Tax News

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INCOME TAX

Reminder For October'09

Action Due	Due Date
TDS/TCS for the month of September'09	07-10-09
PF for the month of September'09	15-10-09
ESI for the month of September'09	21-10-09
Form No.24 C for the quarter ending on 30th September'09	15-10-09

SERVICE TAX

Reminder For October'09

Action Due	Due Date
Service Tax for the month of September'09 in case of company	05-10-2009
Service Tax for the month of September'09 in case of a company for which e-payment is mandatory	06-10-2009
Service tax for Quarter ending 30th Sep in case of assessee other than company that makes payment electronically	06-10-2009
Service tax for Quarter ending 30th Sep in case of assessee other than company that does not make payment electronically	05-10-2009

INCOME TAX

Vital Notifications / Changes

- Fringe Benefit Tax (FBT) is abolished by the Finance Act 2009, with effect from 1 April 2009. Earlier, certain perquisites that were liable to FBT were not taxable in the hands of the employees. However, post abolition of FBT, some of these perquisites would be liable to tax in the hands of the employees. From FY 2009-10, the valuation of such perquisites would be as per the provisions of Rule 3 of the Income Tax Rules, 1962. Rules for some of the significant perquisites are summarized below (for full coverage, please refer to Rule 3 of IT Rules):

1.0 Perquisite : Use of motor car

1.1 Where the motorcar is owned or hired by the employer and :

- Used exclusively in the performance of his official duties, the value of the perquisite shall be NIL, subject to maintenance of specified documents.

- Used exclusively for personal purpose of the employee, and the running and maintenance expenses are met by the employer, the perquisite value shall be the actual amount of expenses incurred by the employer (including chauffeur's salary).

- Used partly in the performance of duties and partly for personal purpose of the employee, the value of perquisite shall be in accordance with the table given in the Rules.

1.2 Where an employee owns a motor car, but the actual running and maintenance charges (including chauffeur's salary, if any) are met by the employer and:

- Where such reimbursement is for use of the vehicle exclusively for official purposes, the value of perquisite shall be NIL, subject to the maintenance of specified documents.

- Where such reimbursement is for the use of vehicle partly for official purposes and partly for personal purposes of the employee, the value of perquisite shall be, subject to the maintenance of specified documents, the actual amount of expenditure incurred by the employer as reduced by the amount specified in the table given in the Rules.

1.3 Similar rules apply where the employee owns any other automotive conveyance.

1.4 Where the motor car is used exclusively in the performance of official duty and employer/employee claims that the actual expenses on the running and maintenance of the motor car owned by the employee is more than the amounts deductible as specified in (1.2) above, he may claim a higher amount attributable to such official use and the value of perquisite in such a case shall be the actual amount of charges met by the employer as reduced by such higher amount attributable to official use of the vehicle.

1.5 The specified documents referred in above paras are as under:

- the employer should maintain complete details of journey undertaken for official purpose which may include date of

journey, destination, mileage, and expenditure incurred thereon;

- the employee should give a certificate that the expenditure was incurred wholly and exclusively for the performance of his official duty;

2.0 Perquisite : Employee Stock Options (ESOP) and Sweat Equity (Section 17(2)(vi))

The value of any ESOP shall be the fair market value of the specified security or sweat equity shares, on the date on which the option is exercised by the assessee as reduced by the amount actually paid by, or recovered from the assessee for such security or shares. The method of calculation of the "fair market value" would be prescribed by the tax authorities.

3.0 Perquisite : Contribution To An Approved Superannuation Scheme (Section 17(2)(vii)

The contribution to an approved superannuation fund by the employer, over and above Rs 1 lakh would be liable to tax as a perquisite.

4.0 Perquisite : Free Meals [Rule 3(7)(iii)]

The value of free food and non alcoholic beverages provided by the employer to an employee (after deducting amount recovered from the employee) exceeding Rs 50 per meal, shall be chargeable as perquisite. Further, tea or snacks provided during office hours or free meals provided during working hours in a remote area or an offshore installation, the value of the perquisite shall be NIL.

5.0 Other Perquisites :

Similarly, rules for valuation of perquisites like Gift to Employees, Club Membership, Holiday Expenses, Credit Card expenditure, etc, have also been defined in Rule 3 of the IT Rules.

