Tax News

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INCOME TAX

Reminder for Sep-2012

Action Due	Due Date
TDS/TCS for Aug 2012	07-09-12
PF for Aug 2012	15-09-12
ESI for Aug 2012	21-09-12
Advance Tax	15-09-12

SERVICE TAX

Action Due	Due Date
Service Tax for Aug 2012 in case of company	05-09-2012
Service Tax for Aug 2012 in case of a company for which e-payment is mandatory.	06-09-2012

INCOME TAX

IMPORTANT CIRCULARS / NOTIFICATION	
Relaxation from compulsory e-Filing of Returns in certain cases:	Rule 12 of the IT Rules, 1962 mandates that if total income during the previous year of an individual or Hindu undivided family, exceeds ten lakh rupees, than he/it shall furnish the return electronically for the AY2012-13 & subsequent assessment years. It has been brought to the notice of the Board that the agents of non-residents, within the meaning of section 160(1) (i) of the Income –tax Act, are facing difficulties in electronically furnishing the returns of non-residents, because there may be more than one agent of the non-resident in India for different transactions, or a person in India may be an agent of more than one non-resident. Such situations are not covered by the existing e-filing software which functions on the principle of one assessee-one PAN-one return. Also, the 'private discretionary trusts' are facing problems in filing their return of income electronically in cases where they are filing their return in the status of an individual. This is because status of a private discretionary trust has been held in law as that of an 'individual', while the existing e-filing software does not accept the return of a private discretionary trust in the status of an 'individual'. Accordingly it has been decided by the Board that it will not be mandatory for: • agents of non-residents, and • 'private discretionary trusts' to electronically furnish the return of income for assessment year 2012-13. *Circular No. 6/2012, Aug 3, 3012.*

Double Taxation Agreement and Agreement for Exchange of Information with respect to Taxes with States of Guernsey:	The Central Government has notified that all the provisions of the Agreement between the Government of India and the States of Guernsey for the exchange of information with respect to taxes, shall be given effect to in the Union of India with effect from the 11th June, 2012, that is, the date of entry into force of the said Agreement. The details are in *Notification No. 30/2012, dated 9-8-2012.*
Transfer Pricing – Computation of Arm's Length Price:	The Central Government has notified that where the variation between the arm's length price determined under section 92C and the price at which the international transaction has actually been undertaken does not exceed five per cent of the latter, the price at which the international transaction has actually been undertaken shall be deemed to be the arm's length price for assessment year 2012-13. *Notification No. 31/2012, dated 17-8-2012.*
SC/HC JUDGMENTS **Set-off of Business Loss:**	The issue was, when the assessee carries forward business loss, whether the same has to be necessarily set off against business profits and not income under other heads in the subsequent year. The Assessee was carrying on the business of sale and purchase of properties and also earning rental and other income. The assessee set off the business loss brought forward against its income by way of rent, car and computer hire charges and commission income and declared a net loss. AO held that rental income was chargeable to tax under the head "income from house property" and that the hire charges and commission income was chargeable to tax under the head "income from other sources", therefore, the brought forward business loss was not permitted to be set off against the income shown under these two heads of income u/s 72(1). The relevant Section permitted adjustment of brought forward business loss only against profits assessed under the head "business".

	Assessee contended that business of leasing, selling and renting of real estate properties was one of the main objects of the company as per the Memorandum of Association and the hire charges and commission income was also business income, therefore, the brought forward business losses could be properly set off against these items of income. Though the rental income was chargeable to tax under the head "income from house property" and the hire charges and commission income were assessed under the head "income from other sources", that was only because of the provisions of the Income Tax Act but were in fact income from business and since there was no bar u/s 72(1) to the brought forward losses being set off against the aforesaid items of income, losses had to be set off. CIT (A) allowed the appeal of the assessee that the brought forward business loss could be set off against the rental income, car and computer hire charges and the commission income u/s 72(1). ITAT reversed the order of the CIT (A). Upon appeal to the High Court, the HC observed: • The income against which the brought forward loss is claimed to be set-off should represent business income judged by the application of commercial principles, and not on an application of the provisions of the Act. • ITAT decided the appeal merely on the basis that the rental income has to be statutorily assessed under the head "income from house property" and the hire charges and commission income have to be assessed compulsorily as "income from other sources". One had to apply the provisions of Section 72 (1) to ascertain whether, by applying commercial principles these receipts could be considered as the business income of the assessee company on a commercial perspective.

