Tax News

PKF SRIDHAR & SANTHANAM
Chartered Accountants

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INCOME TAX

Reminder for Aug-2012

Action Due	Due Date
TDS for July 2012	07-08-12
PF for July 2012	15-08-12
ESI for July 2012	21-08-12
Filing of IT return extended from 31-07-12 to:	31-08-12

SERVICE TAX

Action Due	Due Date
Service Tax for July 2012 in case of company	05-08-2012
Service Tax for July 2012 in case of a company for which e-payment is mandatory.	06-08-2012

INCOME TAX

IMPORTANT CIRCULARS / NOTIFICATION **DTAA with Jersey:**	• The Central Government has notified that all the provisions of the Agreement between the Government of India and the Government of Jersey for the exchange of information with respect to taxes, shall be given effect to in India with effect from the 8th May, 2012, that is, the date of entry into force of the said Agreement. Details are in *Notification No. 26/2012 [F. No. 503/6/2008-FTD-I], dated 10-7-2012.*
SC/HC JUDGMENTS **Interest on inter corporate deposits:**	The assessee was a private limited company, providing consultancy services in electronic and telecommunications. It had made Inter Corporate Deposits (ICD) in another company. Since that company closed down its business, the assessee claimed the ICD as not recoverable and written off. Similarly, other advances made to the same company were also claimed as written off. AO was of the opinion that this claim was not justified for the reason that lending funds was not a part of any business activity of the assessee. On appeal by the assessee, the Tribunal allowed the appeal. On further appeal by the Revenue, the High Court held that: • Advancing money was not a part of the business activity of the assessee as the

	assessee did not hold any permission or licence or recognition as a money lender nor was it recognized as a financial institution, banking or non-banking. • Mere fact that the AO and the appellate authority had opined correctly that the ICDs qualified for deduction under Section 36(1)(vii) of the Act, did not imply that the other advance made by the assessee also automatically qualified for deduction. The assessee's main business activity was only in providing services in telecommunication technology and not in money lending activity. • So, the tribunal had committed an error in answering the two questions posed for HC examination. The appeal of the Revenue was allowed. *2012-TIOL-522-HC-KAR-IT*
Transfer Pricing: Arms' length royalty allowable even in respect of unpaid sales:	The assessee entered into a Software Distribution Agreement with CA Management Inc ("CAMI") pursuant to which it was appointed as a distributor of CAMI's products in India. The assessee was required to pay an annual royalty of 30% on sales. The TPO accepted that the rate of royalty was at arms' length price but held that royalty ought not to have been paid on sales where there were complaints on quality or which had turned into bad debts. The CIT (A) upheld the TPO's stand though the Tribunal reversed it. On appeal by the department, the High Court held: • Sec 92C provides the basis for determining the ALP in relation to international transactions. It does not consider failure of the assessee's customers to pay for the products sold to them by the assessee to be a relevant factor in determining the ALP. • In the absence of any statutory provision, bad debts on account of purchasers

	refusing to pay for the goods purchased by them from the assessee cannot be a relevant factor while determining the ALP. *CIT vs. CA Computer Associates India Pvt. Ltd (Bombay High Court).*
Lease Premium is capital expenditure & not allowable as advance rent:	The assessee entered into a lease agreement with NOIDA pursuant to which it acquired land on a 90 year lease. The assessee paid certain amount as premium and agreed to pay annual lease rent of 2.5% of the premium. The assessee was not entitled to transfer the land before erection of the building without NOIDA's permission. The assessee amortized the premium over the period of the lease and claimed the proportionate part as a revenue deduction. The AO accepted the assessee's claim for 15 years. Thereafter, the AO, CIT(A) & Tribunal rejected the claim on the ground that the lease conferred an enduring advantage and the premium was capital expenditure. On appeal by the assessee, the High Court held: • Sec 105 of the Transfer of Property Act brings out the distinction between a price paid for a transfer of a right to enjoy the property and the rent to be paid periodically to the lessor. When the interest of the lessor is parted with for a price, the price paid is premium. But the periodical payments made for the continuous enjoyment of the benefits under the lease are in the nature of rent. The former is capital in nature and the latter is revenue in nature. • The premium paid was capital in nature and could not be treated as "advance rent" because (a) it was a precondition for securing possession and was a one-time consideration; (b) annual lease rent was payable separately; (c) there was no material to support the contention that the annual rent was depressed and does not

