

Tax & Corporate News Bulletin

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From the Editor's Desk...

Dear Reader,

On 10th November 2009, the Empowered Committee of State Finance Ministers released the first discussion paper on the Goods and Service Tax (GST) in India inviting interaction with the representatives of industry, trade and all concerned. After the introduction of Value Added Tax (VAT) across the country, the introduction of GST, the next logical step, is being viewed a significant breakthrough towards a comprehensive indirect tax reform in India.

The discussion paper lays down the proposed framework of GST in India and the steps being taken for its successful implementation. A dual GST structure with defined functions and responsibilities of the Centre and the States is recommended. One of the important objectives in introducing the GST is to reduce the multiplicity of taxes at the Central and State level and thereby allowing an uninterrupted chain of credits.

An appropriate mechanism that will be binding on both the Centre and the States would be worked out whereby the harmonious rate structure along with the need for further modification could be upheld, if necessary with a collectively agreed Constitutional amendment. The discussion paper also contains Frequently Asked Questions and Answers on GST, for discussions with industry, trade, agriculture and people at large.

The discussion paper has left several unanswered questions viz., rate of GST, number of items that will be exempt from the tax, functioning mechanism between the Centre and the States, etc. This indicates that several aspects of GST are still a matter of debate and haven't reached finality. Besides, there exist some differences among the States. In this backdrop, the target of April 2010 that was set three years back for the introduction of GST appears to be over optimistic.

At this juncture, it is important that no hasty decisions are taken with respect to the implementation of the GST. Such radical initiatives call for a complete transformation of the mindsets. No doubt, once implemented, this would be regarded as one of the most significant revolutionary changes in the indirect taxation system of the largest democracy of the world.

Yours truly,

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INCOME TAX

Karnataka High Court decision on tax withholding from payments to non-residents

The Karnataka High Court in a recent judgment in *CIT v. Samsung Electronics & Ors. (ITA Nos.2808 to 2810 of 2005 and others)*, which has far reaching consequences, held that the Indian payer of income to a non-resident cannot on its own determine that the payment made by it to the non-



resident is not taxable and not deduct tax on that basis. It further held that the Indian payer has to approach the assessing officer and obtain certificate under section 195(2) of the Income-tax Act before affecting payment to the non-resident.

The issue in the aforesaid appeals was whether tax was required to be withheld from payments made by various payers in India to foreign suppliers of shrink wrapped software. No tax was withheld in respect of such payments on the ground that the payment did not constitute royalty either under the applicable Tax Treaty or the Income-tax Act, 1961 ('the Act') and hence was not chargeable to tax in India.

The tax authorities contended that payments made by the Indian payers was in the nature of license fee and, hence, taxable as royalty under the Act as also the respective Tax Treaties and tax was required to be deducted therefrom.

Relying on the Supreme Court decision in *Transmission Corporation of AP Ltd. v. CIT: 239 ITR 587*, it was contended by the Revenue that the Indian payers cannot themselves determine that no income arises to the foreign recipients under the provisions of the Act and in absence of certificate under section 195(2) of the Act, the Indian payers were liable to deduct tax on the payments made to non-residents.

The Indian payers contended that payments were made for the purchase of a copy righted article and were not made for the copyright in the computer software itself and the same cannot be classified as royalty under the Act or the applicable tax Treaties.

The Indian payers relying on the decision of the Supreme Court in the case of *TCS v. State of Andhra Pradesh: 271 ITR 401*, contended that payments made for the purchase of computer software were for purchase of goods and such payments would constitute business income in the hands of the foreign recipient, which were not taxable in absence of permanent establishment in India of the foreign recipients.

The Indian payers contended that for the purpose of withholding tax on payments made to non-residents, it needs to be first determined whether such payments are chargeable to tax under the Act and as the payments were not made in India and were not chargeable to tax, no tax was required to be withheld from the same.