	• There is no doubt that the rental income, hire charges from car and computer and the commission income all represent the profits of business carried on by the assessee. Thus, the brought forward business loss can be set off against these items of income. *2012-TIOL-587-HC-DEL-IT, dated Aug 6, 2012.*
Depreciation on Block of Assets not in use:	The issue was, when assessee had not claimed any depreciation on one set of plant and machinery not in use, whether the same could still be treated as part of 'block of assets', and thus be assessed u/s 50 for capital gains arising on transfer. The assessee had shown plant and machinery (not in use), as a separate item and no depreciation was ever claimed on it. The assessee claimed that since no depreciation at any stage was claimed, Section 50 of the Act would not apply and the assets (not in use) acquired by the assessee would be assessable as long term capital gain according to the definition given in Section 2(29-B) of the Act. However, the Assessing Officer dismissed the claim. On appeal, the CIT(A) held that Section 50 of the Act would apply on the profit on the sale of the plant and machinery (not in use) and the AO had rightly assessed the gain as short term capital gain. On Appeal, the HC held that: • The assessee for all the earlier years, had reflected in its list of fixed assets, plant and machinery under two separate heads, namely, plant and machinery on which depreciation has been claimed and another as plant and machinery (not in use) on which depreciation was never claimed. • The assessee had those assets (not in use) for a period of more than 36 months, which is long term capital asset as defined u/s 2(28A) and the capital gain arising on transfer is required to be assessed as long term capital gain as per Section 2(29B). The aforesaid provision has overriding effect contained in Section 2(42A). Therefore, the plant and machinery (not in use) could not be

	merged with the other head titled as plant and machinery. • Once the Tribunal has recorded a categorical finding of fact that the plant and machinery, which is covered by Section 50, would be a depreciable asset and not the one on which no depreciation was ever claimed, then such assets which are not depreciable, could not ever be assessed u/s 50. *2012-TIOL-584-HC-P&H-IT, Aug 6, 2012.*
Adjustment in ALP on account of bad debts written off:	The assessee, CA Computer Associates India Pvt Ltd had entered into a software distribution agreement with M/s C.A. Management Inc. (CAMI), USA. Under the agreement, the assessee was liable to pay CAMI an annual royalty on all amounts invoiced at the rate of 30%. The assessee had paid royalty on all the invoices raised on customers in India, even in the cases, where customers had raised complaints regarding the quality of the products and not made the payment to the assessee. These unrealized payments were written off in the assessee's books of account. The assessee filed its return of income for AY 2002-03 declaring a loss. The AO referred the determination of the arm's length price (ALP) in respect of the international transaction, to the TPO. The TPO did not dispute the rate of royalty paid by the assessee, but questioned whether royalty could be allowed to be written-off to the extent of the unpaid invoices or bad debts, during the year itself. In appeal, the CIT(A) upheld the AO's order holding that the assessee had paid the royalty to its principal even on the bad debts where customers had complained about the product quality. Such cases should have been treated as though no sales had occurred and so no payment of any royalty should have occurred. In further appeal, the ITAT concluded that merely because the assessee had paid the royalty even in respect of the products sold by it to clients, who had not paid for the same, it would make no difference to the determination of the ALP of the transaction. Accordingly, the ITAT deleted the disallowance.

	In appeal before the High Court, the Revenue contended that the assessee had paid royalty on the amount of bad debts where the software had not worked at all. The HC held that: • Sec.92C, which provides the basis for determining the ALP in relation to international transactions, does not consider failure of the respondent's customers to pay for the products sold to them by the respondent to be a relevant factor. Once it is accepted that the ALP of the royalty is justified, there can be no reduction in the value thereof, on account of the assessee's customers failing to pay the assessee. • The transactions between the respondent and CAMI are unrelated to the transactions between the respondent and its clients. Therefore, disallowance is not justified. *CIT Vs CA Computer Associates(I)Pvt Ltd.2012-TII-02-HC-MUM-TP.*
Residential status of a foreigner on deputation to India:	In terms of a collaboration agreement between M/s. Suzuki Motors, Japan and M/s. Maruti Udyog Ltd., India, the assessee, an employee of Suzuki Motors and a permanent resident of Japan, was deputed to India to offer guidance and technical assistance. His salary was paid by the Japanese company, but his accommodation in a five-star hotel was provided on the expense of the Indian company. The Assessing Officer proposed to assess the rent as a perquisite. The assessee, however, contended that there was no employer and employee relationship between him and the Indian company, and that in any case, the rent paid was exempt by virtue of Section 10(14). AO, however held that tax was payable on the said rental amounts. He also took into consideration the daily allowance and other monetary benefits given to the assessee by Suzuki, holding that in terms of Article 15 of DTAA between India & Japan, the assessee was liable to tax in respect of the salary received by him in Japan.

