Tax & Corporate News Bulletin

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INCOME TAX

Logistics and transportation services are not 'technical' services

The Mumbai Tribunal, in case of *M/s. UPS SCS (Asia) Limited v. ADIT [ITA No. 2426/Mum/2010],* ruled that services relating to logistics and transportation could not be considered as 'technical services' for the purposes of Section 9(1)(vii) of the Income Tax Act, 1961 ('the Act').

The taxpayer, a Hong Kong based company, was engaged in the business of provision of supply chain management, including the provision of freight forwarding and logistics services. The taxpayers entered into "Regional Transportation Services Agreement" (the 'Agreement') with an Indian company ('ICo'), wherein the parties agreed to provide freight and logistics services to each other. For this purpose, the consignments were categorized as import and export consignments. In case of import consignments, which involved import of goods into India, ICo undertook the responsibility for local delivery in India, which involved local pick up, loading unloading and delivery to final destination. Similarly, the taxpayer undertook similar logistics responsibilities outside India, in respect of export consignments. Thus, the entire activity in case of the taxpayer was carried out outside India. The taxpayer received consideration for rendering such services from ICo, and claimed the same to be not taxable in India. The issue before the Tribunal was whether such consideration received by the taxpayer could be taxed in India as 'fee for technical services' under Section 9(1)(vii) of the Income Tax Act, 1961 ('the Act').

The Tribunal, holding that the impugned payment did not fall within the description of 'fee for technical services' since the services were not managerial, technical, or consultancy in nature, observed as follows:

- Managerial services mean managing the affairs by laying down certain policies, standards and procedures and then evaluating the actual performance in the light of the procedures so laid down. The managerial services contemplate not only execution but also the planning part of the activity to be done. If the overall planning aspect is missing and one has to follow a direction from the other for executing particular job in a particular manner, it cannot be said that the former is managing that affair. In the instant case, the role of the assessee in the entire

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transaction was to perform only the destination services outside India by unloading and loading of consignment, custom clearance and transportation to the ultimate customer and such services could not be said to be 'managerial' services.

- The word 'consultancy' means giving some sort of consultation de hors the performance or execution of any work. It is only when some consideration is given for rendering advice or opinion that the same falls within the scope of consultancy services. In the instant case, no consultancy/ advice was being provided by the taxpayer.
- The principle of *noscitur a sociis* mandates that the meaning of a word is to be judged by the company of other words which it keeps. Since the term 'technical' is not defined in the Act and it occurs between the words 'managerial' and 'consultancy', its meaning has to be inferred from the overall meaning of the words 'managerial' and 'consultancy'. 'Managerial' and 'Consultancy' services pre-suppose some sort of direct involvement of man. Where simply equipment or a standard facility albeit developed or manufactured with use of technology is used, such a user cannot be characterized as using technical services. Payment for freight forwarding and logistics could not be considered as fee for 'technical services'.

Comments: The Tribunal, while holding that payment logistics/ transportation services do not fall within the ambit of 'fee for technical services' under Section 9(1)(vii) of the Act, has made some important observations as regards the meaning and scope of the terms 'managerial' and 'consultancy' services, which may be useful for determining the scope of the said terms by taxpayers.

Export commission paid to a non-resident is taxable in India

The Authority for Advance Rulings, incase of *SKF Boiler and Driers Pvt. Ltd.: [A.A.R. No. 983 of 2010]* has ruled that export commission payable to a non-resident outside India would be income deemed to accrue or arise in India.

The taxpayer, an Indian company, engaged in the manufacture and supply of Rice Par Boiling and Dryer Plants, received an order from a client in Pakistan. The order was received through two agents from Pakistan. On completion of export order, i.e., after shipment of equipment to the customer, commission became payable to the agents as per the agreed terms. The issue before the AAR was whether the commission paid to non-residents was taxable in India.

