Tax News

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Chartered Accountants

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INCOME TAX

Reminder For November'09

Action Due	Due Date
PF for the month of October'09	15-11-09
ESI for the month of October'09	21-11-09

INCOME TAX

Vital Notifications / Changes

- **Income deemed to accrue or arise:**

Circulars No. 23 dated 23rd July, 1969, No. 163 dated 29th May, 1975 and No. 786 dated 7th February, 2000 relating to Section 9 of the Income-tax Act, 1961 - Income - Deemed to accrue or arise in India has been withdrawn. Impact of withdrawal of this circular is that now commission paid to a non resident agent operating from outside India would be taxable in India.

Circular No. 7/2009 , dated 22-10-2009.

Recent decisions of SC/HCs

- **TDS u/s 194J:**

The assessee was a Third Party Administrator, licensed by the Insurance Regulatory and Development Authority (IRDA) under the Third Party Administrator Health Services Regulations, 2001 ("TPA Regulations"). The assessee was engaged in the business of providing health insurance claim services under various health insurance policies issued by several Insurers. The services included providing cashless service through network hospitals and settlement or reimbursement of claims in accordance with the terms of the health insurance policies. The petitioner also provided for 24x7 call centre services to the health card holders on various aspects of health insurance claims. It was held that payments made by assessee to hospitals in respect of cashless treatment are liable for TDS u/s 194 J.

2009-TIOL-534-HC-Kar-IT in Income Tax.

Tribunal Judgements

- **Capital or revenue expenditure**:

The assessee was engaged in the business of construction of theatre, running of mini buses and a lodge. It constructed a hockey stadium on the government land for local public for gaining goodwill and it was run by local administration. It was held that since the assessee was not the owner of the land and ownership did not belong to the assessee, construction of the stadium was only for the promotion of its business and for general public welfare to create goodwill for the business, therefore expenditure should be allowed as revenue expenditure.

Velumanickam Lodge v. ITO (2009) 317 ITR (AT) 225(Chennai).

- **Taxability of Subsidy**:

The assessee received a subsidy for phasing out environment-damaging Ozone Depleting Substances (ODS) under Montreal Protocol from UNDP. It was held by the Tribunal that since it is environment related subsidy, given to meet incremental operational costs, it is for subsidizing the day to day running cost of the business, therefore subsidy would be taxable as revenue receipt.

2009-TIOL-623-ITAT-Pune-Income Tax.

- **Taxability of Logistic services**:

The assessee provided logistic services to an Indian company. The issue was whether payment for such services would be treated as fees for technical services or not. It was held that, as per Article 12(4) of the DTAA between India and Singapore, the payments made by the Indian company were not liable to be taxed under the head 'fees for technical services'. In the instant case, the services have been rendered off-shore though these are utilized in India and as per the decision of the jurisdictional High Court, no TDS was required to be made.

2009-TIOL-627-ITAT-Bang-Income Tax.

- **Taxability of reimbursement of cost**:

Assessee, an Indian company, entered into an arrangement with a Singapore company for providing it services in relation to day to day operations of business like administrative, legal and accounting. For these services, cost recovery mechanism without profit mark-up was agreed upon. Revenue took the stand that the so-called reimbursement of costs is nothing but fees for technical services as per Article 12 of the India-Singapore DTAA, however, it was not liable to TDS as the services were provided offshore.

2009-TIOL-666-ITAT-BANG-Income Tax

- **Payments for leasing satellite transponders are royalty:**

In this era of Information and Communication Technology (ICT), an important question arises that whether or not, the services rendered by the satellite companies, through the transponders located at Geostationary satellites (also known as communication satellites), can be treated as royalty. (The transponders are utilised for beaming TV signals in 'footprint area' and also for transmission of internet data).
In this case, the satellite companies provided to the telecasting companies, the use of transponders in their satellite, whereby the telecasting companies could uplink and downlink the telecast of their programmes through the transponders. The nature of the programme, and its time of

telecast, depended entirely upon the telecasting companies. The consideration was paid by telecasting companies to the satellite companies for providing the right to use the transponders. It was held by the Tribunal that:

- The services rendered by the assessees through their satellites for telecommunication or broadcasting amounts to "process."

- It is not necessary that the services rendered must be through "secret process" only. Even services rendered through simple process will also be covered within the meaning of 'royalty'.

- In the case of satellites, physical control and possession of the process can neither be with the satellite companies nor with the telecasting companies. The control of the process, by either of them will be through sophisticated instruments either installed at the ground stations owned by the satellite companies, or through the instruments installed at the earth stations owned and operated by telecasting companies.

- The payments received by a satellite company from a telecasting company is on account of use of process involved in the transponder, and it amounts to royalty within the meaning of Section 9(1)(vi) of Income Tax Act, 1961. It also amounts to royalty within the meaning of respective Articles of DTAA.

