Tax News

PKF SRIDHAR & SANTHANAM
Chartered Accountants

In this issue…

INCOME TAX

Reminder For February'10

Action Due	Due Date
TDS/TCS for the month of January'10	07-02-10
PF for the month of January'10	15-02-10
ESI for the month of January'10	21-02-10

SERVICE TAX

Reminder For February'10

Action Due	Due Date
Service Tax for the month of January'10 in case of company	05-02-2010
Service Tax for the month of January'10 in case of a company for which e-payment is mandatory	06-02-2010

INCOME TAX

Vital Notifications / Changes

- **Income tax deduction from salary u/s 192**:

CBDT has issued a circular to provide tax rates required to calculate income tax to be deducted under Section 192 of the IT Act from income chargeable under the head "Salaries" for the FY 2009-2010 (i.e. AY 2010-2011).

In this circular other provisions related to calculation of TDS on salary, estimation of salary income etc. have also been discussed.

For details, please refer *Circular no. 1/2010 dated 11th Jan 2010*.

Recent decisions of SC/HCs

- **Dispute resolution scheme**:

In the Finance bill 2009, a new section 144C was included, to introduce a new mechanism to a Dispute Resolution Panel, to resolve cases related to international taxation. In the present case it was held by the High Court that:

- In case assessee has objection to the order of the Transfer Pricing Officer (TPO), then it can approach the Dispute Resolution Panel against the order of the TPO as well as against the Draft Order prepared by the Assessing Officer. The said Dispute Resolution Panel, before considering the matter has to be guided by Sub-Section 6 of Section 144C of the Act.

- The petitioner would be entitled to raise all possible objections and along with that furnish necessary evidence. The Dispute Resolution Panel shall scrutinize the objections filed by the petitioner and look into the support evidence furnished by him, before passing its order.

2010-TIOL-74-HC-DEL-IT in Income Tax.

- **Income escaping assessment u/s 147:**

Sec. 147 deals with the reassessment in case income escaped from being taxed during the assessment. As per sec. 147 of Income Tax Act, if :

(a) the Income-tax Officer has 'reason to believe' that, the assessee has omitted/failed to make a return under sec 139 for any AY, or to disclose fully/truly all material facts necessary for his assessment for that year, income chargeable to tax has escaped assessment for that year, or

(b) notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the assessee, the Income Tax Officer has information that gives him reason to believe that income chargeable to tax has escaped assessment for any AY, he may, subject to the provisions of sections 148 to 153, assess or reassess such income or recompute the loss or the depreciation allowance, as the case may be, for that year.

Prior to the amendment to sec 147, the word 'reason to believe' was read as 'opinion', which gave arbitrary powers to the Assessing Officer (AO) to re-open assessments on the basis of "mere change of opinion". The AO has no power to review; he has the power to re-assess.

Therefore, in the present case it was held that, after April 1, 1989, AO has power to re-open, provided there is "tangible material" to come to the conclusion that there is escape of income from assessment. There should be proper evidence to support the reasons of the AO to believe that income escaped assessment.

M/s Kelvinator of India Ltd. v. CIT, 2010-TIOL-06-SC-IT-LB.

Recent decisions of Tribunal

- **Selection of comparables**:

Assessee was a subsidiary of Switzerland based company. It entered into a contract with the parent company to provide technical assistance. Assessee calculated its ALP by using TNM method. One of the comparables chosen by the assessee, had suffered huge losses and just started its business, and another comparable had shown extraordinary profits. Tribunal held that the comparables chosen by the assessee, could not be excluded from the list of comparables on the basis that it was a loss making unit, but as it was just a start up company, assessee was not justified to include it as comparables. Also, the assessee's business was in the nature of sales and support services for the parent company, whereas the functions performed by the start-up company were in the nature of telemarketing services.

2010-TIOL-31-ITAT-CHD-SB in Income Tax.

- **No penalty in case of non filing of appeals**:

It was held that where there is no admission of the assessee that the amount added was its income or concealed income, the mere fact that the addition had been agreed to cannot justify the imposition of penalty, as the assessee agreed to the estimation made by the Assessing officer (AO). It was a case of one estimate against another estimate. The estimate was based on facts declared by the assessee itself, and were not discovered by the AO, which resulted into higher estimate of income.

