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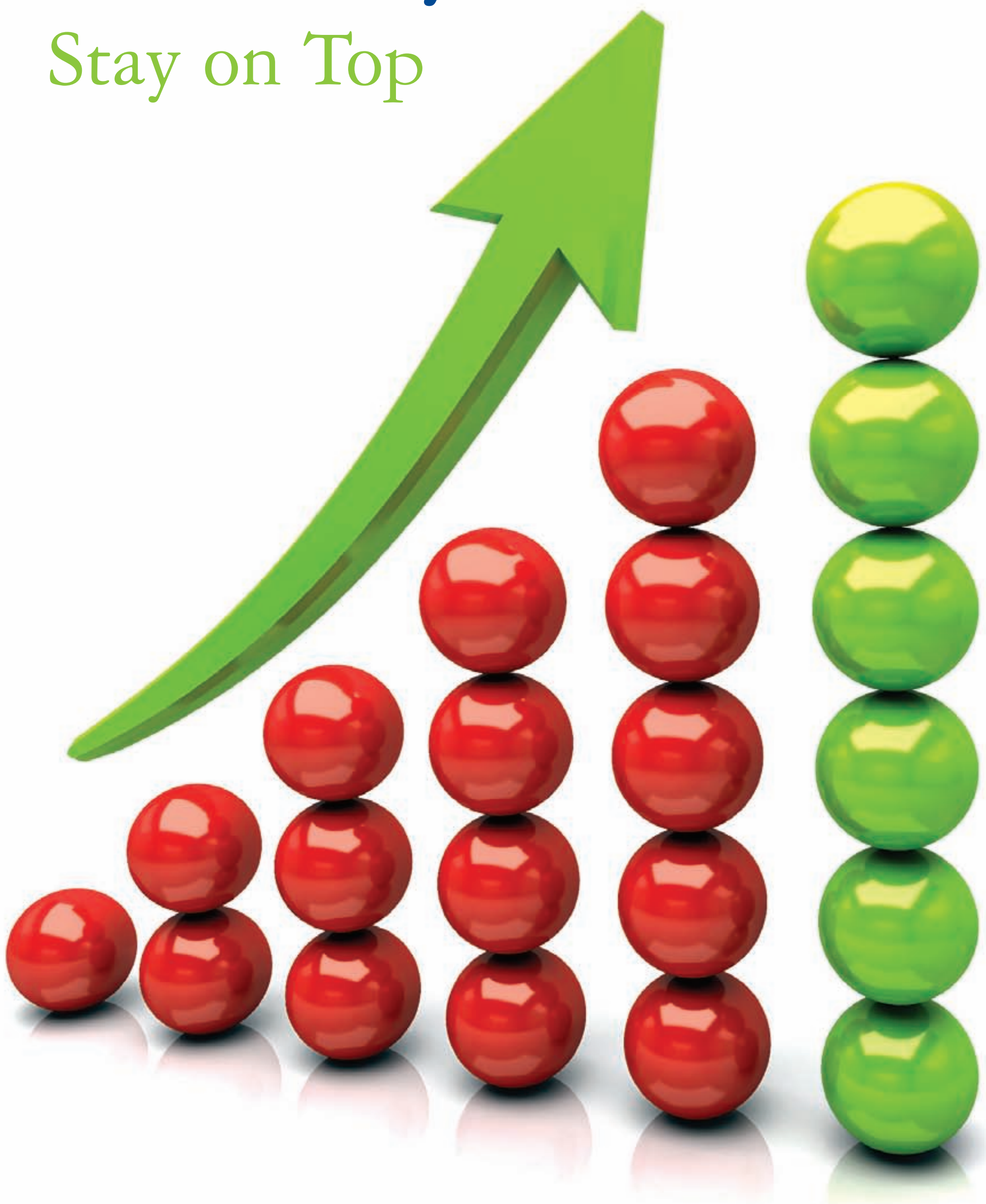

India, May 2009

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- The quarterly TDS/ TCS return for the quarter ended 31 March 2009 falls due on 15 June 2009
- The TDS or TCS effected on or after 1 June 2009 shall be required to be paid electronically by furnishing income-tax challan Form No. 17
- With respect to TDS/ TCS payments for the period 1 April 2009 to 31 May 2009 made under old challan forms, the deductor is required to fill up Form No. 17 in respect of such payments at any time between 1 July to 15 July 2009
- The deductor/ collector may issue TDS/ TCS certificates in new Form 16/16A/27D incorporating the UTN for the assessment year 2009-10 beyond the stipulated period of one month but not later than 30 June 2009. If the deductor opts to issue TDS/ TCS certificates in old format, he will be required to send a consolidated statement of UTNs to the deductees as soon as the same are received from NSDL
- For deductions/collections made after 1 April 2009, it is mandatory to use new Form 16/16A/27D
- Quarterly statement for compliance with TDS provisions in Form No. 24C is to be filed by 15 July 2009 for the quarter ending on 30 June 2009

Direct Tax

Statutes / Notifications / Circulars

Clarification on the matters connected with the new income tax return forms for the assessment year 2009-10

The CBDT has issued Circular No. 3/2009 dated 21 May 2009 containing clarifications in connection with the new forms for the return of income for the assessment year 2009-10 which were notified by CBDT vide Notification No. 866(E) dated 27 March 2009. These are briefly described in the subsequent paragraphs.

Furnishing of return electronically

- Electronic filing is optional for certain categories of tax-payers. However, filing of returns by charitable / religious trusts, political parties and other non-profit entities is to be filed in paper form only.

- The returns shall not be accompanied by any attachments/annexures.

- It is advisable, though not mandatory, to use a digital signature for electronically furnishing the return.

- If the return is electronically furnished under a digital signature or through an E-Return Intermediary, the assessee is not required to furnish Form ITR-V with the ITD and the date of electronic transmission of the data shall be the date of furnishing the return.

- If the return is electronically furnished without a digital signature, the assessee is required to submit Form ITR-V with the ITD within 30 days of such electronic filing and the date of transmitting the data electronically will be the date of furnishing the return.

- In case where Form ITR-V is filed after thirty days, it will be deemed that the return was never furnished and it shall be incumbent on the assessee to electronically re-submit the return and follow it up by submitting the new Form ITR-V within thirty days of such re-submission.

Filing of Form ITR-V with the ITD

- Form ITR-V shall be posted in A4 size envelope and furnished to the ITD by mailing it to "ITD – CPC, Post Box No - 1, Electronic City Post Office, Bangalore - 560100, Karnataka" within thirty days after the date of transmitting the data electronically. It is advisable that Form ITR-V is not folded since it is a bar coded document.

- The Post Box shall deliver all the Form ITR-V to the CPC of the ITD in Bangalore.

- On receipt of Form ITR-V, CPC shall send an e-mail to the e-mail address furnished in the return acknowledging the receipt of Form ITR-V.

- No Form ITR-V shall be received in any other office of the ITD or in any other manner.

Tax Audit Report, TP Report and other documents

- Tax Audit Report under section 44AB of the ITA should be obtained on or before the due date of furnishing the return.

- Relevant columns of the return forms to be filled on the basis of such tax audit report.

- TP report should be separately furnished on or before the due date for filing the return of income.

- Returns are not to be accompanied with any other document including any statutory form or tax audit report or TP report which is to be filed separately.

- The assessee should furnish the tax audit report and other documents, in original, if called for by any income-tax authority during any proceeding under the ITA.

No penalty shall be initiated/ levied for not furnishing the tax audit report or other documents on or before the due date if such report or documents were otherwise obtained before the specified due date.

Procedure to be followed by the tax payers for claiming credit for pre-paid taxes

- Credit for TDS, TCS, advance tax and self assessment tax shall be allowed on the basis of information relating to such taxes furnished in the relevant schedules of the return forms subject to matching with the information provided by the deductor, collector and the banks.

- A system of UTN and Challan Identification Number has been created for matching of information relating to pre-paid taxes furnished by the tax payers.

- Tax payers must ensure that the deductor and the collector have provided them with separate UTNs in respect of each TDS and TCS transaction.

- No disallowance of claim for pre-paid taxes shall be made by the AO only on the ground that the TDS/ TCS certificates and challans have not been furnished along with the return of income or Form ITR-V.

- The return forms require quoting of the relevant UTN for every TDS or TCS claim and credit shall be allowed if the said UTN matches with the UTN in the database of the ITD.

- For the purpose of processing of returns for the financial year 2007-08 (assessment year 2008-09) and enabling the assessee to receive the UTN for TDS and TCS transactions in the financial year 2008-09 (assessment year 2009-10), the following procedure will be followed:

  - NSDL shall assign an UTN for every TDS and TCS transaction record reported in the quarterly returns received by it.
  - NSDL will create a facility to e-mail the UTN file to the deductor. In addition, they will also create a facility for the deductor to download the UTN file.
  - Upon receipt of the UTN, the deductor will inform the UTN to the deductee. Where the UTNs are available to the deductor before the issue of the TDS/TCS certificate to the deductee, the deductor will indicate the UTNs on the certificate. In case if the UTNs were not available, the deductor shall send a consolidated statement of all TDS/ TCS transactions indicating the UTNs.
  - NSDL will also create a facility to allow independent viewing of the UTNs by the deductee to enable them to get the UTNs directly.

Processing of returns by ITD

- All returns filed electronically shall be processed, on priority basis, only at the CPC of the ITD in Bangalore.

- All annexures accompanying the return forms should be detached and returned to the tax payers by the receiving official.

Some Key points to note

- Form ITR-V is to be furnished within thirty days from the date of transmitting the data electronically instead of 15 days period available earlier.

- Form ITR-V is required to be posted to CPC of the ITD in Bangalore instead of filing with the jurisdictional tax officer. Hence, the assessee should consider the time involved in postal of Form ITR-V and ensure that Form ITR-V is posted well in advance so that it is received by the CPC within the prescribed time limit of 30 days.

- A UTN is required for processing the TDS/ TCS claim pertaining to even financial years 2007-08 and 2008-09.

CBDT issues a circular providing salient features of the new system for TDS/ TCS payment and information reporting

Background

ITD has introduced a scheme for centralized processing of annual income-tax returns which envisages no interface with the tax payer and processing of returns to be done in an automated jurisdiction-less manner. Implementation of such scheme requires having a robust system for information relating to payment of TDS and TCS so that the credit for TDS and TCS can be granted accurately and the risk of financial fraud is minimized.

The CBDT has now issued circular providing detailed clarification with regard to the new scheme. Some of the salient features of this new scheme are discussed in the subsequent paragraphs.

