Tax News

PKF SRIDHAR & SANTHANAM
Chartered Accountants

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INCOME TAX

Reminder for May 2013

Action Due	Due Date
TDS/TCS for Apr 2013	07-05-13
PF for Apr 2013	15-05-13
ESI for Apr 2013	21-05-13
ETDS return for Salary of Q4 (form 24Q)	15-05-13
ETDS return for other than Salary Q4 (form 26Q)	15-05-13
Form 16 (salary) for FY2012-13	31-05-13
Form 16A for Q4 (1.1.13 – 31.3.13)	30-05-13

SERVICE TAX

Action Due	Due Date
Service Tax for Apr 2013 in case of company	05-05-2013
Service Tax for Apr 2013 in case of a company for which e-payment is mandatory.	06-05-2013

INCOME TAX

Important Circulars/ Notifications

Issuance of TDS certificate in Form No. 16: With a view to streamline the TDS procedures, including proper administration of the Act, the Board had issued Circular No. 03/2011 dated 13.05.2011 and Circular No. 01/2012 dated 09.04.2012 making it mandatory for all deductors to issue TDS certificate in Form No. 16A after generating and downloading the same from "TDS Reconciliation Analysis and Correction Enabling System" or (https://www.tdscpc.gov.in**)** (hereinafter called TRACES Portal), previously called TIN web-site. The Board has now decided as following:-

- All deductors (including Government deductors who deposit TDS in the Central Government Account through book entry) shall issue the Part A of Form No. 16, by generating and subsequently downloading through TRACES Portal, in respect of all sums deducted on or after the 1st day of April, 2012 under the provisions of section 192 of Chapter XVII-B. Part A of Form No 16 shall have a unique TDS certificate number.
- The deductor, issuing the Part A of Form No. 16 by downloading it from the TRACES Portal, shall, before issuing to the deductee authenticate the correctness of contents mentioned therein and verify the same either by using manual signature or by using digital signature in accordance with sub-rule (6) of Rule 31.

- In other words , Part A of Form No. 16 shall be issued by all the deductors, only by generating it through TRACES Portal and after duly authenticating and verifying it.
- 'Part B (Annexure)' of Form No. 16 shall be prepared by the deductor manually and issued to the deductee after due authentication and verification alongwith the Part A of the Form No. 16 stated above.
- Sub rule (3) of rule 31of the Rules sets the time limit for issuance of Form 16 by the deductor to the employee. Currently, Form 16 should be issued by 31 st May of the financial Year immediately following the financial year in which income was paid and tax deducted. *Circular N0. 4/2013, Dated: April 17, 2013.*

Agreement between India and Gibraltar: India and Gibraltar have signed an agreement for the Exchange of Information with respect to taxes that has come into effect from 11th March, 2013. *Notification No. 28/2013 [F.NO.503/11/2009-FTD-I], DATED 1-4-2013.*

Arm's Length Pricing: Where the variation between the arm's length price determined under section 92C and the price at which the international transaction or specified domestic transaction has actually been undertaken does not exceed one per cent of the latter for wholesale traders and three per cent of the latter in all other cases, the price at which the international transaction or

specified domestic transaction has actually been undertaken shall be deemed to be the arm's length price for assessment year 2013-2014. *Notification No. 30/2013 (F.NO. 500/185/2011-FTD I]*.

Amendments passed by Lok Sabha to Finance Bill, 2013:

- Scope of Sec. 10(48) widened to include other prescribed income also and not just income arising from sale of crude oil
- Trading in commodity derivatives no more a speculative transaction
- Tax Residency Certificate – Can be a conclusive evidence but has to be supported by prescribed documents
- TAN not required to deduct tax from payment made for purchasing an immovable property
- Concessional withholding rates on certain rupee denominated long-term infrastructure bonds is withdrawn
- Non-resident referred to in Section 194LC will not be penalised for not having a PAN
- Even gold coins weighing less than 10 gms will be subject to TCS
- No wealth-tax on agriculture land

Tribunal Judgments

Expected loss on contracts: The assessee was engaged in engineering construction business. It filed Return showing a loss. The AO noticed that assessee had debited in its Profit & Loss Account an item of expenditure called "expected loss". The AO was of the opinion that this was a claim of expenditure, which was not incurred. There was no crystallized liability. Therefore, it was in the nature of a provision which could not be allowed. The AO, disallowed the claim. The CIT(A) was of the opinion that expenses claimed by the assessee were a contingent liability. Thus, the disallowance was rightly made by the AO. On appeal, the Tribunal held that:

- Only expenses incurred or losses suffered could be allowed. If assessees are allowed to consider future costs as a current period expense, then there will be few assessees left, who are liable to pay any tax.
- On the issue of staff benefits expenses, just because a breakup was not furnished, disallowance could not have been made.
- On the issue of bad debts, the Assessee could not have written off as bad debt an amount more than what was due to it. *2013-TIOL-231-ITAT-MAD.*

Payments for technical knowhow: The assessee was engaged in manufacture and sale of cars. In the Return filed by the assessee, the AO made an addition on account of Royalty, provision for warranty and sales services, airfare of technicians booked under technical guidance, entry tax and software expenses. On appeal, CIT(A) on the basis of the Tribunal's order in assessee's own case in the earlier years, deleted the additions made by the AO.

