Tax News

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INCOME TAX

Reminder For June'09

Action Due	Due Date
TDS/TCS for the month of May'09 (see note)	07-06-09
PF for the month of May'09	15-06-09
ESI for the month of May'09	21-06-09

SERVICE TAX

Reminder For June'09

Action Due	Due Date
Service Tax for the month of May'09 in case of company	05-06-2009
Service Tax for the month of May'09 in case of a company for which e-payment is mandatory	06-06-2009
Service tax for the month of May 09 in case of other assessee who makes payment electronically.	06-06-2009

INCOME TAX

Vital Notifications / Changes

● **New system of TDS / TCS payment:**

The new system of TDS / TCS payment and information reporting has been designed by the IT Dept. This new system will be effective for all tax deducted at source or tax collected at source on or after 1st April, 2009. However, any TDS or TCS effected on or after 1st April, 2009 but not later than 31st May, 2009 shall continue to be paid to the credit of the Central Government by using the old challan form. The assessee would nevertheless, be required to fill up Form No.17 in respect of such payments any time between 1st July, 2009 to 15th July, 2009. The TDS or TCS effected on or after 1st June, 2009 shall be required to be paid electronically by electronically furnishing income tax challan in Form No. 17. The **salient features** of the new TDS and TCS payment and information reporting system are as follows:

(i) Every Deductor, including the Central and State Government, has been made responsible for making direct payment of TDS in the bank. They are no longer allowed to make payments of the TDS and TCS by making book adjustments or consolidated payments.

(ii) Rule 30 and Rule 37 CA of the Income-tax Rules, 1962 have been substituted to provide, inter alia, for the following: -

(a) All sums of tax deducted at source under Chapter XVII-B and of tax collected at source under Chapter XVII-BB shall, in general, be paid to the credit of the Central Government within one week from the end of the month in which the deduction,or collection, is made. Similarly, the same time limit for payment will also apply for income-tax due under sub-section (1A) of section 192.

(b) It is mandatory for all deductors (including Central Government and State Governments) to pay the amount by electronically remitting it into the RBI, SBI or any authorized bank**.**

(c) It is mandatory for all deductors (including Central Government and State Governments) to make the payment by electronically furnishing an income-tax challan in Form No. 17.

(iii) In the process of electronically furnishing the income-tax challan in Form No. 17, the deductor will be simultaneously required to furnish to the Taxpayer Information Network (TIN) system maintained by National Securities Depository Limited (NSDL) either through screen based upload or file upload, three basic information relating to the deduction i.e., PAN, name of the deductee and amount of TDS/TCS.

(iv) Upon successful remittance of the TDS/TCS to Central Government account and the uploading

of the basic information as mentioned above to the TIN system, every deduction record will be assigned a unique transaction number (UTN).

(v) NSDL will create a facility to e-mail the UTN file to the deductor if the e-mail address of the deductor is available with them. In addition, they will also create a facility for the deductor to download the UTN file.

(vi) The UTN will be required to be quoted by the deductor on the TDS/TCS certificate issued by him to the deductee.

(vii) NSDL will also create a facility to allow independent viewing of the UTNs by the deductee.

(viii) With a view to enabling the Income Tax Department to monitor compliance by the deductor with the TDS provisions, every person (including Central Government and State Government) who has obtained a Tax Deduction or Collection Account Number (TAN) shall electronically furnish a quarterly statement of compliance with TDS provisions in Form No. 24C. It is mandatory for all TAN holders to furnish this form irrespective of whether any payment liable to TDS has been made or not**.** This form shall be furnished on or before the 15th July, the 15th October, the 15th January in respect of the first three quarters of the financial year, respectively, and on or before the 15th June following the last quarter of the financial year. This e-form No. 24C has to be furnished at http://incometaxindiaefiling.gov.in. The first quarter in respect of which Form 24C is required to be furnished is the quarter ending on 30th June, 2009.

(ix) In order to enable the deductor to furnish the UTN to the deductee, the existing Form 16 and Form 16A have been appropriately modified.

(x) The quarterly returns of TDS and TCS hitherto required to be filed in Form No. 24Q, Form No. 26Q, Form No. 27Q and Form No. 27EQ shall now be required to be filed for all quarters on or before 15th June following the Financial Year. Effectively, the quarterly returns have now been replaced by an annual return. For other details, please refer

Circular no. 02 / 2009, dated 21-5-2009.