The Circular No. 2/2009 dated 21 May 2009 specifies that henceforth the claim for TDS and TCS shall be allowed only if the following conditions are complied:

- The amount of TDS/ TCS has been deposited by the deductor/ collector;

- Deductor/ collector furnishes information relating to the deductee;

- The TDS/ TCS claim matches the information furnished by the deductor/ collector.

The revised information reporting scheme has been harmonized with a view to make TDS payment and information reporting system uniform across all deductors (including Central and State Government).

Payment of TDS/ TCS

Rule 30 and Rule 37CA of the Income-tax Rules which provide for time for payment of the TDS/ TCS to the credit of the Central Government and the mode of such payment have been substituted. It is now mandatory for all deductors (including the Central and State Governments) to make the payment by electronically furnishing the newly introduced income-tax challan in Form No. 17. While furnishing this challan, the deductor will be simultaneously required to furnish three basic information relating to the deduction i.e., PAN, name of the deductee and amount of TDS/ TCS, to the Taxpayer Information Network system maintained by NSDL either through screen based upload or file upload.

Effective date

The new system of reporting is effective for all TDS/ TCS transactions made on or after 1 April 2009. However, any TDS or TCS effected from 1 April 2009 to 31 May 2009 is to be paid to the credit of the Central Government by using the old challan forms. In this case, the deductor/ collector shall, nevertheless, be required to fill up Form No.17 in respect of such payments at any time between 1 July 2009 and 15 July 2009.

The TDS or TCS effected on or after 1 June 2009 shall be required to be paid by electronically furnishing income-tax challan in Form No. 17.

Obtaining UTN

Upon payment of TDS / TCS to the credit of the Central Government and after uploading of basic information, every tax deduction record will be assigned a UTN. The deductor will be able to get the UTN for all deductions by e-mail or by downloading the UTN file. The deductor will be required to quote such UTN on the TDS/TCS certificate issued to the deductees. NSDL will also create a facility to allow independent viewing of the UTNs by the deductee. The deductees will be able to claim credit for the TDS/ TCS by quoting the UTN in their annual income-tax return.

The deductors/ collectors who have effected TDS/ TCS between 1 April 2009 to 31 May 2009 by using old challan form, are nevertheless required to fill up Form No. 17 in respect of such payments at any time between 1 July to 15 July 2009 so that the UTNs relating to TDS/ TCS transactions carried out in the months of April and May can be generated/ obtained for onward transmission to the deductees.

The deductors/ collectors who have effected TDS / TCS after 1 June 2009 will be able to obtain the UTN as and when the payments are made and the basic information is furnished.

Issuing certificates for TDS/TCS in Form Nos. 16 /16A/27D

New Form Nos. 16/16A/27D have been suitably revised with effect from 1 April 2009 to incorporate the mandatory requirement of quoting UTN.

For deduction/ collection made before 1 April 2009, the deductor/ collector may opt to issue Form Nos. 16/16A/27D in old format but he will be required to send a consolidated statement of UTNs to the deductees as soon as the same are received by him. Alternatively, the deductor/ collector may opt to issue certificates for TDS/ TCS in new Form Nos. 16/16A/27D.

There is no revision in the time-limits for issuing Form Nos. 16/16A/27D which is within one month from the end of the month in which the deduction/ collection is made. However, if the deductor/ collector opts to issue new Form Nos. 16/16A/27D, then the new Forms may be issued beyond the stipulated period of one month but not later than 30 June 2009.

For deduction/ collection made after 1 April 2009, it is mandatory to use new Form Nos. 16/16A/27D.

Quarterly statement of compliance with TDS provisions in Form 24C

Every person (including Central and State Governments) who has obtained a TAN will be required to electronically furnish a quarterly statement of compliance with TDS provisions in Form No. 24C as per following time limits:

Quarter ending on:	Due date:
30 June	15 July
30 September	15 October
31 December	15 January
31 March	15 June

It is mandatory for all TAN holders to furnish this statement irrespective of whether any payment liable to TDS has been made or not. This will apply from the quarter ending on 30 June 2009.

Filing of TDS/ TCS returns

The quarterly returns of TDS and TCS will continue to be filed in Form No. 24Q, Form No. 26Q, Form No. 27Q and Form No. 27EQ. However, there is a revision in the time limits for such filing. All the aforesaid quarterly returns will now be required to be filed for all quarters on or before the 15 June following the end of the financial year. Effectively, the quarterly returns have now been replaced by an annual return. This will apply from the financial year 2009-10.

Claiming credit for TDS/ TCS through annual income-tax returns

The deductees will be able to claim credit for the TDS/ TCS by quoting the UTN in their annual income-tax return. The return of income in Form Nos. ITR–1 to ITR–8 for assessment year 2009-10 have been suitably altered requiring to quote the relevant UTN for every TDS/ TCS claim. The key requirement for successfully claiming TDS/ TCS credit is that the deductee should correctly quote the UTN which should match with the UTN available in the ITD database.

For processing of annual income-tax returns for the assessment year 2008-09 (financial year 2007-08) and assessment year 2009-10 (financial year 2008-09), NSDL shall assign a UTN for every TDS/ TCS transaction records for the financial years 2007-08 and 2008-09 reported in the quarterly TDS/ TCS returns received by it. NSDL will communicate the UTN by e-mail or by creating a facility for the deductor to download the UTN file. Upon receipt of UTN, the deductor will be required to inform the UTN to the deductee. The deductor will quote the UTN on the TDS/TCS certificates if such certificates have not yet been issued. If the UTNs are not available before the issue of TDS/ TCS certificate, the deductor will be required to send a consolidated statement of all TDS/ TCS transactions indicating the UTNs.

NSDL will also create a facility to allow independent viewing of the UTNs by the deductee. As a result, even if the UTNs are not received by the deductee from the deductor, they can be directly obtained from the NSDL database and quoted while making claims of TDS and TCS in the return of income.

Furnishing of information by the person remitting payment to a non-resident

The CBDT vide Notification No. 30/2009 dated 25 March 2009 notified the following rules for furnishing information relating to payment to a non-resident:

- The information as prescribed in Form No. 15CA duly verified by an accountant in Form No. 15CB is to be furnished where payment to a non-resident has been made after obtaining a certificate from an accountant.

- The information in Form No. 15CA is to be furnished electronically to the website designated by the ITD and thereafter signed printout of the said form is to be submitted prior to remitting the payment.

- The above requirement is effective from 1 July 2009.

New rules notified for the credit of TDS/ TCS in the hands of a person other than the payee

The CBDT vide Notification No. 28/2009 dated 16 March 2009 amended the rules relating to TDS and TCS:

New rules notified for credit of TDS

- If the income on which tax has been deducted is assessable in the hands of a person other than the deductee, the credit of such tax deduction would be given to the other person in the following cases provided the deductee files a declaration with the deductor and the deductor reports the tax deduction in the name of the other person to the Income Tax Authority or to the persons authorized by such Income tax Authority:

- If the income of the deductee is included in the total income of another person in terms of the provisions contained in the ITA
- If the income of the deductee being an AOP/ Trust is assessable in the hands of the members of the AOP/ Trust
- If the income of an asset held in the name of the deductee, being a partner of a firm or a Karta of a HUF, is assessable as an income of such firm or HUF as the case may be
- If the income from a property, deposit, security, unit or share held in the name of the deductee is owned jointly by the deductee and other persons and the income is assessable in their hands in the same proportion as their ownership of the asset

The declaration filed by the deductee to the deductor shall contain the name, address, PAN of the persons to whom credit is to be given, payment or credit in relation to which credit is to be given and the reason for giving such credit.

The deductor is required to issue the certificate for tax deducted in the name of the person in whose name credit is given and shall keep the declaration in his custody.

- The credit shall be given in the year in which such income is assessable.

- Where the income is assessable over a number of years, the credit of such TDS shall be allowed across those years in the proportion of the income assessable to tax.

- The credit for TDS will be granted on the basis of:

  - The information in relation to tax deduction furnished by the deductor to the tax authorities or the person authorized by such authority; and
  - The information in the return of income in respect of claim for the credit subject to the verification in accordance with the risk management strategy formulated by the Board from time to time.

New rules notified for credit of TCS

- The credit for TCS shall be given to the person from whom the tax has been collected.

- Credit for such tax shall be given in the assessment year in which the income is assessable to tax.

- Where TCS is relatable to more than one year, credit shall be allowed across those years in the same proportion.

- The credit for TCS shall be granted on the basis of the information relating to collection of tax furnished by the collector to the tax authorities or to the person authorized by the tax authority, and the information in the return of income in respect of the claim for the credit, subject to the verification in accordance with the risk management strategy formulated by the Board from time to time.

- The above requirement is effective from 1 April 2009.

Supreme Court Judgments

Loss on exchange fluctuation arising in respect of loans taken for revenue purposes is deductible

The assessee company claimed foreign exchange fluctuation loss arising due to restatement of the foreign currency loan at the balance sheet date. The foreign currency loans were obtained for revenue purposes.

The issue before the SC was whether the additional liability arising due to exchange rate fluctuation in respect of loans taken for revenue purposes could be allowed as deduction under section 37(1) of the ITA in the year of exchange rate fluctuation or in the year of repayment of such loan. The SC held that since the assessee company has been following mercantile system of accounting and had recognized the gains/ losses as per accounting standards, the additional liability arising on account of fluctuation in foreign currency is allowable as a deduction under section 37(1) of the ITA in the year of exchange rate fluctuation.
CIT v. Woodward Governor India Pvt. Ltd. and Ors, 317 ITR 254

Indian entity responsible for withholding tax on remuneration paid outside India by the foreign JV partner to employees deputed by it to India, if services are solely rendered in India

The foreign company had seconded expatriates to its Indian JV. Part of the remuneration of the expatriates was paid by the Indian JV and part remuneration was paid by the foreign company. No deduction was claimed by the Indian JV for the part of salary/ special allowances paid outside India by the foreign company. The services of the expatriates were solely rendered to the Indian JV. The Indian JV had withheld taxes on remuneration paid by it. The taxes on salary/ special allowances paid by the foreign company were paid by the expatriates themselves via the advance-tax mode.

The issue before the SC was whether the withholding tax provisions were applicable to salary payments made abroad by the foreign company which were chargeable and paid to the expatriates who had rendered services in India.

The SC distinguished the withholding tax provisions relating to salary payments with the withholding tax provisions on other income. It observed that the charging sections, which determine the tax liability of an assessee and the withholding tax provisions, which are the machinery provisions are interlinked and need to be read together. SC thus held that if the salary paid by the foreign company abroad was for rendition of services in India and if no work was found to have been performed for the foreign company, such payments would be subject to withholding tax provisions. Thus, the Indian JV was required to comply with the withholding tax provisions even in case of salary paid overseas by the foreign company.

