Tax News

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INCOME TAX

Reminder For March '11

Action Due	Due Date
TDS/TCS for the month of Feb 2011	07-03-11
PF for the month of Feb 2011	15-03-11
ESI for the month of Feb 2011	21-03-11
Advance Income Tax	15-03-11

SERVICE TAX

Action Due	Due Date
Service Tax for the month of Feb 2011 in case of company	05-03-2011
Service Tax for the month of Feb 2011 in case of a company for which e-payment is mandatory.	06-03-2011
Service Tax for the month of March 2011	31-03-2011

INCOME TAX

- **Vital Notifications / Changes**

No circular to be reported in this edition.

- **Supreme Court / High Court Judgments**

Deduction in case of housing project having commercial units also: Income tax authorities cannot deny a deduction u/s 80-IB(10), if a project could be approved as a housing project having residential units with permissible commercial use. Once it is held that the local authorities could approve a project to be a housing project with or without the commercial use, then such project would be eligible for section 80-IB(10) deduction, irrespective of the fact that the project was approved as 'housing project' or approved as a residential plus commercial - [2011] 9 taxmann.com 289 (BOM.)

TDS on payment to contractors: The assessee declared certain income in its return of income. The Assessing Officer made addition of certain amount by disallowing the freight paid to truck drivers under section 40(*a*)(*ia*). On appeal, the Commissioner (Appeals) confirmed addition. However, on appeal to the Tribunal, the Tribunal observed that payment of freight was based on individual GRs, which represented individual and separate contracts, and there was no single contract for carriage or transportation of goods between the assessee and the contractors which would make the assessee liable for deduction of tax at source under section 194C. It, therefore, deleted the addition. On Revenue's appeal, the High Court held that the finding of facts recorded by the Tribunal could not be questioned merely because after re-assessment of the evidence, another view was taken by the Tribunal. Therefore, the order of the Tribunal was confirmed. *[2011] 9 taxmann.com 266 (Punj. & Har.)*

Taxability of Income from use of satellite outside India to beam TV signals into India :
This case highlights the point that in order for income to be taxable in India, the assessee must have operations in India. Just because the end users of the service provided by the assessee are located in India, does not imply that the assessee has operations in India. Also, if the owner of the asset retains the control over the asset, then it cannot be termed as 'leasing' and the service cannot be taxed under 'royalty'. *Asia Satellite Telecommunications Co. Ltd.*

Principles applicable for Taxability of Share Application Money, u/s 68 of Income Tax Act : This case brings clarity on the issue of what is the responsibility of the companies who raise funds through equity and have share application money on their books. Unless they have documentation to prove that the credit has actually come for share application money, this amount is liable to be treated as undisclosed taxable income. However, once the company provides the required documentation, the onus shifts on the Department to trace the investors in case it thinks that the transaction was not genuine. *Oasis Hospitalities Pvt Ltd.*

Tribunal Judgments

Adjustment of Incentive to employees in case of takeover: In case of a takeover, amount paid as incentive to employees of assessee company by its parent company, does not have any element of income for purpose of making adjustment to ALP of the said international transaction. *[2011] 9 taxmann.com 287 (Delhi - ITAT).*

Income deemed to accrue or arise in India [Section 9]: No income arises or accrues to a Liaison Office of a non-resident in India by virtue of purchases made by it for export. *[2011] 9 taxmann.com 286 (Mum. - ITAT)*

Transfer Pricing- CUP method or TNMM: The assessee sold automobile wipers to its associated enterprise (AE) and claimed that as per the "Comparable Uncontrolled Price" (CUP) method, the transactions were at arms' length basis. The TPO rejected the CUP method on the basis that (i) comparability of controlled and uncontrolled transactions was not established with certain degree of reasonableness and accuracy and (ii) the conditions prevailing in the market were not established to be identical. The TPO adopted the TNMM and directed that an adjustment be made by adopting the mean profit of comparables. On appeal, the Tribunal held:

(i) In principle, the CUP method (the traditional transaction method) is preferable to the other methods because all other things being equal, it leads to more reliable results vis-a-vis the results obtained by applying transaction profit method.

(ii) For the CUP method, the focus is on the market in which the products are sold by the assessee and not the market in which the assessee is located. As, in this case, the goods were sold by the assessee in the USA market where there was competition from Chinese manufacturers, the market conditions in the territory of sale were the same.