	reflect the market rent; (d) there was no material to support the argument that the premium paid over 23 years ago did not constitute the true and real consideration for creating an interest in the property; (e) the registration and stamp duty and charges were borne by the lessee; (f) the restrictions imposed on the lessee regarding transfer and user of the land were consistent with the nature of interest created, i.e. lease hold rights; (g) the tenure of the lease was quite substantial and virtually created ownership rights in favour of the lessee & (h) exclusive possession was handed over to the assessee at the time of creation of the lease. • The fact that the AO accepted the assessee's claim for 15 years does not mean that he cannot change his stand because there is no "res judicata" in income-tax law. The appeal of the assessee was dismissed. *Krishak Bharati Cooperative Ltd. vs. ACIT (Delhi High Court)*
TRIBUNAL JUDGMENTS **STT is to be excluded while computing total taxable income:**	The assessee was a broker and had collected security transaction tax (STT) on behalf of the stock exchange and the same had been included in its brokerage income. The assessee claimed deduction for STT while computing total income from the brokerage. The Tribunal held that: • the STT was not required to be collected or paid by a broker. It is the buyer or seller of shares who is required to pay STT under section 98 of STT Act. • The collection and recovery of STT is the responsibility of stock exchanges under section 100 of the STT Act. The assessee had only collected STT on behalf of stock exchanges from the clients and the same was included in the brokerage income and therefore, while computing the total income, the STT is required to be excluded.

	• The liability on account of STT is the liability of the clients of the assessee who are buying and selling shares. The assessee is only a broker who has collected STT on behalf of the stock exchanges and has paid the same to the latter. *2012-TIOL-388-ITAT-MUM.*
Grant received from non-resident holding company for protecting image and goodwill:	Assessee was engaged in the business of manufacture of pharmaceutical formulations and bulk drugs. During the previous year, a company (BMIL) got amalgamated with the Assessee. BMIL had received a payment from Boeheringer Mannheim GmbH, Germany (BMG) in November, 1996. This amount was credited to the capital reserve in the books of the assessee company. The Assessee claimed this amount to be a capital receipt and therefore, not offered for taxation. On appeal by the Revenue, the ITAT held that: • This payment was neither to enable BMIL to recoup its losses nor was it a payment without business consideration. The fact that it was voluntary or that it was an unconditional payment, did not make it a capital receipt. • There was holding and subsidiary company relationship between BMIL and BMG besides business relationship viz., BMIL was using the brand image of BMG, making use of the technical know-how of the parent company and was also acting as the marketing agent for BMG for sale of certain products. It was only because of such relationship and also in the light of the help rendered by BMIL in terms of protecting and promoting the interests of BMG, that the payment was made by BMG, and was therefore a payment connected with the business of BMIL and was liable to be taxed u/s.28(i) read with Sec.2(24) of the Act. *2012-TIOL-382-ITAT-MUM***.**
Profit from sale of plot where the Sale Deed is not yet registered:	Assessee company was engaged in the business of development of township at Gurgaon (Haryana). It followed partial project completion method of accounting. The AO observed that against the name of certain purchasers, assessee had shown zero balance towards receivable. In the opinion of the AO, once nothing was to be recovered then assessee

	ought to have accounted for these receipts in the sale. The assesse submitted that, the revenue in respect of sale of plots/apartment were recognized upon registration of the Sale Deed of the plot in favour of the customer. The physical possession of the plots/apartment was to be handed over simultaneously upon registration of the Sale deed and in the absence thereof, possession was not handed over. Thus, in such circumstances the assessee continued to remain the legal owner of the property and no sale had been recorded in accordance with the method of accounting regularly followed and approved by the Revenue. Thus, assessee relied upon the concept of consistency. AO observed that partial project completion method valued by the assessee was in total disregard to AS-7. In terms of AS-7, percentage completion method had to be mandatorily followed by all developers and if the same was not followed by assessee, his accounts were not correct, accurate and complete. Therefore, assessee's income or revenue for the relevant A.Y. was recomputed by including properties which were complete and ready for possession and all advances received by the assessee company. Aggrieved, the assessee appealed before the CIT (A). AR contended that AS-7 was applicable only to construction contractors and not to builder or real estate developers. The assessee further submitted that it was following similar method of accounting in the past also which was never disputed by the AO in AYs 2003-04 to 2005-06. It was also contended that accounting standard not prescribed under the Act were not binding for tax assessment. The assessee contended that its rights vis-à-vis the rights of the purchasers were to be seen in the light of agreement. CIT(A) followed the principles of consistency and observed that sales had not materialized and therefore could not be recognized as a revenue in that year. Hence, the addition was deleted. Revenue submitted that by not registering the conveyance deed,