The SC also directed that interest be charged only in cases where no taxes have been paid on foreign salary or where there is a gap between the date on which tax was deductible and the date of actual tax remittance. It further clarified that the date of payment of tax by the concerned expatriate can be treated as the date of actual payment.

The SC further held that no penalty could be levied since the Indian JV had a reasonable cause for non-deduction of tax at source considering that the matter was a debatable one and no deduction for foreign salary has been claimed in the books of the Indian JV.

CIT v. M/s. Eli Lilly & Company (India) Pvt. Limited, 178 Taxman 505

'Lease' included within the meaning of word 'sale' for claiming export benefits

The SC, in this case, held that with globalization and growing cross border transactions, the difference between 'goods' and 'services' is getting blurred. Today with technological advancement one has to change our thinking regarding concepts like goods, merchandise and articles. It held that 'rights' would certainly fall in the category of articles of trade and commerce, hence, merchandise. The SC further held that the word 'lease' is included within the meaning of the word 'sale' and accordingly export profits earned from lease right of film for limited period were held to be eligible for the benefits under section 80HHC of the ITA pertaining to deduction in respect of profits retained for export business.

CIT v. B. Suresh, 178 Taxman 457

Employers need not obtain evidence from employees for grant of exemption for LTC

The assessee companies granted LTC exemption under section 10(5) of the ITA to their employees without obtaining evidences. The issue before the SC was whether the employer was under a statutory obligation under the ITA, and/or the Rules to collect evidence to show that its employees had actually utilized the amounts paid towards LTC.

The SC held that the beneficiary of exemption under section 10(5) of the ITA is the individual employee and there is no salary circular of CBDT which casts an obligation on the employer to collect and examine supporting evidence to the declaration given by individual employees. The SC accordingly held that the declaration to be submitted by an employee need not have supporting evidence to show that the employee had actually utilized the amounts paid towards LTC.

CIT v. Larsen & Toubro Limited; CIT v. I.T.I. Limited, Civil Appeal no. 993 of 2005

High Court Judgments

Technical services provided by a non-resident in connection with maintenance of software and upgradation of instrumentation of solar engine for the purpose of exploration, extraction and

production of mineral oil is subject to tax as fees for technical services and not on presumptive basis

Presumptive taxation provisions i.e. section 44BB of the ITA are applicable in case of non-resident engaged in the business of providing services or facilities in connection with, or supplying plant and machinery on hire used, or to be used, in the prospecting for, or extraction or production of, mineral oils. The assessee company filed tax returns as representative of two non-resident companies. Both the non-resident companies rendered services to the assessee company. The services rendered were for maintenance of four modules of software and upgradation of instrumentation of solar engine for the purpose of exploration, extraction and production of mineral oil.

The HC held that the fees received by the non-resident companies were for technical services rendered by them and hence the provisions of presumptive taxation were not applicable.

CIT v. ONGC Ltd. (No.1), 309 ITR 244 (Uttarakhand) and CIT v. ONGC Ltd. (No. 2) 309 ITR 447 (Uttarakhand)

Money retained by the travel agent in the form of supplementary commission is covered by the TDS provisions

The assessee company engaged in passenger transportation business entered into an agreement with travel agents for sale of tickets. In consideration, the assessee company paid standard commission and supplementary commission in the form of collecting net fare against published fare. The assessee company deducted tax at source on standard commission but disputed TDS liability on supplementary commission. The other issue was regarding applicability of TDS in respect of issue of tickets at concessional price to the travel agents by the assessee company.

The assessee company supplied blank tickets to the travel agent, on terms that the same may be sold at a minimum price and the difference between the said minimum price and the price at which the tickets were sold was retained by the travel agent. The issue was whether the amount so retained by the agent was "commission" and whether the assessee company was required to deduct tax thereon under section 194H of the ITA.

The HC held that the relationship between the airline and the travel agent was that of a principal and agent. The money retained by the travel agent in the form of supplementary commission was not a "discount" because the travel agent never obtained proprietary rights to the tickets and had never paid a "price" for the same. Instead, the same was "commission" because it was received for services rendered on behalf of the assessee company and the assessee company ought to have deducted tax. The argument that the assessee company was unable to deduct tax at source since it was unaware of the commission retained by the agent till a billing analysis was done was not acceptable because once an obligation is cast, it was for the assessee company to retrieve the necessary information from the travel agent and put itself in a position to deduct tax. The assessee company could not take up the stand that the machinery for deduction of tax had failed.

As regards the issue of tickets at concessional rate to the travel agents by the assessee company, the HC held that the difference between the full value and the concessional price was not "commission" because it was a reward for services, title to the ticket passes to the agent and the relationship between the travel agent and assessee company was that of a principal to principal. The difference was a "discount" and not to be subjected to TDS.

CIT v. Singapore Airlines and others, 2009 TIOL 183 (Delhi)

Facilities/ amenities provided by hotels to its customers not subject to withholding tax as applicable to contractors and sub-contractors for carrying out 'work'

The assessee company operated a number of five star hotels in India. The assessee company offered various facilities/ amenities to its customers which include highly trained / experienced multi-lingual staff, 24-hour service for reception, telephones, house-keeping, select restaurants, bank counter, beauty salon, barber shop, car rental, shopping centre, laundry / valet, health club, business centre services, etc.

The issue before the HC was whether the facilities/ amenities provided by the assessee company are subject to TDS under section 194C of the ITA (which applies for payments to contractors and sub-contractors). The HC held that the words 'carrying out any work' in

section 194C of the ITA was limited to any work which culminates into a product or result. In other words, the word 'work' in section 194C of the ITA was limited to doing something with a view to achieve the task undertaken or carry out an operation which produces some result. The HC held that facilities/ amenities provided by the assessee company to its customers could not be said to be covered under section 194C of the ITA as neither such a contract constitutes 'work' within the meaning of section 194C of the ITA nor those contracts are in the nature of service contracts specifically included in the said section. Accordingly, the HC quashed the Circular No. 681 dated 8 March 1994 to the extent it holds that section 194C of the ITA applies to payments by the customers to the assessee company for availing the facilities/ amenities.
East India Hotels Limited and Others v. CBDT, New Delhi and Others, WP 2104 of 1994 (Mumbai)

Liaison office of a non-resident entity in India does not constitute its PE in India
The assessee company incorporated in UAE was engaged in offering remittance services to NRIs in UAE for transferring their money from UAE to various places in India. For this purpose, the assessee company opened LO at various places in India. However, RBI prohibited the company from charging any commission or fee or from receiving or earning any remittances from any activity undertaken by the company in India. The RBI also stated that the expenses of the LO are required to be met exclusively out of the funds received from abroad through normal banking channel. The funds were transmitted to the beneficiaries of the NRI remitter, in India, either by telegraphic transfer or by involving the LO who in turn downloaded the necessary information from the servers in UAE, drew cheques and dispatched the same to the beneficiaries of the NRI remitter in India. A one-time fee was collected by the assessee company from the remitter in UAE. The tax authorities accepted the nil returns filed by the assessee company without dispute till the impugned ruling of the AAR was pronounced in the year 2004.

The AAR in its ruling observed that there was a real and intimate relationship between the business carried on by the company in India and the commission received by the company in UAE. AAR held that the income of the assessee company received in UAE should be deemed to accrue or arise in India as there was a 'business connection' in India as per provisions of ITA and the activities of LO contributed directly or indirectly to the earning of income by the assessee.

The HC observed that the provisions of the ITA relating to 'business connection' had no applicability in the present case and what was required was examination of the expression PE as per the relevant article of India-UAE Tax Treaty. The only activity of the LO in India was to download the information from the main servers located in UAE and making cheques and couriering them to actual beneficiaries of NRIs in India. Such activity was only in the 'aid' or 'support' of the main activity which was carried out by the company in UAE and therefore 'auxiliary' in nature and covered within the exclusion clause of the relevant PE article of India-UAE Tax Treaty. The HC therefore quashed the ruling pronounced by the AAR and held that the activities carried out by LO in India were 'auxiliary' in nature and such activities did not constitute a PE of the assessee company in India and therefore no income was taxable in India.
UAE Exchange Centre Limited v. Union of India, WP(C) No.14869/2004 (Delhi)

Sharing of expenses of corporate office are not taxable as income
The assessee company was engaged in carrying out medical and clinical research for which it set up a super speciality hospital. An agreement was executed between the assessee company and its sister concern under which expenses of maintenance of corporate office which was used by the assessee as well as the sister concern were shared by them. The sister concern remitted its share of expenses to the assessee company after deducting tax. The issue before the HC was whether the reimbursed amount which was subject to TDS is taxable under the head income from other sources.

The HC observed that the money received by the assessee company from its sister concern was nothing but reimbursement of expenses incurred by the assessee company in respect of common services extended. The HC further observed that the earlier authorities had found as a fact that the expenses incurred by the assessee company were equivalent to the monies received by the assessee company from its sister concern and hence, no income would arise to the assessee company.
CIT v. Fortis Health Care Ltd., ITA 8/2009 (New Delhi)

Reimbursement of expenses not taxable

The HC, in the present case, held that the amount received by way of reimbursement cannot be regarded as revenue receipt particularly when the ITAT had found that the assessee company had received no sums in excess of the expenses incurred. Accordingly, the HC held that the amount was not liable to tax in the hands of the assessee company.

CIT v. Siemens Aktiongesellschaft, 310 ITR 320 (Mumbai)

Advertising, publicity and sale promotion income is in the nature of business income and not royalty

The assessee company incorporated in USA entered into commercial agreement with Indian hotels for advertising, publicity and sale promotion including reservation services. In consideration, the assessee company was to receive 3% of the room sales. The issue before the HC was whether the amount received by the assessee company is in the nature of royalty or fees for technical services under the domestic tax laws and the India-USA Tax Treaty.

The HC observed that the entire transaction entered into between the assessee and the Indian hotels was an 'integrated business arrangement' the main purpose of which was to carry out advertisement, publicity and sales promotion for mutual benefit and all other services i.e. use of trademark, trade name, computer reservations were incidental to the main purpose. The HC held that the amounts received by the assessee company were not in the nature of royalties or fees for technical services under the domestic tax laws and India-USA Tax Treaty. However, the HC having regard to the integrated business arrangement held that the amounts clearly represented business profits which were not liable to tax since the assessee company did not have a PE in India.