● New Return Forms for A.Year 2009-10:

The Central Board of Direct Taxes has notified the following new forms for Assessment Year 2009-10:

(i) ITR-1 return of income for individuals having income from salary/ pension/ family pension and not having any other income except income by way of interest chargeable to income-tax under the head 'Income from other sources';

(ii) ITR-2 return of income for Individuals and Hindu Undivided Families (HUFs) not having any income under the head Profits or gains of business or profession;

(iii) ITR-3 return of income for Individuals and HUFs being partners in firms and not carrying out business or profession under any proprietorship;

(iv) ITR-4 return of income for individual and HUFs having proprietory business or profession;

(v) ITR-5 combined form for return of income and fringe benefits for Firms/ Association of Persons / Body of Individuals;

(vi) ITR-6 combined form for return of income and fringe benefits for companies (other than companies claiming exemption under sec 11);

(vii) ITR-7 combined form for return of income and fringe benefits for persons including companies required to furnish return under section 139(4A) or section 139(4B) or section 139(4C) or section 139(4D);

(viii) ITR-8 stand alone form for return of fringe benefits for persons who are not required to furnish return of income but are required to furnish return of fringe benefits.

Rule 12 of the Income Tax Rules, 1962 provides for the form and the manner in which the income tax return is required to be furnished. **Sub-rule (3) of rule 12** provides that return of income/ fringe benefits can be furnished in any of the following manners:

(i) furnishing the return in a paper form;

(ii) furnishing the return electronically under digital signature;

(iii) transmitting the data in the return electronically and thereafter submitting the verification of the return in Form ITR-V;

(iv) furnishing a bar-coded return in a paper form.

For further details, please refer *Circular No. 03 / 2009, dated 21-5-2009*.

Recent decisions of SC/HCs

● **Allowability of Provision for warranty as business expenditure (Sec 37):**

Assessee was engaged in manufacture of value actuators. It offered standard warranty linked to sales and made provision for it. The actual expenditure was less than the provision made for warranty, so the excess sum was reversed to P&L account. Assessing officer held that deduction of provision should not be allowed. However, SC held that, if warranty is an integral part of the sale price of the goods and it is attached to the sale price of the product, obligations arising from past events have to be recognized as provisions. Provision as a liability, is recognised when an enterprise has a present obligation resulting from a past event; a reliable estimate may be made of the amount of the obligation. If these parameters are satisfied, provision for warranty is to be allowed as deduction u/s 37 of the I-T Act. In the case of manufacture and sale of one single item, the provision for warranty could constitute a contingent liability not entitled to deduction under Section 37 of the said Act.

Pepsico India Holdings P Ltd Vs State Of Kerala dated May 11, 2009, SC.

● **Revision of assessment order:**

It was held that an assessment order passed by an Income-Tax Officer should not be interfered with, only because another view was possible, and an assessment order passed at the instance of the higher authority, is illegal.

Arvind Mills Ltd. v. DCIT dated April 13, 2009.

● **Sec 44BB (exploration of mineral oil):**

Assessee is a non-resident company, engaged in exploration of mineral oil. As per agreement, assessee received reimbursement of mobilisation and demobilisation charges for transporting drilling rigs from various parts of the world to specified locations. It was held that the payment made to the assessee for mobilisation of rigs is not the actual reimbursement, and such amounts are liable to be included in the 'gross receipt' irrespective of the fact that whether the amount was paid or payable in or outside India. The mobilization/ demobilization charges paid for transportation of the plant and machinery from the place out of India to the locations in India or its territorial waters are covered under this section.

R & B Falcon Drilling Co vs. CIT (Uttarakhand), Dehradun, 2009-TIOL-213-HC-Uttranchal.

Tribunal Judgements

● **AO cannot decide how business has to be done:**

The assessee has the liberty to choose its business model. In a complex manufacturing process it is the assessee who decides as to what to produce in the factory, what to buy and what to outsource. The Assessing officer (AO) cannot decide how to do the business of the assessee, given the circumstances of the case. The AO should not look at the matter from his own view point but from that of a prudent businessman.

M/s Elgitread (India) Ltd Vs ACIT (Chennai), 2009-TIOL-271-ITAT-MAD.

● **TDS:**

Assessee was engaged in business of running cinema hall and food courts by taking cinema premises on hire and shared profit based on certain guidelines agreed upon by both parties. It was held that since it is a profit-sharing agreement and not works contract, no TDS is to be deducted u/s 192.

