Tax News

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INCOME TAX

Reminder for Apr-2013

Action Due	Due Date
TDS/TCS for Mar 2013	30-04-13
PF for Mar 2013	15-04-13
ESI for Mar 2013	21-04-13

SERVICE TAX

Action Due	Due Date
Service Tax for Mar 2013 in case of company	05-04-2013
Service Tax for Mar 2013 in case of a company for which e-payment is mandatory.	06-04-2013
Due date of filing of ST-3 for the quarter July 2012 to Sept 2012(date extended)	15-04-2013

INCOME TAX

Important Circulars / Notifications

- **Application of profit split method (PSM):** Clarifications have been issued regarding points to be kept in mind while selecting profit split method as most appropriate method for R&D activities. The details are in *Circular No. 02/2013, New Delhi, 26th March, 2013.*

- **Development centres engaged in R&D service with significant risk:** There was divergence of views amongst the field officers and taxpayers regarding the functional profile of development centres engaged in contract R &D services for the purposes of transfer pricing audit. Moreover, while at times taxpayers have been insisting that they are contract R &D service providers with insignificant risk, the TPOs are treating them as full or significant risk-bearing entities and making transfer pricing adjustments accordingly. The issue has been examined in CBDT, and certain clarifications have been given which specify the conditions under which a development centre in India may be treated as a contract R &D service provider with insignificant risk. The details are in *Circular No. 03/2013, New Delhi, 26th March, 2013.*

SC / HC Judgments

- **Income u/s 40A(2):** The assessee was a 50-50 joint venture of Saipem SPA (Italy) and one Mr Binoy Jacob. The assessee had acquired the running business of design and consultancy in the oil and gas sector from Triune Projects Private Limited by way of a slump sale and the total amount paid was approximately divided into two categories of tangible and intangible assets. The assessee had made a claim of depreciation at the rate of 25% on the intangible assets and 15% with regard to the tangibles. The AO disallowed the depreciation claimed in respect of the intangibles, but allowed the depreciation claimed with regard to the tangible assets. On appeal before the CIT(A), the disallowance was maintained. Aggrieved, the assessee filed an appeal before the Tribunal. The Tribunal instead of staying the recovery of demand, converted the same into installments. Still aggrieved with this order, the assessee appealed to the HC.

  The assessee submitted that this sum could not be added back to the income of the assessee u/s 40A(2), as this was never claimed as an expenditure. Regarding the disallowance, it was submitted that the stand of the CIT(A) was inconsistent with the view taken that the transaction was a sham transaction. If on the one hand, he disallowed depreciation on intangibles, he could not have, on the other, allowed depreciation on tangibles. Having heard the parties, the High Court held that:

- This amount had not been claimed by way of expenditure by the petitioner. It was an amount which was embedded in the price paid in the slump sale. Even if the said sale was a sham, this amount could not be added to the income of the assessee under Section 40A(2) of the said Act or any other provision.
- Disallowance for depreciation had already been made by the Assessing Officer and, therefore, there was no need for any further disallowance insofar as the depreciation amount was concerned. *2013-TIOL-220-HC-DEL-IT.*

- **Denial of TDS benefit for fault of deductor:** Refunds were denied by the Revenue for bogus or wrong demands or incorrect record maintenance. The problem had escalated because of centralised computerisation and problems associated with the incorrect data uploaded by the tax deductors or payers and the Assessing Officers. Revenue submitted to the Bench that 43% and 39% of the returns filed by the deductors in Delhi zone for the financial year 2010-11 and 2011-12 respectively were defective. This effectively meant that the assessee would not get credit of the tax deducted from their incomes by the deductors. Revenue admitted that the data uploaded in the Centrally Processing Unit, Bengaluru had errors and faults, and that Rs.2.33 lac crores was due and payable, on or before 31st March, 2010. Having heard the parties, the Bench held that:
  - Revenue has taken a right decision to computerise the income tax records, have Central Processing Unit for processing of returns and issue of refunds. These steps relate to policy and fall within the exclusive domain of the Revenue.
  - Revenue accepts and admits the position that wrong and incorrect demands have been uploaded in the CPC Bengaluru. Thus, the problem was created and caused by the Revenue who did not realise the effect and impact of incorrect and wrong arrears being uploaded in CPU Bengaluru and did not follow the statutory requirements of Section 245 of the Act.
  - Steps to ensure that credit is given to such assessee should be taken by the respondents in this regard and for compliance instructions should be circulated to the Assessing Officer. Thus every effort and attempt must be made to ensure that the assessee should get benefit of the TDS deducted by the deductor and paid to the Government. It would be unfortunate and a matter of regret if an assessee does not get credit, inspite of payment of tax. *2013-TIOL-207-HC-DEL-IT.*