The High Court held that in light of the decision of the Supreme Court in the case of *Transmission Corporation (supra)*, payments made to non-residents are subject to withholding tax unless the assessee obtains an order from the tax authority for a lower or a nil withholding tax rate under section 195(2) and the payer of income cannot on his own determine that no income arises to the non-resident and not deduct tax on that basis.

As per the Court, the payer can only be relieved of his duty to withhold taxes under section 195 of the Act by going through the procedure envisaged under sub-section (2) thereof upon making an application to the assessing officer. If the resident payer is able to demonstrate before the assessing officer that the entire payment does not bear the character of income and only a part of it is so, it can seek permission to deduct tax only on such proportionate amount.

If an assessee has failed to withhold tax on payment to a non-resident, the tax authorities can initiate proceedings for collection of taxes and interest from the assessee. In such a case, the assessee cannot contend that the payment did not result in any taxable income.

The High Court, however, refrained from answering the question as to whether the amount paid by the Indian companies to the foreign recipients constituted royalty income chargeable to tax in India. The Court held the Indian payer companies did not comply with the provision of the Act relating to tax withholding as

they did not approach the assessing officer for obtaining order under section 195(2) of the Act prior to remitting the payment without deduction of tax at source.

Comments

The aforesaid decision has unsettled the hitherto accepted position that the order from the assessing officer under section 195(2) of the Act is to be obtained only where payer of the income considers a part of the payment as chargeable tax but is not sure what part of the payment is taxable. Where no part of income is chargeable to tax or the whole of the income is chargeable to tax, provision of section 195(2) of the Act will come into play. [Refer *Mahindra & Mahindra: 313 ITR 263 (Special Bench)*]

Further, vide Circular No. 759, dated November 18, 1997, the Central Board of Direct Taxes had laid down the procedure for payments to non-resident on the basis of certificate of Chartered Accountants and undertaking of the remitter and done away with the requirement of obtaining the 'No objection certificate' from the Department before affecting the remittance. The aforesaid procedure for remittance continues to be in place even today and the CBDT vide Circular No.4 dated 29.6.2009, clarified that certificate from the Chartered Accountant and the undertaking from the remitter was to be obtained in Form No.15CA and 15CB of the Income-tax Rules. The aforesaid procedure for remittance was prescribed so that the payer did not have to approach the assessing officer for obtaining no objection certificate from the department in all cases. The aforesaid procedure cannot be said to be inconsistent with the provisions of section 195(2) of the Act. Had it been the requirement of law that the order from the assessing officer is to be obtained under section 195(2) in every case before remitting remittance to a non-resident, the CBDT would not have prescribed the aforesaid procedure. This aspect of the matter was not brought to the notice of the Karnataka High Court.

It is a moot issue whether the procedure for remittance of payments to non-resident based on Chartered Accountant's certificate as prescribed by CBDT can be followed after the decision of the Karnataka High Court.

CENTRAL EXCISE & SERVICE TAX

Assessable value in respect of goods manufactured on Job work - CBEC Clarification



CBEC has clarified that if goods are manufactured on job work basis, value for payment of excise duty to be determined as per Rule 10A of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000.

The Circular clarifies that the assessable value for the purpose of charging central excise duty, in the cases where the job worker transfer the excisable goods to the Depot/ Sale office/ Distributer and/or any other sale point of the principal manufacturer, shall be the transaction value on which goods are sold by the principal manufacturer from such a place.

[Source - CBEC Circular no.902/22/2009-CX., dated October 20, 2009]

Departmental instruction consequent to judgment of the Delhi High Court w.r.t. service tax on 'Renting of Immovable Property'



The Department clarified that it has filed an appeal against the order of the Delhi High Court in the case of *Home Solutions Retail India Ltd and Others v. Union of India*, and pending the decision of the higher authorities, it has instructed the service tax formations throughout the country to take necessary action to safeguard revenue by either pursuing the tax payer

to pay up the service tax due or resort to means under law to protect the revenue.