M/s Competent Films Pvt Ltd Vs ITO, (New Delhi),2009-TIOL-273-ITAT-DEL.

● **Depreciation:**

Assessee claimed depreciation at the rate of 40% on commercial vehicles. Assessing officer disallowed it. But by CIT (A) it was held that on the basis of previous year's judgments in favour of assessee it should be allowed.

Siemens Power Engineering Pvt Ltd Vs ACIT (Delhi) dated April 30, 2009, 2009-TIOL-276-ITAT-DEL.

● **TDS on technical and professional services:**

Assessee was a franchisee of NIIT, Delhi. It entered into an agreement for providing a variety of services and for purchase of course materials. It was held that the payments made by the assessee to NIIT for allowing the use of trade mark, for providing copyrighted material, for proprietory information and technical know-how relating to the location, design and operation of the computer education centres, are liable for TDS u/s Sec 194J as such services do qualify as technical service as per Explanation 2 of Sec 9(1)(vii). However, the payments made for courseware consumables, educational aids and royalty cannot be subjected to TDS provisions.

M/s Frontline Software Services Pvt Ltd Vs ACIT, Bhopal, 2009-TIOL-287-ITAT-Indore.

● **Reassessment u/s 147:**

It was held that if reassessment has been made within limitation period of four years then it is valid, irrespective of the claim of the assessee, that there has been a complete disclosure of all relevant facts. If period of four years has not expired and A.O. has all the reasons to believe that income has escaped assessment, then proceedings could be started even if all the material facts had been disclosed by the assessee. The words 'reason to believe' appearing in section 147 cannot mean that the A.O should have finally ascertained the facts by legal evidence.

M/s Lakshmi Machine Works Ltd Vs ACIT, Coimbatore, dated March 27, 2009, 2009-TIOL-305-ITAT-MAD.

● **Taxability of income earned on deputation:**

The Assessee was an employee of Indian company sent on

deputation to a non-resident JV company. He stays for 98 days in India during the relevant previous year. Assessee claimed exemption in regard to income earned from the JV company deputation. The assessing officer took the view that the assessee is an employee of an Indian company and was seconded by its JV outside India, and any income earned while on deputation with a non-resident company is not exempt. The Tribunal upheld the decision of CIT (Appeals) that since the assessee was in India for less than 180 days and the salary during the deputation period was paid by the non-resident company, such income is not taxable in India.

*Shri Ashok Kumar v. DCIT (Dehradun)*2009-TIOL-261-ITAT-DEL.

- **Deduction of bad debt Section u/s36(1)(vii):**

It was held that with effect from 1.4.89, u/s36(1)(vii) of Income Tax Act, it is not necessary for the assessee to establish that debt had become bad, but other conditions as mentioned in the relevant section have to be fulfilled for allowance of bad debt.

M/s Sateo Securities & Financial vs ITO, Mumbai 2009-TIOL-265-ITAT-MUM.

International Tax Alert

● **Supreme Court Decision:**

Taxation of expatriates

Taxation of expatriates becomes important given the increasing foreign technology agreements. The recent decision of Supreme Court in the case of **Eli Lilly and Company (India) Pvt Ltd** should be borne in mind when an employer decides upon the tax withholding obligations for his employees.

Assessee is a joint venture of a non-resident and a local company. The Non-resident partner seconded a few employees to work with the JV – The assessee paid salary in India and tax was deducted on the same - But no TDS was deducted on Home salary / special allowances paid by the non-resident as retention money.

The Revenue found that the entire work was done by the expat employees in India but no TDS was deducted on their Home salaries and took a view that as per Section 9(1)(ii) of the Income Tax Act 1961 the income derived by the expatriates was taxable in India and subject to Section 192(1).

Accordingly TDS was to be deducted even on the home salary paid for services rendered in India.

The Supreme Court has held that the Indian subsidiaries of foreign companies employing expatriates will have to deduct tax at source on their entire salary just as domestic companies do.

● **High Court Decisions:**

1. **Treaty shopping could turn perilous**

The instance of **E-trade Mauritius** is one that warns on the perils of treaty shopping.