The AAR, relying on its earlier ruling in case of *Rajive Malhotra: 284 ITR 564 (AAR),* held that income on account of export commission would be deemed to accrue and arise in India under Section 9(1)(i) of the Act for the reason that the right to receive the commission arose in India on execution of the order by the taxpayer in India. The AAR further held that the fact that agents have rendered services abroad in the form of soliciting orders and that commission is to be remitted to them abroad is wholly irrelevant for the purpose of determining the situs of such income.

Accordingly, export commission was held to be taxable in India and hence subject to tax withholding under Section 195 of the Act.

Comments: The AAR, while holding that export commission was income deemed to accrue or arise in India, was guided by the place where the right to receive the payment arose, which is not a relevant test for purpose of Section 9(1)(i) of the Act. For the income to be deemed to accrue or arise in India in terms of Section 9(1)(i) of the Act, the non-resident should carry on some operations in India through ' business connection' or income should arise through a source of income in India. Since the non resident agent did not carry on any activities in India, the question of their having a 'business connection in India did not arise. If the source of income were to be the location of the taxpayer of income, then all payments made by India residents to non-residents would become liable to tax in India.

The taxability of services rendered by the non-resident agents should have been viewed from the prism of Section 9 (1)(vii) and not Section 9(1)(i) of the Act.

Payment for website hosting and related services is not royalty

The Mumbai bench of the Tribunal, in case of *People Interactive (I) Pvt. Ltd [ITA 2180/2009],* held that payment for hosting websites and providing related services does not constitute 'royalty' under Section 9(1)(vi) of the Act.

In the aforesaid case, the taxpayer was owner/ host of website [www.shaadi.com], where individuals could register and exchange the relevant information for matrimonial alliances on payment of subscription fee. The taxpayer entered into an agreement

to avail services of a non-resident company, Rackspace Inc (Rackspace). Under the agreement, broadly, the following services were to be provided to the taxpayer:

- Server management – providing dedicated services for the taxpayer and dedicated support team with account manager
- Bandwidth and connectivity –providing large bandwidth to enable access by users of the website of the taxpayer.
- Security –for data stored on servers

The taxpayer did not withhold tax from the payments made to Rackspace for the above services. The issue was whether the said payment could be said to be payment for use of equipment and thus 'royalty' under Section 9(1)(vi) of the Act.

The Tribunal, while holding that payment was not in the nature of transfer of 'right to use' the equipment, observed that it was evident from the agreement that payments were made for providing web hosting services with backup, security, maintenance and uninterrupted services. The taxpayer did not operate the equipment and did not have physical access to the equipment and the payment could not be considered as for the right to use the equipment so as to be considered as royalty.

Comments: The Tribunal has followed the OECD principles and its earlier decision in case of *Yahoo India Pvt. Ltd [ITA No. 506/Mum/ 2008],* and held that in order for a payment to constitute royalty for use of equipment, the payer must be in physical possession or control of the equipment. This decision reinforces the aforesaid positions and would be welcomed by the taxpayer.

SERVICE TAX

Clarification regarding leviability of service tax on toll fee

Service tax is not leviable on toll paid by the users of roads, including those roads constructed by a Special Purpose Vehicle (SPV) created under an agreement between National Highway Authority of India (NHAI) or a State Authority and the concessionaire (Public Private Partnership Model, Build-Own/ Operate-Transfer arrangement).