- **Royalty & lump sum fee –** the assessee had obtained only the right to use, during the currency of the agreement, the technical knowhow and information and the intellectual property right relating to the manufacture of Honda cars and did not secure any ownership right over them. Therefore, the payment of the lump sum fees for the technical know-how and the royalty was allowable as revenue expenditure.
- **Warranty and sales services -** the AO had made the addition holding that provision of warranty claims was in fact a deferment of tax. The CIT(A) held that provision for warranty is an ascertained and accrued liability of the appellant. The assessee had been following the same method of accounting and had been making provisions for the same on the basis of actual expenses incurred in the past. In the past, such expenses had been allowed by the Revenue. The AO had made no efforts to find out whether the amount of provision exceeded the actual on repairs and replacement. But the fact remains that the expenses were allowed for the reason it was not a contingent liability and such liability arose as soon as assessee made the sale. Therefore, this was ascertained and accrued liability of the assessee and accordingly the same was allowable.
- **Airfare of technicians -** It was held that the expenditure claimed by the appellant on account of air fare and travel expenses was in nature of revenue expenditure and, therefore, the addition made by the AO was deleted.
- **Entry tax u/s 43B of the Act -** It was held that the appellant was entitled to deduct this amount in computing its total income.
- **Software Expenses -** It was held that merely because expenditure may result in enduring benefits, it can not be classified as expenditure of a capital nature. In the case of expenditure on website, there was no change in fixed assets of the assessee so the matter was decided in favour of the appellant. *2013-TIOL-234-ITAT-DEL*

Interest on borrowed funds: The assessee company was engaged in business of leasing of telecom equipments. In its Return, the assessee had claimed Finance expenses which were incurred on account of borrowed funds. The AO noticed that huge amount of borrowed funds were invested in subsidiary and group companies and thus, the finance expenses incurred by assessee were not related to the business. The assessee stated that the borrowed funds were pooled into the mixed funds of the company and from thereon it was utilized for business purpose.

Further, the AO disallowed part of the balance finance charges contending that the assessee had not maintained separate bank account as regards business expenses and non-business expenses. The assessee argued that the interest free advances to group companies were made out of own funds abundantly available.

The assessee company had paid telecom licence fees which was incurred on basis of annual revenue. Thus, the assessee claimed the same as revenue expenditure. However, the AO was of the view that telecom license fees was required to be amortised over a period of 20 years as per provisions u/s35ABB of the Act.

Also, in the A.Y. under consideration, the assessee had made additions on account of computers, computer accessories and claimed depreciation @ 60%. The AO was of the view that 1% of total additions were on account of computer peripherals and accordingly depreciation was allowed @ 25% and balance was disallowed. In appeal, the CIT(A) allowed depreciation @ 60% based on Tribunal decision in one of group company of assessee, where it was held that computer accessories and peripherals such as, printers, scanners and server etc. form an integral part of the computer system as they cannot be used without the computer. Hence, same are the part of the computer system and entitled to depreciation at the higher rate of 60%.

On appeal, the Tribunal ruled in favour of the assessee in all the above incidents. *2013-TIOL-236-ITAT-DEL.*

Discount offered to the distributors on payments: The assessee was the provider of postpaid and prepaid mobile connections. For post paid cellular services, the assessee had appointed a number of distributors and was paying them commission for the services rendered and was deducting tax at source as per the provisions of section 194H. In prepaid mobile services, the assessee was delivering starter kits, sim cards, recharge vouchers, etc. of fixed denomination coupled with specific air time duration to the consumers.