The appellant E-Trade Mauritius is a limited company. It is a subsidiary of the E-Trade Financial Corporation of the USA. It sold shares of the Indian company, IL & FS Ltd, to a Mauritian company, HSBC Violet Investments (Mauritius) Ltd. The DTAA between India and Mauritius provides that capital gains arising in India to a resident of Mauritius would be subject to tax only in Mauritius. Hence on a literal application there should have been no tax liability in India. The Company accordingly claimed exemption from capital gains tax under Indo-Mauritius DTAA. But the Income Tax Department took the view that E Trade Mauritius was just an instrument of the US Company for routing investments into India and the gains are taxable under the Indo-US tax treaty.

Apparently the Income tax Department was buoyed by its success in the case of Vodafone in raising this issue.

The tax demanded was Rs. 245 million (US$ 5.27 million); the remedy to have the tax demand annulled through revision proceedings, also failed.

E-trade Mauritius dragged the Income Tax Department to the Mumbai High Court challenging the direction of the Income Tax Department in a Writ. The High Court felt that the tax deposited by E-Trade could not be refunded to them.

2. **Whether payments for advertising, publicity and sales promotion to a non-resident would amount to fee for Technical services or royalty?**

Sheraton International Inc., USA entered into commercial service agreement with ITC Hotels of India for advertising, publicity and promotion of their sales worldwide. The question was whether the payments by ITC Hotels under the agreement, were royalties liable to tax in India?

The payments made to the non-resident will not fall under the definition of royalty as there was:

- No transfer/ use of all or any rights in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property.
- No imparting of any information concerning the working of, or the use of a patent, invention, model, design, secret formula or process or trade mark or similar property.
- No imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill
- No use/ right to use any industrial, commercial or scientific equipments.
- No transfer of all or any rights in respect of any copy right, literary, artistic or scientific work or scientific work including films or video tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or distribution or exhibition of cinematographic films or
- There was no rendering of any services in connection to the above.

The payments made to the non-resident will not fall under the definition of fees for technical services as there is no rendering of any managerial, technical or consultancy services.

The payments made are to be treated as business income. But, since the assessee has no PE under Article 7 of the DTAA, it cannot be taxed in India.

● **Decisions of Authority of Advance Rulings (AAR):**

1. **Service PE under the Indo-Australian DTAA:**

How to determine whether a Service PE exists is an issue that arose under the Indo-Australian Treaty.

The Australian company, **Worley Parsons Services Pty Ltd** (WPS) became successful bidder for the assignment of Oil and Natural Gas Commission (ONGC) to review the technical and commercial bid documents (inviting bids from contractors) for installation of the new platform and to give its recommendations in respect of Mumbai High North Offshore field.

A Contract (No. 1) was entered into in May 2001 with ONGC. Services to this contract were carried out by the applicant in Australia. The applicant's employees were in India for meetings in March and June 2001 for a total period of 7 days for negotiation and field level data gathering.

The work was awarded by ONGC to Engineers India Ltd. for February 2002. The applicant having become a successful bidder, for review of designs and documents, as required by Engineers India, and entered into a Contract (No 2) in April 2002 with ONGC. The scope of the contract as given in clause (17) thereof consisted of providing back up consultancy assistance for review of ONGC's detailed design and engineering documents through provision of required engineers. Further, the engineers were also required to assist ONGC in review and evaluation of various optimization and cost savings proposals. The work involved desk-top review of workings prepared by a third party in Worley's facilities in Australia. As the work entrusted to the applicant required inputs from the field and the ONGC staff, the employees of the applicant came to India and stayed for duration of 39 days in all in the financial year 2002-03.

Apart from the above, Contracts No. 3 to 6 were entered to in relation to Mumbai High South Offshore Field (for short 'MHS) development. Contract No. 5 related to designing a new

process platform. Contract No. 6 related to rendering of consultancy services. ONGC prepared a scheme to implement seven separate packages for developing Integrated Process-cum-Gas Compressor Platform, several well platforms, drilling of new wells and new pipeline segments of 245 kms.

The applicant contended that

a) The services under various contracts except contract no. 5 cannot be brought within the sweep of 'royalties' as defined in Art. XII.3 of the DTAA,
b) there was no permanent establishment in India except in relation to Contract no.6 (Employees were present in India for Contract No. 6 for 90 days in the year 2003-04 and 13 days in the next year) and
c) Royalty income in respect of the contract no. 5 has to be apportioned in such a manner that only income attributable to the Indian operations is taxed in India.