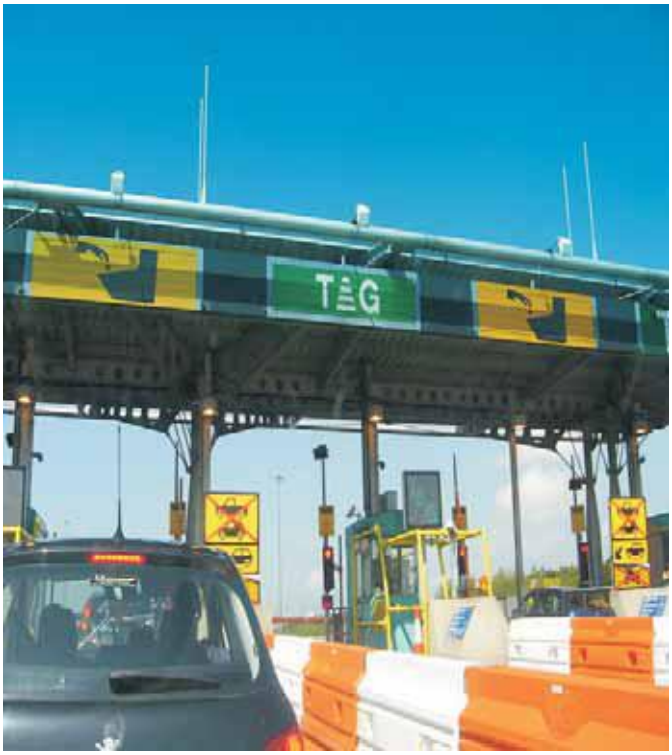
'Tolls' is a matter enumerated (serial number 59) in List-II (State List), in the Seventh Schedule of the Constitution of India and the same is not covered by any of the taxable services at present.

Tolls collected under the PPP model by the SPV is collection on own account and not on behalf of the person who has made the land available for construction of the road.

However, if the SPV engages an independent entity to collect toll from users on its behalf and a part of toll collection is retained by that independent entity as commission or is compensated in any other manner, service tax liability arises on such commission or charges, under the Business Auxiliary Service [Section 65(105) (zzb) read with Section 65(19) of the Finance Act, 1994].

Further, an SPV formed as a result of agreement between NHAI or State Authority and the concessionaire under the BOT arrangement, cannot be considered as an agent of the NHAI. Renting, leasing or licensing of vacant land by the NHAI or State Authority to an SPV for construction of road and such construction do not attract service tax.

(Source: CBEC Circular No. 152/3/2012-ST dated February 22, 2012)



Clarification on Service tax on 'Construction Services'

The CBEC has issued a circular on the applicability of service tax to various models of transaction in construction services.

It clarifies that if a building was not constructed for commercial or industrial purpose but later its use is changed, no service tax is attracted (paragraph 2.4). It also deals with the issues of joint development, re-development, build-operate-transfer models, tripartite agreements, and investment in construction projects.

On the issue of investment, the circular holds that if a person has invested in a construction project with the option of taking a flat, the investment is to be treated as advance paid for construction service and is taxable. If the person exercises his option of exit without taking a flat, and the amount including service tax is returned to him, the builder may take credit of the service tax paid.

(Source: CBEC Circular No. 151/2/2012-ST dated February 10, 2012)

Clarification on meaning of "gross amount" - Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007

The meaning of the expression 'gross amount' appearing in Rule 3(1) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007, is qualified by the Explanation inserted in the said Rule with effect from July 7, 2009. The inclusion of value of free-of-cost supplies of goods and services in or in relation to the execution of Works Contract in the 'gross amount' for the purpose of payment of service tax on works contract under the composition scheme, is a legal requirement, only with effect from July 7, 2009

Where execution of works contract has commenced prior to July 7, 2009 or where any payment (except payment through credit or debit) has been made towards a works contract prior to July 7, 2009, then in those cases 'gross amount' for the purpose of payment of service tax does not include the value of free of cost supplies.

(Source: CBEC Circular No. 150/1/2012-ST dated February 8, 2012)

SEBI & CORPORATE LAWS

Amendments to Format of Disclosures under Clause 41 of the Listing Agreement

Pursuant to the notification of MCA revising the format for disclosure of Balance Sheet under Schedule VI of the Companies Act, 1956, the format of disclosure under clause 41 of the Listing Agreement has been redrawn. The modified format shall be applicable for financial year ended on March 31, 2012 for all filings made after April 16, 2012.