DIT v. Sheraton International Inc., 178 Taxman 84 (Delhi)

Authority for Advance Rulings

Recognition of foreign partnership as a 'firm' under the Indian tax laws. TP provisions applicable in respect of the transfer of capital asset by a partner to such partnership firm

The applicant, registered in Canada is engaged in the business of exploration and production of petroleum and natural gas. In India, it held participating interest in three oil blocks. In order to attract investment, the applicant proposed to restructure its business in India by transferring its participating interest in one of the blocks to a partnership firm to be formed in Canada between the applicant and its wholly owned subsidiary company in Canada.

On the question of whether the proposed partnership would be treated as partnership under the ITA, the AAR observed that the provisions of the Partnership Act of Alberta were substantially similar to those of the Indian Partnership Act, 1932 and accordingly held that the proposed partnership could be assessed as a firm under the ITA, provided certain requirements were complied with.

The AAR held that the residential status of the partnership could be determined by the AO by verifying where the control and management of the affairs of Indian business was actually situated.

The AAR held that the proposed transfer of participating interest to the partnership firm should be regarded as an 'international transaction' between the two AE's. Accordingly, the transfer value of the participating interest would have to be determined on the basis of the TPR contained under the ITA.

Canoro Resources Limited v. DIT, AAR No. 779 of 2008

Reimbursement of salary in terms of secondment agreement for mutual benefit is not liable to withholding tax

The applicant engaged in the business of non-life insurance ties up with a Korean insurance company for deputation of an experienced staffer. The Korean company continued to be employer of the deputed employee and paid salary to him. The applicant reimbursed the Korean company a part of salary and other benefits payable to the deputed employee. The Korean company was deducting tax from the salary payable to the seconded employee.

The AAR observed that the fact that the Korean company provided technical personnel to the applicant did not automatically follow that the payments by the applicant to the Korean company were to be treated as fees for technical services. The AAR on perusal of the agreements observed that the parties had entered into a mutually beneficial arrangement whereby both the companies would benefit and it was in the context of these beneficial clauses that secondment of employee and reimbursement of only a part of salary should be viewed. AAR held that the reasonable conclusion to be drawn was that the companies never contemplated payment of a fee for technical services.

AAR held that the essence or substance of the transaction was not deriving income by way of a charging a fee for the service and accordingly no tax was liable to be deducted.
Cholamandalam MS General Insurance Co. Ltd., 309 ITR 356

Consideration for offshore services forming part of a contract is taxable in India in view of sufficient territorial nexus

The applicant, a company incorporated in Australia was engaged in the business of providing professional services to energy and resource industries. The applicant entered into two agreements with Indian company towards engineering and procurement services and project management services in connection with laying of cross-country pipelines. The basic services relating to engineering and procurement services agreement were carried out in Australia. Certain services relating to project management services were rendered in India through employees of the applicant who were present in India for substantial number of days.

The applicant contended that the amounts received in respect of two agreements were in the nature of royalty income but claimed that income attributable to part services executed outside India was not taxable relying on the decision of SC in the case of Ishikawajima Heavy Industries (288 ITR 408).

The AAR observed that the terminology 'effective connection' denotes a real and intimate connection. Clear co-relation between the services, which gave rise to royalty income and PE, was a key factor for the purpose for exclusion of income from basic engineering services from the purview of royalties. The AAR held that a portion of services relating to engineering and procurement services agreement were performed in India and on perusal of agreement, it revealed that certain activities could be carried out in India only. Such activities which were pre-requisites or components of the services afforded sufficient territorial nexus to tax the receipts in India even though major part or most of services were carried out outside India.

It was not the extent and magnitude of services rendered outside India and in India that is decisive. The territorial nexus is real and identifiable in this case. The activities expected to be undertaken in India in connection with engineering and procurement services were not insufficient or negligible in nature. Accordingly, in the present case, the doctrine of territorial nexus applied and the entire income representing royalty under the agreement was liable to be taxed in India.

The services rendered under project management services agreement had commenced after basic engineering phase was over and at a stage when the PE came into existence. The AAR accordingly held that project management services were connected with a PE and receipts were taxable as business income only to the extent they were attributable to operations of PE.
Worley Parsons Services Pty Ltd., 312 ITR 273

The above assessee company had filed another application with respect to agreement entered with an Indian company for rendering conceptual and basic engineering services and providing deliverables in connection with setting up of an Alumina Refinery in Orissa. The design services were performed in Perth whereas the personnel visited India for collecting data and information.

The applicant contended that the services provided were performed mostly outside India and were in the nature of royalty and that they did not have a PE. The applicant subsequently claimed that the receipts are taxable only to the extent of services utilized as well as rendered in India relying on the decision of SC in the case of Ishikawajima Heavy Industries (288 ITR 408).

AAR held that the income of the applicant is in the nature of royalty. Further, in view of the short duration of the presence of personnel in India, the applicant did not have a PE in India. AAR referred to the observations made in the AAR Ruling No. 747/2007 wherein it held that the width and extent of territorial connection is not really material when some of the ingredients relevant to the territorial nexus were found to be present in India. The AAR based on the present facts held that services rendered by personnel in India are by no

means negligible or insufficient and it cannot be said there is no sufficient territorial nexus for the levy of tax. The AAR held that the principles of apportionment as laid down by SC in the case of Ishikawajima Heavy Industries cannot be extended to a situation where there is a single agreement covering only one particular type of work/services, as in the present case. The AAR accordingly held that entire receipts representing royalty income were liable to tax in India.
Worley Parsons Services Pty Ltd., 312 ITR 317

Tribunal Judgments

Availability of the deduction under section 80-IB(10) of the ITA in respect of profits and gains from housing projects comprising construction of residential dwelling units as well as commercial establishments for the assessment year 2004-05 and earlier years

The assessee was engaged in construction of a project which comprised residential flats as well as commercial premises. The assessee claimed a deduction under section 80-IB(10) of the ITA in respect of the total profits earned by it from the project.

The AO rejected the appellant's claim on the ground that deduction under section 80-IB(10) of the ITA is available on the profits from housing projects comprising construction of residential units only. The CIT(A) confirmed the disallowance made by the AO.

The SB observed that the specific restriction placed on the commercial use of the built up area by way of an amendment to section 80-IB(10) of the ITA with effect from 1 April 2005 itself reveals that commercial use of built-up area was permissible in a "housing project". Based on purposive interpretation of provisions, the permissible commercial construction would be 10% of the total area. The SB accordingly held that deduction under section 80-IB(10) of the ITA is available in respect of a 'housing project' comprising of residential units and commercial establishments and is available even for assessment year 2004-05 and earlier years.
Brahma Associates & Others v. JCIT, 122 TTJ 433 (Pune SB)

Deduction under section 42 of the ITA cannot be claimed while computing MAT liability

The assessee was engaged in the business of exploration and extraction of oil and gas. The assessee claimed special deduction under section 42 of the ITA for capital expenditure incurred on prospecting of mineral oil in computing the book profits for the purpose of MAT. The ITAT rejecting the claim of the assessee observed that the special deduction could be applicable only for the purpose of computing profit and gains of any business under the regular provisions. The special deduction under section 42 of the ITA cannot override the provision of MAT as MAT is not levied on the business income of the assessee but on its "book profits".
Gujarat State Petroleum Corporation Limited v. JCIT, 308 ITR 248 (Ahmedabad)

Payment for a non-compete right is an intangible asset eligible for depreciation

The assessee had paid a compensation for acceptance of non-compete obligation in respective exports of bulk drugs, pharmaceuticals products and formulations, being a part of the consideration paid for acquisition of business division.

The assessee claimed the payment as revenue expenditure in the return of income. The assessee also made an alternative claim that non-compete right may be treated as a capital asset and depreciation be allowed. The CIT(A) allowed depreciation on non-compete compensation.

The ITAT held that the non-compete right acquired by the assessee is towards compensation in the export business and hence it is a business/ commercial right. The ITAT further held that non-compete right is an intangible asset similar to that of patents, copyrights, trademarks and licenses and applying the principle of *ejusdem generis*, it is eligible for depreciation.
ITO v. Medicorp Technologies India Ltd., 122 TTJ 394 (Chennai)

Adhoc selection of TP method by the assessee and the TPO struck down

The assessee was engaged in the business of manufacture and marketing of prescription drugs. The assessee had imported certain materials from its AE. TNMM was adopted by the assessee as the most appropriate method and the overall profit of the assessee was compared with overall profits of comparable companies obtained from the prowess database after a benchmarking exercise.

The TPO held that the TNMM was not appropriate and no proper documentation was maintained by the assessee. The TPO held that CUP is the most direct method and should always be applied first.

The ITAT made the following observations and set aside the matter to TPO for fresh adjudication in accordance with law:

- Though CUP is a direct method, it automatically does not become the most appropriate method and cannot be applied in all situations – much depends on the availability of data on comparables.

- Properties of a product/ accompanying circumstances and conditions have to be evaluated for comparison – time period of comparables is a factor.

- International transactions have to be evaluated on a standalone basis and then compared with similar analysis undertaken on independent transactions. Comparing aggregate profits of appellant with aggregate profitability of certain other companies, without any adjustments, do not satisfy the requirements of TNMM under law.

- For comparability analysis, comparables need to have similar ratio of manufacturing/ trading activity - similar product mix – Functions, Assets & Risk analysis has to be demonstrated - whether comparables also manufacture licensed and patented drugs.

UCB India Pvt. Ltd. v. ACIT, Appeal No. 428 and 429 (Mumbai)

Start-up operations and different business models call for appropriate economic adjustments to increase comparability

The assessee entered into transactions for purchase of raw material from its AE's and adopted the TNMM as the most appropriate method to benchmark its international transactions with an internal CUP as a corroborative method. For the TNMM analysis, the assessee selected six uncontrolled comparables two of which were rejected by the TPO for non-availability of data for the relevant period and the other was rejected on the basis of sustained losses.

The ITAT made following observations and remanded the matter back to the TPO for fresh adjudication:

- Though as per the Indian Regulations on TP, data for the relevant financial year, in which the international transaction was entered into should be considered for analyzing the comparability of an international transaction, multiple year data might be used where it has an impact on the product life cycle.

- A difference in business models followed and start-up stage of the business might severely impact the results of the comparability analysis. Accurate economic adjustments to factor the difference in business models and age of the company is required.