- **Interest expenditure on account of non-taxable income:** Assessee earned Dividend which was not taxable. It also earned Interest which was taxable. The assessee also paid interest, of which a part was towards non-taxable income, but no expenditure with respect to the non-taxable income was shown, and deduction was claimed on the full amount of the interest paid. On this basis, a total loss was computed, which was accepted by the AO. The CIT(A) directed the AO to pass a fresh order to make appropriate disallowance under Section

14A of the Income Tax Act. Tribunal reversed the order of the CIT(A). On appeal, the High Court held:

- The assessee did not maintain any separate accounts for the purpose of the exempt income. The assessee did not give one to one co-relation between the funds available and the funds deployed. It was therefore, not possible to determine that part of the interest expenditure which was related to the exempt income.
- The interest paid by the assessee was both on account of taxable income and the exempt income. It was for the assessee to furnish the actual amount of interest paid for the purpose of earning the dividend income which the asessee did not do. The assessee, as such, did not discharge its burden and, therefore, the CIT(A) was correct in disallowing the entire interest expenditure. *2013-TIOL-188-HC-KOL-IT.*

ITAT Judgments

- **Advance tax on commission earned:** Assessee, an individual, was carrying on the activity of diagnostic services through his proprietary concern Vijaya Diagnostic Services. It had entered into an agreement with Vijaya Diagnostic Centre Pvt. Ltd. ('company') under which, the business of the proprietary concern was taken over by the company. It was found that huge amounts were received by the assessee as 'commission' on the total sales made by the company. The assessee contended that the amount was not accrued during the year as the royalty payable to the assessee could be ascertained only when the company's accounts were audited. The AO treated the commission income as undisclosed income of the assessee for the assessment year.

CIT(A) observed that the company was all along treating the amount to be paid or payable to the appellant as commission only. The company had also confirmed that the amount paid to the appellant was commission @2% on the total receipts. Also for the purpose of tax deduction and in Form 16 the said payment was shown as commission. Since commission was part of the salary it was to be assessed on accrual basis or due basis. The amount was ascertainable from the accounts of the company, and should be assessed to the year in which the amount was debited to the P & L a/c of the company. Thus, CIT(A) had confirmed the addition made by the AO. On appeal, the High Court held that:

- It is evident that the commission received from the company has been treated as part of salary of the assessee. In case of an assessee who earns income under the head "salary" the burden to deduct tax at source while making payment, is on the employer. If the employer does not deduct tax as per the provision then the assessee shall pay the tax directly. Therefore, there is no obligation on the part of the assessee to pay advance-tax on the salary income.
- The employee assessee cannot foresee that the employer would fail to deduct tax. Consequently, the

liability to pay interest in respect of such deductible amount is clearly excluded to that extent. Accordingly, no interest can be levied u/s 234B and 234C for non-payment of advance-tax. *2013-TIOL-188-ITAT-HYD.*

- **In a land transaction, forfeited sums form a part of sale consideration:** Assessee company had filed its Return showing a loss. The AO noted that the assessee had received almost full consideration at the time of execution of the said agreement of sale and irrevocable POA, but had shown this receipt under current liability, as advance against 'sale of property'. The balance small amount was forfeited. The AO noted that having received full sale consideration, the irrevocable POA assumed the character of regular sale deed. The purchaser had taken the possession of the property immediately and started construction of a multistoried building thereon. With these observations, AO held that there was a clear transfer of the said property within the meaning of sec 2(47), and that the entire amount received including the forfeited amount was taxable as sales consideration received for the sale of property. The CIT(A) agreed with the findings of the AO. On appeal, the Tribunal held that:
  - It is to be noted that all the parties to the transaction are interrelated. The assessee made an attempt to reduce the tax. The assessee's attempt to evade tax cannot be given any credit and the consideration received through earlier agreement is nothing but a part of the sale consideration received by the assessee towards transfer of the property and it is an attempt by the assessee to mislead the Department.
  - The findings in the case of Arms Length Transaction cannot be applied to the transaction of the assessee, where the parties were interrelated and the assessee involved in tax evading methods. *2013-TIOL-182-ITAT-HYD.*