In the case of pre-paid mobile services, the assessee appointed a number of distributors on the basis of agreements. The MRP was mentioned on every product. Distributors/Retailers were not permitted to sell the products to the ultimate consumers at a price of their choice but not exceeding the MRP. The distributor's margin was the difference between the sale price and the invoice price. This remuneration was however treated by the assessee as 'cash discount' in its books of account and no TDS was being made by the assessee on these payments. The AO levied tax u/s 201(1) and the consequential interest u/s 201(1A) for not deducting tax at source in respect of the so called cash discount .The CIT(A) confirmed the AO order. On Appeal before the Tribunal the AR submitted that what was paid to the distributors was 'discount' and not 'commission'. Having heard the parties, the Tribunal held that:

Once the recipients have paid the tax on the amount of commission receivable by them, then the assessee cannot be held liable u/s 201(1), but interest for non deduction of tax may be levied till the date of filing of return by the recipient. *2013-TIOL-245-ITAT-HYD.*

Allowability of interest incurred on borrowed funds: The assessee had borrowed huge funds from banks and also in the form of Inter Corporate Deposits. The AO observed that the

interest incurred by the assessee was in excess of the brokerage income. Also, the assessee had carried out huge volume of trade on which no brokerage had been charged. Thus it was concluded that there was no commercial sense involved in the transactions of the assessee, and so deduction of interest incurred on financing the loan could not be allowed.

Further, the AO relied on the fact that SEBI had debarred the assessee from trading in the stock market for two years for transactions against the public policy. He also came to a conclusion that the borrowed capital was being utilized for financing the traders, which was not an active business of the assessee. The AO was of the opinion that any expense incurred in a business venture, which had no profit motive could not be allowed as expenditure. The counsel for the assessee contended that if the brokerage earned by the assessee from such activities was taxed, the deduction of interest expenditure incurred to earn that brokerage had to be allowed. It was argued that as per the subsequent amendments carried out to Section 37, the AO could only disallow illegal expenditure incurred while carrying on legal business. Even if the activity of the assessee was treated as entirely illegal, still the expenditure had to be allowed. Further, it was contended that the funds were borrowed for financing various traders from whom the assessee had earned brokerage which was more than the interest expenditure. Having heard the parties, the Tribunal held that:

- During the year under consideration the assessee had earned brokerage of about Rs.109 crore against brokerage earned of Rs.67 crore in earlier year. Therefore, the contention of the AO as well as DR that against huge interest expenditure the assessee has earned less brokerage, is factually incorrect.

- The interest expenditure has to be set off against brokerage earned by the assessee because the interest expenditure is incurred by the assessee on borrowed money for the purpose of buying shares or making purchases of shares on behalf of others. Huge brokerage is charged, which is much more as compared to interest expenditure. This is not expenditure, which is prohibited under Explanation of Section 37(1) as this expenditure does not belong to bribery, as these expenditures are on account of borrowed money used for the purpose of business transaction.

Keeping in view these facts and circumstances, the CIT(A) was correct in allowing the issue in favour of the assessee. *2013-TIOL-246-ITAT-MUM.*

Foreign exchange fluctuation loss: Assessee company was engaged in the business of exports of merchandise and goods. During assessment, AO noted that assessee had debited an amount on account of restatement of debtors. In reply to the query, assessee submitted that it was following merchandise system of accounting and as per the prevailing accounting

standards the FEF loss on restatement of debtors was a revenue expenditure and, therefore was allowable.

However, the AO held that assessee had basically claimed deduction for notional loss on account of FEF and that actual loss would arise only at the time of remittances and not before and, therefore AO made an addition on account of unrealized loss on account of FEF. On appeal before CIT(A), the assessee submitted that the exchange difference on account of purchase and sales recasted at the end of the FY was not a notional loss. Rather it was a revenue loss to be set off against the profits and loss of the year and moreover, the loss was booked in compliance of section 145(2) and accounting standards-11 which were mandatory. It was further submitted that 'term expenditure' used in section 37, covered an amount which was a loss even though the said amount had not gone out from the pocket of the assessee.

It was also submitted that appellant had been consistently following mercantile system of book keeping from the very beginning and there was no change in the method of accounting and appellant had offered similar treatment to unrealized gains in earlier year. Reliance was also placed on the decision of SC in the case of *Sutlej Cotton Mills Ltd. vs CIT (2002-TIOL-546-SC-IT)* which held that profit or loss arising out of currency conversion would ordinarily be trading profit or loss, if it was held on revenue account or as a trading asset.

Having heard the matter, the Tribunal held that unrealized forex foreign exchange fluctuation loss being in the nature of revenue, should be allowed as deduction. *2013-TIOL-258-ITAT-DEL.*

SERVICE TAX

CESTAT JUDGMENT

- **Building Interiors work**: The appellant – Carpenters - were providing services under the category of 'Commercial or Industrial Construction Services'. They undertook interior contract work such as paneling, tiling, painting, etc. and claimed that these were repair, alteration, renovation or restoration services in relation to a building or civil structure as mentioned in clause (d) of the category. They discharged service tax on the above activity after availing an abatement of 67% on the gross value of the taxable value of the service rendered, under Notification No. 1/2006-ST dated 01/03/2006. The department was of the view that the appellant was not eligible for the said abatement for the reason that the activity undertaken by the appellant related to completion and finishing services in respect of buildings or civil structure and fell under clause (c) of the definition of 'Commercial or Industrial Construction Services' which was excluded from the scope of the said Notification. Upon appeal, the CESTAT held that:

- the activity undertaken by the appellant was in respect of ***existing*** buildings and contracts awarded to them were for interior work, wood work, furniture etc.
- These activities will not come under completion and finishing services under clause (c) of the 'Commercial or Industrial Construction Service' but under clause (d) which deals with repair, alteration, renovation or restoration or similar services in relation to building or civil structure. *2013-TIOL-646-CESTAT-MUM.*

➢ **Business Auxiliary Service:** The appellant was engaged in providing various services to *M/s Citi Bank* and allied entities in India and abroad. It undertook collection and sales services, call center services and computerized data processing services for the client. On the collection and sales services it had been discharging service tax liability under 'Business Auxiliary Services (BAS)' w.e.f 01/07/2003 and on call center services it had been discharging service tax liability under BAS w.e.f 01/03/2006 as the said service was exempt prior to 01/03/2006. In respect of computerized data processing services, it had been discharging service tax under the category of 'Business Support Services' w.e.f 01/05/2006 when the said service was brought under tax net. The department issued a show cause notice to the appellant with respect to "computerized data processing" proposing to classify the same under 'Business Auxiliary Services' as defined under section 65(19)(iv) of the Finance Act, 1994 and demanded Service Tax on it. Upon appeal, the CESTAT held:

- As per the definition of 'Business Auxiliary Services' under section 69(19) of the Finance Act, 1994, in the explanation thereof, computerized data processing has been specifically excluded from the scope of BAS but neither in the SCN nor in the order there is any allegation or finding that the activity undertaken by the appellant is not computerized data processing.

- In that case, the activity undertaken by the appellant, which is nothing but computerized data processing, cannot come within the scope of BAS and hence the entire demand is unsustainable. *2013-TIOL-636-CESTAT-MUM* .

➢ **Caterer Services rendered by mandap keepers:** Appellant was registered with the department under the category of 'Mandap Keeper Service'. While rendering 'Mandap Keeper Services' it was also providing catering services. However, it split the charges for the services rendered into two parts. One was for 'hall charges' which was towards temporary usage of the banquet hall for conducting the function and the other was for supply of food. It discharged the service tax liability on the 'hall charges' collected from the customers, but did not pay service tax on the food charges collected from the customers on the ground that the transaction was one of sale of food and, therefore, service tax was not leviable, and also food was exempt from sales tax.

The department issued a demand on these food charges. Upon appeal, the CESTAT held that:

- The services rendered by the mandap keepers as caterer would also be liable to service tax under the category of ‘Mandap Keeper Services'.
- In the present case, the demand is not under any of these services but on ‘Mandap Keeper Service' and as can be seen from the decision of the hon'ble apex Court in the case of Tamil Nadu Kalyana Mandapam Assn. (supra), service tax liability is attracted in case the mandap keeper also performs catering services.
- The Bench directed the appellant to pay the demand as pre-deposit and report compliance for obtaining Stay. *2013-TIOL-616-CESTAT-MUM***.**

OUR OFFICES

Head Office	Branches:	Branches:
KRD Gee Gee Crystal, 7th floor, No.91/92 Dr. Radhakrishnan Salai, Landmark: Sri Krishna Sweets, Mylapore, Chennai - 600 004 Phone # + 91 44 28112985/86/87/ Fax # + 91 44 2811 2989 Email : taxation@pkfindia.in	**Bangalore** T8 & T9, Third Floor,' GEM PLAZA, No 66, Infantry Road Bangalore 560 001 Tele Fax : (+91) 080 25590553 Email : bangalore@pkfindia.in	**Mumbai** No.406, Madhava Building 4th floor, Bandra Kurla complex Bandra (E), Mumbai – 400 051 Phone : +91-22-26591730 / 26590040 Email : mumbai@pkfindia.in
Branches:	**Branches :**	**Branches :**
Delhi No. 512, Chiranjiv Towers, 5th Floor, Nehru Place, New Delhi 110 049 Phone : +91 11 40543689 Email: delhi@pkfindia.in	**Hyderabad** 2nd Floor, Kiran Arcade, Door No 1-2-272-273/6, Mchno:100 Sarojini Devi Road, Hyderabad - 500 003 Phone: (+91) 040-27819743, Mobile No :+91-9490189743 Email: viswanadh.k@pkfindia.in	**Coimbatore** No.38/1, Raghupathy Layout, Coimbatore 641 011. Phone: (+91) 422 2449677 Mobile: +91-94430 49677 Email: shankar@pkfindia.in