Skoda Auto India Private Limited v. TPO, 122 TTJ 699 (Pune)

Mere delay in payment of tax deducted at source on salary does not attract disallowance

The assessee company deducted taxes at source on the salaries paid to non-residents. The assessee company however remitted the taxes so deducted to the government treasury after the prescribed due date. The payments made were disallowed by the AO but relief was granted by the CIT(A). The ITAT upheld the order of the CIT(A) stating that mere delay in payment of taxes deducted from salaries would not attract disallowance. The ITAT based its decision on the reasoning that section 40(a)(iii) of the ITA which deals with disallowance of salaries paid to non-residents, does not have any requirement of payment of TDS within the time limit prescribed unlike the mandate provided for other payments like royalty, interest or fees for technical services.

DCIT v. Dolphin Drilling Ltd. 28 SOT 141 (Delhi)

No disallowance of expenditure can be made for not withholding tax when income is computed under special provisions and reimbursement of expenses held not subject to withholding tax

The assessee engaged in the business of prospecting for and production of mineral oils in India made certain payments to its parent company. The payments were in connection with the exploration and processing activities carried on by the parent company and re-charged the same on cost basis i.e. without any mark-up or profit. The assessee reimbursed these expenses to its parent company without withholding any tax from the payments. Section 40(a)(i) of the ITA provides that certain expenses are not deductible unless tax thereon has been deducted at source. Accordingly, the AO disallowed the expenses on the ground that no tax was deducted at source on payments made to the non-resident.

The assessee claimed that it was governed by the special provisions of section 42 of the ITA which provides for certain additional deduction of expenditure in the case of business of prospecting, etc of mineral oil. The provisions of section 40(a)(i) of the ITA have an over-riding effect only in respect of deductions provided under section 30 to 38 of the ITA. The ITAT observed that section 42 of the ITA, though not a non-obstante provision, yet is a special provision relating to computation of income of an assessee engaged in the business of prospecting for or extraction or production of mineral oils in India and therefore, should be given priority over general provisions. It further observed that as per settled legal principles and as per Board Circular issued in the context of section 42 of the ITA, section 40(a)(i) of the ITA cannot be invoked where the income is computed under section 42 of the ITA. The ITAT held that since reimbursement of expenses does not involve element of income, it could not be said that such sum would attract withholding tax obligations under the ITA. Accordingly, the ITAT held that the assessee is entitled to deduction in respect of payments made to its parent company under section 42 of the ITA.
M/s Cairn Energy (I) Pvt. Ltd. v. ACIT, Appeal No. 208-211/2006 (Chennai)

Job work charges eligible for deduction under section 80IB of the ITA

The assessee, in the business of manufacture and sale of biscuit making machines, also undertook job work for its sister concern engaged in manufacture of different types of biscuit making machines. The sister concern supplied raw material to the assessee which in turn subjected the same to one or more processes depending on requirement of sister concern of component to be manufactured. The assessee utilized its existing manufacturing process to undertake job work. The ITAT observed that merely because manufacturing was undertaken for another concern, it would not imply that the income therefrom was not derived from an activity of manufacture. The ITAT relying on the decision of the Madras HC in the case of CIT v. Taj Fireworks Industries 204 CTR 108 held that the income earned by assessee by way of job work charges would be eligible for deduction under section 80IB of the ITA.
ACIT v. New Era Machines (P.) Ltd., 119 TTJ 696 (Chandigarh)

Contract for manufacture by third party is sale of goods and not works contract

The assessee had entered into contracts with third parties for manufacturing of goods as per its specification and supervision and treated the same as purchase of finished goods. The AO held that it was works contract and tax is required to be deducted at source on contractor fees.

The ITAT observed that the goods are produced by the manufacturer on its own though subject to the assessee's specification, supervision and control and then sold to the assessee. The property in the goods passes over to the assessee only if such goods are as per the standards of the assessee and is delivered to the assessee. Accordingly, the ITAT held that it is a contract of sale and not a works contract.
Novartis Health Care Private Ltd. v. ITO (TDS), 29 SOT 425 (Mumbai)

Indirect Tax

Service Tax

Notifications / Circulars

ST tax rate reduced from 12% to 10%

The rate of ST has been reduced from 12% to 10% with effect from 24 February 2009. The reduction in the rate of ST is applicable to all categories of taxable services. The effective rate of ST would now be 10.3% instead of 12.36%.

Notification No. 8/2009-ST dated 24 February 2009

Exemption from ST to services provided to SEZ developer/unit

Services provided in relation to the authorized operations in a SEZ and received by developer/ unit in SEZ have been exempted from ST. The exemption is granted by way of a refund of ST paid to the SEZ developer/ SEZ unit subject to fulfillment of prescribed conditions. The Notification issued in this regard replaces an earlier exemption available to service providers in respect of services provided for consumption within the SEZ.

Notification No. 9/2009-ST dated 3 March 2009

Clarification on use of service outside India to qualify as export of services

As per the Export of Services Rules, 2005, a taxable service shall be treated as export of service *inter-alia* if such service is provided from India and used outside India. It was noticed that the benefit of export is being denied by service tax authorities to certain services falling under Category III (where the recipient of services is located outside India) on the ground that such services are performed in India and hence they cannot be said to be 'used outside India'.

The CBEC has now clarified that the meaning of the term 'used outside India' should be understood in the context of the category of service for which the test is being applied. For category III services which comprise of knowledge or technique based services and where relevant factor for export is location of service receiver, the phrase 'used outside India' is to be interpreted to mean that the benefit of the service should accrue outside India. Importantly, the Circular requires all pending cases to be disposed off accordingly.

Circular No. 111/05/2009 dated 24 February 2009

Procedure for refund of ST to exporters

Notification No. 41/2007-ST dated 6 October 2007 allows refund of ST paid on specified services used for export of goods. Considering the procedural difficulties in implementation of this refund scheme, the CBEC has issued the following additional clarifications:

- Refund will not be admissible on services received prior to the date of the said notification, even if the goods in relation to which the services are used are exported after the date of coming into effect of the notification.
- Refund is admissible on the basis of gross amount received for the exports. Any deductions made by the banks from export remittances, in lieu of services provided by the bank should not be deducted while granting refund.
- Limitation period of six months is to be computed from the date of exports of goods.
- Where FIRCs are issued on consolidated basis, exporters should submit along with FIRC, self-certified statement showing the details of export in respect to which the FIRC pertains. Exporters should maintain a register showing running account which should be reconciled between the export and the remittance periodically.
- Where banks do not issue FIRC for the reason that payments are received by cheque, refund may be allowed on the basis of duly certified bank statement.
- Certified copies of supporting documents like invoice, Bill of Lading etc. should be accepted and only in case of in-depth enquiry original documents need to be verified.
- Verification of registration certificate of the supplier of service is not required to grant refund to exporters.

Circular No. 112/06/2009-ST dated 12 March 2009

ST payable on maintenance or repair of road

It has been clarified that maintenance or repair of roads is leviable to ST under 'management, maintenance or repair service'. Though the definition of 'commercial or industrial construction service' specifically excludes construction or repairs of roads, there is no specific exemption under 'management, maintenance or repair service' for services provided in respect of roads.

Circular No. 110/4/2009-ST dated 23 February 2009

Levy of ST on activity of screening of film supplied by a film distributor

The CBEC has clarified the taxability of the various arrangements between the distributors and the theatre owners for the screening of films:

- Where the distributor takes on lease hall for screening of the movie, the theatre owner provides the taxable service of 'renting of immovable property for furtherance of business or commerce' and is liable to pay ST.

- Where the contract between the theatre owner and the distributor is on revenue sharing basis, the two contracting parties act on principal-to-principal basis and one does not provide service to another and the activities are not covered under ST.

- Where the theater owner buys the print / CD of the film on payment of a fixed price and thereafter screens it in his theatre, the transaction is in the nature of sale of goods and not liable to ST.

- Where a theater owner screens the movie for fixed number of days under a contract, the proceeds earned through sale of tickets go to the distributor but the theatre owner receives a fixed sum depending upon the number of days of screening, irrespective of whether the movie runs well or not, there is no liability to ST under 'support services of business or commerce'.

Circular No. 109/03/2009-ST dated 23 February 2009

Credit of duty paid on goods used in providing 'supply of tangible goods for use service'

The Commissioner of Central Excise, Madurai has clarified that credit of ED / additional duty of customs paid on vehicles, aircrafts, vessels etc. will be available to the service providers providing 'supply of tangible goods for use service'. Even if such goods do not fall under the definition of 'capital goods', these goods are in the nature of 'inputs' since they are primary requirements for providing such output service.
Trade Notice No. 12/2009; Service Tax No. 4/2009 dated 13 March 2009

Automation of ACES

The CBEC has developed a new software application called ACES which is being rolled out in phases from 12 March 2009 in Service Tax Commissionerate, Chennai. The ACES application will allow the users to take assessee registration online, electronically file statutory returns, claims, intimations and permissions, refunds and requests for provisional assessment, view and track status of their documents online.
Trade Notice No. 12/2009- ST dated 5 March 2009 issued by Commissioner of Service Tax, Chennai

Case Laws

Lottery tickets are not goods but services to promote the same taxable from 16 May 2008

The Apex Court while dealing with the taxability of promotion of lottery tickets under 'business auxiliary services' has held that lottery tickets are not goods and hence its promotion cannot be said to be promotion of goods. Reliance was placed on the decision of the Constitution Bench in the case of Sunrise Associates. Further, the Explanation inserted from 16 May 2008 to clarify that 'promotion or marketing of services provided by client' will include such service provided for promotion of lottery cannot be said to be retrospective in nature being a substantive amendment. Hence, ST, if any, would be payable only with effect from 16 May 2008 and not with retrospective effect.
UOI v. Martin Lottery Agencies Ltd.,2009-TIOL-60-SC-ST

Mere renting of immovable property not exigible to ST

While disposing off a batch of writ petitions that challenged the validity of Notification No. 24 / 2007 – ST dated 25 May 2007 (which exempts from ST, the taxes paid on property from the gross value charged for renting of immovable property) and CBEC Circular No. 98/1/2008 – ST dated 1 January 2008 (which clarified that right to use immovable property is leviable to ST), the Delhi HC delivered a landmark decision holding that renting of immovable property *per-se* is not a taxable service since it does not entail any value addition. However, if there is some other service provided along with renting of immovable property for instance services like air conditioning, standby power, sanitation, water supply etc., such services will be liable to ST.
Home Solution Retail India Ltd. & Others v. UOI & Others,2009-TIOL-196-HC-DEL-ST

'Supply of tangible goods for use service' and 'mining service' are both mutually exclusive

The Bombay HC has held that the service of supply of offshore vessels, barges etc. without transferring right of possession and effective control over them will not be taxable under 'mining services' since the same was introduced to comprehensively bring under the ST net activities having a direct nexus to mining activities. 'Supply of tangible goods for use service' is not carved

out of mining services and the same was not inserted in Finance Act, 1994 by amending scope of 'mining services'. Introduction of new entry and inclusion of certain services in that entry would presuppose that there was no earlier entry covering the said services.
Indian National Shipowners' Association v. Union of India, 2009-TIOL-150-HC-MUM-ST

Taxable event for levy of ST is the date of rendering of service

The Gujarat HC has held that for applicability of ST, the 'taxable event' is the rendering of taxable service and not the raising of the invoice or receipt of payment from the service recipient.
CCE v. Schott Glass India Pvt. Ltd, 2009 (14) STR 146 (Gujarat)

CENVAT credit on outward transportation eligible

On the question of eligibility of the CENVAT Credit on the outward transportation up to the customer's doorstep where the entire cost of freight was borne by the manufacturer, the HC held that CENVAT credit was eligible since the following requirements were fulfilled:

- The ownership of the goods and the property therein remained with the seller of the goods till the delivery of the goods in acceptable condition to the purchaser at his door step;

- The risk of loss or damage to the goods during transit to the destination was borne by the seller and the freight charges were an integral part of the value of the excisable goods.

