Tax News

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INCOME TAX

Reminder For March'10

Action Due	Due Date
PF for the month of February'10	15-03-10
ESI for the month of February'10	21-03-10
Advance Income Tax	15-03-10

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SERVICE TAX

Reminder For March'10

Action Due	Due Date
Service Tax for the month of February'10 in case of company	05-03-2010
Service Tax for the month of Febuary'10 in case of a company for which e-payment is mandatory	06-03-2010
Service Tax for the month of March	31-03-2010

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INCOME TAX

Vital Notifications / Changes

No important change/notification to be reported for this issue

Recent decisions of SC/HCs

- **Taxability of interest receivable**:

It was held that in case realization of principal amount is doubtful, then accrued interest on it should not be credited as income because under the mercantile system of accounting, what is not realizable is not to be recognized as income.

Eicher Ltd. v. CIT (2010) 320 ITR 410.

- **Treatment of custom duty for valuation of closing stock**:

It was held that in case goods are lying in a bonded warehouse for clearance, then they could not be included in closing stock, and therefore custom duty on such goods should also not be added in closing stock.

India Piston Ltd. v. CIT (2010)320 ITR 257.

- **Amount received as compensation in gender discrimination**:

In this case, the assessee was denied a job by Voice of America, on gender grounds. In the settlement of the case, compensation was awarded to the assessee. The Assessing Officer wanted to tax this compensation, but CIT (A) and Tribunal held that since employment was not taken up at all, therefore it was a capital receipt and not taxable. The Court held that there was no question of law involved in this case and approved it.

Smt. Rani Shankar Mishra v. CIT (2010)320 ITR 542.

- **Taxability of loss of stock broker**:

It was held that in case a stock broking company purchased shares on the client's instructions, and the client did not pay the amount, then this amount along with interest could be claimed as a deduction, as the loss was a genuine one.

Bonanza Portfolio Ltd. v. CIT (2010) 320 ITR 178.

- **Applicability of limit u/s 40A(3) for more than one payment**:

It was held that with effect from 1st April 2009, sec. 40A(3) requires application of limit of Rs. 20,000 by aggregating the payments on the same day, i.e. during the day all the payments made by a mode other than account payee cheque or account payee draft should not exceed Rs. 20,000 in aggregate. This amendment is effective from 1st April 2009, not retrospectively, therefore for earlier years it was not to be aggregated.

Ashok Iron and Steel Rolling Mills v. CIT (2010) 320 ITR 101.

Recent decisions of Tribunal

- **Status of residency in India**:

Assessee was an employee of IBM Global Services India (P) Ltd, deputed to work with IBM Global Services in USA. As per the contract he left for USA on 1-2-2004 and he received salary in USA for assignment from April 2004 to January 2005. During this period assessee visited India from 18-8-2004 to 6-9-2004 and returned to India permanently on 31-1-2005. On the question of resident status of the assessee, Tribunal held that assessee had visited India during previous year and to compute the number of days of stay in India as per sec 9 of the General Clauses Act, the first day in the series of days had to be excluded, and hence his stay in India from 1-2-2005 to 31-3-2005 was only for 59 days. Therefore, assessee was a non resident in India for the relevant previous year.

Manoj Kumar Reddy v. ITO(2009)34 SOT 180.

Advance Rulings

- **Status of Non resident in India**:

Assessee left India for USA for employment purpose on 31st March 2008 and came back on 29th November 2008. He was in India for 122 days. On the question of whether assessee was a non resident during the previous year 2008-09, Advance Ruling was given that under sec. 6(1) the net effect is that a person who left India for employment would be considered as resident of India only if he was present in India for 182 days or more during the relevant previous year. In other words, if an individual has spent less than 182 days in India during a previous year and was outside India for the purposes of employment, then regardless of his being in India for 365 days or more during 4 preceding previous years, he cannot be treated as a resident of India. Therefore in present case, assessee would be considered as non resident in India and his income earned in USA would not be taxable in India.

2010-TIOL-05-ARA-IT.

International Taxation

- **Payer's obligation to deduct TDS u/s 195 is unavoidable even if the payment received is non taxable in the hands of the recipient**:

In the case of Samsung Electronics Co. Ltd. v. CIT, a very interesting decision was given by the Karnataka High Court, which may have a wide-ranging impact. The High Court opined that when a resident makes a payment to a non resident which is in the nature of an income receipt in hands of the non resident, then the resident payer has to deduct the TDS u/s 195. It cannot contend that TDS need not be deducted because the payment would not result in taxable income in the hands of the non resident, or because the non resident could have avoided tax liability under different provisions of the Act or the DTAA. The decision gives rise to several questions, particularly because it goes against the spirit of the CBDT circular issued in July 2009, where it was stated that if a CA certifies that the income would not be taxable in the hands of the recipient, then TDS may not be deducted by the payer.

