

RNM ALERT

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Thinking of the Bottom Line – Think of Us

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U.N. Marwah

Dear Readers,

As we bid adieu to another muted winter season, it may be a time to reflect on the impact of global climate change on our environment. For the sake of our future generations we must do our bit to reduce wastage of water, paper and electricity which each of us can achieve by being more conscious users in our own offices, factories and homes.

The Indian Union Interim General Budget for 2009-10 shall be presented on the floor of the Parliament on February 16, 2009 since the general elections are expected in April –May 2009 and convention is that only a poll winner can present a full budget in an election year. However, it is expected that some changes in the tax structure may be introduced therein and thereafter a fresh round of rate cuts may also be due from the RBI.

Inspite of the global slowdown, net direct tax collections of the Government during first ten months of the present fiscal (up to January 2009) stood at Rs.2,473.96 billion, up from Rs.2,185.38 billion, registering a growth of 13.21%. Growth in Corporate Taxes was 17.32% (Rs.1,570.39 billion as against Rs.1,338.51 billion), while Personal Income Tax (including FBT, STT and BCTT) grew at 6.71% (Rs.900.10 billion as against Rs.843.49 billion). However, it is unlikely that the Budget Estimates Direct tax target of Rs.3,650.00 billion shall be achieved this fiscal, with negative growth being clocked in the months of November and December 2008 as compared to the same period in 2007.

I would like to draw the attention of the readers to the burning issue of International Financial Reporting Standards (IFRS) implementation under Indian GAAP, to all listed and other public interest entities such as banks, insurance companies and large sized organizations, from the accounting period commencing on or after 1st April 2011. There are now more than 100 countries across the world where IFRS is either required or permitted, including EU countries and USA. With the SEC in US passing a ruling to allow the use of IFRS without reconciliation to US GAAP in the financial reports filed by foreign private issuers, convergence of international accounting under a single framework of IFRS is truly commenced. The implementation of IFRS in India will lead to some major benefits and throw up some challenges also. A detailed impact assessment between Indian GAAP and IFRS accounting policies is required to be done by all organizations, since the extraordinary impact on the financial reporting and the organization and its processes to brought about in less than two years requires proactive planning and steps today.

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On behalf of the **RNM Alert** Editorial Team

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DIRECT TAX



was set up and same is revenue nature. No assets as such was acquired from which enduring benefit could be availed of, infact it was on account of development expenses which was rightly been allowed as deduction by the CIT(A) as upheld by Tribunal. *CIT v, Vardhman Spinning & General Mills [2009] 176 Taxman 157 (P & H)*

Survey

Sustainability of addition made under section 69 of IT Act solely on basis of statement given on oath during survey

Section 133A does not compel an assessee to give statement on oath; if the survey officials have recorded the statement on oath, it is an excessive exercise of power; an addition under section 69 is possible provided the assessee has made investments which are not recorded in the books of account, if any maintained and the assessee offers no explanation about the nature and source of investment; however, when the assessee denies the fact of having made any investment and there is no other material except the statement of assessee that any

➤ Case Law

Business Expenditure

Pre-operative expense of failed project to be expensed

The assessee company had incurred certain expenses for exploring possibility of setting up a paper project which didn't materialize, no assets of a permanent nature with an enduring benefit had been

acquired. In respect of said expenditure was to be allowed treating it as revenue expenditure. The expense was disallowed by AO with the observation that same should not be revenue in nature and was acquired to be

capitalized. Learned counsel of revenue submitted that the expense in question deserve to be disallowed for simple reason that the same couldn't be claimed as revenue expenditure because it was on account of preoperative expenses which should have been capitalize against plant set up where as learned counsel for the assessee pointed out that the expense strictly in furtherance to the object for which the company

investment has been made, no addition can be made under section 69 without actually finding that investments are made. *TDI Marketing Pvt. Ltd. v ACI [ITA No. 1069/Del/2007*

Deductions

Carried forward depreciation and investment allowance before allowing deduction u/s 80HHC.