Ambuja Cements Ltd. v. Union of India, 2009-TIOL-110-HC-P&H-ST

Incidence of duty is deemed to have been passed if any expense is debited to the Profit and Loss Account

The Appellants claimed refund of ST paid erroneously on reimbursements to the non-resident service providers. The Tribunal held that any payment, if debited to the Profit and Loss Account is to be considered as revenue expenditure and will amount to addition in cost of finished goods. Accordingly, the incidence of duty can be presumed to have been passed on to the other person and refund stood rejected.
Keihin Fie Pvt. Ltd. v. CCE, Pune-I, 2009-TIOL-550-CESTAT-MUM

CENVAT credit cannot be denied if invoice has a foreign address of the recipient

The assessee, a multinational company having only a liaison office in India, rendered consulting engineering services to M/s. Renu Sagar Power Project. For the services rendered by them, invoices were issued from Dubai and ST was paid in India on the gross amount received after availing credit of ST paid on input services received from M/s. GE Power Service (India) Pvt. Ltd. Revenue denied the credit on such input services on the ground that the input service invoices were addressed to the Dubai office of the taxpayer and that payments were also made from Dubai. The Tribunal observed that the output services had been rendered in India and the input services had also emanated in India and used for rendering services in India and therefore CENVAT credit was eligible.
General Electric International Inc. v. CCE, Delhi, 2009 (13) STR 565 (Tri-Del)

Activity of reinsurance taxable even prior to the amendment of the definition of 'insurer'

The issue before the Tribunal was whether activity of reinsurance will be taxable prior to 1 May 2006 when the definition of 'insurer' was amended to include the reinsurer. The Tribunal held that inclusion of 'reinsurer' in the definition of 'insurer' under section 65(58) should be taken as express statement of the obvious. Even prior to the amendment, the definition of 'insurer' was wide enough to include a 'reinsurer' and consequently 'insurance auxiliary service' concerning general insurance business, provided to a reinsurer by an intermediary / insurance intermediary / insurance agent was taxable under section 65(105)(zl) of the Finance Act, 1994 prior to 1 May 2006.
Suprasesh General Insurance Services & Brokers Pvt. Ltd. v. Commissioner of Service Tax, Chennai, 2009-TIOL-338-CESTAT-MAD

Setting up of Wide Area Network on build, operate and transfer basis will not be taxable under 'telecommunication services'

The Tribunal has held that setting up of Wide Area Network on build, operate and transfer basis will not be taxable under 'online information and database access or retrieval service'. It impressed that whenever there is information and data retrieval, the ownership definitely becomes very relevant. Merely because the Appellant provided a part of the network equipment,

one cannot say that Appellant was responsible for the entire services. Such services were taxable under 'telecommunication services' w.e.f. 1 July 2007.
United Telecom Ltd. v. Comm. of Service Tax, Bangalore, 2009-TIOL-595-CESTAT-BANG

Excise

Notifications / Circulars

ED rate reduced to 8% in respect of goods chargeable to duty at 10%

The rate of central ED had been reduced by 4% on 7 December 2008. Considering the same, the *ad valorem* rates of central ED, applicable for various products, became 10%, 8% and 4%. The rate of central ED, for products attracting 10% duty has been further reduced to 8% with effect from 24 February 2009. However, there is no reduction in the duty rates for goods attracting duty at either 8% or 4%.
Notification No. 4/2009-CE dated 24 February 2009

Sugar cess exempted on pharmaceutical grade sugar and bura sugar

The industry had represented to the CBEC that where manufacturers of Pharmaceutical grade sugar and Bura sugar purchase raw sugar from other manufacturers on which central ED and sugar cess is paid; such manufacturers are not liable to pay sugar cess again as all the products, namely sugar, pharmaceutical sugar and Bura sugar fall under the same tariff classification. Accordingly, the CBEC, based on the exemption notification issued by the Ministry of Public Distribution and Consumer Affairs, has clarified that any sugar manufactured from such other sugar on which cess leviable under section 3(1) of the Sugar Cess Act, 1982 has been already paid will be exempt from the levy of such cess.
Circular No. 883/03/2009-CX dated 26 February 2009

Case Laws

CVD not payable on imports when ED not leviable on manufacture of like goods

Notification No. 4/2006-CE provides for exemption from ED on manufacture of finishing agents, dye carriers etc. if such goods are used in same factory for manufacture of textile articles. The question was whether such exemption from CVD will also be available to imported goods as they will not be manufactured in the same factory.

The Apex Court observed when the goods are imported; evidently, the same would not be manufactured in the same factory. It would, therefore, be impossible to apply provisions of exemption notification to section 3(1) of the Customs Tariff Act, 1975. Reiterating the well settled principle that where literal meaning leads to an anomaly and absurdity, it should be avoided, the Apex Court has held that the expression 'same factory' would mean that the imported goods should be used in the factory belonging to importer where manufacturing activity takes place.
Commissioner of Customs (Prv.), Amritsar v. Malwa Industries Ltd., 2009 (235) ELT 214 (SC)

SSI exemption not available even if brand name of another person not entirely reproduced on goods

The Apex Court was dealing with the construction of the exemption notification in respect of goods manufactured by SSI units. The exemption notification provides that such exemption shall not apply to goods bearing the brand name or trade name, whether registered or not, of another person.

The Appellants, manufacturers of ice-cream makers were availing the benefit of SSI Exemption. They were selling ice-cream maker in their own brand name 'CREMICA' and also sold the same to different customers including United Tele Shopping & Tele Shopping Network. In respect of sale to United Tele Shopping & Tele Shopping Network, the goods were being examined by the supervisors of these customers before dispatch from their factory and stickers bearing United Tele Shopping/ Tele Shopping Network were being affixed. The stickers bore the words 'Checked Sl. No. Do not remove this sticker'. Revenue treated the words United Tele Shopping & Tele Shopping Network as brand name belonging to other and disallowed the benefit of small scale exemption notification. It was submitted that the words United Tele Shopping and Tele Shopping Network are not brand names but are the abbreviations of the name of the marketing companies which does not amount to use of the brand name.

The Apex Court held that merely because the registered trade mark is not entirely reproduced it does not take the respondents out of exclusion clause and make them eligible to the benefit of the notification.
Unison Electronics Pvt. Ltd. v. CCE, Noida,2009-TIOL-30-SC-CX

Freight and insurance charges not includible in assessable value

The assessee was under contractual obligation to transport the goods from the factory gate to the place of the buyer. He had entered into two separate contracts, one in respect of supply of goods and other in respect of transportation and transit insurance thereof. The issue which arose for consideration was whether freight and insurance charges are includible in the assessable value. The Apex Court, on considering the definition of 'place of removal' under section 4(3)(c) of the CEA, held that the amount claimed by way of transportation charges and insurance cannot be included in the value of goods for purposes of ED payment.

CCE, Noida v. Accurate Meters Ltd., 2009 (235) ELT 581 (SC)

Installation charges not to be included in assessable value

The Tribunal has held that installation charges collected from the buyers are not includable in the transaction value since the same are not collected for the reason of, or in connection with sale of computers. Transaction value is the total consideration received by the assessee in exchange for the excisable goods at the time of sale, or later. Installation of computers cannot be categorized as after sales service of the computers sold and therefore, ED will not be leviable on the same.

HCL Infosystems Ltd. v. CCE, Pondicherry, 2009-TIOL-535-CESTAT-MAD

On clearances from EOU to DTA, the exemption has to be computed on each of the duties of Customs and not on aggregate duty

The Tribunal upholding the order of the Commissioner (Appeals) has held that the computation of duty on goods cleared by EOU in DTA under Notification No. 2/95-CE has to be computed by giving exemption of 50% from each of the duties of Customs and not at the rate of 50% of the aggregate duties of customs.

CCE, Delhi-III v. Usha Amorphous Metals Ltd., 2009-TIOL-631-CESTAT-DEL

Blending petrol and diesel with multifunctional additives is not 'manufacture'

The Tribunal has held that blending MS and HSD with small quantity of multifunctional additives to make branded MS and HSD is not manufacture as blending merely improved quality and selling under a different brand name could not be said to result in different characteristics and usage.

Hindustan Petroleum Corporation Ltd. v. CCE, 2009 (234) ELT 648 (Tri-Del)

Foreign Trade Policy

Notifications / Circulars / Public Notice

Annual Supplement to the FTP and HBP announced

The Central Government has announced certain trade facilitation measures in the form of a Supplement to the FTP 2004-09. The major amendments to the FTP and the HBP are stated below:

- Duty credit scrips under certain Export Promotion Schemes under Chapter 3 of the FTP to be issued without waiting for realization of export proceeds subject to fulfillment of prescribed conditions.
- Credit under DEPB Scheme to be extended for payment of duty on import of restricted items.
- Export obligation period against advance authorizations to be extended up to 36 months from the present limit of 24 months.
- Intermediate products can be supplied by the domestic manufacturers to the port for export by the ultimate exporter against advance intermediate authorization.
- Facility of reimbursement of Additional duty of Excise levied on fuel under the Finance Acts extended to EOUs.
- The threshold limit of export turnover (in the previous three years and the current year taken together) for recognition as Premier Trading House to be reduced from Rs.10,000 crores to Rs.7,500 crores.
- Procedural requirements relaxed for claiming Deemed Export Benefits.
- Bhilwara in Rajasthan and Surat in Gujarat have been recognised as Towns of Export Excellence, for textiles and diamonds respectively.

