com 242 (Delhi - ITAT).*

TDS in case of mineral oil, business for prospecting / exploration, etc: In Assessment year 2004-05 , assessee had entered into an agreement with ONGC and 'H' Ltd. to drill Oil wells in Indian waters. For purpose of its contract, assessee had taken two drilling units owned by two foreign companies belonging to Norway. Assessee was to pay the hire charges for drilling units as Bare Boat charges and expat Crew charges. Assessee deducted TDS at rate of 4.1 per cent of Bare Boat charges. According to assessee, as per provisions of section 44BB, income of service provider was deemed to be 10 per cent of aggregate amount and rate of tax including surcharge came to nearly 41 per cent. Thus, when whole amount of Bare Boat charges was considered as income as done by Assessing Officer, TDS amount came to 4.1 per cent. Assessing Officer rejected assessee's explanation and invoked provisions of section 40(a)(i) for disallowing payment made to two Norway companies . It was held that since assessee had deducted tax at specified rate of 10 per cent on Bare Boat charges paid to Norway company who was non-resident, computed as per provisions of section 44B, there was no violation of provisions of section 195 in assessee's case which could call for a disallowance u/s 40(a)(i). *[2011] 10 taxmann.com 250 (Chennai – ITAT)*

TDS out of Profits and gains from industrial undertakings u/s 80-IB It was held that where assessee has not deducted tax from any payment which it was required to do or has failed to deposit tax within prescribed time-limit, payment so made has to be disallowed and added back to profits derived from eligible business, and the resultant figure of profits, enhanced by amount of disallowance, would be eligible for deduction under section 80-IB(10) . *[2011] 10 taxmann.com 247 (Mum. - ITAT)*

TDS in case of shipping freight charges: It was held that provisions of section 194C do not apply to shipping freight charges paid by an exporter to shipping agents of non-resident shipping companies as it is nothing but "reimbursement" of freight charges for which necessary memos were issued by the shipping agent. *[2011] 10 taxmann.com 229 (Ahd. - ITAT)*

TNMM Mehod: It was held that only the net profit margin which is actually realised can be taken as comparable when TNMM method is adopted for Transfer pricing analysis. As per the provisions contained in the Act and Rules, the assumption of turnover or operational expenses on hypothetical basis, ignoring the actual figures, is not allowed. *[2011] 10*

taxmann.com 231 (Delhi - ITAT)

TDS on transportation: Payment of fixed vehicle charges to transporter by an assessee for transportation of its employees from one place to another would fall within scope of section 194C and not section 194-I. *[2011] 10 taxmann.com 233 (Ahd. - ITAT)*

Permanent Establishment: Aggregation of time spent on different projects can only arise for connected projects for ascertaining permanent establishment of a non-resident in India. Assessee, a tax resident of UAE, carried out two projects in India in the same financial year, for the same client. One of those contracts was for certain installation work of equipments, and other contract was for barge hire. Assessing Officer was of view that these two contracts were executed in same geographical area, for same party and were, therefore, required to be viewed as geographically and commercially connected. Since period of two contracts, taken together, worked out to 294 days which was in excess of threshold limit of nine months, assessee was said to have a permanent establishment in India as per provisions of article 5(2)(i) of India-UAE tax treaty. Commissioner (Appeals) upheld order passed by Assessing Officer. However, the Tribunal held that aggregation of time spent on different projects can be done only when the projects are connected in their nature and content, and not merely because they are geographically close or done for the same client. Since in this case, there was no finding that there was any interdependence and interconnection between two contracts, it could not be established that assessee had a PE in India. *[2011] 10 taxmann.com 210 (Mum. - ITAT)*

India-US DTAA: Sharing of management experience and business strategies by a foreign professional in India cannot be termed as technical services under Indo-US DTAA. *[2011] 10 taxmann.com 208 (Mum)-ITAT.*

CUP method in case of same market conditions : This case highlights that CUP method is an appropriate method to determine the arm's length pricing, when the comparable goods are sold in a competitive, unbiased, and uniform market. When economic conditions prevailing in the exporter's country do not have a bearing on the competitiveness of the market where the goods are sold, and quality and price of the goods are the sole determinant of demand, then CUP method can be used to determine the ALP. At the same time, it is important to maintain the prescribed documentation regarding the comparative companies' financial and sales information, to establish the correctness of the arm's length pricing derived using the CUP method.