As there was a complete disclosure in respect of contracts entered into by the assessee, and assessee had not concealed any particulars of income or furnished inaccurate particulars, no incorrect particulars of any expenditure have been submitted by the assessee either in the tax return or during the course of the assessment proceedings. Therefore the penalty is not leviable.

2010-TIOL-26-ITAT-DEL in Income Tax.

- **Set off of unabsorbed depreciation and b/f loss before calculating deduction u/s 10A**:

It was held that the unabsorbed depreciation or unabsorbed business loss in respect of eligible 10A unit, or division, or undertaking, is to be set off against the profit of the same eligible 10A unit, or undertaking, for the purpose of determining the amount of deduction available u/s 10A of the Act.

2010-TIOL-24-ITAT-DEL in Income Tax.

- **Liability of TDS out of fees for technical services**:

Assessee was an automobile giant which hired services of a French company (UTAC) to do the testing of various models of car. Assessee did not deduct TDS at the time of remitting testing charges, assuming that there was no transfer of any knowledge or technical knowhow which may qualify the payment as fees for technical services either under Sec 9(1)(vii) or Article 13(4) of the India-France DTAA. It was held by the Tribunal that as the testing reports sent by the French company were used by the assessee in manufacture or modification of its models in India, therefore this would amount to rendering of technical services/information to the assessee. Accordingly, the amounts paid by the assessee to UTAC would be in nature of technical or consultancy services. Also, as the place of accrual of the service charges was the place where the services are utilized (and not where they are rendered), therefore, the payments made to UTAC are chargeable to tax in India.

2010-TIOL-22-ITAT-DEL in Income Tax.

- **Taxability of interest on Income tax refund in case of a co-operative bank**:

In case of interest on refund, normally it is taxable under the head 'Income from other sources', but in the present case the issue was, what would be the treatment in case of a co-operative bank. Whether deduction u/s 80P would be available on it? It was held that for the assessee carrying on the banking business, the assessee would not have paid the income tax which was refunded to it. Since income tax was paid in relation to the banking business, the interest on income-tax refund would be considered as `gain' (not `profit') of banking business covered within the expression `profits and gains' of banking business. Thus interest on refund of income-tax would be covered within the expression "profits and gains of business" notwithstanding the fact that it fell under the head `Income from other sources', and so deduction u/s 80P on such interest cannot be denied.

2010-TIOL-45-ITAT-MUM-SB in Income Tax.

SERVICE TAX

Vital Notifications / Changes

- **Problems faced by exporters in availing refund of excess credit:**

CENVAT Credit Rules, 2004, permit taking of credit of inputs and input services which are used for providing output services or output goods. In order to zero-rate the exports, Rule 5 of the Rules provides that such accumulated credit can be refunded to the exporter subject to certain stipulated conditions.

Notification No. 5/2006-CE (NT) dated 14.03.2006 provides these stipulated conditions.

It was represented by the exporters of services (mainly the call centres or the BPOs) that they were facing difficulties in getting refund under the said notification. In order to ascertain the causes for such delay, a number of meetings were held with the refund sanctioning authorities. The following legal/procedural impediments were identified to be partly responsible for such delays:

(a) As per the notification, refund is permitted of duties/taxes paid only on such inputs/input services which are either **used in** the manufacture of export goods or **used in** providing the output services exported. As against this, the phrases used in the CENVAT Credit Rules permit credit of services used "*whether directly or indirectly, in or in relation to the manufacture of final product"* or *"for providing output service*". The assessing officers tend to take the view that for eligibility of refund, the nexus between inputs or input services and the final goods/services has to be closer and more direct than that is required for taking credit. Many refund claims are being rejected on this ground.

(b) Even if a nexus is considered acceptable, the officers processing the refund claims find it difficult to co-relate goods or services covered under a particular invoice with a specific consignment of export goods or specific instance of export of service.

(c) As per the notification, the claims are to be filed quarterly. For large exporters, the procurement of inputs/input services in a quarter is substantial resulting in each refund claim being accompanied with hundreds of invoices. Verification of these documents with corroborative documents showing exports (such as export invoices, bank certificates, shipping bills) consumes a long time;

(d) Though the notification prescribes that refund claims should be filed quarterly in a financial year, it is not clear whether the refund is eligible only of that credit which is accumulated during the said quarter or the accumulated credit of the past period can also be refunded; and

(e) In certain cases, the invoices accompanying the refund claim are incomplete in as much as either the description of service or its classification is not mentioned.