Notification No. 88/2008 and Public Notice No. 151/2008 dated 26 February 2009

Notification designating powers to officers as per the value of goods amended

The Central Government has amended the limits of the value of the goods for the officers who will exercise powers under section 13 read with section 11 Foreign Trade (Development and Regulation) Act, 1992. The revised limits are given below:

Designations	Revised Limit
Additional Director General of Foreign Trade	Without limit
Zonal Jt. Director General of Foreign Trade/ Export Commissioner	Up to Rs.50 crores
Joint Director General of Foreign Trade	Up to Rs.25 crores
Deputy Director General of Foreign Trade	Up to Rs.10 crores
Assistant Director General of Foreign Trade	Up to Rs.2 crores
Foreign Trade Development Officer	Up to Rs.1 crore
Development Commissioner, SEZ	Without limit in respect of EOU and units in SEZ

Notification No. 102/2008, dated 17 April 2009

Stringent measures prescribed to prevent export of counterfeit drugs from India

To prevent counterfeit drugs from being exported out of the country, it has been decided that every exporter of drugs & pharmaceuticals at the time of shipment shall submit, among other requisite documents, the following:

- A copy of Certificate of Analysis issued by the manufacturer for the subject product; or
- A copy of Certificate of Analysis issued by approved laboratory of the importing country / FDA; or
- A copy of Certificate of Analysis issued by a laboratory approved by Drugs Controller under Drugs & Cosmetics Act 1940 and the rules made thereunder.

Public Notice No.173/2008 dated 13 April 2009

Procedural clarifications pertaining to deemed export benefits

The DGFT has clarified that the authorities having functional jurisdiction over the applicant units should process the application for deemed export benefits under Para 8.2 (b) of FTP. Thus, DTA units should submit applications for deemed export drawback and Terminal Excise Duty refund only with the concerned RA and EOU can submit deemed export benefit applications only with the Development Commissioner on production of suitable disclaimer from DTA supplier.

Policy Circular No. 75/2008 dated 27 March 2009

Customs

Notifications / Circulars

Extension of exemption from Basic Customs Duty to Naptha imported for generation of electrical energy

Exemption granted to Naphtha, imported for generation of electrical energy by specified undertakings owned by the Central and State Governments including a licensed person under the Electricity Act, 1910 which was valid till 31 March 2009 will now be available even for imports after such date. This exemption will not be available if the naphtha is used for generation of electricity for captive consumption.

Notification No. 20/2009-Cus dated 24 February 2009

Government notifies Handling of Cargo in Customs Areas Regulations, 2009

The Central Government has notified the Handling of Cargo in Customs Area Regulations, 2009. The same will be applicable to any person responsible for receipt, storage, delivery, dispatch or otherwise handling of imported goods and export goods and includes a custodian as referred to in section 45 of the Customs Act, 1962 including persons referred to in section 141(2).

Notification No. 26/2009-Cus (N.T.) dated 17 March 2009

Clarification on applicability of NCCD on cellular phones on MRP basis

The CBEC has clarified that telephone sets for cellular networks or for other wireless networks are covered under the description 'Telephone sets' of Sl. No. 87 of Notification No.49/2008-CE dated 24 December 2008. Therefore, they would continue to be assessed for additional duties of customs on the basis of MRP / RSP. Consequently, NCCD, being a duty of excise, is also required to be collected on the basis of MRP / RSP, in the same manner as applicable to the levy of additional duty under section 3(2) of the CTA.

Circular No. 12/2009-Cus dated 12 March 2009

Case Laws

Reference can be made to foreign journal for international price of imported goods to determine the value of contemporaneous imports in specific cases

The Apex court has held that on mis-declaration of the nature and classification of goods, the value declared for assessment also becomes unacceptable. Once transaction value is rejected on valid grounds, the Customs Authority has to proceed to determine the value of goods by following Customs Valuation Rules and on the basis of contemporaneous import. The Court further observed that availability of evidence of contemporaneous import of the same goods provides the best guide for determination of value of the imported goods but in the absence of such evidence of contemporaneous import, reference to foreign journal or price report for finding out correct international price of imported goods may not be irrelevant because ultimately the Assessing Authority has to determine value of the imported goods, at which such goods are sold or offered for sale in the course of international trade at the time of importation.

The Apex Court also held that section 151A which confers upon the CBEC the power to issue orders, instructions and directions to the authorities for proper administration of the provisions of the Act does not in any manner control or affect the independent exercise of quasi-judicial functions by the Assessing Authorities. Similarly, a standing order issued by a Chief Commissioner of Customs is to be taken only as assistance in exercise of the quasi-judicial power.
Varsha Plastics Pvt. Ltd. v. UOI, 2009-TIOL-16-SC-CUS

Refund of excess duty paid on account of clerical errors permissible under section 154 even during the pendency of provisional assessment

The importer sought a refund of the excess duty paid erroneously on account of an extra zero stated in the Bill of Entry. Revenue held that refund of the excess duty paid by mistake could not be allowed before finalizing the provisional assessment. The Tribunal held that in a case of conspicuous short payment or excess payment of duty by mistake outside the dispute leading to provisional assessment, it will be legal and proper for the department to recover the short paid duty or the assessee seeking refund of the excess paid duty during provisional assessment. In either case the parties cannot be held to suffer prejudice. No provision in the Act prohibits rectification of the errors in the provisional assessment under section 154 and allowing the importer consequential relief. Grant of refund arising out of such rectification shall be subject to the provisions of section 27 (2) of the Act prescribing test of unjust enrichment.
Volvo India Pvt. Ltd. v. CC, Chennai, 2009-TIOL-442-CESTAT-MAD

VAT / CST

Notifications / Circulars / Announcements

Deductions while determining taxable turnover in Orissa

Sale of goods to SEZ, STP, EHTP or EOU shall qualify for a deduction from the taxable turnover only if such goods are intended to be used as capital goods as specified or in manufacture of goods. Earlier, there was no such end-use based restriction.
Notification No. 65/2009 dated 25 February 2009

Extension of date for existing manual system for accepting applications for declarations prior to 1 April 2008 and notification of procedure for online submission of application

The Maharashtra Government has prescribed procedure for online submission of application [Statement of Requirement] for the statutory forms (C/F/H/EI/EII) under the Central Sales Tax Act, 1956 and delivery at the place of business of the dealer. It has also been clarified that any application seeking declarations for the period prior to 1 April 2008 may be made as per the existing manual system (on CD) or available on new online system. However, such application shall be made prior to 30 June 2009. Declarations for period prior to 1 April 2008 will not be issued after 1 July 2009.
Trade Circular No.12 T of 2009 dated 31 March 2009

Expansion in scope of definition of 'Dealer' in Uttar Pradesh

Air cargo operators and courier service providers failing to disclose the identity of the consignor or consignee of goods shall be deemed to be the dealer and shall be liable to tax in respect of such goods from the date on which such consignments are found to be in their custody.

However, transporters failing to disclose the identity of the consignor or consignee of goods shall no longer be deemed to be dealers.

The scope of the definition of 'dealer' has further been expanded to cover the owner or person in-charge of cold storage storing commercial goods. Such dealers shall be liable to tax in respect of such goods upon failing to disclose the identity of the owner of the taxable goods stored in such cold storage.

Air cargo operator, courier service provider and owner or person in-charge of godown, cold storage and warehouse dealing in taxable goods are accordingly required to apply for registration in the prescribed manner. They are further required to maintain the prescribed records.
Notification No. 497(2)/LXXIX-V-1-09-1(Ka)7/2009 dated 28 February 2009

Case Laws

Goods taken delivery by purchaser at the seller' state and taken outside the state would be an inter-state sale

The assessee delivered goods in Delhi to its distributors / stockists for assigned territories outside Delhi. Though the supplies were made ex-works, the purchasing dealers were obliged to take the goods to their respective territories outside Delhi for sale in those territories at prices fixed by the assessee. The issue which arose for consideration was whether the transaction was an inter-state sale. The Apex Court observed that taking of delivery by the purchasing dealers would not take away the transaction from the category of inter-state sales and that the determinative test was whether the purchasing dealers were obliged contractually to move goods from Delhi to assigned territories and whether in fact the goods actually moved. Since the movement of goods outside the state was a covenant of the contract the Apex Court held that the transaction was an inter-state sale.
DCM Ltd. v. CST, 2009-TIOL-27-SC-CUS

Providing broadband connectivity is 'sale of light energy' – HC judgment on merits set aside by SC on ground of alternate remedy

The assessee provided broadband connectivity through leased lines to subscribers of bandwidth. The Revenue demanded VAT on such activity on the ground that the assessee was engaged in selling light energy under the Karnataka Value added Tax Act, 2003. The Division Bench of the Karnataka HC held that the light energy required for transmitting the data was created by the assessee and that the light energy was goods since it was capable of being abstracted, possessed, transmitted, delivered and used and, to some extent, stored. It further held that VAT is applicable on such sale of light energy to the subscribers in the course of providing broadband services despite the fact that the assessee is being assessed to ST under the provisions of the Finance Act, 1994.

The Apex Court directed the assessee to exhaust statutory alternative remedy on the ground that the matter would require adjudication since technical evidence had to be looked into and cross examination of experts was warranted. The Apex Court set aside the judgement of the HC and directed the assessee to file statutory appeals and further directed the first Appellate Authority to hear and dispose of the appeal expeditiously.
Bharti Airtel Ltd. v. State of Karnataka & Ors., 2009-TIOL-99-HC-KAR-VAT and 2009-TIOL-36-SC-VAT

Supply of goods to contractor with recovery of value thereof is a sale of goods liable to VAT

The assessee entered into an agreement with his mining contractor to supply diesel for consumption by vehicles and machinery owned by the contractor and used in mining operation. The cost of diesel supplied was recovered subsequently out of the amount payable to the contractor. The Court observed that there was a transfer of property in diesel from the taxpayer to the contractor and that though no payment was made by the contractor immediately, the value of diesel recoverable from the contractor has to be considered as sale of diesel for deferred payment. The decision in the case of N.M. Goel & Co. was applied and the decision in the case of Bangalore Water Supply and Sewerage Board was distinguished.
State of Karnataka v. Narrain Mines Ltd., 19 VST 535 (Kar.)