[Source – Instruction F. No. 336/10/2009 – TRU dated July 15, 2009 made available to the public on October 28, 2009]

No service tax on construction of canals by Government agencies



The canal system built by the Government or under Government projects not falling under commercial activity will not be chargeable to service tax. Construction activity of dams, buildings or

infrastructure construction etc. through EPC (Engineering Procurement & Construction) mode is covered under works contract service. However, this service itself excludes works contract in respect of dams, road, airports, railways, transport terminals, bridges & tunnels executed through EPC mode. Hence works contract in respect of above works even if done through EPC mode are exempt from payment of service tax

[Source - Circular No. 116/10/2009 - ST dated September 15, 2009]

FEMA/RBI

Remittance of salaries by expats to their foreign currency accounts abroad

Expats can now remit their entire salary to their foreign currency account maintained with a bank outside India subject to the payment/deduction of applicable tax(es) under the Income-tax



Act, 1961. Prior to this amendment, expats were allowed to remit only 75% of their salary to such foreign currency account maintained with a bank outside India.

[Source - Notification No. FEMA 199/2009-RB dated September 30, 2009]

Relaxations in RBI Branch Authorisation Policy

- ✧ The Reserve Bank of India (RBI) has permitted domestic scheduled commercial banks (other than RRBs) to open branches in Tier 3 to Tier 6 centres (with population up to 49,999 as per Census 2001) without permission from the RBI in each case, subject to reporting.



- ✧ The RBI has also permitted the domestic scheduled commercial banks (other than RRBs) to open branches in rural, semi-urban and urban centres in North Eastern States and Sikkim without permission from the RBI in

each case, subject to reporting.

- ✧ Opening of branches by domestic scheduled commercial banks (other than RRBs) in Tier 1 and Tier 2 centres (centres with population of 50,000 and above as per 2001 Census) will continue to require prior permission of the RBI, except in the case of North Eastern States and Sikkim where the general permission would cover semi-urban and urban centres also.
- ✧ Banks are also free to convert their general banking branches into Specialised branches subject to the condition that the bank should continue to serve the existing customers of the general banking branches, which are being converted into specialized branches.
- ✧ Nevertheless, the RBI would have the option to withhold the general permissions now being granted, on a case-to-case basis, taking into account all relevant factors.
- ✧ As regards foreign banks, the existing Branch Authorisation Policy as contained in the Master Circular on Branch Authorisation dated July 1, 2009 would continue to be applicable until review of the roadmap for foreign banks.

For further details, visit www.rbi.org.in

Special Economic Zones

Clarification on calculation of NFE obligation

The Government has clarified that Net Foreign Exchange (NFE) earning obligation, as per Rule 53 of the SEZ Rules 2006, is to be calculated in rupee terms only. In case a unit is NFE negative and claims that it is due to foreign exchange fluctuation, the Approval Committee may consider such cases provided that the unit gets the computations certified by the Authorised Bank, on a case to case, basis.

[Source - Instruction no. 41 dated November 13, 2009 issued by Ministry of Commerce & Industry]

INFORMATION TECHNOLOGY LAW

Information Technology (Amendment) Act, 2008 comes into force

The Information Technology (Amendment) Act 2008, which aims at tightening procedures and safeguards for monitoring and interception of data to prevent cyber crimes, came into force on October 27, 2009. The Amendment Act also provides for appointment of the Indian Computer Emergency Response Team which would deal with and respond to computer security incidents.



Among others, the Rules pertaining to procedure and safeguards for interception, monitoring and decryption of information, procedure and safeguards for blocking for access of information by public, procedure and safeguard for monitoring and collecting traffic data or information have also been notified.