Recent decisions of SC/HCs

- Leave Travel concession: It was held that employer is under no obligation to collect evidence to show that its employee has actually utilized amount paid towards leave travel concession or conveyance allowance for the purpose of TDS u/s 192.
  ITI Ltd. v. CIT (2009) 183 Taxman 219.

- Offshore Services under US Treaty : Assessee was thermal power company and obtained following services from a non resident US company in relation to set up of a power plant :

  a. technical services meaning overall conceptualization of the plant, the technical logistics and designs etc.

  b. start up services

  c. supervision services

  It was held by the court that technical services are more in the nature of a theoretical formulation of the project, services are rendered outside India therefore remuneration paid towards technical services would not attract tax liability. In respect of 'start up services and supervision services', services were rendered in India and utilized in India, therefore assessee was liable to pay tax on such services.
  Jindal Thermal Power Co. Ltd. v. DCIT (2009) 182 Taxman 252 (Kar.).

- TDS : It was held that tax is not liable to be deducted on salary income, where the employee is serving abroad although employer is in India, because salary income accrues where service is rendered. In the present case salary was paid to crew of Indian ships plying on high seas, therefore salary of employees arises out of India and hence not liable to TDS in India as not taxable in India.
  ICL Shipping Ltd. v. CIT (2009)315 ITR 195(Mad).

- Provision for Bad debt in case of Banks : It was held that as banks are required to make a provision of non performing assets , such a provision is allowed as a deduction (under RBI guidelines) u/s 36(1)(viii) of the Income Tax ACT, but if it is claimed u/s 36 (1)(vii), it would not be allowed as debts themselves were not written off.
  South Indian Bank Ltd. v. CIT (2009) 316 ITR 306(Ker).

Tribunal Judgements

- **Taxability of an American company :**

It was held that to be covered under the Article 12(4) of Indo US tax treaty , it is required that services must result in making available technical knowledge to the party of the contracting state ; and make available means that other party can use this knowledge, may be once or on a continuous basis. It was also held that for the provisions of clause of Article 7(1), if there is a PE of the company but no business profits are attributable to that PE, then no question of taxability of business profits would arise.

Scientific Atlanta Inc. v. DDIT(Int. Taxation) (2009)182 Taxman 4(Breaking News).

- **Allowable Expenditure :**

It was held that issuance of shares by the assessee could not be considered as any expenditure had been incurred and hence issuance of shares in lieu of interest liability could not be considered to have been payment towards allowable expenditure.

SRF Ltd. v. DCIT (2009)182 Taxman 2(Breaking News).

- **Taxability of compensation for loss of employment :**

It was held that any compensation due or received in foreign currency ,from an employer or former employer in connection with the termination of employment or modification in terms and condition of the employment, would be taxable as 'profit in lieu of salary' under section 17(3)(i).

Ravinder Behl v. ADIT (International Taxation)(2009) 120 ITD 3(Breaking News).

- **Taxability of Netherlands company :**

Assessee was a non resident company incorporated in Netherlands and got a contract in India by IOC for engineering, procurement and construction of a sulphur block in Haldia project on turnkey basis. For this project assessee set up a project office in Mumbai and site office in Haldia. Assessee gave a sub contract to its subsidiary company in Malaysia to supply of personnel and claimed a deduction of the amount paid to it, as a business expenditure. Personnel supplied by the Malaysian company were to function under the control, direction and supervision of the assessee and it was responsible for execution and supervision of project. It was held that since Malaysian company did not have any PE in India in terms of the provisions of Article 5 of DTAA between India and Malaysia, therefore payment received by the Malaysian company is not taxable in India, therefore no liability for assessee to deduct TDS u/s 195 of IT Act and expenditure would be allowed as deduction.

Stock Engineer & Contractors BV (Mum)(2009)32 SOT 249.

- **Taxability of waiver of loan:**

It was held that in case plant and machinery already existed and loan was taken thereafter then it could not be said that it was taken for plant and machinery and if the loan was waived by the lender then, it could not be related to the purchase of plant and machinery and could not be reduced from the cost for the purpose of reducing allowable depreciation. 'Waiver' does not mean either 'subsidy' or 'grant' or 'reimbursement' as given in section 43(1) of the act.