(Source: SEBI Circular no. CIR/CFD/4/2012 dated April 16, 2012)

Exemptions from 100% promoter(s) holding in demat form

This is further to SEBI circulars SEBI/Cir/ISD/3/2011 dated June 17, 2011 and SEBI/Cir/ISD/ 05/2011 dated September 30, 2011 regarding 100% promoter(s) holding in demat form.

In light of these representations and in consultation with Stock Exchanges, it has been decided that following exemptions shall be taken into consideration while arriving at compliance with 100% promoter(s) holding in demat form. Such exemption shall be applicable in cases where:-

a) Promoter(s) have sold their shares in physical mode and such shares have not been lodged for transfer with the company; or

b) Matters concerning part/ entire shareholding of promoters/ promoter group are sub-judice before any Court/ Tribunal; or

c) Shares cannot be converted into demat form due to death of any promoter(s); or

d) Shares allotted to promoter(s) that await final approval for listing from stock exchange and such pendency is less than 30 days or shares that upon receipt of final listing approval from stock exchange are pending conversion to demat and such pendency is less than 15-days.

Further to avail such exemption under Para 3 (a) to (d) above, companies shall approach Stock Exchange(s) along with necessary documentary evidence.

The provisions of SEBI Circular SEBI/Cir/ISD/3/2011 dated June 17, 2011, SEBI/Cir/ISD/05/ 2011 dated September 30, 2011 and this Circular shall come into effect from April 30, 2012.

(Source: SEBI Circular no. SEBI/Cir/ISD/1/2012 dated March 30, 2012)

Director Identification Number (DIN) holders to furnish PAN

In continuation of MCA General Circular nos. 32/2011 dated May 31, 2011; 36/2011 dated October 4, 2011 and 70/2011 dated December 12, 2011 MCA has extended the time for furnishing PAN at the time of filing e-form DIN - 4 by DIN holders and to update their PAN details till April 30, 2012.

(Source: MCA General Circular no. 4/2012 dated March 9, 2012)

Registration of companies or LLPs depending upon their objects

At the time of incorporation of companies or LLPs where one of the objects is to carry on the business of banking, insurance or to practice

the profession of Chartered Accountancy, Cost Accountancy & Company Secretaries or to carry on the business/ profession of architecture then the concerned Registrar of Companies or Registrar of LLP, as the case may be, shall incorporate the same only on production of in-principle approval/ NOC from the concerned regulator/ professional institutes.

(Source: MCA General Circular no. 2/2012 dated March 1, 2012)

Guidelines for Credit Rating Agencies

According to SEBI (Credit Rating Agencies) Regulations, 1996 ("Regulations"), a credit rating agency (CRA) has been defined as a body corporate which is engaged in the business of rating of securities offered by way of public or rights issues. The term "securities" has been defined in Clause (h) of Section 2 of the Securities Contracts (Regulation) Act, 1956.

It has been observed that the CRAs registered with SEBI also carry out rating of other securities / instruments and loans/ facilities provided by banks which are not regulated by SEBI and such ratings are being used by the other regulators or their regulated entities for the specified purposes.

In order to bring such ratings under the governance of the stringent norms as applicable for rating of securities issued by way of public and rights issues in addition to the review/ accreditation process put in place by these other regulators, if any, SEBI has now decided, that for the above mentioned ratings, CRAs shall follow the applicable requirements pertaining to rating process and methodology and its records, transparency and disclosures, avoidance of conflict of interest, code of conduct, etc, as prescribed in the Regulations and Circulars issued by SEBI from time to time. The half-yearly internal audit for the CRAs as prescribed by SEBI shall also cover the above mentioned ratings.

(Source: SEBI Circular no. CIR/MIRSD/3/2012 dated March 1, 2012)

Amendment to SEBI (Portfolio Managers) Regulations, 1993

SEBI has increased the level of minimum investment amount per client, from ₹ 5 lakhs to ₹ 25 lakhs, for new clients and for fresh investments by existing clients. However, existing investments of clients, as on date of notification of amendment may continue as such till maturity of the investment.