Samsung Electronics Co. Ltd. v. CIT, Internationl Taxation Dec 2009, Pg 145.

- **Taxability of services acting as a facilitator and technical consultant:**

The applicant, FICCI, a non-profit company, entered into a MOU with DRDO for identification and business development of competitive global technologies in DRDO's inventory. To implement the MOU, applicant and DRDO jointly initiated a programme called ATAC, and applicant entered into an agreement with University of Texas (UT) to perform certain work and services for this project. FICCI agreed to provide facilities and assistance for this project. It was agreed that DRDO would pay consultancy fees to FICCI and applicant will pay fee to UT. Some of the functions were to be performed in India and some in USA. The issue was whether amount received by UT liable to be taxed in India and was FICCI liable to deduct TDS u/s 195 of the Income Tax Act. The ruling was given as follows:

- None of the services as mentioned in ATAC undertaken by UT, would amount to make available the technical knowledge, experience, skill, know how, or processes possessed by UT. UT was acting as a facilitator and technical consultant for the purpose of commercialization of identified technologies. As such, its services would not fall under the purview of para 4(b) of Article 12 of DTAA between India and USA.

- Therefore the payments received under the Agreement are not liable to be taxed as fees for technical services under the domestic law.

- Also the payments cannot be subjected to tax as business profits, in view of the undeniable fact that UT has no permanent establishment in India.

FICCI, In Re (AAR), International Taxation Jan 2010, Pg 130.

- **Taxability of profits in case of independent service provider working on behalf of Singapore based company**:

Assessee was a tax resident of Singapore. It manufactured hard disk drives and supplied them to OEMs in India. Assessee entered into a contract with independent service providers (ISP) who stock disks in India on behalf of the assessee and delivered the same to the OEM, on 'just in time' basis. ISPs also provided adequate security, proper storage facility, and electronic data interchange of inventory records. Assessee could audit and inspect the goods kept by ISP at their warehouse. Invoices were raised to the OEM which made payment to the assessee outside India. Advance ruling was given that, on the basis of the facts, demarcated space in the warehouse of ISP constituted the fixed place of business, or PE, by virtue of definition given in Article 5.1 of the DTAA between India and Singapore. Further, for the purpose of computation of profit of the PE in relation to the sales activity in India, it should be treated as a separate and distinct enterprise, wholly independent of the enterprise of which it is a PE. The amounts paid to ISPs and other expenses if any incurred should be deducted.

2010– TIOL-08-ARA-IT in Income Tax.

- **Transfer Pricing:**

The assessee, Gharda Chemicals Ltd., entered into an international transaction for sale of Dicamba (medicine) to Gharda USA Inc (AE), a wholly owned subsidiary of the assessee. Assessee sold Dicamba to unrelated parties in various other countries at

significantly higher rates as compared to the rate offered to its AE. The assessee had determined the 'ALP' by comparable uncontrolled price (CUP) method. The transfer pricing officer rejected the CUP method as well as the assessee's alternative submission for adoption of "resale price method" for calculating ALP. The Additional Commissioner of Tax passed an order u/s 92CA, requiring an adjustment in total income.

The Assessee submitted that:

- Provisions of section 92CA were not applicable in this case as there was no reduction in tax liability of the assessee. Assessee exported Dicamba to other countries and because direct export to USA was not permissible, assessee opened an AE in the name of Gharda USA Inc.

- Gharda USA was running under high losses, and did not pay tax. Sale of Dicamba to AE at a lower rate did not result in lowering of tax incidence. It did not have any ultimate effect on tax liability of the assessee, when considered in totality.

The Tribunal held that:

- To determine correct tax liability in hands of an Indian enterprise, it is not relevant how much tax was paid by the foreign AE. Correct amount of tax payable in India should not suffer due to adjustment of price for goods or services between the related enterprises.

- In the present case choice is between CUP method or resale price method. Resale price method is not applicable as this method is applicable when there is a purchase of property or services by an enterprise from its AE which is then resold or provided to unrelated party.

- The essence of determining ALP under CUP method is to ensure that the price charged from unrelated parties is same as from AE, under similar circumstances. Two types of CUP methods- Internal and external CUP methods - were discussed in this case:

- Internal CUP method is not suitable in this case as price varies from one country to another due to many factors. Therefore no comparison can be made between the price charged from other countries with that from USA, more particularly when the quantity exported to USA is on wholesale basis while that to other countries is in small lots on retail basis.