Steelco Gujarat Ltd. v. ACIT (2009) 32 SOT 2 (Breaking News).

- **Taxability of legal charges :**

It was held that when the legal charges are paid in UK and it was accepted as chargeable u/s 9 of the Income Tax act then same charges if paid in Hongkong would also be treated same in the law as nature of services remained same.

Tata Iron and steel Co. Ltd. v. DDIT (International Taxation) (2009) 120 ITD 2(Breaking News).

- **Taxability of loss on guarantee obligation :**

It was held that loss suffered on guarantee of a loan to a joint venture company which had defaulted would be allowed as expenditure as obligation was in the course of its business.

Tulip Star Hotels Ltd. v. ACIT (2009) 316 ITR (AT) 341 (Delhi).

Advance Rulings

- **Commission income of non resident :**

In case a non resident earned commission income from the orders obtained for the goods exported by a resident with his services totally outside India without any permanent establishment in India, then there would be no tax liability of non resident in India.

Spahi Projects P. Ltd. In Re(2009) 315 ITR 374(AAR).

- **Minimum Period of activity:**

It was held that for inferring a Permanent Establishment (PE), the company should have had a presence in India as per the minimum period defined in the DTAA between India and country of origin. A casual, off and on presence in India would not qualify as the PE. The start date of the commencement of a project in India need s to be a predefined date and can not be determined subsequently when the project had already started.

Cal Dive Marine Construction (Mauritius) Ltd. In re (2009) 315 ITR 334(AAR).

- **Taxability of database maintained by a non resident :**

The applicant was a non resident US company maintained data base located outside India containing financial and economic information including fundamental data of a large no. of companies worldwide. The information was available in public domain and customers were allowed to retrieve this publically available information. Data centre was located in US. Applicant entered into a non transferable right to use the software, hardware, consulting services and database exclusively for licensee's own internal and business use within the business premises. The ruling was given on the following matters:

a. Payment made by the customers to the applicant would not be treated as 'Royalty' as no proprietary right or exclusive right which the applicant had was given over to the customers. Therefore not liable for tax under section 9 of Indian Income Tax Act.

b. Customers were using data base for its own internal use therefore does not fall not covered in article 12 of DTAA between India and US as use of right to use any copyright of a literary or scientific work. Therefore not taxable under DTAA between India and US.

c. There was no permanent establishment of the applicant in India.

d. Customers were not liable to withhold the tax out of the subscription amount paid to the applicant.

e. Applicant was not required to file any return in India.

Factset Research System Inc. In Re. (2009)317 ITR 169 (AAR).

- **Validity of Application for Advance Ruling :**

Applicant was a non resident company , it entered into a share purchase agreement with the Indian company which had come into existence after conversion from a partnership firm. The issue was whether the application of applicant is maintainable u/s 245 of the IT Act or not , related to capital gain tax liability arised to the Indian company. It was held that as the capital gain tax liability matter of the Indian company would effect the business of the applicant as per the share purchase agreement, then due to large scope of section 245 of the IT act, the application of the applicant would be maintainable.

Umicore Finance In Re (2009) 225 CTR 353(AAR).

SERVICE TAX

Vital Notifications / Changes

- **Exempted Services**:

Central Government, with effect from 1st Sept 2009, hereby:

(a) Exempts the taxable service provided to any person in relation to the transport of goods, the description of which is specified in column (2) of the Table (as given in the Notification), through national waterway, inland water and coastal shipping as referred to in sub-clause (zzzzl) of clause (105) of section 65 of the Finance Act, from the whole of service tax leviable thereon under Section 66 of the said Act.

Notification no. 30/2009 dated 31st Aug 2009.

(b) Exempts the taxable service provided to any person in relation to transport of goods by rail, as referred to in sub-clause (zzzp) of clause (105) of section 65 of the Finance Act, from the whole of the service tax leviable thereon under section 66 of the Finance Act, provided, nothing contained in this notification shall apply to any service provided or to be provided, by any person other than government railway, in relation to transport of goods in containers by rail.

Notification no. 33/2009 dated 1st Sept. 2009.