It was held by the Authority for Advance Ruling that:

In so far as Services are concerned:

- The various contracts involving rendering of services in India were with one party.
- The nature of work and services are of the same pattern.
- Hence, services cannot be dissociated from each other for the purposes of Article 5(3)(c), which deals with Service PEs.
- The duration of the totality of services furnished under various contracts between the same parties during the 12 month period has to be taken into account.
- If so, the yardstick of 91 days stands satisfied, and the income attributable to the PE will be taxable in India.

In regard to the submission for apportionment of Royalty income and the plea that tax is applicable only to the extent of income attributable to the operations on India:

Theory of territorial nexus:

To execute the contract, the applicant's employees were present in India for 22 days in the year 2002-03 for on-the-spot study, reviewing the documents and providing clarifications. The transfer of plan/design indisputably took place in India. Though the bulk of the work connected with preparation of plan/design and study report was done from Australia, there is sufficient territorial nexus with India and the profits derived from this contract are liable to be taxed u/s 5(2) read with section 9(1)(vi) of the IT Act on gross basis at 15%. It is not permissible to split up such royalty income by allocating part of it to the work done in Australia.

2. Status of overseas Limited Liability Partnerships under Indian Tax Laws

The case of **Canoro Resources Ltd** involved interesting issues on the status of overseas LLPs under Indian Tax laws. Other issues like Transfer Pricing and scope of Article relating to Non-discrimination in DTAA are also discussed.

The applicant company, Canoro Resources Limited, is engaged in the business of exploration and production of petroleum and natural gas in India. It is a Canadian company having participating interest in 3 oil blocks out of which only one block ('Amguri' block) has started commercial production and the remaining two are in the exploration stage. The applicant has entered into separate Production Sharing Contracts (PSC) with the Government of India and the concerned participating company in respect of each of the above three blocks. The applicant, the Government of India and the Assam Company Ltd. are parties to the PSC in respect of Amguri block in which the applicant holds 60% participating interest and is also the operator. The company proposed to restructure its

business in India by transferring its participating interest in Amguri block to a partnership firm to be formed in Canada between it and its wholly owned subsidiary company, namely Legasi Petroleum International Inc, which is incorporated in Canada.

The questions that had been recasted and the respective rulings are given below:

a. Can a partnership firm formed between the applicant and an entity in Canada be granted status of 'firm' for the purpose of taxation under the Income-tax Act, if it satisfies the conditions listed u/s 184 of the Act?

   Sec. 184 of the Income Tax Act prescribes certain conditions for a partnership firm to qualify as a firm.

   Hence, the proposed partnership firm to be formed by the applicant with Legasi Petroleum International Inc. at Alberta, Canada can be assessed as a firm under the Income-tax Act, 1961, provided the requirements of section 184 are complied with.

b. If it is a firm, what would be the residential status of the partnership under the Act, in view of the fact that all significant decisions relating to activities of the partnership would be taken by the management team of the firm outside India?

   Since the control and management of the affairs of the partnership firm will be located wholly outside India, the said firm shall be a non-resident firm. However, the Revenue argued that the firm will carry its entire business operations in India only and hence it will become a resident firm.

   Hence, the AAR held that the residential status of the said partnership firm is a question of fact which can be determined by the assessing officer at the relevant point of time.

c. If it is a firm, would tax rate prescribed under the Act for a 'firm' be applied, while computing tax liability of the partnership in India?

   Being a non-resident firm will not make any difference so far as the rate of tax is concerned, as the Income Tax Act does not differentiate between resident and non-resident partnership firms.

   Hence, the aforesaid firm shall be liable to tax @ 30 % plus applicable surcharge and ess in accordance with paragraph (c) of the First Schedule of the Finance Act, 2008.

d. If it is a firm, would share in post-tax profits of partnership firm be exempt in hands of the respective partners, since Indian Tax laws do not tax the share of profits of partners?

   The proposed partnership is to be assessed as a firm and hence share of partners in the total income of the firm shall not be included in the total income of such partners.

e. Where a capital asset is transferred by a partner to the partnership firm as his capital contribution, whether Transfer Pricing provisions would apply since it is to be regarded as an international transaction?

   The Transfer Pricing laws apply exclusively to international transactions carried out between associated persons – whether individuals, firm or company. These provisions are aimed at tackling the issue of price manipulation associated with international transactions. The apprehension of price manipulation is real even in international transactions between partners and firm, who are associated persons. Therefore, transfer pricing provisions should apply to such transactions.

f. Whether by applying transfer pricing provisions for determining the consideration for transfer (of participating interest in Amguri block to the partnership firm as its capital contribution), the

provisions of Article 24 (non discrimination clause) of DTAA between India and Canada would be attracted?