(iii) The assessee needs to provide the sale data of the AE and its competitors in the USA market (e.g sale price of Chinese and assessee's goods, quantitative **d**ata of purchase of Chinese and Indian wipers by the AE, the terms of payment for comparison etc) and the AO shall compute the arm's length price using this data on CUP method. *Clear Plus India (P) Ltd. DCIT (2011) ITAT (Delhi).*

Taxability of Keyman Insurance Policy premium: The Tribunal held that Keyman's Insurance premium can be treated as an allowable expenditure if it could be established that the insurance was taken for the benefit of business of the firm to protect it from disruption of business on death of that Keyman. *[2011] 9 taxmann.com 308 (Ahd. - ITAT)*

Transfer Pricing – RPM method or TNMM: The assessee company was having its registered office out of India and a branch in India (AE). The Indian branch imported rough diamonds from abroad and sold them in India. It did only trading (no value addition) and in order to benchmark its transactions, the assessee used the Resale Price Method (RPM). The TPO held that imports by the AE of the assessee were not in accordance with the transfer pricing regulations.

The First Appellate Authority held that the RPM method adopted by the assessee, could not be accepted for the reason that, comparable companies cited by the assessee, were engaged in export of cut and polished diamonds and were not resellers of rough diamonds as claimed by the assessee. The authority, therefore, considered the arithmetical mean of the operating margins of three other comparables, along with the comparables cited by the assessee, and arrived at an average profit of 2.68%.

On appeal, it was held by the Tribunal that in case of assessee engaged in trading of goods without any value addition, Resale Price Method is the most appropriate method for determining the ALP with respect to AE transaction. *[2011] 9 taxmann.com 311 (Mum. - ITAT).*

Telecommunication charges attributable to delivery of computer software outside India: Assessee was a public limited company engaged in the business of development and export of various software products for telecommunication industry. One of its business units was registered as a software technology park (STP) and the deduction was claimed u/s 10A of the Act.

The issue before the Tribunal was – (i) whether expenses incurred on telecommunication charges which are *attributable* to the delivery of computer software outside India, but are not actually *incurred,* are also to be reduced from the export turnover, and (ii) whether expenses incurred abroad by the assessee for onsite development are rightly excluded by the AO from the export turnover.

It was held by the Tribunal that:

a. the assessee's business being development and export of computer software, all the expenditure incurred by it was attributable to the delivery of computer software outside India. The Legislature

has used the words 'attributable', not 'incurred', in the definition for the delivery of articles or things with regard to the expenditure incurred in foreign exchange in providing technical services outside India. The telecommunication charges and insurance charges were indirectly included in the export turnover of the assessee and therefore they had to be necessarily reduced from the export turnover for the purpose of computation of deduction u/s 10A of the Act. These expenses should also be reduced from the total turnover.

Taxability of waiver of Principal amount of loan: The issue was whether waiver of principal amount of loan, as settled by the bank, was capital in nature and could not be taxed u/s 28 & 41(1) of the Act. The second issue was whether the expenses could be disallowed when the business was temporarily closed down due to lull in the business.

The Tribunal held that the term loans received were definitely on capital account and related to capital assets. The waiver of such term loan did not constitute business and the waiver could not be held as income u/s 28(i)or 41(1).

For the second issue it was held that the assessee had not closed down its business permanently. From the returns of income filed by the assessee, it was clear that the assessee had revived its business. It was not a complete breakdown of business but it was a case of mere lull in business. Therefore expenses would be allowed. *2011-TIOL-100-ITAT-MUM in Income Tax*.

Taxability of Bandwidth charges etc. for IT company : This case highlights three main points: First, charges paid to a foreign company for providing bandwidth, for uploading and downloading of signals abroad, are not taxable in India, and TDS need not be deducted on such charges. Also, getting 'no deduction certificate' is not the only option available to the assessee if it wishes to claim deductibility on certain charges under sec 40(a)(i). Second, subscription charged paid towards accessing web-based database are not in the nature of 'royalty' or 'fees for technical services', and so no TDS is deductible. Third, surcharge is to be calculated before the double taxation relief is computed, not after. *M/S Infosys Technologies Ltd. V. CIT.*

SERVICE TAX

- **Important circular/ notification**

Exemption to organizer of business exhibition: The Central Government has exempted the taxable service specified in sub-clause 65(105)(zzo) of the Finance Act, when provided by an organiser of business exhibition for holding a business exhibition outside India, from the whole of the service tax leviable thereon. *Notification no.5/2011 dated 1st March 2011.*