- **Benefit on account of amalgamation cannot be construed as income:** Assessee, a registered company, had shown loss in its Return. It was explained that the assessee company was part to an amalgamation scheme, duly approved by Calcutta High Court, wherein one Vidya Vincon Private Limited (VVPL, in short), i.e. amalgamating company, amalgamated in the assessee company. The Capital reserve came into existence in the books of the assessee, on account of amalgamation with VVPL. The AO called upon the assessee to show cause as to why the Capital reserve credited by the company on amalgamation, not be treated as income of the assessee under section 28 (iv) of the Act. The assessee's explanation was that the said amount was neither a benefit, nor a perquisite, nor even advantage of any kind, but simply a result of merger of accounts of amalgamating and amalgamated company. On appeal, the Tribunal held that:
  - The question that needs to be answered is whether the transfer of capital reserve to the assessee company can be considered as income of the assessee under section 28 (iv) as a 'business income'. 'Business income' implies that the benefit or perquisite must be in the nature of a

business receipt or revenue receipt. The burden is on the Revenue to establish that the receipt is of a revenue nature.

- As a result of amalgamation, the assessee, being the transferee company, will increase its assets and liabilities, and, even if there be any benefit in the process, such a benefit can only be in the capital field because it is relatable to the non-trading assets and capital.
- Therefore, the Capital reserve is not a business income, and so it cannot be taxable u/s 28(iv). *2013-TIOL-181-ITAT-KOL.*

- **Services rendered by machines is not "fees for technical services":** The assessee made payment to a laboratory in Germany for carrying out certain tests on circuit breakers manufactured by the assessee. The assessee claimed that as the said tests were carried out by sophisticated machines without human intervention, the services did not constitute "fees for technical services" as defined in s. 9(1)(vii) of the Act. The AO & CIT(A) rejected the claim on the ground that even assuming that human intervention was not necessary, the same was present in the form of humans observing the process, preparing the report, issuance of certificate and monitoring the machines. On appeal by the assessee, the Tribunal held:
  - The test is whether the services are rendered by a human or by a machine. If a human renders the technical services with the aid of a machine, the services are "technical services". But if the services are rendered by a machine without human interface or intervention, then it is not "technical services" as defined.
  - The mere fact that certificates have been provided by humans after the test is carried out by the machines does not mean that services have been provided by human skills.

- **Compensation received to equalize inequalities in family settlement:** There was a dispute between two groups of a family. During the pendency of litigation, the parties agreed to divide the assets and businesses of the family into two lots. In terms of such settlement, lot-1 fell to the share of Group 'A' and lot-2 fell to the share of Group 'B' with the condition of payment of Rs.24 crores. A dispute regarding the date of split of the said amount was pending. The AO assessed the said sum in the hands of the assessee. This was reversed by the CIT(A) and Tribunal on the ground that the distribution of assets including the sum of Rs.24 crores was not complete as the matter was sub-judice and the amount did not accrue to the income of the group 'A". On appeal by the department, the High Court held:
  - A family partition which results in an adjustment of shares and of the respective rights in the family properties is not a "transfer" in the eyes of law. When there is no transfer of asset, there is no capital gain and consequently there is no liability to pay tax on capital gains.
  - In a family partition, a situation arises where an item of property is not capable of physical partition or is such that, if divided, it will lose its intrinsic worth. In such a

case, with a view to ensure an equitable partition, the item is allotted to one party and he is asked to pay compensation in money value to the other party. This amount is called "owelty". As the amount of compensation is only to equalize the inequalities in the partition it is nothing but a share in the immovable property itself (though paid in cash) and cannot be treated as income liable to capital gain. If such amount is to be treated as income liable to tax, inequalities would set in as the share of the recipient will diminish to the extent of tax.

- On facts, the payment of Rs.24 crores to Group A is to equalize the inequalities in partition of assets. The amount so paid is immovable property and is not income liable to tax . *Siemens Ltd v.CIT (ITAT Mumbai).*

SERVICE TAX

Important Circular / Notification

➢ **Submission of Form ST-3:** The Central Board of Excise & Customs hereby extends the date of submission of the Form ST-3 for the period from 1st July 2012 to 30th September 2012, from 25th March, 2013 to 15thApril, 2013. The special circumstances which have given rise to this extension of time, are:

- The Form ST-3 is expected to be available on ACES around 20th March, 2013.
- This will result in all the assessees attempting to file their returns in a short time period, which may result in problems in the computer network and further delay and inconvenience to the assessees. *Order No: 01/2013-ST dated 6th March, 2013.*