The matter was examined. At the outset, the entire purpose of Notification No. 5/2006-CX (NT) is to refund the accumulated input credit to exporters and zero-rate the exports. Delayed sanction of refund causes cash flow problems for the exporters. Therefore, the sanctioning authorities are directed to dispose of the refund claims expeditiously based on the following clarifications to the issues raised above.

- **Different phrases in Rules and in the Notification:**

As regards the extent of nexus between the inputs/input services and the export goods/services, it must be noted that the purpose is to refund the credit that has already been taken. There cannot be different yardsticks for establishing the nexus for taking of credit and for refund of credit. Even if different phrases are used under different rules, they have to be construed in a harmonious manner. To elaborate, the definition of input services for manufacture of goods, includes all services used "*in or in relation to the manufacture of final products*" and includes services used "*directly or indirectly*".

The following test can be used to see whether sufficient nexus exists. In case the absence of such input/input service adversely impacts the quality and efficiency of the provision of service exported, it should be considered as eligible input or input service. In the case of BPOs/call centres, the services directly relatable to their export business are renting of premises; right to use software; maintenance and repair of equipment; telecommunication facilities; etc. Further, in the instant example, services like

outdoor catering or rent-a-cab for pick-up and dropping of its employees to office would also be eligible for credit on account of the fact that these offices run on 24 x 7 basis and transportation and provision of food to the employees are necessary pre-requisites which the employer has to provide to its employees to ensure that output service is provided efficiently. Similarly, since BPOs/call centres require a large manpower, service tax paid on manpower recruitment agency would also be eligible both for taking the credit and the refund thereof. On the other hand, activities like event management, such as company-sponsored dinners/picnics/tours, flower arrangements, mandap keepers, hydrant sprinkler systems (that is, services which can be called as recreational or used for beautification of premises), rest houses etc. *prima facie* would not appear to impact the efficiency in providing the output services, unless adequate justification is shown regarding their need.

- **Scrutiny of voluminous record:**

Just like in Budget 2009, the scheme for refund of service tax paid on services used by an exporter was simplified by making a provision of self-certification, where under an exporter or his Chartered Accountant is required to certify the invoices about the nexus between the inputs/input services and the exports, it has been decided that similar scheme should be followed for refund of CENVAT credit under notification No. 5/2006-CE (NT). The details of the procedure to be followed in all cases, including the pending claims, are given in the Notification.

The Assistant or Deputy Commissioner may, after verification of the fact that the input credit has been correctly claimed, sanction the refund on the basis of the declaration. In case there is a doubt about the correctness of the claim of CENVAT credit on any service, the undisputed amount may be refunded and the balance claim may be decided after following the dispute settlement process.

- **Quarterly refund claims:**

As regards the quarterly filing of refund claims and its applicability, since no bar is provided in the notification, there should not be any objection in allowing refund of credit of the past period in subsequent quarters. However, in case of service providers exporting 100% of their services, such disputes should not arise and refund of CENVAT credit, irrespective of when he has taken the credit, should be granted, if otherwise in order. Such exporters may be asked to file a declaration to the effect that they are exporting 100% of their services, and only if it is noticed subsequently that the exporter had provided services domestically, the proportional refund to such extent can be demanded from him.

- **Incomplete invoices:**

It had earlier been prescribed in circular No.106/09/2008-ST dated 11.12.2008 that the invoices/challans/bills should be complete in all respect. In the case of refund under Rule 5, so far as (i) the nature of the service which has been received by the exporter can be ascertained; (ii) tax paid therein is clearly mentioned; and (iii) other details as required under rule 4(a) are mentioned, the refund should be allowed if the input service has a nexus with the service/goods exported as discussed earlier. In any case, the suggested Chartered Accountant's certificate should clearly bring out the nature of the service and this will assist the officer in taking a decision.

The instructions contained in this circular should be implemented with immediate effect and the pending claims may be disposed of accordingly. It is expected that with the clarifications provided and liberalization of procedure, most of the impediments to smooth and expeditious disposal of exporters' claims for refund of accumulated credit would be removed. The Board, therefore, expects that the concerned refund sanctioning authorities should decide all claims of exporters within 30 days of their receipt as has been prescribed in notification No. 17/2009-ST. Any lapse in this regard would be viewed seriously.