[Source – Press Release dated October 27, 2009 issued by the Ministry Communications & Information Technology]

SEBI & CORPORATE LAWS

Applicability of delisting guidelines – Transitional provisions

SEBI has been receiving queries from various market participants, listed companies etc regarding the 'transitional provisions' contained in Regulation 31 of the SEBI (Delisting of Equity Shares) Regulations, 2009 (“**Delisting Regulations**”). In this regard, SEBI has clarified vide Circular dated September 14, 2009 that in cases where a special resolution has already been passed under the SEBI (Delisting of Securities) Guidelines, 2003 (“**Delisting Guidelines**”) prior to commencement of the Delisting Regulations, the delisting process shall be governed by the provisions of the Delisting Guidelines, provided the said resolution is acted upon within a period of three months from the date of the circular issued by SEBI. Otherwise, the company would be required to pass a fresh special resolution in terms of Delisting Regulations and proceed for delisting in terms of the Delisting Regulations. For this



purpose, the words “acted upon” means that the implementation of activities including opening of the book building process for determination of the exit price in terms of Clause 8.1 of the Delisting Guidelines should be done within three months from the date of the Circular.

[Source - Circular No. SEBI/CFD/DCR/DL/01/2009/14/09 dated September 14, 2009]

MCA substitutes certain E-Forms



The Central Government has amended some of the forms pursuant to the Companies (Central Government's) General Rules and Forms (Fourth Amendment) Rules, 2009, which seeks to

substitute the following forms:

- Form I – Application and declaration for incorporation of a company
- Form 5 – Notice of consolidation, division etc. or increase in share capital or increase in number of members
- Form 44 – Documents delivered for registration by a foreign company
- Form 67 – Form for filing addendum for rectification of defects or incompleteness

The Central Government has issued the Companies (Central Government's) General Rules and Forms (Fifth Amendment) Rules, 2009, which seeks to substitute the following forms:

- Form 24B – Form of application to the Central Government for obtaining prior consent for holding of any office or place of profit in the company by certain persons.
- Form 25A – Form of application to the Central Government for approval of appointment or reappointment and remuneration or increase in remuneration or waiver for excess or over payment to managing or whole-time director or manager and commission or remuneration or expression of opinion to directors.

[Source - Notification No. G.S.R. 649 (E) dated September 8, 2009]

Filing of offer document with SEBI

As per SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009, an issuer making a public issue or rights issue (where the aggregate value of specified securities offered is INR 5,000,000 or more) is required, inter alia, to file a draft



offer document or an offer document, with SEBI at various points of time. Merchant bankers have been advised to file the draft offer documents or offer documents with a particular office of SEBI based on the estimated issue size.

[Source - Circular No. SEBI/CFD/ICDRR/2/2009/29/09 dated September 29, 2009]

Trading hours of the Stock Exchanges

In consultation with the Stock Exchanges and other market participants, it has been decided to permit the Stock Exchanges to set their trading hours (in the cash and derivatives segments) subject to the condition that the trading hours are between 9 AM and 5 PM, and the Stock Exchange has in place risk management system and infrastructure commensurate to the trading hours.



[Source - Circular No. SEBI/DNPD/Cir-47/2009 dated October 23, 2009]

VAISH ACCOLADES

Conferences/ Seminars addressed by Partners/ Associates (Alphabetically)

- ✧ **Ajay Vohra** and **Rupesh Jain** made a presentation on the topic “Direct Tax Code-Corporate Tax Issues” in the ASSOCHAM Conference on New Direct Tax Code held on 13th October 2009 at New Delhi.
- ✧ **Hitender Mehta** addressed at Rajasthan State CS Students Conference held on November 2, 2009 at Jaipur on the topic of “Emerging professional avenues for CS professionals under the Companies Bill 2009, SEZ Act, LLP Act, etc.”

- ✧ **Sandhya Iyer** made a presentation on “Stressed Assets – Legal Aspects” at an in-house training program conducted by CRISIL Ltd. for Tata Capital Ltd on October 28, 2009 at Mumbai.

Newspaper / Law Journal Publications (Alphabetically)

BNA International’s “Tax Planning International Review” carries article titled “The GAAR Dimension of Anti-Avoidance: Possibilities in India” by Dhruv Sanghvi

- ✧ Article titled “The GAAR Dimension of Anti-Avoidance: Possibilities in India” written by Dhruv Sanghvi was published in BNA International’s “Tax Planning International Review”, a UK based publication in August 2009 issue.