➢ **Amendment in Notification No.26/2012-Service Tax**, dated the 20th June, 2012 : In the notification of the Ministry of Finance (Department of Revenue), the TABLE, for serial number 12 is being replaced as follows:

Construction of a complex, building, civil structure or a part thereof, intended for a sale to a buyer, wholly or partly except where entire consideration is received after issuance of completion certificate by the competent authority,-	25	(i) CENVAT credit on inputs used for providing the taxable service has not been taken under the provisions of the CENVAT Credit Rules, 2004;
(i) for residential unit having carpet area upto 2000 square feet or where the amount charged is less than rupees one crore;	30	
(ii) for other than the (i) above.		(ii) The value of land is included in the amount charged from the service receiver.".

No.2 /2013 - Service Tax dated 1st March, 2013

- **Amendments in the notification No.25/2012-Service Tax**, dated the 20th June, 2012: In the said notification, certain clauses regarding (i) Services provided by way of temporary transfer or permitting the use or enjoyment of a copyright, (ii) Services provided in relation to serving of food or beverages by a restaurant, (iii) Services provided by a goods transport agency, by way of transport in a goods carriage, have been amended. The details are in ***Notification No.3 /2013 - Service Tax, 1st March, 2013***

SC / HC JUDGMENT

- **Fee for ropeway facility: The a**ppellant leased a ropeway installed by Municipal Board, at Mall Road, Mussoorie and operated it to entertain tourists. After amendment of section 65 (115) of Finance Act, 1994 to include any means of transport in the definition of tour operator, the department asked the appellant to deposit service tax on the charges collected by it from the tourists and it paid such tax under protest. Later it claimed refund of the tax paid because it was of the view that it will not be covered by the definition of tour. Upon appeal, the High Court held:
  Since the appellant is not planning, scheduling, organizing or arranging tours, but only operating a ropeway taken on lease from the Municipality, it is not a tour operator and will not be covered by definition given at 65 (115) of the FA, 1994. *Consequently, there shall not be liability to tax.* ***2013-TIOL-20-HC-UKHAND-ST.***

CESTAT JUDGMENT

- **Loading and transportation of clinkers: A**ppellant was manufacturer of cement. The raw material – clinker – was received by sea through ships, unloaded at the jetty and transported to its factory by availing services of transporters, namely, New Konkan Transport and M/s. Yashashree Transport. Non-payment of Service Tax was detected by the audit party and show cause notice issued. The assessee contended that the service rendered was classifiable under 'Cargo Handling Service' and, therefore, the demand of service tax under GTA was not sustainable. The Bench observed:

- *The work order given by the appellant to the transporters clearly indicates that it is for loading and transportation of clinkers and rate for transportation is far higher than that for loading. In any transportation, loading and unloading is incidental and, therefore, the predominant and essential nature of service is transportation and not 'Cargo Handling'.*

  *A*ppellant has not made out a case for complete waiver of the pre-deposit of the dues adjudged against it. Appellant is directed to make a pre-deposit of 50% of the ST demand for obtaining a Stay. *2013-TIOL-529-CESTAT-MUM***.**

- **'Mandap Keeper' service: The a**ppellant was engaged in providing taxable service under the category of 'Mandap

Keeper'. The appellant had collected some advance payment along with Service Tax from the customers and deposited such Service Tax collected to the Government account. Subsequently, the party plot was sealed by an order of Ahmedabad Municipal Corporation due to which the party plot could not be given for the intended purposes. The appellant cancelled the bookings for the party and at the request of customers refunded the booking amount along with the Service Tax collected by them. The appellant filed a refund claim before the lower authorities. The adjudicating authority allowed the refund of part amount and rejected the part amount in both these appeals as being time barred as per the provisions of Section 11B. Upon appeal, the CESTAT held:

- *An assessee may take credit of Service Tax paid by him, if he has not provided any service and has refunded the amount to the service recipient along with the Service Tax paid by him. There is no time limit indicated in the provisions of Rule 6(3) of Service Tax Rules, 1994 for the appellant to utilize or take credit of excess tax paid by him.*

- *The appellant can avail the credit of such excess Service Tax paid by him for discharge of Service Tax liability which may arise subsequently having started his business as Mandap Keeper services. Thus, credit of excess amount of Service Tax paid by the appellant that can be utilized to discharge the Service Tax liability arising out of the services rendered by him, after lifting of sealing of the party plots. 2013-TIOL-516-CESTAT-AHM.*