The profit should be reduced when the question by amount of carried forward depreciation and investment allowance before allowing deduction u/s 80HHC. The AO allowed the deduction after reducing the profit derived by the assessee from export goods by the amount of carried forward unabsorbed depreciation and investment allowance. The CIT (A) and Tribunal also justified the decision aforesaid. *Mahalaxmi Fabric Mills Ltd. v. Asst CIT [2009] 176 Taxman 153 (Guj.)*

Deduction U/S 80I Is Not Available On Export Incentive / DEPB Entitlement.

The assessee engaged in the business of manufacturing and export of stationery goods. The

assessing officer didn't allow the claim for deduction under section 80-I of the Act in respect of export incentive in respect of DEPB entitlement holding that same was not derived industrial undertaking, hence we can conclude that the deduction u/s 80I is not available on export incentive / DEPB entitlement when same are not profit derived from industrial undertaking. *CIT v. Kanin (India) Behind Aarti Steel Ltd. [2009] 176 Taxman 162 (P & H)*

Chargeability of income

Co-owners in case of Commercial Complex

Where assessee, who were four individuals, purchased a plot of land and thereafter, constructed a commercial complex thereon; each co-owner had equal undivided share in entire schedule property' a part of said complex was given on rent have for years under consideration; and each co-owner had returned rental income from house



property in his individual hands, Assessing Officer was not right in treating assessee as Association of Persons - *Assistant Commissioner of Income-tax v. S. Prabhakar Kamath - [2009] 116 ITD 155 (Bang.)*

Taxability of compensation amount received by an assessee for termination of its agreement

The mere fact that the agreement was not an agency agreement is not a decisive factor as to the taxability of the amount received on termination of the agreement; even if the agreement was not an agency agreement and it was a simple contract, the amount received on termination of the contract can still be taxed as a revenue receipt; merely because it does not come under the purview of section 28(ii) (c) of the Income-tax Act does not mean that it cannot be taxed at all; under the provisions of section 28(ii)(c); compensation is taxable irrespective of whether it is a revenue receipt or capital receipt but under the general concept of income, it can be taxed only when it is a revenue receipt

CHEMET V. ADDL. CIT [ITA NO. 8183/M/2003]



not inter-dependent on each other then the period of six months would be counted separately in respect of each activity; hence, if the supervisory activity in respect of a project is carried out by a German Company in India under a separate and independent contract then the minimum period of six months would commence only when such activity itself had commenced and not from the date of the project. - *Jt. DIT (IT) v Krupp Uhde GmbH [ITA No. 5084/Mum/2003]*

No taxability in India of foreign company

making secondment

Indian company makes payment to Hyundai Marine & Fire Insurance Co. Ltd., Korea (HMFICL) from time to time in connection with the 'Secondment Agreement' entered into between them. Under that agreement, the services of Mr. Shin Bong In, (hereinafter referred to as Seconded) who was an employee of HMFICL at Korea were kept at the disposal of the applicant for a period of two years in order to assist the applicant in matters relating to Korean insurance business. HMFICL is not in the

International Taxation

Computation of threshold limit prescribed in Article 5(2)(i) of Indo-German DTAA for determining existence of a PE in India

The date of commencement of the threshold limit of six months as contemplated by Article 5(2)(i) would depend on the facts of each case considering the terms of contract; where different contracts are awarded which are

business of supply of man power. Under the Agreement, the applicant reimburses HMFICL only a part of the salary and other benefits payable to the seconded employee as provided in the Agreement. Debit notes are raised by HMFICL on the applicant on a monthly basis for the amounts due. No part of the salary or benefits is payable to the Secondee by the applicant. HMFICL continues to be the employer of the seconded employee and it continues to pay salary to the employee. The seconded employee has no right or authority to conclude any contract on behalf of the recipient. HMFICL has been deducting tax from the salary payable to the seconded employee and such tax has been deposited with the Income-tax Department in India. The issue before the AAR was whether any tax withholding should be made by the applicant on the payment made to HMFICL or not. The AAR held in favour of the applicant by holding that no income of HMFICL arose in India on which withholding was liable to be made and found that the amount paid by the applicant cannot be said to be in the nature of a consideration for offering the services of the seconded employee. [AIT-2009-32-AAR-Cholamandalam Ms General Insurance Co. Ltd VS. CIT, Chennai

F.No. AAR/778/2008/ Dated
29.01.2009]