Further, in addition to segregating each client's holding in listed securities in separate accounts, portfolio managers would now also be required to segregate each client's holding in unlisted securities in separate accounts, in respect of investment by new clients and fresh investments by existing clients. However, existing investments in unlisted securities of clients, as on date of notification of the amendment, may be held in a pooled manner till their maturity.

Further, the disclosure document instead of being signed by all the directors of the portfolio manager, may now be signed by at least two directors of the portfolio manager.

(Source: SEBI Circular no. LAD-NRO/GN/2011-12/37/3689 dated February 10, 2012)

Requirement of filing the cause of cessation from Directorship

In order to avoid the filing of conflicting returns with regard to appointment or change of Director(s) a company is required to mandatorily file the attachment relating to cause of cessation along with e-Form 32 with the ROC concerned irrespective of the ground of cessation.

Any Director, who is aggrieved with his cessation in the company, may file complaint in the Investor Complaint Form. On receipt of complaint, the concerned Registrar of Companies will examine the complaint and mark the company as having 'management dispute' and will issue a letter to the company and the parties to settle the matter amicably or get an order/interim order from a Court or Tribunal of competent jurisdiction. Till such dispute is settled, the documents filed by the company and by the contesting Director(s) will not be approved/ registered/ recorded and will thus not be available in the registry for public viewing.

(Source: MCA General Circular no. 1/2012 dated February 10, 2012)

Amendments to SEBI (Buy-back of securities) Regulations, 1998

SEBI has made it mandatory for listed companies proposing to buy-back securities through tender offer method, to reserve, 15% of the number of securities proposed to be bought-back or number of securities entitled as per their shareholding, whichever is higher, for small shareholders. Small shareholders have been defined to mean *"a shareholder of a listed company, who holds shares or other specified securities whose market value, on the basis of closing price of shares or other specified securities, on the recognized stock exchange in which*

highest trading volume in respect of such security, as on the record date, is not more than two lakh rupee".

Further, such companies, instead of specifying a date in the public announcement for the purpose of determining the entitlement and names of the security holders to whom the letter of offer shall be sent, shall be required to fix a record date as per the practice followed for other actions as per listing agreement.

The time lines for various activities involved in buy-back have been revised, which would considerably reduce the time taken for completion of buy-back. The offer period has been reduced from 15-30 days to 10 working days. The time limit for filing draft letter of offer with SEBI, after the public announcement, has been reduced from 7 working days to 5 working days.

In addition to the abovementioned changes SEBI has revised the format of standard letter of offer, in respect of buy-back of securities, issued *vide* SEBI Circular (MIRSD/DPS-2/MB/Cir-02/8859/04) dated May 7, 2004.

(Source: SEBI Circular no. LAD-NRO/GN/2011-12/36/3187 dated February 7, 2012 and CIR/CFD/DCR/ 2 /2012 dated February 9, 2012)

Amendments to Equity Listing Agreement

SEBI has made the following amendments to Clause 40A, 43 and 43A of the Equity Listing Agreement:

1. Amendment to Clause 40A

A listed Company may now achieve the minimum level of public shareholding through the following methods, in addition to the existing methods that can be adopted to achieve minimum public shareholding.

- Institutional Placement Programme (IPP) in terms of Chapter VIII-A of SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009; or
- Offer for sale of shares by promoters through stock exchanges in terms of SEBI Circular CIR/MRD/DP/05/2012 dated February 1, 2012.

2. Amendment to Clause 43 & 43A

Further, listed entities have been mandated to disclose utilization of funds raised upon conversion/ exercise of warrants issued along with public or rights issue of specified securities in order to enhance disclosure requirements.

(Source: SEBI Circular no. CIR/CFD/DIL/1/2012 dated February 8, 2012)

Offer for sale of shares by promoters

In order to facilitate promoters to dilute/ offload their holding in listed companies in a transparent manner with wider participation, SEBI has laid down the guidelines to allow the offer for sale of shares by promoters of such companies through a separate window provided by the stock exchange(s).