	assessee cannot defer the recognition of revenue. The Tribunal held that: • In the findings of the Assessing Officer, he nowhere assigned any reason enabling him to change the method of accounting consistently followed by the assessee. In the assessment order, nowhere Assessing Officer has expressed his difficulty either about the method or about the completeness of the accounts which cancreate an hindrance in computing the true income. • Accounting method followed by an assessee continuously for a given period of time has to be presumed to be correct till the AO comes to the conclusion for reasons to be given that system does not reflect true and correct profit. • Taking into consideration all these aspects, we do not find any reason to change the method of accounting in this year which was accepted in the past. • When expenses are not claimed by the assessee in the year, they cannot be added, it would amount double addition. *2012-TIOL-374-ITAT-DEL*.
Difference between market price & option price of ESOP shares deductible:	The assessee allotted shares to its employees under an ESOP scheme. As per SEBI guidelines, the difference between the market value of the shares and the value at which they were allotted to the employees was debited to the P&L A/c. This was claimed as a deduction under the head "staff welfare expenditure". The AO allowed the claim though the CIT revised the assessment u/s 263 and held that the expenditure was notional and contingent in nature and not allowable as a deduction. On appeal, the Tribunal held that as the SEBI regulations required the difference between the market price of the shares and the price at which the option is exercised by the employees to be debited to the P&L A/c as expenditure, it was an ascertained expenditure and not contingent in nature. On appeal by the department, the High Court held: As far as the Employees Stock Option Plan is concerned, the assessee had to follow SEBI direction and by following such directions, the assessee claimed the ascertained amount as

	liability for deduction. There is no error in the order of the Tribunal. *ACIT vs Spray Engineering Devices Ltd (ITAT Chandigarh), 19-Jul-2012.*
Cap on tax payable under DTAA:	The assessee, a Singapore company, offered interest and royalty income to tax at the rate of 15% & 10% as specified in Articles 11 & 12 of the India-Singapore DTAA respectively. The AO held that the assessee was also liable to pay surcharge and education cess in addition to the tax. The CIT (A) upheld the assessee's claim that surcharge was not leviable though he rejected the claim with regard to cess. On further appeal by the assessee, the Tribunal held that Articles 11 & 12 of the DTAA provide that the tax chargeable in India on interest and royalties cannot exceed 15% and 10% respectively. Accordingly, education cess cannot be levied in respect of the assessee's tax liability. *DIC Asia Pacific Pte Ltd vs. ADIT (ITAT Kolkata)*

SERVICE TAX

IMPORTANT NOTIFICATIONS / CIRCULARS **Transportation by Railways:**	The Central Government, has exempted the taxable services of transportation of passengers in first class or AC coaches, and transportation of goods, by the Indian Railways from the whole of service tax leviable thereon under section 66B of the IT Act, with effect from the date of publication of this notification in the Official Gazette, upto and including the 30th day of September, 2012. *Notification No. 43/2012-Service Tax.*
Export of Goods:	The Central Government has exempted the taxable service received by an exporter of goods from service tax leviable thereon under section 66B of the said Act, which is in excess of 10% on the free on board value of export goods for which the said specified service has been used, subject to certain conditions. The details are in *Notification No 42/2012 - Service Tax dated 29-Jun-12.*
Accounting Code for payment of service tax under the Negative List:	Negative List based comprehensive approach to taxation of services came into effect from the 1st July, 2012. For payment of service tax under the new approach, a new Minor Head - 'All taxable Services' has been allotted under the Major Head "0044-Service Tax". Accounting codes for the payment of service tax under the Negative List approach, with effect from 1st July, 2012 is as follows:

Name of Services	Accounting codes			
	Tax collection	Other Receipts	Penalties	Deduct refunds
All Taxable Services	00441089	00441090	00441093	00441094

Note: Service specific accounting codes will also continue to operate, side by side, for accounting of service tax pertaining to the past period (meaning, for the period prior to 1st July, 2012). Details are in Circular No.161/12/2012 –ST, 6th July, 2012.