➤ Latest Notification/ News



Additional depreciation permitted on commercial vehicles

With effect from AY 2009-10 assessee shall be eligible for depreciation of 50% on new “commercial vehicle” which is acquired on or after the 1st day of January, 2009 but before the 1st day of April, 2009 and is put to use before the 1st day of April, 2009 for the purposes of business or profession. “Commercial vehicle” means “heavy goods vehicle”, “heavy passenger motor vehicle”, “light motor vehicle”, “medium goods vehicle” and “medium passenger motor

vehicle” but does not include “maxi-cab”, “motor-cab”, “tractor” and “road-roller”. The expressions “heavy goods vehicle”, “heavy passenger motor vehicle”, “light motor vehicle”, “medium goods vehicle”, “medium passenger motor vehicle”, “maxi-cab”, “motor-cab”, “tractor” and “road-roller” shall have the meanings respectively as assigned to them in section 2 of the Motor Vehicles Act, 1988 (59 of 1988). [Notification No. 10/2009/F.No.142/01/09- TPL] dated 19th January 2009

Rules amended for claiming deduction on scientific research

As per amendment in Rule 5D of the Income Tax rules, 1962 the scientific research association claiming deduction of 125% u/s 35(1)(ii) of the I.T. Act shall, by the due date of furnishing the return of income under subsection (1) of section 139, furnish a statement to the Commissioner of Income-tax or Director of Income-tax containing -

- (i) a detailed note on the research work undertaken by it during the previous year;
- (ii) a summary of research articles published in national or

international journals during the year;

(iii) any patent or other similar rights applied for or registered during the year;

(iv) programme of research projects to be undertaken during the forthcoming year and the financial allocation for such programme"

As per amendment in Rule 5E of the Income Tax rules, 1962 the university, college or other institution claiming deduction of 125% u/s 35(1)(iii) of the I.T. Act shall, by the due date of furnishing the return of income under sub-section (1) of section 139, furnish a statement to the Commissioner of Income-tax or Director of Income-tax containing -

(i) a detailed note on the research work undertaken by it during the previous year;

(ii) a summary of research articles published in national or international journals during the year;

(iii) any patent or other similar rights applied for or registered during the year;

(iv) programme of research projects to be undertaken during the forthcoming year and the financial allocation for such programme. **CBDT Notification No. 2/2009, Dated 5-1-2009**

New rules for issuance of non-transferable pre-paid electronic meal card exempt under FBT

For the purposes of sub-clause (iii) of clause (B) of sub-section (2) of section 115WB, the non-transferable pre-paid electronic meal card (hereinafter called the "card") shall fulfil the following conditions, namely:—

(i) The card shall be granted by the employer to its employees under a scheme framed by the employer specifying therein the circumstances under which the meal card can be used by the employee.

(ii) The card under clause (i) shall be issued by the issuing bank.

(iii) An employee shall not be issued more than one card.

(iv) The card shall bear the name of the employer along with

the name, photograph and signature of the employee to whom the card is issued.

(v) The card shall be used only by the employee to whom the card is issued.

(vi) The card shall be used by the employee only for the purpose of purchasing ready to eat food or non-alcoholic beverage from a member establishment.

(vii) The aggregate amount of ready to eat food or non-alcoholic beverage purchased during a day by an employee shall not exceed one hundred rupees.

(viii) The details of each transaction of purchases made by the employee against the card shall be maintained by the employer and the member establishment in such manner and for such period as is required under the Act for any other similar transaction

CBDT Notification No. 1/2009, Dated 5-1-2009

INDIRECT TAX

➤ Central Excise & Service Tax



➤ Case Laws

Service Tax leviable on TDS amount or not

Assessee received service charges for providing management consultancy service. While paying above service charges, recipient of said service deducted TDS and paid service tax thereon. Original authority confirmed demand of differential service tax along with interest and penalty on said TDS portion of service charges. Commissioner (Appeals) set aside penalty and also held that withheld amount of TDS should be treated as *cum*-tax

amount for purpose of levy of service tax and accordingly, reduced service tax demand and interest thereon. It was held that since liability to pay income-tax arising out of income from services rendered is on assessee, and TDS amount deducted is payable only on behalf of assessee to Income-tax Department, there was no justification to exclude said amount from gross amount for purpose of determining service tax and treating amount of withheld TDS as *cum*-duty tax for purpose of service tax – [Commissioner of Central Excise v. Louis Berger International Inc. - [2009] 18 STT 312 (New Delhi - CESTAT)]