(c) Exempts the taxable service referred to in sub-clause (zzb) of clause (105) of section 65 of the Finance Act,1994, provided by any person, to a client as defined in clause (19) of Section 65 of the Finance Act,1994, in relation to the manufacture of pharmaceutical products, medicines, perfumery, cosmetics or toilet preparations containing alcohol, which are charged to excise duty under Medicinal and Toilet Preparations (Excise Duties) Act, 1955 from the whole of the service tax leviable thereon under section 66 of the said Finance Act.

Notification no. 32/2009 dated 1st Sept. 2009.

(d) Exempts the taxable service referred to in sub-clause (zzb) of clause 105 of section 65 of the Finance Act, 1994, provided by a sub-broker, to a stock-broker as defined in clause (101) of Section 65 of the Finance Act,1994, in relation to sale or purchase of securities listed on a registered stock exchange from the whole of the service tax leviable thereon under section 66 of the said Finance Act.

Notification no. 31/2009 dated 1st Sept. 2009.

(e) Exempts the taxable service specified in sub-clause (zzb) of clause 105 of sec 65 of the Finance Act, provided by a 'service provider' to a 'service receiver' during the course of manufacture or processing of alcoholic beverages, from value which is equivalent to the value of inputs, excluding capital goods, used for providing the same service, subject to the conditions:

(i) that no Cenvat credit has been taken under the provisions of the Cenvat Credit Rules, 2004

(ii) that there is documentary proof specifically indicating the value of such inputs; and

(iii) where the service provider also manufactures or processes alcoholic beverages, on his or her own account or in a manner or under an arrangement other than as mentioned aforesaid,

he or she shall maintain separate accounts of receipt, production, inventory, despatches of goods as well as financial transactions relating thereto.

Notification no. 39/2009 dated 23rd Sept. 2009.

- **Leviability of service tax on construction of canals by Government agencies**:

On a reference being received by the Board, two following issues were examined for a clear understanding of facts.

The first is regarding leviability of service tax on construction of canals for Government projects. As per sec 65 (25b) of the Finance Act, 1994, the "commercial or industrial construction service" is chargeable to service tax if it is used, occupied or engaged either wholly or primarily for the furtherance of commerce or industry. As the canal system built by the Government or under Government projects, is not falling under commercial activity, the canal system built by the Government will not be chargeable to service tax. However, if the canal system is built by private agencies and is developed as a revenue generating measure, then such construction should be charged to service tax.

The second issue is about Government taking up construction activity of dams, buildings or infrastructure construction etc. through EPC (Engineering Procurement & Construction) mode. The said service is covered under section 65 (105) (zzzza) of Finance Act, 1994. The said section itself excludes works contract in respect of dams, road, airports, railways, transport terminals, bridges & tunnels executed through EPC mode. Hence works contract in respect of above works even if done through EPC mode are exempt from payment of service tax.

Circular No. 116/10/2009 – ST dated 15th Sept. 2009.

- **Transport of Export Goods**:

In July, under Notification No. 17/2009, the Central Govt. had exempted certain taxable services received by an exporter of goods and used for export of goods pertaining to sub-clauses of clause(105) of section 65 from the whole of the service tax leviable under the said Act, subject to certain conditions. These sub-clauses, services, and conditions were given in a Table in that notification. In a current Notification, the following entry shall be inserted after S.No.16 for the entries in column (1), (2), (3) and (4) of that Table:

17.	(zzzzl)	Service provided for transport of export goods through national waterway, inland water and coastal shipping.	i. The exporter shall- 1. produce the Bill of Lading or a Consignment Note or a similar document by whatever name called, issued in his name; 2. produce evidence to the effect that the said transport is provided for export of relevant goods.

(*Notification no. 40/2009, dated 30th Sept. 2009*)

Recent decisions of SC/HCs

- **Definition of Input in CENVAT credit rules 2002**:

The assessee was engaged in the business of manufacturing motor vehicles which were cleared on payment of duty. Assessee claimed credit of input of electricity generated in the factory in terms of CENVAT credit rules 2002. The issue of dispute was that the electricity generated in the factory was cleared by the assessee to its joint ventures, sister concerns, vendors etc. on the agreed price, so whether this input should be allowed as credit or not? It was held that credit to the extent of electricity cleared at the contractual rate to others would not be allowed to the assessee as it was not used for the manufacture of final products in the factory.