	The assessee's appeal was partly accepted by the CIT(A). However, he relied on the provisions of Article 15 of the DTAA between India and Japan to tax the salary of the assessee earned outside India, holding that the provisions of DTAA override the provisions of taxing statute. Upon appeal, the HC held that: The status of the assessee was that of "not ordinarily resident" in India, having worked in India for 273 days in the relevant previous year and not being "resident" in India in any of the nine out of ten previous years. The substantial questions of law framed in this appeal are answered in favour of the assessee, and against the Revenue. *2012-TII-37-HC-DEL-INTL dated Aug 3, 2012.*
Goodwill arising on Amalgamation is eligible for Depreciation:	M/s. YSN was amalgamated with the assessee, and the assets and liabilities of YSN were transferred to the assessee. In the process of amalgamation goodwill had arisen in the books of assessee. The AO held that goodwill was not an asset falling under Explanation 3 to section 32(1) and denied assessee's claim for depreciation. On appeal, the CIT(A) held in favour of assessee, which was confirmed by the ITAT. On further appeal, the Supreme Court held in favour of assessee as under: • Explanation 3(b) to section 32(1) states that the expression 'asset' shall mean an intangible asset, being know-how, patents, copyrights, trademarks, licenses, franchises or any other business or commercial rights of similar nature. • Following the principle of 'ejusdem generis', goodwill would fall under the expression 'any other business or commercial right of a similar nature'. • Thus, 'Goodwill' is an asset under Explanation 3(b) to section 32(1) of the Act and entitled for depreciation. *CIT v. SMIFS Securities Ltd. [2012] 24 taxmann.com 222 (SC).*

## TRIBUNAL JUDGMENTS	
Cash payments made to agents are deemed direct payment:	Assessee was engaged in the business of purchasing milk, and after processing, selling the milk and milk products. The AO disallowed 20% of the cash payments u/s 40A(3) stating that as per the vouchers produced, payments had been made to some persons who in turn had split payment to various persons. Also, the claim that payments were made in places where banking services were not available was not acceptable as banking facilities were available in nearby centres. Assessee submitted before CIT (A) that the payments were made to the supplier of milk and the amount never exceeded Rs. 20,000/- and the provision of Sec 40A(3) were inapplicable. CIT(A) allowed the appeal of the assessee stating that the company made the payment in the name of the representative, and after receipt of the payment, he disbursed the amounts to the members as per the entries recorded in the milk collection centre. The ITAT held that: • The payments made for purchase of produce of the animal husbandry or dairy etc to its producer are outside the scope of the provisions of sec 40A(3) of the Act. • Where assessee makes the payment in cash to his agent who is required to make payment in cash for goods or services on behalf of such person, such payments are outside the scope of the provisions of sec 40A(3) of the Act. Also, there is no bar on the said agent to work in dual capacity to the milk producers too. • Further, there is no dispute on the fact that the milk is a dairy produce. The payments in cash made by the assessee to the milk producers through composite representatives/agents in dual capacity of the assessee - milk producers combine, should be deemed as direct payment to the milk producers within the meaning of the provisions of Rule 6DD(f) of the Income tax rules, 1962. The agents are required to make the payment in cash for milk, to the cattle owners, who belong to economically weaker section, on behalf of the assessee. Thus, the payments are squarely covered by the exceptions provided in clause (l) of Rule 6DD. *2012-TIOL-449-ITAT-HYD, Aug 9, 2012.*