  2009-TIOL-641-ITAT-DEL-SB In Income Tax.

- **Non-resident supplying equipment outside India has no taxable income in India:**

The assessee, a German company, executed various contracts in India for many decades. During the relevant year, the assessee executed a contract with BPL for execution of the cellular mobile project on CIF basis for a total consideration of about USD 20 million (approx Rs 746 million). The Assessing Officer (AO) came to the conclusion that since the assessee was present in India for many decades and the contract with BPL was executed over a period far more than six months, and the assessee had sent its technicians for executing projects in India who were paid through its Indian subsidiary, it could be said that the assessee had a PE in India.

The contention of the tax payer was

- It did not have any employees stationed in India for carrying out any activity on its behalf. Some of its employees that were deputed to its Indian subsidiary - Siemens (India) Ltd. - were on the rolls and under the supervision of the Indian company.

- All the onshore operations were the responsibility of the Indian company, who was engaged in ensuring supplies and the availability of know-how whenever required. It was further clarified that for such services, there was no separate recovery by the assessee company and the charges were recovered by the Indian company directly from the customers.

- It did not have any taxable income from this contract as per India's Income-tax Act, and hence there was no question of going into DTAA with Germany. It was stated that the assessee had supplied the equipment to BPL outside India, and the payment was also received outside India. It was pointed out that the ownership of equipment was to be delivered to the carrier at the port of the shipment, and the equipment was to become the absolute property of the purchaser free from any

encumbrances at the time of delivery at the port of shipment only.

- Hence, the assessee did not have any PE in India and hence no income was taxable.

The Tribunal Authority ruled the following:

- The contract between the assessee and BPL was for supply of equipment on principal to principal basis, and since the assessee did not have any PE in India, the question of supply of equipment being attributable to the PE did not arise.

- If there is no tax liability as per domestic law then the DTAA cannot create it.

- The assessee received the payment outside India. The offshore supply of equipment from abroad, means that the supply of goods is made outside India.

- The local activity with respect to the installation was carried out by the Indian subsidiary in its independent capacity.

2009-TIOL-618-ITAT-MUM in Income Tax.

Advance Rulings

- **Fees for technical services**:

Assessee was a company in US, engaged in the business of supplying advance technology for the manufacture of radial tyres. It entered into an agreement with an Indian company to grant it a perpetual irrevocable right to use the know-how, as well as, to transfer the ownership in tread and side-wall designs and patterns, required for the manufacture of radial tyres, for a lump sum consideration of US $ 710,220. The assessee stated that the sale and transfer of technology and know-how took place in USA and the documents were executed in USA, and no part of the consideration was received in India. The ruling was given that a) the consideration received towards technology transfer/technical know-how and the services connected therewith, are clearly liable to be taxed as royalty under Sec. 9(1)(vi) of the IT Act, 1961, b) the consideration received for consultancy, assistance and training as per Clauses 7 and 8 of the DTAA is liable to be taxed as fee for included services under the Treaty, and as fee for technical services under the IT Act, 1961, c) the rate of tax at which the deduction shall be made is 10% plus surcharge at the prescribed rate.

2009-TIOL-25-ARA-IT in Income Tax.

- **Managerial services provided by a technology company are not 'technical service' under DTAA between India and USA:**

The Applicant (Invensys Systems Inc) , a US based company, was engaged in the business of manufacturing process control instruments, and providing related engineering, research, technology, and consortium services etc. It entered into an agreement, called the Cost Allocation agreement, with an Indian company- Invensys India, which was a part of Invensys group.

Applicant provided services of the following categories to the Indian company:

- o Environmental health safety
- o Human resource support and learning and development initiatives
- o Assistance on key projects
- o Assistance in relation to finance, internal audit treasury and tax
- o Corporate, secretarial, and legal support

The Applicant raised invoices on Indian company for the above services, for the amounts worked out on the basis of the agreement. No personnel of the applicant visited India for assistance to Indian company and the Applicant had no permanent establishment (PE) in India.

Question was whether nature of the above services could be brought within the definition of technical or consultancy services, and made taxable in India.

On analysis, it was determined that these services are of managerial nature. For classifying them as 'technical' or 'consultancy' services, the basic requirements of clause (b) of article 12(4) of the DTAA between India and USA -- that the service should 'make available technical knowledge, experience, skill' -- needs to be fulfilled, which is not true in this case. Hence these services are not taxable in India.

Even if some services can be construed to be in the nature of 'shareholder activities' which are normally taxable, still, in the absence of a PE, they would not be taxable in India.

2009-TIOL-21-ARA-IT in Income Tax.