This mechanism may be used by:

i) All promoter(s)/ promoter group entities of such companies that are eligible for trading and are required to increase public shareholding to meet the minimum public shareholding requirements in terms Rule 19(2)(b) and 19A of Securities Contracts (Regulation) Rules, 1957 (SCRR), read with Clause 40A(ii)(c) of Listing Agreement.

ii) All promoter(s)/ promoter group entities of top 100 companies based on average market capitalization of the last completed quarter.

For (i) and (ii) above, the promoter/ promoter group entities should not have purchased and/ or sold the shares of the company in the 12 weeks period prior to the offer and they should undertake not to

purchase and/ or sell shares of the company in the 12 weeks period after the offer.

The size of the offer shall be at least 1% of the paid-up capital of the company, subject to a minimum of ₹ 25 crore. However, in respect of companies, where 1% of the paid-up capital at closing price on the specified date (the last trading day of the last completed quarter) is less than ₹ 25 crore, dilution would be at least 10% of the paid-up capital or such lesser percentage so as to achieve minimum public shareholding in a single tranche.

Subject to allocation methodology, minimum of 25% of the shares offered shall be reserved for mutual funds and insurance companies. However, any unsubscribed portion thereof shall be available to other bidders. Apart from mutual funds and insurance companies, no single bidder shall be allocated more than 25% of the size of offer for sale.

The offer for sale may be withdrawn prior to its proposed opening. In such a case there will be a cooling off period of 10 trading days from the date of withdrawal before an offer is made once again.

Cancellation of offer is not permitted during the bidding period. If the seller(s) fails to get sufficient demand at or above the floor price, he may choose to either conclude the offer or cancel it in full.

(Source: SEBI Circular no. CIR/MRD/DP/ 05/2012 dated February 1, 2012)

COMPLIANCE CHECKLIST

April 2012

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 April, 2012	Section 192	Income Tax Act, 1961	May 7, 2012	Income Tax Authorities
2	Deposit TDS from Contractors Bill, Payment of Commission or Brokerage, Professional/ Technical Services Bills/ Royalty made in April, 2012.	Section 194-H Section 194-I Section 194-C Section 194-J	Income Tax Act, 1961	May 7, 2012	Income Tax Authorities
3	Issue certificate in prescribed form for TDS during financial year ending March 31, 2012.	Section 203	Income Tax Act, 1961	May 31, 2012 (Salaries)	The person to whose account such credit is given or to whom such payment is made or cheque or warrant is issued
B.	**CENTRAL EXCISE & SERVICE TAX**				
4	Pay Service Tax in Form TR-6, collected during April, 2012 (by persons other than individuals, proprietors and partnership firms).	Rule 6	Service Tax Rules, 1994	May 5, 2012 (May 6, 2012 in case of e-payments)	Service Tax Authorities
5	Submission of CENVAT Return for April, 2012	Rule 9(7)	CENVAT Credit Rules, 2004	May 10, 2012	Excise Authorities
C.	**SEBI & CORPORATE LAWS**				
6	Submission of annual audited financial results alongwith the results for the quarter ended March 31, 2012	Clause 41	Listing Agreement	Within 60 days from end of fourth quarter	Stock Exchange
7	Submission of limited review report (in case of unaudited financial results) for the quarter ended March 31, 2012.	Clause 41	Listing Agreement	Within 45 days from end of the quarter	Stock Exchange
D.	**LABOUR LAWS**				
8	Payment of monthly Employees' Provident Fund (EPF) dues.	Para 38	EPF Scheme, 1952	Within 15 days from close of every month	Provident Fund Authorities
9	Monthly return of Provident Fund for the previous month w.r.t. international workers.	Para 36	EPF Scheme, 1952	Within 15 days from close of every month	Provident Fund Authorities
10	Monthly return of Provident Fund for the previous month (other than international workers)	Para 38	EPF Scheme, 1952	Within 25 days from close of every month	Provident Fund Authorities

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