Clarification on Point of Taxation Rules:	Consequent to the changes introduced at the time of Budget 2012 in the Point of Taxation Rules, 2011, together with revision of the service tax rate from 10% to 12% and the subsequent changes that have been made effective from 01.07.2012, the following clarifications have been desired: • Point of taxation and the rate applicable in respect of continuous supply of services at the time of change in rates effective from 01.04.2012; • Applicability of the revised rule 2A of the Service Tax (Determination of Value) Rules, 2006 to ongoing works contracts for determination of value when the value was being determined under the erstwhile Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007; and • Applicability of partial reverse charge provisions in respect of specified services. The above issues have been examined and clarifications issued in *Circular No. 162/13 /2012 –ST dated 6th July 2012.*
Rebate on Service Tax on services received by exporters:	The Central Government has granted rebate of service tax paid on the taxable services which are received by an exporter of goods subject to the extent and manner specified herein below, in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue) number 52/2011 - Service Tax, dated the 30th December, 2011, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) vide number G.S.R. 945(E), dated the 30th December, 2011. Details are in *Notification No. 41/2012-Service Tax.*
CESTAT JUDGMENTS **Difference in receipts shown in IT and ST-3 returns:**	Apellant was engaged in providing taxable services under the category of "Business Auxiliary Services". The CERA audit observed that there was a difference in receipts shown in Income tax return and in ST-3 return. On this differential value, the department raised a service tax demand. The adjudicating authority confirmed the demand of service tax.

	Incidentally, after the audit was conducted by the CERA party, the officers of the Service Tax wing of the department also conducted the audit of the appellant's record for the period 2004-2005 to 2008-2009 and after reconciliation of the figures in the balance sheet and the figures shown in the ST-3 returns, it was pointed out that the appellant was liable to pay Service Tax of Rs. 1,43,592/-. This amount with interest was deposited by the appellant. Since the appellant had already paid the Service Tax amount worked out by Audit party, which included the period in the current proceedings, the amount already deposited was considered sufficient by the Bench and the appeal itself was taken up for final disposal. The CESTAT, thereafter, observed that: The demand confirmed by the lower authorities amounts to duplication of the demand in respect of the amount already paid by the appellant. The lower authorities have not considered the audit report of Service Tax wing, since they have taken a view that it was for the appellant to show that the Service Tax has been paid correctly by producing documentary evidence. This is not a correct approach. *2012-TIOL-917-CESTAT-AHM*.
Profit and loss of a construction company:	The appellant was registered with the department for payment of Service Tax in respect of services of Construction of Residential Complexes. Pursuant to audit conducted, it was found that there was a difference between gross receipts shown in the profit and loss account and the value of service rendered by them as declared in their service tax return. Alleging that there was a short payment of Service Tax, a demand was issued. Before the CESTAT, the appellant submitted that the main reasons for the difference in P&L account and the ST-3 figures were – • It had undertaken several housing projects and had sold complete houses which had been constructed on its own land. As no services were rendered to the customers in such situation appellant's activities were not liable to tax. • The amount received from customers during the year was not likely to tally with the

	amount of sale booked in profit and loss account. Whereas sale was booked on the basis of work completed, the amount received from the customer was the amount on which service tax was paid. • There was no liability for payment of service tax on the amount received prior to 15.6.2005. • An Amount recoverable from debtors as on 31.3.2009 was liable to be reduced from the amount of sale. • No service tax was payable on the amount received towards sale of shops during 15.6.2005 to 31.3.2009. The Bench held that: • the adjudication order did not take into account the outstanding payments to be received as reflected in the balance sheet. This showed that the amount was not confirmed with due diligence. • The amounts were confirmed with reference to figures shown in profit and loss account as per AS7 standards prescribed by the Institute of Chartered Accountants for maintaining accounts of Construction companies. This standard was for ascertaining the profit and loss of a construction company and did not straight away reflect the position of receipt of payments which was the relevant factor for paying service tax. 2012-TIOL-896-CESTAT-DEL.
Cenvat Credit of tax shown on invoices as paid by transport company:	The appellant was a manufacturer of excisable goods. The invoices issued by the transport companies showed that service tax was paid by them on the freight amount. Accordingly, during the period January, 2005 to January, 2008 the appellant availed Cenvat Credit in respect of inputs services viz. Goods Transport Agency for transporting raw materials to their factory. Revenue raised an objection that in the case of services of Goods Transport Agency it was the consignee who was to pay service tax as per the provisions of Rule 2(d)(v) of Service Tax Rules 1994 and the amount shown to be paid by the transporter cannot be treated