Credit for Tax Paid on Services Received From Non-Resident

In this present case the appellant is a multi-national company with one of their offices in Dubai; they did not have any branch office in India. They had a liaison office in India. They entered into a contract to render services as Consulting Engineer to M/s. Renu Sagar Power Project and for the services rendered by them, they issued invoices from Dubai and received payment. They paid service tax on the gross amount

of services received as provided under the law.

The appellant received certain services from M/s. GE. Power Service (India) Pvt. Ltd. and the said services were reportedly used as input services in rendering the services by the appellant to the above mentioned project. The appellant claimed the service tax paid by M/s. GE Power Service (India) Pvt. Ltd. as credit of tax paid on input-service.

But The Commissioner has denied service tax credit on the ground that the invoices issued by M/s. GE Power Services (India) Pvt. Ltd. for the said services was addressed to the Dubai office of the appellant and that payments were also made from Dubai.

According to the Appellant view taken by the Department would imply that they have rendered off-shore services and they may not be required to pay any service tax at all during the relevant period. He submits that the view of the Department that the services rendered are of off-shore services are contrary to the facts; their company employees do visit India and render the services and for the said services, they have

paid the service tax due. The input-services have been received in India from an India based company for rendering further services to an Indian project.

The Tribunal found that the output services have been indeed rendered in India. The input-services have also emanated in India and used for rendering further services in India. The payment of service tax totally [amounting to Rs.46,72,287/-] for the output service is not being disputed. Therefore, the reasoning adopted by the Commissioner in denying the Cenvat Credit is not valid. Under these circumstances, the denial of credit amounting to Rs.26,98,981/- on the input-services used in connection with the said output services is not legal and not proper. [General Electric International Inc Vs CCE, Delhi, 2009-TIOL-42-CESTAT-DEL]

Cenvat Credit of Mediclaim Policy for Manufacturer

This was a Revenue's appeal, in which the issue involved was regarding credit of service tax paid on Group Mediclaim Policy and Workmen's Accident Policy taken by the manufacturer for its workers.



The Tribunal followed the decision by Larger bench in *GTC Industries (2008-TIOL-1634-CESTAT-MUM-LB)* wherein as principle it has been held that any expenses which form part of the manufacturing cost as per format prescribed in CAS-4 statement shall be allowable as credit. Since in para 5.2 of CAS-4, medical benefits are included. The dispute in the present case is squarely covered by the Larger Bench decision. [CCE & C, *Aurangabad Vs M/s Endurance Systems India Pvt Ltd, 2009-TIOL-210-CESTAT-Mum*]

Valuation of Property by Architect is Not Liable for Service Tax

In this instant case the assessee is an architect who conducted the valuation of property. The Revenue demanded Service tax but the Commissioner(A) disagreed. The Respondent submitted that as per the trade notice issued by Delhi vide Trade Notice No. 1/98-ST dt. 5.01.1998, architects are not under the ambit of service provided by consulting engineers in view of the fact that consulting engineer service covers services provided by a professionally qualified engineer and engineering and architecture are considered as separate disciplines of technical education and two

separate professions. Council of Architecture and All India Council for Technical Education have been relied upon to arrive at this conclusion. The Commissioner (Appeals) has held that only when valuation of immovable property is done by a professionally qualified engineer which is not the case here, it is covered by consulting engineer service.