- **Service charges paid to foreign lessor for procuring aircrafts: The** appellant procured aircrafts for which it got equipment lease financing and for which payment was made by the appellant to various entities abroad, connected with lease finance. It also kept a deposit with the International Finance Corporation, lessor towards maintenance reserve. The department was of the view that the appellant is liable to discharge Service Tax in respect of the above activities undertaken under the category of 'Banking and Financial Services" namely, finance leasing. As regards the maintenance reserve, the department was of the view that appellant was liable to pay Service Tax under the category of "Management, Maintenance and Repairs". Accordingly, a show-cause notice was issued and Service Tax demand confirmed along with interest thereon. Upon appeal by the appellant, the CESTAT held:

  - The activity of maintenance and repair took place in India and, therefore, the amount kept in reserve is not for the payment of services rendered and hence, the same does not come within the ambit of Management, Maintenance or Repairs services.

  - As regards Financial Lease services, the aircraft has been delivered abroad and the services have been

rendered abroad. Therefore, the same is not taxable as per the Indian law. *2013-TIOL-470-CESTAT-MUM*

- **Services of Direct Sales Agent for Bank: The** appellant was providing services as Direct Sales Agents (DSA) on commission basis to General Insurance Companies and ICICI Bank. It had obtained Service Tax registration under the category of "BAS" but did not pay Service Tax or file returns. A case was booked and it was revealed that the appellant had earned commission on which it had not discharged its service tax liability. Upon appeal, the CESTAT bench observed:

  - *The appellant was misguided by his consultant that the ICICI Bank is liable to pay the service tax. After coming to know about the tax liability, he has paid the entire liability of service tax along with interest.*

  - *This is an appropriate case for condoning the lapse of not filing the return and not paying the service tax. Accordingly, invoking provisions of Section 80 of the Finance Act, 1994, the penalties imposed by the lower authorities on the appellant, are being set aside.* *2013-TIOL-462-CESTAT-AHM*.

- **Two units jointly providing service to overseas client: T**wo companies - Jubilant Chemsys Ltd, Noida (appellant) and Jubilant Biosys Ltd, Bangalore - which were subsidiaries of Jubilant Life Sciences, provided the service of scientific and technology consultancy to overseas clients. The payment for the services rendered by the appellant to offshore clients was received through M/s. Jubilant Biosys Ltd, Bangalore. The appellant, did not pay any service tax on the amount being received by it for this service from M/s. Jubilant Biosys Ltd. The department took the view that the appellant has supplied the taxable services of scientific and research technology consultancy to Jubilant Biosys Ltd. in respect of which it has not paid any service tax. Upon appeal, the CESTAT held:

  - The appellant is providing scientific and technical consultancy services, taxable under Section 65(105)(za). However, this activity of the appellant would be taxable only when this service has been provided to a customer in India. It would be treated as an export of service under Export of Service Rules, 2005 if it has been received by the person abroad, and payment for the same has been received in convertible foreign exchange.
  - The service provided by the appellant is to its overseas clients and just because the payment by the appellant unit for its portion of service has been received by it through Jubilant Biosys Ltd., the appellant cannot be treated as sub-contracts of M/s. Jubilant Biosys Ltd. The service provided by the appellant has to be treated as an export of service and hence, in terms of Rule 4 of the Export of Service

Rules, no service tax would be chargeable. *2013-TIOL-448-CESTAT-DEL*.

- **Sourcing of technical data readily available off the shelf: The** appellant wanted to market agro-chemicals in USA, for which it needed to register with US Environmental Protection Authority (USEPA), for which it required to provide technical data/information about the products. It obtained this information from the various other companies in USA by paying Data Access Fee. The department was of the view that this acquisition of technical data is liable to Service Tax under reverse charge mechanism and in the category of 'Business Auxiliary Service' inasmuch as it constitutes promotion or marketing/sale of goods of the appellant in the USA. Upon appeal, the CESTAT held:

  - The appellant obtained technical data from the company based in USA. This data was readily available. It is not as if that this data was created for the appellant. Thus, the activity would not come under the purview of Business Auxiliary Service which envisages service to promote or market or sell the goods on behalf of the appellant.
    No such activity has been undertaken by the foreign company in their case and, therefore, the demand of Service Tax under 'Business Auxiliary Service' is not sustainable in law. ***2013-TIOL-422-CESTAT-MUM*.**

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