SERVICE TAX

Important Circular/ Notification:

Exemption to Health Services - The new levy on medical services in terms of sub-clause (zzzzo) of section 65(105) has been exempted. It may be noted that the earlier levy on certain services provided by hospitals imposed last year was substituted by the new entry. Thus the levy imposed last year will not be applicable anymore. *Notification No.30/2011 – Service Tax dated 25-4-2011.*

Exemption withdrawn on Legal Services - With the amendments coming into force, exemption provided to CAs, CWAs and CSs vide notification No. 25/2006-ST dated 13-7-2006 for similar services is being withdrawn. *Notification No.32/2011 – Service Tax dated 25-4-2011.*

Exemption to Coaching Centres - The Central Government has exempted (i) any preschool coaching and training; (ii) any coaching or training leading to grant of a certificate or diploma or degree or any educational qualification which is recognised by any law for the time being in force; when provided by any commercial coaching or training centre from the whole of the service tax leviable thereon under sec 66 of the Finance Act, 1994.This notification shall come into force on the 1st day of May, 2011. *Notification No.33/2011 – Service Tax dated 25-4-2011.*

Service tax on A/c restaurants having licence to serve alcoholic beverages – With effect from May 1, 2011, service tax to be imposed on 30% of the value of the invoice (including service charge if any, but excluding tips) for services provided or to be provided, to any person, by a restaurant,

by whatever name called, having the facility of air-conditioning in any part of the establishment, at any time during the financial year, which has licence to serve alcoholic beverages, in relation to serving of food or beverage, including alcoholic beverages or both, in its premises, u/s 65(105)(zzzzv). The exemption on remaining 70% is available provided no Cenvat credit is availed either of inputs or input services. *Notification No.34/2011 – Service Tax dated 25-4-2011.*

Service tax on hotels – With effect from May 1, 2011, service tax to be imposed on 50% of the value of the invoice for services provided or to be provided, to any person, by a hotel, inn, guest house, club or campsite, by whatever name called, in relation to providing of accommodation for a continuous period of less than three months, u/s 65(105)(zzzzw). The exemption on remaining 50% is available provided no Cenvat credit is availed either of inputs or input services. However, service tax is fully exempt when the declared tariff for providing of such accommodation is less than Rs. 1000/ day. "Declared tariff" includes charges for all amenities provided in the unit of accommodation like furniture, air-conditioner, refrigerators etc., but does not include any discount offered on the published charges for such unit. *Notification No.34 & 31/2011 – Service Tax dated 25-4-2011.*

Amendment in service tax rule for life insurance premium – Sub-rule 7A in Rule 6 of the Service Tax Rules, 1994, is amended as follows- "(7A) An insurer carrying on life insurance business shall have the option to pay tax: (i) on the gross premium charged from a policy holder reduced by the amount allocated for investment, or savings on behalf of policy holder, if such amount is intimated to the policy holder at the time of providing of service;(ii) 1.5 per cent of the gross amount of premium charged from a policy holder in all other cases; towards the discharge of his service tax liability instead of paying service tax at the rate specified in section 66 of Chapter V of the said Act. Provided that such option shall not be available in cases where the entire premium paid by the policy holder is only towards risk cover in life insurance." *Notification No.35 & 31/2011 –ST dated 25-4-2011.*

Assistance provided for processing visa applications – A clarification has been issued regarding whether service tax liability would arise on the assistance provided by visa facilitators, to individuals directly, for processing of visa applications.