The Tribunal found that the decisions of the Commissioner (Appeals) is logical and in this case it is an individual who is providing the service. The proprietor is an architect and not a qualified engineer. Only services provided by a professionally qualified engineer is covered by the consulting engineer service. If service receivers find the consultation acceptable given by a non-qualified engineer, it would not mean that service tax is payable on such service. The basic requirement is that service should have been provided by a professionally qualified engineer. It is not the case here. We also note that the Trade Notice cited by the Dy. Commissioner covers the case. [*Commissioner Of Central Excise & Customs, Vadodara Vs M/s Sthapatya Rachana, 2009-TIOL-37-CESTAT-Ahm*]

Training and Education by Charitable Institution Not Subject of Service Tax

In the instant case, the Appellants are a charitable institution. They have entered in the area of impugned training and education for the betterment of the recipients of training. The Appellants submitted that it cannot be categorized as commercial training and that they are an approved organisation by the Central Government and further they are conducting courses for Commonwealth countries under the Colombo Plan. They also cite the following cases in support of his contention that the impugned services are not taxable under the Service Tax Law:-

(i) 2008(86) RLT 420(CESTAT-Che.) *Great Lakes Institute of*

Management Ltd. vs. CST, Chennai = (2008-TIOL-134-CESTAT-MAD);

(ii) 2007(6) STR 319 (Tri.-Bang) *Administrative Staff College of India vs. CCEX, Hyderabad* = (2007-TIOL-613-CESTAT-BANG);

(iii) 2007(8) STR 579 (Tri.-Mumbai) *Institute of Banking Personnel Selection vs. CST, Mumbai* = (2007-TIOL-1393-CESTAT-MUM).

The Tribunal found that on the basis of earlier decisions of the Tribunal cited above, the Appellants have a prima facie case in their favour being a charitable institution registered under the Co-operative Societies Act. [*M/s Indian Institute For Production Management Vs CCE, Customs & Service Tax, Bhubaneswar-II, 2009-TIOL-45-CESTAT-KOL*]



➤ Latest Notification

Clarification on levy of service tax on educational institutions

Commercial Nature Of Institute-

The first issue arises from the very name i.e. '**Commercial training or coaching center**'. Many service providers argue that the word '**commercial**' appearing in the aforementioned phrase, suggests that to fall under this definition, the establishment or the institute must be commercial (i.e. having profit motive) in nature. It is argued that institutes which are run by charitable trusts or on no-profit basis would not fall within the phrase *commercial training or coaching center* and none of their activities would fall under the taxable service. This argument is clearly erroneous. As the phrase '**commercial training or coaching center**' has been defined in a statute, there is no scope to add or delete words while interpreting the same. The definition *commercial training or coaching center* has no mention that such institute must have 'commercial' (i.e. profit making) intent or motive. Therefore, there is no reason to give a restricted meaning to the phrase. Secondly,

service tax, unlike direct taxes, is chargeable on the gross amount received towards the service charges, irrespective of whether the venture is 'profit making, loss making or charity oriented' in its

are exempted from service tax vide notification no. 24/2004-ST, dated 10.09.2004 (as amended). By definition, such institutes should provide training or coaching that imparts skill to



motive or its outcome. The word "Commercial" used in the phrase is with reference to the activity of training or coaching and not to the nature or activity of the institute providing the training or coaching. **Thus, services provided by all institutes or establishments, which fulfills the requirements of definition, are leviable to service tax.**

Vocational Training Institute-

The vocational training institutes

enable the trainee to seek employment or undertake self-employment, directly after such training or coaching. Disputes have arisen in respect of institutes that offer general course on improving communication skills, personality development, how to be effective in group discussions or personal interviews, general grooming and finishing etc. It is claimed that such training or coaching improves the job prospects of a candidate and

therefore they are eligible for exemption as 'vocational training institutes'. However, a careful reading of the definition shows that the exemption is available only to such institutes that impart training to enable the trainee to seek employment or self-employment. The courses referred to above do not satisfy this condition because on their own such courses do not prepare a candidate to take up employment or self-employment directly after such training or coaching. They only improve the chances of success for a candidate who already has the required skill. Therefore, such institutes are not covered under the exemption. [Circular No. 107/01/2009 – ST dated 28th January 2009]

Imposition of service tax on Developer/ builder clarified

The Central Board of Excise and Customs (CBEC) deliberated the issue pertaining to the applicability of service tax in a case where developer /builder/promoter enters into an agreement, with the ultimate owner for selling a dwelling' unit in a residential complex at any

stage of construction (or even prior to that) and who makes construction linked payment.