	as service tax and credit cannot be extended to the appellant. Both the lower authorities confirmed the demand by also observing that the appellant did not produce the relevant documents to show that service tax was paid by the transporter. The CESTAT Bench noted that: • In the case of *Navyug Alloys Pvt. Ltd. Vs. CCE* - *(2008-TIOL-2156-CESTAT-AHM)* Cenvat credit was allowed in similar circumstances on the ground that the service tax has been paid by the transporter and Revenue has not refunded the service tax paid by the transporter to them. • In respect of the credits claimed by the appellant there are invoices showing that service tax has been paid by the transporter. Revenue may either accept the payment of service tax indicated in the invoices or if Revenue wants to reject the claim as false, it may conduct verification at the end where service provider is registered and thereafter pass an adjudication order in this matter. Thus all issues are kept open and the impugned orders of lower authorities are set aside and the matter remitted to the adjudicating authority for a fresh decision as per guidelines above. *2012-TIOL-904-CESTAT-DEL*.
Service tax on activities related to Horse Races:	The appellant was engaged in the activity of conducting horse races. During the horse race, licensed book makers (bookies) accept bets from public in the premises of Turf Club and these bookies have been provided stalls and other infrastructural facilities within the premises of the Turf Club. The Turf Club charges fees from the bookies in two components, one is fixed amount under the Head "Stall fees" and the other is variable amount under the Head "Commission" which is collected as a percentage of the betting amounts collected by such bookies. The Turf Club conducts live telecast of races which can be viewed from other racing clubs in India located in Bangalore, Kolkata, Hyderabad, Mysore, Delhi, Madras and Ooty. The technical support for live telecast of horse race events held in Mumbai and Pune is provided by M/s. Essel Shyam Communications Ltd., NOIDA. For such broadcasting, the Turf Club receives royalty income from other racing clubs and the royalty amounts are worked out either on fixed percentage of betting placed at the respective clubs or a fixed

	lump sum amount depending upon the understanding made with the respective race clubs. The Turf Club also receives royalty from caterers who have been permitted to use the infrastructural facilities and to operate within the premises of Turf Club. A show-cause notice was issued demanding service tax of Rs. 1.19 crore under two categories – the royalty/commission received from the clubs was categorized as 'Broadcasting Services' and royalty/commission received from bookies and caterers was categorized as 'Business Support Services'. The Commissioner of Central Excise upheld the demand of service tax under the category of 'Mandap Keepers Services', 'Broadcasting Services' and 'Business Support Services'. Another show-cause notice was issued demanding service tax amounting to Rs. 1.08 crore categorizing the income received from other race clubs under the head royalty/commission as 'Intellectual Property Rights Services' and categorizing the receipts from race clubs received as fixed amount for live telecast under the category of 'Broadcasting Services'. Similarly in respect of fixed amount paid by the bookies, the same was categorized as 'Business Support Services' and the commission received from the bookies were categorized as 'Intellectual Property Right Services'. As regards the royalty amount from the caterers the same was treated under the category of 'Business Support Services'. The Commissioner confirmed the demand classifying the services under 'Broadcasting Services', 'Intellectual Property Right Services' and 'Business Support Services'. Upon appeal, the Bench observed: • If service tax has to be demanded under the category of 'Intellectual Property Right Services' both the show-cause notices as also the order confirming the demand thereon, should clearly categorize the transactions under one or more of the 'Intellectual Property Right' which are covered under 'Intellectual Property Right Services ' law. • In the instant case we do not find any categorization or findings by the learned Commissioners in any of the orders and, therefore, we find that prima facie the appellants have made out a strong case in their favour against the demand of service tax under the

	category of 'Intellectual Property Right Services'. • As regards the demand under 'Broadcasting Services' we find that sale of such rights will not come under the category of advertising agency or other services for the period prior to 2010 when a new service under the category of "services of permitting commercial uses or exploitation of any event organized by a person or a organization" was brought under the category of taxable services in the Budget 2010. Therefore, such services would be taxable only from 2010 onwards and not prior to that. • None of the services rendered by the race course to the book makers will come under the category of 'Business Support Services". • Thus, the appellant has made out a prima facie case against pre-deposit of service tax demand, interest thereon and penalties, and is granted unconditional waiver of dues adjudged in the impugned orders and stay recovery thereof during the pendency of these appeals. *2012-TIOL-846-CESTAT-MUM*.

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