1. Assistance provided by a visa facilitator, for obtaining visa, to a visa applicant or for foreign employer does not fall within the scope of supply of manpower service. Visa facilitators, while providing visa assistance directly to individuals does not act on behalf of the embassies, as agents of the principal and hence service tax is not leviable within the meaning of business auxiliary service.

2. Visa facilitators, merely facilitate the procurement of visa and directly assist individuals who intend to travel abroad, to complete the immigration formalities. Visa facilitators collect certain statutory charges like visa fee, certification fee, attestation fee, emigration fee, etc. from the visa applicant, which are remitted to the respective authorities, and in addition collect service charges for themselves as remuneration for the assistance provided by them to obtain the visa. Such a service provided by a visa facilitator, in the form of assistance to individuals directly, to obtain a visa, does not fall under any of the taxable services under section 65(105) of the Finance Act, 1994. Hence service tax is not attracted.

3. However, service tax is leviable on any service provided other than assistance directly to individuals for obtaining visa, falling under the description of any taxable service. For example, where in addition to rendering assistance directly to individuals for obtaining visa, visa facilitators may also act as agents of recruitment or of foreign employer, in which case, service tax is leviable to the extent under the service of 'supply of manpower'. *Circular No. 137/6/2011 – ST dated 20-4-2011.*

Service Tax Audit Manual 2011 - The Board has approved the Service Tax Audit Manual 2011 (the previous version was dated 2009), and will be circulated by the Directorate General of

Audit. All Service Tax audits should henceforth be carried out in accordance with the principles laid down in the said Manual and the extant prevalent instructions. This Manual is for the use of departmental officers only. *Circular No. 135/6/2011 – ST dated 19-4-2011.*

SC/HC Judgments

Liability to pay service tax on spare buses having spare permits – The assessees being stage carriage operators were issued permits by the RTA, Pollachi. All the assessees had permit for a spare bus, to be operated in place of the regular bus, in case of break down or for special occasions. The service tax authorities issued a notice directing the assessees to register themselves for payment of service tax on the ground that they were tour operators coming under the definition in terms of section 65(78) of Finance Act, 1994, which was challenged by the petitioners. The High Court held that the spare buses of the petitioners may not be termed as 'tourist vehicles' within the meaning of Section 2(43) of the Motor Vehicles Act and, therefore, they are not liable. It was held that buses running under the public transport system fall under the category of stage carriage. Since the passengers have a right to board or alight from such buses according to their choice and convenience and such passengers individually pay the fares for the journey, therefore such stage carriages do not fall under the definition of tourist vehicle under Section 2(43) of the Motor Vehicles Act. *2011-TIOL-244-HC-MAD-ST*

Service Tax on Maintenance of Software - The assessee, engaged in the business of publishing newspapers and periodicals, had entered into a contract on 31.10.2000 with CCI Europe A/S Denmark for the purchasing software for pagination system. Also, an agreement for maintenance of software was also entered, for which the assessee paid DKK equivalent of Rs. 16.6 million (approximately). The CBEC issued a circular on 17.12.2003 to the effect that the software service would be outside the purview of service tax. In October 2005, the Board issued the circular that software amounts to 'goods' and therefore, the maintenance of software will attract maintenance charges liable for service tax. Based on the above circular of the Board, the Revenue insisted for payment of service tax on maintenance charges payable to the company in Denmark. The High Court held that:

1. Under the contract the petitioner entered a maintenance contract paying annual maintenance charges to the foreign dealer and by virtue of the said circular, the petitioner would be bound to pay service tax in respect of maintenance of software.