Economic Times carries a story titled “No Fair Play in Pharma Industry” by M M Sharma

- ✧ Article titled “No Fair Play in Pharma Industry” authored by M M Sharma, Head –Competition Policy & Law, Vaish Associates was published in the Economic Times on November 3, 2009.

The Hindu Business Line carries a story titled “Paradigm Shift in Tax Avoidance” by Puneeta Kundra

- ✧ Article titled “Paradigm Shift in Tax Avoidance” authored by Puneeta Kundra, Associate (Tax Group) was published in the Business Line on October 19, 2009.

CSR INITIATIVES

Health check up at Tarang



Tarang, a chain of Balwadi's is run by Vaish Associates Public Welfare Trust, at Jaunapur Mehrauli, Delhi. At present the trust is running three Balwadi centres at Pahadi, Jaunpur and Rampat farms in Mehrauli. A health

check up was organized and the children were assessed by Dr. Sanjeev Gupta, Paediatrician in the Month of September and October 2009.

Reproductive and Child Health (RCH) Project

A RCH Project has been started with Lady Irwin College for women and adolescent girls in the community.

IMPORTANT DATES WITH REGULATOR (S)

COMPLIANCE CHECKLIST

December 2009

Sr. No	PARTICULARS	Sections/ Rules Clauses, etc	Acts/Regulations, etc.	Compliance Due Date	To whom to be submitted
A. INCOME TAX					
1	Deposit TDS From Salaries paid for November, 2009	Section 192	Income-tax Act, 1961	December 7, 2009	Income-tax Authorities
2	Deposit TDS from Contractor's Bill, Payment of Commission or Brokerage, Professional/ Technical Services bills/ Royalty made in November, 2009	Section 194C Section 194J	Income-tax Act, 1961	December 7, 2009	Income-tax Authorities
3	Advance tax (up to 75% of advance tax payable, in case of companies)	Section 208	Income-tax Act, 1961	December 15, 2009	Income-tax Authorities
B. CENTRAL EXCISE & SERVICE TAX					
4	Pay Service Tax in Form TR-6, collected during November, 2009 by persons other than individuals, proprietors and partnership firms	Rule 6	Service Tax Rules, 1994	December 5, 2009	Service Tax Authorities
5	Pay Central Excise duty on the goods removed from the factory or the warehouse during November, 2009	Rule 8	Central Excise Rules, 2002	December 5, 2009	Excise Authorities
6	Submission of CENVAT Return for November, 2009	Rule 9(7)	CENVAT Credit Rules, 2004	December 10, 2009	Excise Authorities
C. LABOUR LAWS					
7	Payment of monthly Employees' Provident Fund (EPF) dues	Para 38	EPF Scheme, 1952	December 15, 2009	Provident Fund Authorities
8	Monthly return of Provident Fund for the previous month w.r.t. international workers	Para 36	EPF Scheme, 1952	December 15, 2009	Provident Fund Authorities
9	Monthly return of Provident Fund for the previous month (other than international workers)	Para 38	EPF Scheme, 1952	December 25, 2009	Provident Fund Authorities
10	Remittance of ESI contribution for the previous month (Form S-III cash challans & S-IV cheque challans)	Regulation 31	ESI Act, 1948 read with the ESI (General) Regulations, 1950	December 21, 2009	ESIC Authorities

Hitender Mehta receives Award on behalf of ICSI-NIRC



The Northern India Regional Council (NIRC) of Institute of Company Secretaries of India (ICSI) was awarded the National Best Regional Council for the year 2008 under the Chairmanship of

Hitender Mehta. He received the Award from Mr. Salman Khurshid, Hon'ble Minister of State (I/C) for Corporate Affairs at the 37th National Convention of Company Secretaries held at Hyderabad from November 5-7, 2009.

Ajay Vohra elected as Chairman, IFA-India Branch



Ajay Vohra, Managing Partner, Vaish Associates has been unanimously elected as Chairman of International Fiscal Association (IFA) – India Branch for a period of two years (2009-11).



Disclaimer:

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