- **Profits from business not covered under DTAA are taxable in India** – Indo-Swiss DTAA

Applicant, a Swiss company, transported cargo from Indian ports to foreign ports. The question was (a) whether it had a Permanent Establishment (PE) in India in relation to this transportation activity, under the provisions of the India-Switzerland DTAA, and (b) if there is no PE, then whether income from such charter of vessels is not liable to tax in India under the DTAA.

It was determined by the Appellate Authority that:

o The applicant's profits from international shipping operations are not covered under the Indo-Swiss DTAA. The rationale of the treaty negotiators to keep shipping profits outside the DTAA was that Switzerland being a land-locked country, is not expected to have shipping companies operating from its land.

o Hence the freight income received by the applicant for carrying the cargo from the Indian ports to the foreign ports by deploying chartered vessels, is liable to be taxed in India under the provisions of Sec 172 of the Income Tax Act of India.

2009-TIOL-24-ARA-IT.

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SERVICE TAX

Vital Notifications / Changes

- **Exemption of service related to work contract on canals:**

The Central Government exempts the taxable service referred to in sub-clause (zzzza) of clause 105 of section 65 of the said Act. With this, execution of a works contract on Canals, other than those primarily used for the purpose of commerce or industry, is exempted from the whole of service tax leviable thereon under section 66 of the said Act.

Notification No. 41/2009-Service Tax dated 23rd Oct 2009.

Recent decisions of CESTAT

- **Business Auxiliary Services**:

It was held that services such as collection of telephone bills, arrangement for drawing Demand Drafts, arranging payment collection for insurance policy etc,. by a bank, would not fall under 'Business Auxiliary Services'.

Federal Bank Ltd. v. CCE (Bang)(2009)22 STT 361.

- **Taxability of 'laying of pipes'**:

Assessee was engaged in the activity of lowering, laying, jointing and testing GRP pipes (manufactured by the appellant) at the customers' site during the material period. They undertook such activity for the benefit of numerous customers. Lowering, laying, jointing and testing GRP pipes for GIDC, was judged to be a taxable service as GIDC is a corporation primarily undertaking development of infrastructure for industries.

2009-TIOL-1583-CESTAT-MUM in Service Tax.

- **Consulting Engineer**:

Assessee, a successor company to Maharashtra State Electricity Board (MSEB), was rendering services to the consumers of electrical energy. In one scheme, the appellant-company themselves installed the necessary infrastructure for supply of electricity to consumers after collecting a contribution from the latter (lump-sum method). In the other scheme known as "outright contribution scheme", the materials and labour for installation of the necessary infrastructure for supply of electricity were provided by the consumers at their own cost, and the appellant-company charged 15% of the total amount of such cost as supervision charges. It was held that in the second scheme, assessee was providing taxable services in the nature of 'consulting engineer' services and liable for service tax.

- **Taxability of training in biotechnology**:

It was held that training in biotechnology and pharmacy, through software, would come under the category of vocational training, and service tax would be leviable.

2009-TIOL-1805-CESTAT-BANG IN Service Tax.

- **Process under Technical Inspection and Certification service**:

It was held that the word 'process' under the category of Technical Inspection and Certification service does not include the assessment of management quality. It could be related only to assessment of physical and chemical processes that examine goods, processes, material or immovable property, to ensure that the specified standards are maintained. Therefore activities carried out by assessee related to certification of quality management systems practiced by clients, would not come under the purview of 'Technical inspection and certification service'.

American Quality Assessors (India) (P)Ltd. v. ACIT (2009)22 STT 2(Breaking News).

- **Business Support service**:

Assessee was a chartered accountant firm, carrying out spot billing services and data processing for a power distribution company . It was held these services would fall under the category of 'Business support services' which are taxable with effect from 2006.

Gandhi & Gandhi Chartered Accountants v. CCE (2009) 22 STT 6(Breaking News).

- **Clearing and Forwarding Activities**:

The assessee was engaged in arranging for receipt, storage and sale of the lubricants on behalf of its principals, and received

commission for these activities. It was neither involved in clearing activity nor in forwarding activity. Hence, it was held that it is erroneous to treat them as clearing and forwarding agents.

2009-TIOL-1548-CESTAT-DEL in Service Tax.

- **Cenvat Credit**:

Assessee had availed the service tax credit with regard to service tax levied by Airport Authority of India (AAI) for services such as landing, parking, and X-ray. Charges were incurred by the assessee for availing the services of AAI in connection with the operation of the aircraft owned by the appellant. It was held that services rendered by the AAI and the service tax charged by them would get covered under the definition of input services as per rule 2(l) of the Cenvat Credit Rules, 2004, and so tax credit was allowed.

2009-TIOL-1520-CESTAT-MUM in Service.

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