Circular No. 120/01/2010-ST dated 19th January 2010.

Recent decisions of SCs/HCs

- **Cenvat credit in case of input used for dutiable as well as exempted goods:**

Assessee was engaged in the manufacture of excisable goods as well as exempted (or nil rate of excise duty) goods. Assessee availed Cenvat credit of duty paid on the input (RFO), which was used as fuel for generation of steam within the factory premises. The steam was used for manufacture of dutiable as well as exempted goods. Credit was denied by the Commissioner stating that RFO was a common input which was used to manufacture both dutiable as well as exempted goods, and the assessee was not maintaining separate records. It was held by the Court that, as per provisions of sub rules (1) and (2) of rule 6, a manufacturer cannot avail Cenvat credit on such quantity of input which was used in manufacture of exempted goods, except under the circumstances mentioned in sub rule 2. Since assessee had used RFO as a fuel only, and not for any other purpose, therefore duty paid on it should be allowed as Cenvat credit.

Nestle India Ltd. v. CCE (2009)23 STT 210.

Recent decisions of CESTAT

- **Service tax can be charged on amount received**:

It was held that although service tax liability arises on the date when taxable service is provided, however, service tax is paid on the amount which has actually been received, and, it has to be paid by the 5th day of the month immediately following the calendar month in which the payment for the service provided is received.

Sudesh Sharma v. CCE (2009) 23 STT 12 (Breaking News).

- **Taxability of service provided by sub-contractor**:

It was held that a sub-contractor would not be liable for service tax if the main contractor had paid service tax on the same service for same period.

Sunil Hi Tech Engineers Ltd. v. CCE (2009) 23 STT 13 (Breaking News).

- **Service tax on activity which is exempt**:

It was held that as service tax is not to be levied on the services provided by RBI (because RBI's clients are departments of the Union Govt.), therefore, service tax liability would not arise even if same activity was done by some other bank acting as RBI's agent.

Canara Bank v. CST (2009) 23 STT 16(Breaking News).

- **Taxability of 'construction of complex' service**:

Assessees were engaged in the construction of residential flats / complex on their own, and thereafter, provided the same for use and occupation by their members. As per the circular issued by the Board, in case where a builder, promoter or developer builds a residential complex having more than 12 residential units by engaging a contractor for construction of such residential complex, the contractor shall be liable to pay service tax on the gross amount charged for the construction services provided to the promoter/ builder/ developer under 'construction of complex' services. Since in this case, assesses did not hire any contractor but did the construction work on their own, therefore, in the absence of any service provider and service recipient relationship, such activity of construction would not be liable to service tax.

Shrinandnagar Co-op Housing Society Ltd. v. CST (2009)23 STT 46 (Ahd.).

- **Service tax paid to Airport Authority for availing its services**:

Assessee was an aircraft operator. It availed credit of service tax paid/ reimbursed to Airport Authority of India for availing services such as landing, parking and X-ray, in connection with the operation of the aircraft owned by it. The tax authorities did not allow it. It was held by the Tribunal that as aircraft was stationed at airport and used by the assessee for its business activities such as conveyance between its plants, and was essential for its business purpose, therefore service tax charged by the Airport Authority would get covered under the definition of input services, as per rule 2(l) of Service Tax Rules.

Force Motors Ltd. v. CCE (2009) 23 STT 160 (Mum).

Our Offices

Head office

98A, IV floor,
Dr. Radhakrishnan Salai
Mylapore, Chennai – 600 004
Phone : +91-44-28478701/02

Branches

Bangalore
Unit G1, 'Ebony'
No.7, Hosur Road
Langford Town
Bangalore – 560 025
Phone : +91-80-22110512

Mumbai
No.406, Madhava Building
4th floor, Bandra Kurla complex
Bandra (E), Mumbai – 400 051
Phone : +91-22-26591730/
26590040

Delhi
No.35, Hauz Khaz Apartments
Hauz Khaz
New Delhi
Phone : +91-11-65814982

Hyderabad
6-3-609/140/A
No.402, Annapurna Enclave
Ananda Nagar Colony
Khairatabad
Hyderabad – 500 004
+Mobile:+91-9490189743