2. With effect from 1.6.2007, the term 'goods' has been expressly made to include computer software in the Finance Act. But earlier in the Finance Act, 2003 in which the terms, 'business auxiliary service' and 'maintenance or service' were introduced for the first time. There was specific exclusion of information technology service including maintenance of computer software from the purview of business auxiliary service.
3. Therefore, on fact, it is clear that till the advent of the Finance Act, 2007, the information technology which included maintenance of computer software, had been outside the purview of 'business auxiliary service'. Hence, the said Circular is declared to have no application to the petitioner. *2011-TIOL-240-HC-MAD-ST.*

CESTAT Judgments

Service Tax on Reimbursable expenses - Appellant paid service tax on "erection, commissioning and installation" services provided to its customers during the period April, 2003 to March, 2006. However, it did not pay any service tax on the 'reimbursable expenses' incurred by it in connection with these services to the customers. Incidentally, these expenses were shown separately in the relevant invoices issued. A demand of service tax was raised by the jurisdictional authorities along with imposition of penalty and interest. This order was upheld by the Commissioner(A). Upon appeal, the CESTAT held that:

1. Prima facie, under sec. 67, a service-provider has to pay service tax on the gross amount

collected by him from his customer in connection with the rendering of the service. In the present case, the appellant not only collected consideration for the services from their customers but also recovered the expenses incurred by them in connection with the services provided. These recoveries were made under statutory invoices issued to the customers, but service tax was not paid on the expenses reimbursed by the customers. The appellant could not produce even a sample invoice in support of its plea that the consideration for services and the expenses incurred in connection with the providing of the services was separately shown in the relevant invoices and that the consideration for the services alone could be taken as gross taxable value. Prima facie, the entire amount collected by the appellant from their customers would constitute gross taxable value for the purpose of payment of service tax.

2. The fact that expenses incurred in connection with the providing of services were also being recovered by the appellant from the customers was suppressed before the department. These expenses were not returned in the service tax returns for the purpose of payment of tax. Prima face, therefore, the appellant indulged in suppression of material facts with intent to evade payment of appropriate tax. The plea of time-bar is, therefore, not sustainable at this stage.
3. Accordingly, the appellant was directed to make a pre-deposit of the Service Tax demand and report compliance. *2011-TIOL-453-CESTAT-MUM*.

Construction of factory building is an 'input service' - The appellant was engaged in the manufacture of motorcycles and parts thereof. It availed the Cenvat credit of the excise duty paid on inputs and capital goods and of the service tax paid on input services under the Cenvat Credit Rules, 2004. During the course of its business, it had availed the construction service for construction of factory buildings in the factory premises, from contractors, on which service tax had been paid on the basis of the invoices issued, and had taken service tax credit on this. The department was of the view that credit of input services can be taken only if the output service was liable to service tax, and since in this case the outcome of the construction activity was an immovable property, which was neither service nor goods, the input credit in respect of construction service was not available.The Tribunal noted that from the definition of 'input service', it was clear that the services used in or in relation to the setting up, modernization, renovation or repairs of a factory or premises of output service provider or an office relating to such factory or premises, are covered by the definition of 'input service'. So Tribunal was of the prima facie view that there is merit in the appellant's plea that the requirement of pre-deposit of Cenvat credit demand, interest and penalty should be waived. *2011-TIOL-424-CESTAT-DEL.*

Advisory Service related to Issue of equity shares is an input service - Assessee was engaged in the manufacture of motor vehicle parts. It availed Cenvat credit of service tax paid on services provided by a financial advisory services company towards advisory and placement charges in connection with the private placement of their preferential equity shares. The Commissioner issued a show-cause notice, proposing to deny the Cenvat Credit on the grounds that since the said services are rendered in the head office and not used in or in relation to the manufacture and/or clearances of the finished goods, the Cenvat credit availed would not be covered under the definition of 'input service'.Upon appeal, the CESTAT held that the services of banking and other financial service received by the party in respect of their private placement of preferential shares for raising the capital, is an activity related to the business and, hence, eligible for Cenvat credit as per the definition of input service given in the Cenvat Credit Rules, 2004. Merely because the invoice has been raised on the head office, the credit cannot be denied to the factory of the assessee. Thus, a prima facie case has been made out by the assessee for stay of the recovery of the demands towards Cenvat credit, interest and penalty. *2011-TIOL-402-CESTAT-MUM.*

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