LPG regulator is not a part of LPG Cylinder

The HC has held that LPG regulator is not a part of LPG Cylinder. It is an unclassified item and taxable at the rate of 12.5%. After referring to the Gas Cylinder Rules, 2004 and Liquefied Petroleum Gas (Regulation of Supply and Distribution) Order, 2000, the Court reasoned that 'cylinders' are separately mentioned from item 'pressure regulators' in the respective regulations indicating that the two are different items and as such 'pressure regulator' cannot be said to be a container by interpreting it to be part and parcel of the 'cylinder'.
I.A.S. Products v. Commissioner, Commercial Taxes, Uttarakhand, 2009-VIL-18-HC-UTR

Franchisee fee collected from franchisor is not liable to VAT

The question before the Maharashtra Sales Tax Tribunal was whether the consideration charged from the

franchisee for the use of trade mark and other services shall be liable to tax under the erstwhile Lease Tax Act. The Tribunal has held that such transaction does not involve the transfer of right to use the trade mark on the ground that it is a license to use the trade mark granted simultaneously to various persons and the agreement is a composite agreement for provision of services to ensure standard and quality of the product in order to maintain the reputation of the franchisor. The permission to use the trade mark is only incidental.
Smokin Joe's Pizza Pvt. Ltd. v. State of Maharashtra [Order of the MSTT in Appeal No. 25/2004]

International Taxation

United Kingdom

U.K. 2009 Budget Announced

A significant amount of new law was announced in the 2009 U.K. Budget on 22 April 2009, along with confirmation of the implementation date of several provisions that had been subject to previous consultation.

The attraction of the U.K. as a holding location will increase following the introduction of a broad dividend participation exemption. The expected tightening of the anti-avoidance rules relating to debt have been deferred and relaxed, which is another positive development.

The government's continuing focus on compliance is reflected in a number of new provisions intended to encourage taxpayers to maintain good records, file returns on time and pay the right amount of tax. The consequences of non-compliance will, in the future, result in higher penalties and the risk of public disclosure in the event of default. In an unexpected announcement, there will be an annual requirement for senior accounting officers to certify the adequacy of accounting systems for the purposes of preparing tax returns. This requirement introduces the risk of financial penalties for both the company and the individuals.

The key revenue raising measures announced relate to an increase in the top rate of personal income tax from 40% to 50%and the increase in the headline rate of VAT from 15% back to 17.5%.

China

Dividend withholding tax – enjoyment of tax treaty benefits is not automatic and far from guaranteed

The tax landscape in China (PRC) has changed significantly since the Enterprise Income Tax Law came into effect on 1 January 2008. It is probably not an overstatement to say that the PRC is transforming itself from a form-based to a substance-based tax jurisdiction, especially in the tax anti-avoidance arena, where the PRC tax authorities are becoming more aggressive in cracking down on arrangements driven by tax avoidance motives. The support for that view includes two recently reported tax cases, one involving the Chongqing Municipal Taxation Bureau and the other the Xinjiang Uygur Autonomous Region tax authorities, in which the PRC tax authorities either disregarded the offshore transaction or denied tax treaty benefits to an offshore investment holding special purpose vehicle that they found to lack economic substance and a genuine/legitimate business purpose.

On 20 February 2009, the tax authorities added a new dimension to their pursuit to curtail tax treaty abuse when the State Administration of Taxation issued Notice 81, setting out policy relating to the implementation of the dividends article in China's tax treaties. Notice 81 follows the January 2009 Implementation Regulations for Special Tax Adjustments (Provisional) that detail the rules on administering the general anti-avoidance provisions (introduced into PRC tax law for the first time in the 2008 EIT Law).

Notice 81, taken together with recent tax cases and regulations, signals a new era in the PRC tax regime that will have far reaching ramifications for offshore SPVs holding investments in China that seek to claim tax treaty benefits.

European Union

Germany referred to European Court of Justice over discriminatory tax treatment of outbound dividends

The European Commission announced on 19 March 2009 in a press release that it has decided to refer Germany to the European Court of Justice with respect to the domestic tax provisions governing withholding tax on dividends paid to foreign corporate shareholders.

Under German tax rules, dividends paid by German corporations are generally subject to a 26.375% statutory withholding tax, regardless of whether the dividends are paid to a domestic or foreign shareholder. A German corporation receiving dividends can credit the withholding tax against its own corporate income tax liability, even though the dividends are effectively 95% tax exempt, and the credit may result in a refund if the withholding tax levied exceeds the total corporate income tax due. Except for cases where the EC Parent-Subsidiary Directive applies, the withholding tax (which may be reduced under a tax treaty) on dividends paid to non-resident shareholders will result in a final tax liability unless the shareholder's home country effectively provides for a credit for German withholding tax. The Commission views this different treatment as an infringement of the free movement of capital provision in the EC treaty and the EEA agreement.

The infringement proceedings should mainly have relevance for dividends paid to EU and EEA resident corporate portfolio shareholders, but also may be relevant in other cases where a refund of withholding tax under a tax treaty or the EC Parent- Subsidiary Directive is not available, e.g. certain types of deemed dividends triggered in reorganization transactions, distributions of liquidation proceeds or distributions on certain types of hybrid instruments that qualify as equity for German tax purposes. It may also have relevance for cases where a refund of withholding tax is not granted under the anti-treaty shopping rule because the strict substance requirements are not met, but the case does not qualify as abuse from an EC law perspective (i.e. it does not constitute a "wholly artificial arrangement" under European Court of Justice case law). This may be the case if the shareholder has some substance and a business purpose but fails the additional requirement that 10% of its gross earnings are derived from its own business activities.

EU and EEA (except Liechtenstein) resident shareholders potentially affected by the infringement proceeding should file claims for a refund of withholding taxes. Given the currently unclear procedural situation, claims should be filed as soon as possible with both the Federal Tax Office and the local tax offices competent for the distributing entities. Liechtenstein and third-country resident taxpayers should decide whether to file withholding tax claims on a case-by-case basis.

Italy

Guidance issued on new procedure to obtain tax avoidance ruling

The Italian tax authorities issued instructions on 24 February 2009 clarifying the procedure to obtain a "tax avoidance ruling" (Circular No. 5/E). The procedure primarily relates to the steps a taxpayer must take to obtain a ruling on a potentially abusive transaction. Guidance was necessary because the consulting committee, whose main duty previously was to give an opinion on taxpayer requests, was abolished in 2006.

Canada

Appeal Court upholds decision on beneficial ownership of dividends

In its decision released on 26 February 2009, the Federal Court of Appeal unanimously upheld the Tax Court of Canada's earlier decision in the Prévost Car case.

In dismissing the Crown's appeal, the FCA affirmed that a Dutch company (Dutch Co) was not acting as a mere conduit in favor of its Swedish and U.K. resident shareholders with respect to dividends from its Canadian subsidiary. This is the first appeal court decision to address the interpretation of the term "beneficial ownership" for purposes of Canada's tax treaties.

U.S,

U.S. Government delivers details – and surprises – in expanded FY 2010 budget package

More than two months after releasing its FY 2010 budget blueprint and a week after unveiling a set of provisions to reform the international tax rules, the Obama administration on 11 May 2009 provided a comprehensive description of its tax proposals for the coming fiscal year. This latest budget document describes more than 40 new provisions ranging from additional penalties or information reporting to dramatic new tax increases on businesses and estate tax reforms.

Overall, the new details reinforce the fundamental structure of the administration's prior statements on taxation – tax cuts for working families, tax increases for businesses and upper income individuals, reform of international tax rules and closing of perceived corporate loopholes. The expanded budget package clarifies many of the provisions in the laundry list of proposals included in the budget outline released in February. In some cases, however, it elaborates on these provisions in unexpected ways. The proposal to treat income from carried interests as ordinary income, for example, has been expanded to all service partnerships, not just asset management partnerships.

The detailed budget package also proposes to make a down payment on health care reform – one of President Obama's top legislative priorities for this year – through a nearly USD 326 billion "health reform reserve fund" of corporate and individual revenue raisers.

Additionally, several new international reform proposals were debuted in the 11 May release. These include provisions to limit earnings stripping by expatriated entities, prevent repatriation of earnings in certain cross-border reorganizations, repeal the 80/20 company rules and repeal the dual-capacity rules.

Glossary of Terms

AAR	–	Authority for Advance Ruling
ACES	–	Central Excise and Service Tax
AE	–	Associated Enterprise
AO	–	Assessing Officer
AOP	–	Associations of Persons
CBDT	–	Central Board of Direct Taxes
CBEC	–	Central Board for Excise and Customs
CENVAT	–	Central Value Added Tax
CEA	–	Central Excise Act, 1944
CIT	–	Commissioner of Income-tax
CIT(A)	–	Commissioner of Income-tax (Appeals)
CPC	–	Centralized Processing Centre
CST	–	Central Sales Tax
CTA	–	Customs Tariff Act, 1975
CUP	–	Comparable Uncontrolled Price
CVD	–	Countervailing Duty under section 3(1) of the Customs Tariff Act
DEPB	–	Duty Entitlement Passbook Scheme
DGFT	–	Director General of Foreign Trade
DTA	–	Domestic Tariff Area
ED	–	Excise Duty
EHTP	–	Electronic Hardware Technology Park
EOU	–	Export Oriented Unit
FBT	–	Fringe Benefit Tax
FIRC	–	Foreign Inward Remittance Certificate
FTP	–	Foreign Trade Policy
HBP	–	Handbook of Procedures
HC	–	High Court
HSD	–	High Speed Diesel
HUF	–	Hindu Undivided Family
ITA	–	Income-tax Act, 1961
ITAT	–	Income Tax Appellate Tribunal
ITD	–	Income Tax Department
JV	–	Joint Venture
Lease Tax Act	–	Maharashtra Sales Tax on Transfer of Right to use any Goods for any Purpose Act, 1985
LO	–	Liaison Office
LTC	–	Leave Travel Concession
MAT	–	Minimum Alternative Tax
MRP	–	Maximum Retail Price
MS	–	Motor Spirit

NRI	–	Non Resident Indian
NCCD	–	National Calamity Contingency Duty
NSDL	–	National Securities Depository Limited
PAN	–	Permanent Account Number
PE	–	Permanent Establishment
RBI	–	Reserve Bank of India
RSP	–	Retail Sale Price
SB	–	Special Bench
SC	–	Supreme Court
SEZ	–	Special Economic Zone
ST	–	Service Tax
STP	–	Software Technology Park
TAN	–	Tax Deduction and Collection Account Number
TCS	–	Tax Collected at Source
TDS	–	Tax Deducted at Source
TNMM	–	Transactional Net Margin Method
TP	–	Transfer Pricing
TPO	–	Transfer Pricing Officer
TPR	–	Transfer Pricing Regulations
UTN	–	Unique Transaction Number
VAT	–	Value Added Tax

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