The Board has clarified that the initial agreement between the promoters / builders / developers and the ultimate owner is in the nature of 'agreement to sell'. Such a case, as per the provisions of the Transfer of Property Act, does not by itself create any interest in or charge on such property. The property remains under the ownership of the seller. It is only after the completion of the construction and full payment of the agreed sum that a sale deed is executed and only then the ownership of the property gets transferred to the ultimate owner. Therefore, any service provided by such seller in connection with the construction of residential complex till the execution of such sale deed would be in the nature of 'self-service' and consequently would not attract service tax. Further, if the ultimate owner enters into a contract for

construction of a residential complex with a promoter / builder / developer, who himself provides service of design, planning and construction and. after such constitution the ultimate owner receives such property for his personal use,



then such activity would not be subjected to service tax, because this case would fall under the exclusion provided in the definition of 'residential complex'.

However, in both these situations, if services of any person like contractor, designer or a similar service provider are received, then such a person would be liable to pay service tax. [Circular No.108/02/2009- ST dated 29th January 2009]

COMPANY LAW

➤ Latest News

Appointment of Company Secretary – Limit revised to Rs.5 Crore from Rs.2 crore

As per newly inserted Rule 3A of Companies (Appointment and qualifications of Secretary) Amendment Rules, 2009, the limit for appointment of whole time Company Secretary in a Company has been increased from existing paid up capital requirement of Rs.2 crore to Rs. 5 crore for all companies.

The Amendment Rules, 2009 will be effecting from 15th March, 2009. [Notification No. G.S.R. 11 (E), dated 5th January, 2009]

Revised and New Electronic and Forms introduced

The Central Government has introduced a new form for filing addendum for rectification of defects or incompleteness vide Form 67 which shall become

effective from 15th February 2009.

[Notification No. GSR 876(E), dated 24-12-2008]

The Central Government has revised the old Form 21 and Form 23 and replaced them with new forms. Form 21 deals with Notice of the Court or the company law board order or any other competent authority and Form 23 deals with Registration of Resolution (s) and Agreement (s). The said revised forms shall become effective from 15th February 2009.

[Notification No. GSR 872(E), dated 23-12-2008]

The Central Government has revised the old Form 23B and replaced them with new forms. Form 23B deals with information by auditor to Registrar. The said revised forms are effective from 11th January 2009.

[Notification No. GSR 824(E), dated 28-11-2008]

The Central Government has revised the old Form 1, Form 1A, Form 2 and Form 5 and replaced them with new forms. Form 1 deals with Application and declaration for incorporation of a

company, Form 1A deals with Application form for availability or change of name, Form 2 deals



with Return of Allotment and Form 5 deals with Notice of consolidation, division, etc. or increase in share capital or increase in number of members. The said revised forms are effective from 11th January 2009.

[Notification No. GSR 868(E), dated 22-12-2008]

FOREIGN EXCHANGE MANAGEMENT ACT

➤ **Latest News**

Notification/

FDI in Print Media dealing with news and current affairs Liberalised

The Department of Industrial Policy & Promotion, Ministry of Commerce & Industry, Government of India has decided to allow FDI in publication of facsimile edition of foreign newspapers and Indian edition of foreign magazines dealing with news and current affairs. Presently, prior to the said liberalisation only 26% FDI was permitted in publishing of newspapers and periodicals dealing with news and current affairs and 100% FDI was permitted in publishing of scientific magazines, specialty journals and periodicals, both with prior govt. approval.

1. FDI in publication of facsimile edition of foreign newspapers

- FDI upto 100% is permitted with prior govt. approval
- Publication is permitted only by an entity incorporated or registered in India under the

provisions of the Companies Act, 1956

- Shall be subject to relevant Guidelines issued by the Ministry of Information & Broadcasting on 31.03.2006

2. FDI in publication of Indian editions of foreign magazines dealing with news and current affairs

- FDI upto 26% is permitted with prior govt. approval
- 'magazines' for this purpose have been defined to mean a periodical publication, brought out on a non-daily basis, containing public news or comment on public news
- Shall be subject to relevant Guidelines issued by the Ministry of Information & Broadcasting on 04.12.2008 [*Press Note No. 1 (2009) F.No. 9(6)/2008-FC dated 14th January 2009*]





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