The non-discrimination provision prohibits a Contracting State from making any discrimination in the matter of taxation between its own national and a national of the other Contracting State, who are placed in similar circumstances. Article 3(h) of the DTAA defines the term 'national' to include both – natural persons and artificial persons, such as companies, etc. The transfer pricing provisions relate to international transactions between associated enterprises. International transactions give rise to their own peculiar problems. 'International transaction' has been defined in section 92B of the Act to mean transaction between enterprises, either or both of whom are non-residents.

It may also be seen that Sec. 92B makes a distinction between enterprises on the basis of their residential status, and not with reference to their nationality. The residential status of an individual depends on the number of days he lives in India. In the case of a legal person, like a company, or in the case of a firm, it would depend on factors, such as place of registration, situs of control and management, etc. It is possible that a national of India could be a non-resident for the purpose of this Act and a national of the other Contracting State could be a resident. Be that as it may, a cross-border transaction between Indian nationals, one or both of whom are non-residents and who are associated enterprises, will also attract the transfer pricing provisions, as they would apply to similarly situated Canadian nationals. Viewed from this angle, the discrimination clause has no basis in this case.

Hence, it was held that Article 24 of DTAA does not come to the aid of the applicant.

● **Decisions of Income Tax Appellate Tribunal (ITAT):**

1. **Whether various sites or projects for providing technical know-how, basic engineering services and supervisory activities can be considered as Permanent Establishment?**

Krupp Uhde Gmbh is a company incorporated in Germany. It is engaged in the business of providing technical know-how/license, basic engineering services and supervisory activities in connection with construction or installation of the specified machineries/ assembly provisions.

The question is whether the various sites or projects for the above activities can be considered as PE.

Under Article 5(2)(i), Indo-German treaty prescribes a minimum period of six months for treating a site of the project as PE.

But in this case the company had entered into various contracts with different parties and had carried out supervisory works at them for less than six months period on each of them. However, the Revenue insisted that for considering the PE, it is not the period of supervisory work done at one site, but all sites together should be taken into account.

Moreover, the minimum period of six months for various sites cannot be considered together particularly when different contracts had no effective interconnection with each other.

The date of commencement of the threshold limit of six months would depend on the facts of each case considering the terms of contract.

If the supervisory activity is carried out under a separate and independent contract

then the minimum period of six months would commence only when such activity itself had commenced and not from the date of the project.

The period can be counted from the date of commencement of the project only where there is one single indivisible contract for various activities undertaken by the non-resident.

The intervening period caused on account of various factors should be not be excluded while computing the minimum period of six months as an activity once commenced continues till its completion and the intervening period cannot be excluded.

2. **Whether Reimbursement of salary under the secondment agreement can be treated as fee for technical services?**

Whether a secondment arrangement can be construed as provision of technical services under the Act and whether the reimbursement received by a Foreign Company is liable to tax in India in the hands of the Foreign Company is a question that came in the case.

IDS SOFTWARE SOLUTIONS (INDIA) PVT LTD is a company engaged in the business of software development. It entered into a secondment agreement with its U.S. holding company.

The Bangalore Income Tax Appellate Tribunal in the above case held that payment made under secondment arrangement by an Indian Company to a Foreign Company was not Fees for Technical Services and hence not liable to tax in India.

The Indian Company was the 'economic employer' of the secondee and employer-employee relationship existed between the Indian Company and the secondee.

The key reasons were that the secondee's employment as Managing Director was ratified by the Indian Company and that the secondment agreement between the Indian Company and the Foreign Company constituted an independent employment contract between the Indian Company and the secondee. Also, the secondee worked exclusively for the Indian Company and under its supervision/ direction/ control, the secondee's costs were borne by the Indian Company and the Indian Company had discretion to reject or remove the secondee.

Further, the Foreign Company did not warrant the quality of the secondee and the Indian Company was to indemnify the Foreign Company for any claim arising due to the secondee.

Hence, it was held that the secondee was an employee of the Indian Company and reimbursement made by the Indian Company to the Foreign Company represented salary for services rendered by the secondee to the Indian Company and was not for services rendered by the Foreign Company to the Indian Company. Thus, salary, which has already been subject to TDS in India, cannot suffer further TDS while remitting the same to the Foreign Company.