Expenditure incurred for earning dividend income from investments in foreign companies:	The assessee received dividend both from foreign and domestic companies. The issue was whether interest expenditure incurred can be averaged and disallowed in terms of section 14A to the proportion of dividend income received from domestic companies, even though investement in shares were out of substantial free reserves, and not from borrowings. Also, whether or not, provisions of Sec 14A are applicable to expenditure incurred to earn dividend income from investments in foreign companies. The Tribunal held that: • Section 14A(1) provides that no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income. Thus, the provisions of section 14A cannot extend to investments made in the shares of foreign companies. • Regarding the assessee's objection about the sustainability of part of disallowance u/s 14A, the bench observed that the profit for the relevant year itself was much more than the amount of investment. If interest-free funds are available to the assessee, sufficient to meet its investments, and at the same time loan has been raised, it can be presumed that the investments were made from interest-free funds. It is axiomatic that where investment is made out of assessee's own funds and not out of borrowed funds, there can be no disallowance u/s 14A. • Therefore, the CIT(A) was not justified in sustaining the disallowance u/s 14A in respect of the investments made by the assessee in the shares of three domestic companies. *2012-TIOL-453-ITAT-MUM dated Aug 14, 2012.*
Availing Sec 80IA(4) benefits, it is necessary for assessee to own infrastructure facility:	Assessee company was engaged in the development of irrigation canals and Railways tracks including conversion of gauge. It claimed deduction 80IA(4) on the ground that it was a developer and had developed and maintained infrastructure facility. AO denied the claim of the assessee on the ground that assessee was not a developer,

	rather a work contractor, since the assessee did not own the infrastructure facility. The CIT(A) affirmed the view of the AO. On appeal before the ITAT, the ITAT held that: • The deduction available for any enterprise earlier under section 80IA (4A) are also made available under Section 80IA(4) itself. Further, the very fact that the legislature mentioned the words (i) "developing" or (ii) "operating and maintaining" or (iii) "developing, operating and maintaining" clearly indicates that any enterprise which carried on any of these three activities would become eligible for deduction. • Where an assessee incurred expenditure for purchase of materials himself and executes the development work i.e., carries out the civil construction work, he will be eligible for tax benefit under section 80 IA of the Act. In contrast to this, an assessee, who enters into a contract with another person, including Government or an undertaking or enterprise referred to in Section 80 IA of the Act, for executing works contract, will not be eligible for the tax benefit under section 80 IA of the Act. • Enterprises carrying on development of infrastructure should be owned by the company and not that the infrastructure facility should be owned by a company. Therefore, there is no requirement that the assessee should have been the owner of the infrastructure facility. • Therefore, the assessee should not be denied the deduction under section 80IA of the Act as the contract involved, development, operating, maintenance, and financial involvement, and so it could not be called a simple works contract. *2012-TIOL-452-ITAT-HYD Aug 13, 2012.*

## ADVANCE RULINGS	
Taxation of off-shore sale of shares of an Indian company:	CRL Mauritius, a Mauritius based company, sold 100% shares in an Indian company CRIL Pvt Ltd, to Moody's Cyprus, a Cyprus based company. There was another sale by a Mauritius based company CMRL, Mauritius, of 100% shares of Exevo Inc, US, which in turn held 100% shares of an Indian company Exevo India Pvt. Ltd to another American company, Moody's USA. The Applicant submitted that the two sellers being Mauritian companies, were entitled to the benefit of the India-Mauritius Double Taxation Avoidance Convention (DTAC). If the amendments to the Income-Tax Act brought about in Budget 2012, were considered, and the transactions were held to be taxable in India, even then, going by the DTAC, the transactions which gave rise to capital gains, could be taxed only in Mauritius. It was submitted that the Tax Residency Certificates have to be accepted in the light of the observations in the decision of the Supreme Court in Azadi Bachao Andolan. Revenue, on the other hand, submitted that this was a clear case of avoidance of tax. The beneficial owner of the shares was CPL, Jersey, and since there existed no convention between India and Jersey, the taxability of the transactions had to be according to the Income-tax Act. The Revenue argued that a Tax Residency certificate is not conclusive and the position of law as enunciated in Azadi Bachao has since been modified by the decision of the Supreme Court in the Vodafone case. Also, the management and control of the companies involved, was not in Mauritius but was with Rishi Khosla, the Director of Exevo Inc, USA, the Director of Copal India, and CEO of Copal. Rishi Khosla was a resident of the United Kingdom, and hence the applicant cannot take advantage of the DTAC between India and Mauritius. The AAR ruled that: • It cannot be said that it has been shown that the effective management of the companies is not from where their Board of Directors function. Normally, the