Maruti Suzuki Ltd. v. CCE (2009) 21 STT 1 (Breaking News).

- **Taxability of Hire purchase or leasing transactions**:

The issue was raised that since sales tax was paid on hire purchase and leasing activities, service tax should not be charged on the same. It was held by the court that service tax is charged on the service part of the transaction, as each hire purchase and leasing transaction involves some type of service as well. Hence it is justifiable to charge service tax on these transactions.

Hire Purchase association v. UOI (2009)21 STT 355(Mad).

Recent decisions of CESTAT

- **Export of Services**:

The assessee was an agent of a foreign company, GMC USA. It arranged contracts from Indian Railways for GMC and received commission on which service tax was paid under the category of Business Auxiliary services. The commission was not received directly from GMC but it was received in Indian currency from Indian Railways, as Indian Railways made the payment to GMC after deducting commission of the assessee. The assessee filed refund claim of the service tax paid by it in terms of rule 3(3) of Export of Services Rules. It was held by the Tribunal that since GMC did not have any office or any commercial or industrial establishment in India, therefore the condition that commission should have been received in foreign exchange did not apply in assessee's case. Hence assessee is eligible for the refund of the tax paid by it.

National Engg. Industries Ltd. v. CCE (2009) 21 STT 188(New Delhi).

- **Transport service as Input service**:

The issue in the present case was whether the tax paid on transportation of final products from the place of removal should be allowed as credit as input services. It was held that definition of input services can be divided into following categories:

a. Any services used by manufacturer, whether directly or indirectly in or in relation to the manufacture of final products;

b. Any services used by the manufacturer whether directly or indirectly in or in relation to clearance of final products from the place of removal;

c. Services used in relation to setting up, modernization, renovation or repair of factory or an office to such factory;

d. Services used in relation to advertisement or sales promotion, market research, storage upto the place of removal and procurement of inputs;

e. Services used in relation to activities relating to business and onward transportation upto place of removal.

Hence it was held by the Tribunal that definition of 'input services' should be analysed from the point of business requirements, therefore services availed by the manufacturer for outward transportation of final products from the place of removal should be treated as an input services and so credit should be allowed to the assessee.

ABB Ltd. v. CCE & ST (2009) 21 STT 77 (Bang.).

Note: With effect from 1st March 2008, transport agency service is excluded from the definition of 'output service'.

- **Levy of service tax on Business Auxiliary services to foreign principal**:

Assessee was acting as an agent of a foreign principal providing Business Auxiliary services. Assessee provided marketing support to the principal who ultimately made goods or services available to the consumers in India. It was held that whether service is provided by foreign principal directly in India, or through its agent in India, makes no difference under service tax law, when service tax is VAT and destination based consumption tax. If services provided to the foreign principal did not result in the ultimate supply of goods or services to the consumers in India, then it would have been treated as export of service following tested principles of customs law in India.
Microsoft Corp. (I)(P) Ltd. v. CST (2009) 22 STT 6 (Breaking News).

- **CENVAT credit on input services**:

Assessee was a paper manufacturing unit and it was under an obligation to maintain a staff colony. It was held that all the services received in maintaining such a colony would be covered as input services. If a service or activity is related to business then it should be treated as input service as per the definition of 'input services'.

ITC Ltd. v CCE (2009) 22 STT 3(Breaking News).

- **CENVAT credit**:

Assessee had provided mobile phones to its employees to enable them to take decision in time and timely communication so as to improve their sales activity and meet the targets. Bills of phones were in the name of assessee and payments were also made by the assessee. It was held that CENVAT credit of service tax paid on phones would be allowed.

Hindustan Coca Cola Beverages (P) Ltd. (2009) 22 STT 9 (Breaking News).

- **Taxability of Freight forwarding activities**:

It was held that activities related to freight forwarding could not be brought under Custom Housing Agent category.

DHL Lemuir Logistics Pvt. Ltd. v. CST (2009) 22 STT 1 (Breaking News).

- **Rebate for services exported**:

It was held that once the service was exported and various input services were utilized for providing the output service, the service provider is entitled for rebate which would be equal to the service tax paid on the input services.

Dell International Services India (P) Ltd. v. CCE(Appeals) (2009) 22 STT 4 (Breaking News).

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