- External CUP method is most suitable method for the present case, as this method compares the price charged by the assessee from its AE, with the average price at which the goods were available in the open market in that country from transactions between unrelated third parties.

Gharda Chemicals Ltd vs DCIT, International Taxation Jan 2010, Pg 132

- **Agent of a non resident:**

In this case it was held that a live nexus between employer and expatriate personnel must be proved to consider them as agent of the non-resident.

Pride Foramer S.A.S. v ACIT , International Taxation Jan 2010, Pg 141.

SERVICE TAX

Vital Notifications / Changes

- **Assessees who have paid service tax of more than Rs. Ten lakhs:**

It has been notified by the department that in case an assessee has paid a total service tax of rupees ten lakh or more, including the amount paid by utilisation of CENVAT credit, in the preceding financial year, he shall deposit the service tax liable to be paid by him electronically, through internet banking, and also file the return electronically. Accordingly amendment has been done in Rule 6 sub rule 2 and Rule 7 sub rule 2 of Service Tax Rules.

Notification no. 01/2010 dated 19th Feb. 2010.

Recent decisions of SCs/HCs

- **Whether original authority can examine eligibility of credit on input services apart from eligibility of taking credit on debit notes**:

It was held that in case appeal was made to CESTAT for allowing credit of service tax paid through debit notes issued by service provider, then CESTAT should not go beyond the scope and start examining the eligibility of credit on input services.

2010-TIOL-180-CESTAT-MAD.

Recent decisions of CESTAT

- **Cenvat Credit**:

It was held that Cenvat credit on pipes used for laying pipelines for transportation of natural gas is admissible. Credit is also available in case of construction services and commissioning and installation services.

2010-TIOL-271-CESTAT-AHM+2010-TIOL-272-CESTAT-AHM+2010-TIOL-273-CESTAT-AHM.

- **Penalty in case tax paid belatedly**:

In this case assessee rented its premises to a bank. Since service tax was introduced w.e.f. 1.6.2007 on the category of "renting of immovable property", assessee asked the tenant to reimburse service tax payable on the rent of the premises. The tenant agreed to reimburse it only on 1.4.2008. On receipt of tax, the assessee immediately deposited the same in the treasury. It was held that in this case penalty should not be levied since it was a bona fide belief that being a new levy delay could be possible.

2010-TIOL-164-CESTAT-MUM.

- **Qualification of input services in case of EOU**:

Assessee was a EOU that manufactured electrical wiring and accessories made of aluminium, zinc and copper alloys. The entire production was exported out of India except waste and scrap arising during the manufacture which is cleared in DTA on payment of central excise duty. The issue was whether services like rent a cab service, outdoor catering service, air travel booking, telephone/mobile services and steamer agent qualify as input services under Cenvat Credit Rules or not? It was held that assessee was entitled to Cenvat Credit since the services were used in relation to the business activity.

2010-TIOL-162-CESTAT-MUM.

Advance Rulings

- **Taxability of aircraft specific type rating training**:

The applicant M/s CAE Flight Training (India) Pvt. Ltd. Bangalore (CFTI), was a joint venture between Flight Training Device (Mauritius) Ltd., a 100% subsidiary of CAE Inc, Canada and Emirates CAE Flight Training LLC, Dubai. The applicant was engaged in providing various flight training services at its facility in Bangalore and planning to provide aircraft specific " Type Rating Training " to the trainee pilots as part of its flight training services. The Commercial pilot's Licence holders intending to undergo aircraft specific type rating training, approach CFTI either directly or through the airlines with whom they were employed and CFTI had to issue Certificate of course completion under Aircraft Rules 1937, after finishing the type rating training.

Advance ruling was sought:

- Whether CFTI can be considered as an Institute imparting training which is specifically excluded from the definition of 'Commercial coaching and training centre' as defined u/s 65(27) of the finance act as an establishment which issues a certificate recognized by law for the time being in force: It was held that considering the facts of the case CFTI could not be considered as an institute or establishment which is specifically excluded from 'Commercial coaching and training centre'.

- Whether CFTI could be considered as 'vocational training institute' so as to be exempted from tax vide Notification no. 24/2004 dated 10.09.2004, because it provides aircraft specific training to pilots to enable them to qualify for flying specified aircraft and enable them to obtain employment in various airlines: It was held that CFTI could not be considered as a 'vocational training institute' for the purpose of exemption under the category of 'commercial training and coaching service' in terms of N*otification no. 24/2004 dated 10th Sept. 20*

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