	management of a company vests in its Board of Directors. • The role of Rishi Khosla is in respect of the sale transactions undertaken. It does not appear to be a role in connection with the running of the businesses of the companies concerned. It cannot be said that the role played by Rishi Khosla in these transactions establish that the management and control of the Mauritian companies is with Rishi Khosla. It is therefore not possible to accept the contention of Revenue that the seller companies are non-Mauritian companies. • The Revenue's contention that since capital gain is not actually taxed in Mauritius, so it is liable to be taxed in India, is not correct. • The fact that the owner company is a 100% subsidiary of another company will not alter the legal ownership. Every corporation is an independent legal entity. • The transactions cannot be taxed in India. *2012-TII-32-ARA-INTL dated Jul 31, 2012.*

SERVICE TAX

IMPORTANT NOTIFICATIONS / CIRCULARS	
Amendment in Service Tax Rules:	The Central Government hereby makes the following rules, called the Service Tax (Third Amendment) Rules, 2012, to amend the Service Tax Rules, 1994, namely: (A) in clause (d), in sub-clause (i), (i) after the item (E), the following item shall be inserted, namely;- "(EE) in relation to service provided or agreed to be provided by a director of a company to the said company, the recipient of such service;"; (ii) in the item (F), in the sub-item (b), after the words "manpower for any purpose", the words " or security services" shall be inserted. (B) after clause (f), the following clause shall be inserted, namely:— "(fa) "security services" means services relating to the security of any property, whether movable or immovable, or of any person, in any manner and includes the services of investigation, detection or verification, of any fact or activity;". *Notification No. 46/2012 - Service Tax, New Delhi, dated 7-8-2012*
Amendment in Service Tax Rules:	The Central Government hereby makes the following amendment in the Notification of the Government of India in the Ministry of Finance (Department of Revenue), No.30/2012-Service Tax, dated the 20th June,2012: (a) in para I, in clause (A) of the said Notification: (i) after the sub-clause (iv), the following sub-clause shall be inserted, namely :-

	"(iva) provided or agreed to be provided by a director of a company to the said company;"; (ii) in sub-clause (v), after the words "manpower for any purpose", the words " or security services" shall be inserted. (b) in para II of the Notification, in the Table,- (i) after Sl. No. 5, the following S.No. and entries shall be inserted, namely:- ***"5A - in respect of services provided or agreed to be provided by a director of a company to the said company – Nil - 100%"*** (ii) in Sl. No. 8, in the entries under the heading 'Description of a service', after the words "manpower for any purpose", the words "or security services" shall be inserted. *Notification No. 45/2012 - Service Tax New Delhi, the 7th August, 2012.*
CESTAT JUDGMENTS **Taxability of treatment and recycling of effluents and solid waste**	The appellant company was incorporated in the year 1997, for taking over the responsibility of operation of Common Effluent Treatment Plant from Gujarat Industrial Development Corporation (GIDC) for treating the effluent discharged by the industries located in the GIDC area, Vapi. The industrial units located in the Vapi industrial area discharging hazardous effluents are compulsorily required to become a member of the appellant association. Appellant charged one-time payment for providing the service and also charged from industrial units on monthly basis on the estimated cost of operation of the effluent treatment facility. On the ground that the appellant is an association of operating units of GIDC Vapi and the appellant association is providing services after charging subscription from the