In relation to the question whether the payment can be treated as fees for technical services, the Tribunal observed that the Article VI of the agreement which provides for indemnity, i.e. the liability of the assessee company to indemnify the US Company from all claims, demands, etc., consequent to any act or omission by the seconded employee, is inconsistent with the claim of the department that this is an agreement for rendering technical services. The Article further provides that nothing in the agreement shall be construed as a warranty of the quality of the seconded employee. It is not usual to find such a stipulation in an agreement for rendering technical services. Hence, the payment cannot be treated as fees for technical services.

SERVICE TAX

Vital Notifications / Changes

- **Refund of tax paid to units of Special Economic Zone (SEZ):**

The developer of the units of SEZ shall be provided by way of refund, the service tax paid on the specified services used in relation to the authorized operations in the SEZ, except for the services consumed wholly within the SEZ.

Notification no. 15/2009 dated 20th May 2009.

Recent decisions of SC/HCs

● **Business Auxiliary Service:**

Assessee, an agent of State Government, purchased lottery tickets from State Government and made profit by selling these tickets to principal stockists at a higher price. By the Finance Act 2008, an explanation was added to the sub clause (ii) of section 65(19) of the Act w.e.f. 16th May 2008, declaring that services related to promotion and marketing include services in relation to marketing and promotion of lottery. On the basis of the CBEC circular dated 14.1.2007, in which, it was clarified that activities provided by assessee are for promotion or marketing of lottery tickets, it was held that assessee would be liable to pay service tax with effect from 16th May 08. The tax would not be with retrospective effect as the explanation added by the Finance Act was declaratory or clarificatory in nature, not to be taken with retrospective effect.

Martin Lottery Agencies Ltd. v. UOI (2009)20 STT 203 (SC).

Tribunal Judgements

● **Valuation of Taxable service:**

Assessee providing taxable service, charges gross value without indicating service tax element separately. Taxable value realized has to be treated as inclusive of service tax due.

Robot Detective & Security Agency Vs CCE (Chennai) (2009)20 STT 42.

● **Broadcasting agency:**

Assessee was a subsidiary of BBC, engaged in marketing of timeslots, collection of billed amount from clients and remitting amount to BBC. It was held that it had to be treated as 'Broadcasting agency or organization' providing broadcasting services.

BBC World (India) (P) Ltd. Vs CST (New Delhi)(2009) 20 STT 54.

● **Erection, commissioning or installation service:**

It was held that, where activity of installation, erection and commissioning was incidental to delivery of goods to customers, without any separate contract for it, and charges for same were included in value of the equipment on which excise duty was discharged, then service tax should not be levied.

Allengers Medical Systems Ltd Vs CCE (New Delhi)(2009) 20 STT 287.

● **Tour Operator:**

Unless, vehicle of a contract carriage permit holder fulfils requirement as mentioned in Central Motor Vehicle Rules of a 'tourist vehicle', he would not be considered as a tour operator. By merely holding contract carriage permit, he does not become liable to tour operator service.

Ghansyam Travels vs. CCE (Ahd.)(2009) 20 STT 281.

● **Consulting Engineer**-

Where primary object of incorporation of a joint venture company was to share expertise and know-how of both parties, and fruits of joint venture was shared by both parties, sharing of knowledge could be called as providing consulting engineering service, as expertise acquired and shared by a concern was also used for its benefit along with that of others.-

Nyco S.AA vs CST (New Delhi) 20 STT 113.

● **Insurance Auxillary Services:**

It was held that in case the assessee has raised out of pocket expenses on its clients on flat rate basis, then assessee can claim the credit of it. Charging out of pocket expenses on flat rate basis does not mean that no expenses have been incurred and the Revenue cannot deny the credit. If reimbursed sum was more than the flat rate, the tax would be paid on the differential, but the details need to be verified.

M/s Absolute Consultants Pvt Ltd Vs CST, Ahmedabad (Dated: April 21, 2009) 2009-TIOL-760-CESTAT-AHM.

● **Cenvat Credit**:

It was held that outdoor catering services employed in factory canteen are 'Input Service'.

Pudumjee Pulp & Paper Mills Ltd Vs CCE, Pune-I 2008-TIOL-1634-CESTAT-Mum.

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