Amendment in Works Contract rules 2007: The Central Government has amended the Works Contract rules by inserting a clause which states that the CENVAT credit of tax paid on taxable services, (a) to any person, by an erection, commissioning and installation agency in relation to commissioning and installation; (b) to any person, by any other person, in relation to commercial or industrial construction service; (c) to any person, by any other person, in relation to construction of complex , as referred to under sub-clauses (zzd), (zzq) and (zzzh) of clause (105) of section 65 of the Finance Act, 1994, shall be available only to the extent of 40% of the service tax paid when such tax has been paid on the full value of the service after availing CENVAT credit on inputs. *Notification No.1/2011 dated 1st March 2011.*

Exemption on services provided within a port: The Central Government has exempted services provided in relation to the execution of works contract, referred to in sub-clause 65(105)(zzzza) of the Finance Act,(to any person, by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams), when provided wholly within the port, for construction, repair, alteration and renovation of wharves, quays, docks, stages, jetties, piers and railways from the whole of service tax leviable thereon. *Notification no. 11/2011 dated 1st March 2011.*

Exemption on services provided within an airport: The Central Government has exempted services provided in relation to the execution of works contract, referred to in sub-clause 65(105)(zzzza) of the Finance Act, when provided wholly within an airport and classified under sub-clause 65(105)(zzm) of the Finance Act, 1994, from the whole of service tax leviable thereon. *Notification no. 10/2011 dated 1st March 2011.*

Exemption on goods transport services by aircraft operator: The Central Government w.e.f 1st April 2011, has exempted the taxable services as referred to in sub-clause 65(105)(zzn) of the Finance Act, i.e. to any person, by air craft operator, in relation to transport of goods by aircraft; from service tax leviable thereon, to the extent so much of the value as is equal to the amount of air freight included in the value determined under section 14 of the Customs Act and rules. *Notification no. 9/2011 dated 1st March 2011*.

Exemption on goods transport service by aircraft, by road, or by rail, outside India: The Central Government, w.e.f 1st April 2011 has exempted the taxable services as referred to in sub-clauses (zzn) (to any person, by air craft operator, in relation to transport of goods by aircraft); (zzp)(to any person, by a goods transport agency, in relation to transport of goods by road in a goods carriage;) and (zzzp) (to any person, by any other person other than Government railway as defined in clause (20) of section 2 of the Railways Act, 1989, in relation to transport of goods in containers by rail, in any manner); of clause 65(105) of the Finance Act, provided to any person located in India, when the goods are transported from a place located outside India to a final destination which is also outside India, from the whole of service tax leviable thereon. *Notification no. 8/2011 dated 1st March 2011.*

Exemption on selected insurance services: The Central Govt. has exempted the taxable service specified in sub-clause 65(105)(d) of the Finance Act, provided by an insurer carrying on General Insurance Business to any person for providing insurance under the Rashtriya Swasthya Bima Yojana from the whole of the service tax leviable thereon. *Notification no. 7/2011 dated 1st March 2011.*

Exemption on services pertaining to residential complex: The Central govt. has exempted the taxable service of execution of a works contract referred to in sub-clause 65(105)(zzzza) of the Finance Act, when provided for the purpose of carrying out- (a) construction of new residential complex or part thereof; or (b) completion and finishing services of new residential complex or part thereof, under Jawaharlal Nehru National Urban Renewal Mission and Rajiv Awaas Yojana, from the whole of the service tax leviable thereon. *Notification no. 7/2011 dated 1st March 2011.*

Exemption on service provided to SEZ units: The Central Government, has exempted the taxable services specified in clause 65(105) of the Finance Act, received by a Unit located in a Special Economic Zone or Developer of SEZ for the authorized operations, from the whole of the service tax, education cess and secondary and higher education cess leviable thereon subject to certain conditions as mentioned in the notification. Details are in *Notification no. 17/2011 dated 1st March 2011.*

Exemption on services provided for transport of coastal goods: The Central govt. has amended Notification no 1/2006 by inserting one more entry which is 'Services provided or to be provided, to any person, by any other person, in relation to transport of (i) Coastal goods; ii) Goods through national waterway; or iii) Goods through inland water. These services are exempt from so much of the service tax leviable thereon, as is in excess of the service tax calculated on a value which is equivalent to 75% specified in the corresponding entry in column (5) of the said Table, of the gross amount charged by such service provider for providing the said taxable service, subject to the relevant conditions specified therein. *Notification no. 16/2011 dated 1st March 2011.*