	members, the Department raised a demand of service tax on the service provided by the appellant to the members under the category of club or association services. The appellant submitted that with the introduction of Section 145 in the Finance Act, 2012, the services provided by club or association in relation to common facilities set up for treatment and recycling effluent and solid waste, with the financial assistance from the Central Government or State Government, have been given exemption with retrospective effect from 16.06.2005. The period involved in the dispute is covered by the provisions of Finance Act, 2012 and therefore the demand is not sustainable. The Department submitted that appellant is not an association but a limited company and therefore is not covered by the exemption with retrospective effect. Only club or association including registered co-operative society is covered. The Tribunal held that the appellant is an association for the purpose of liability of service tax and so, eligible for exemption. *2012- TIOL -1104 – CESTAT – AHM.*
Service tax on outward transportation of clinker:	The appellant manufactured cement clinker and cement in their Sonadih factory. The clinker was stock transferred on payment of duty by road to Nipania depot from where it was transported to the appellant's cement factory by rail. The cement manufactured at Sonadih plant was cleared on payment of duty to its cement depot from where the same was sold. The duty on cement sold from depot was paid on sale price of cement at depot. During period from April 2010 to March 2011, the appellant took Cenvat credit of service tax paid on outward transportation of – (a) cement from Sonadih factory to cement depot; and (b) clinker from Sonadih factory to Nipania depot. The department took a view that the Cenvat credit so availed was inadmissible. The appellant submitted that clinker was cleared on stock transfer basis to Nipania Depot from where the same was transported by rail to the appellant company's Jojobera cement plant. The Jojobera plant is the place of removal. Since there was no change of

	ownership, the road transportation service availed for transportation from Sonadih to Nipania Depot would have to be treated as input service. The CESTAT observed: • The dispute is whether the factory gate of 'Sonadih plant' of the appellant is the "place of removal", or the factory of appellant at Jojobera is the "place of removal". • The definition of 'place of removal' in Section 4(3)(c) can be adopted for Cenvat Credit Rules, only in those cases where the rate of duty is ad-valorem and the duty is charged on value determined under Section 4. In this case, the duty on clinker is at specific rate and hence the definition of "place of removal" in Section 4 (3) (c) would be of no relevance. The "place of removal" would be the place where the duty is liable to be paid, which in this case, is the factory gate of Sonadih factory. • Therefore, the GTA service for transportation of clinker from Sonadih factory to Nipania depot, having been availed after the removal of the clinker from the factory, is not covered by the definition of 'input service'. *2012-TIOL-1025-CESTAT-DEL & 2012-TIOL-1026-CESTAT-DEL.*
Distributing medical tools of non-resident for commission is Export of Service:	The appellant was exclusive distributor of various medical equipments manufactured by M/s. Viasys International Corporation, Pennsylvania, USA. It engaged in promoting, marketing and distributing the various medical equipment manufactured by VIASYS, in India, for which it received commission. According to the Department, this service was liable to service tax under the category of 'Business Auxiliary Services', and could not be considered as 'export of services' under the Export of Services Rules, 2005 as amended. The Tribunal held that: • It is evident that these services can be rendered by the appellant only within the territorial jurisdiction assigned, which is in India, and used within the territory of India. Therefore, the activity does not come within the scope of export of service. • For the period from 19/04/2006 to 28/03/2007, the Rules provided that any taxable service shall be treated as 'export of service' when the following conditions are satisfied, namely, (a) such service is delivered outside India and used outside India and payment for such service provided outside India is

	received by the service provider in convertible foreign exchange. In the instant case, though the condition of receipt of payment in convertible foreign exchange is satisfied, the conditions relating to delivery of service outside India and the use of the service outside India are not satisfied. Therefore, the use of service is not outside India. *2012-TIOL-993-CESTAT-MUM.*
Taxability of 'Write backs' viz. amount retained by paying less to media than that received from client:	The applicant undertook advertising work for its clients comprising: (i) creation of advertising material and (ii) placement of advertising material in the media for display. For providing this Advertising service, it got certain commission and discharged the service tax liability. The dispute was regarding the payments received by applicant for media cost. Out of the total media cost billed to the client, the applicant paid a lesser amount to the broadcaster and kept some amount with itself which was written off in the books of accounts as "write backs". The Department raised a service tax demand on this 'write back' amount, under the category of "advertising agency service". Another demand was confirmed under the category of "Business Auxiliary Services" on discounts received by the applicant from media for giving bulk "volume" advertisement to them. The Tribunal held that: • The applicant is liable to pay service tax on the amount which it has retained with itself i.e the amount received from the client less, amount paid to the media. • In the present case, the advertising agency is not at the liberty to decide the advertiser. Therefore, the requirement of pre-deposit of tax on account of Volume discounts is waived. *2012-TIOL-982-CESTAT-MUM.*

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