Amendment in Service Tax Rules: The Central Government has made certain rules for the purpose of collection of service tax and determination of rate of service tax. These amendments will be effective from 1st April 2011. For detail please refer *Notification no. 18/2011 dated 1st March 2011.*

Amendment in rate of Interest: Rate of interest has been increased from 13% to 18% under section 73B of the Finance Act. *Notification no. 15/2011 dated 1st March 2011.*

➢ SC/HC Judgments

Renting of Immovable Property: Assessee being the owner of a building, had entered into a registered Lease Deed for renting out the building. Subsequently, with effect from 1st June, 2007, the Central Government levied service tax on the renting of immoveable property for business purposes. The assessee contended that the said tax was in the nature of an indirect tax, which the assessee would deposit after collecting the same from the user of the service (tenant). It contended that the burden of service tax was to be borne by the user. The tenant however contended that since service tax was not mentioned in the Lease Deed so the tenant was not required to pay the tax.

The High Court held that service recipient is required to pay

service tax to service provider even if the contract did not specifically mention it; it is the service which is taxed, and the user has to bear it. *2011-TIOL-114-HC-DEL in Service Tax.*

- **CESTAT Judgments**

  Credit for duty paid on inputs used for providing taxable service: Notification 1/2006-ST allowed reduction of 75% of the taxable value, for the service tax payable under the category of GTA service, on the condition that the service provider had not availed credit on inputs, capital goods and input services, used for providing the service. Exemption was also subject to the condition that the service provider had not availed the benefit of Notification no. 12/03-ST dated 20.6.2003.

  Notification 12/2003-ST, as amended, exempted from service tax, that value of **all** the taxable services, as was equal to the value of goods and materials sold by the service provider to the recipient of service, subject to condition that there was documentary proof to evidence the value of the said goods and materials. The notification, inter alia, further stipulated that the exemption shall apply only in such cases where no credit of duty paid on such goods and materials sold, has been taken under the CENVAT Credit rules 2004.

In the present case, the appellant - M/s IOCL - had discharged service tax under the category of GTA service by availing the benefit of notification 1/2006-ST read with notification 12/2003-ST. However, it had availed Cenvat credit.

Tribunal relied on the case of *Commissioner of Central Excise, Rajkot vs. Sunhill Ceramics Pvt. Ltd., w*herein the Tribunal had held that 'In respect of the Goods Transport Agency services, the service provider is undoubtedly goods transport agency. However, the liability to pay tax in certain cases has been shifted to either the consignor or to the consignee depending upon who actually paid the freight. In other cases where neither the consignee nor consignor is required to pay the service tax, the responsibility for paying service tax continues with the concerned Goods Transport Agency. The condition of not taking "credit of duty paid on inputs of capital goods used for providing such taxable service" necessarily should relate to the services actually rendered by the Transport Agency. The respondent has not actually rendered the said services; as a consignor he has not availed the credit of duty paid on inputs of capital goods for providing such taxable services; the respondent merely paid the tax which, in the normal course, should have been paid by the transport agency.'

Therefore it was held that the appellant was entitled to the credit in view of the abovesaid decision. *2011-TIOL-261-CESTAT-MUM.*

Commercial or Industrial Construction Service: The appellant (L&T) entered into a contract with M/s Gujarat Water Supply & Sewerage Board (GWSSB) for the Design, Build & Operate contract for distribution of water under Mehsana District Water Supply Scheme.

The issue before the Tribunal was whether by purchasing water at one rate and selling at higher rates, the pipeline constructed can be said to be used 'primarily for commerce or industry', so that the activity undertaken by L&T for GWSSB becomes liable to Service Tax.

The Tribunal held that the purpose of buying water by GWSSB and bringing it from Narmada Dam was not for selling it, but for supplying it to needy people. The term "primarily for commerce" would mean that primary purpose should be buying and selling and the other purposes also may be served incidentally. In this case, purchase and sale of water are incidental and the main purpose is supply of water to needy citizens of the State.

Thus, the Tribunal concurred with the views already taken by the Coordinate Bench of this Tribunal in case of *M/s Nagarjuna Construction Co. Ltd.* Accordingly, the appeal was allowed and relief given to the appellant. *2011-TIOL-218-CESTAT-AHM.*

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