Issue – 6 | June 2008

SNK Newsletter

DIRECT TAXES

Judicial Pronouncements

Diamond Services International (P.) Ltd. v. Union of India (2008) 216 CTR 120 (Bom.)

Gemological institute of America (GIA) is engaged in the activity of grading and certification of diamonds which are shipped to its laboratory through an international network of participants. Grading report issued by GIA is a statement of fact as to the characteristics of the diamond. It includes an analysis of diamond's dimensions, clarity, colour, polish, symmetry and other characteristics. GIA does not assign or transfer any industrial or commercial experience to its customers. There is no transfer of any skill or knowledge of GIA to the customers in the issuance of grading reports. Payment received is not for the use of the right to use the industrial, commercial or scientific experience but for the application of experience to a certain factual situation i.e. GIA applies its expertise to determine the true features of the diamonds of its clients which are offered for certification of grading. GIA is not imparting its technical knowledge, experience, skill etc. to its customers. When there is no transfer of right to use, payment cannot be treated as royalty within the meaning of Article 12 of the DTAA. Therefore payment received by the petitioner a Singaporean company, as a sub-participant of GIA's network from Indian clients for collecting and shipping diamonds and certification thereof by GIA does not fall within the expression "royalty" and the respondents were not justified in refusing to issue certificate u/s 195 r.w.s.197.

Worley Parsons Services Pty. Ltd. In re (2008) 7 DTR 70 (AAR)

Assessee Australian Company admittedly had a PE in India within the meaning of Article 5(k) of DTAA between India and Australia. Receipts by assessee under the agreement with GAIL constituted business profits under

Article 7(1) of the DTAA and not royalty under Article 12.3(g) as no technical knowledge, experience, skill or know-how is 'made available' to GAIL on account of rendering the services. Income from such receipts are liable to be taxed as business profits in India in view of Article 7 of DTAA and only the profits attributable to the PE in India are liable to be taxed as per the provisions of the IT Act

R & B Falcon (A) Pty. Ltd. v. CIT (2008) 6 DTR 313 (SC)

Fringe Benefit Tax – Tour and Travel – Expenditure incurred on traveling of non-resident employees from home country to India and from city in India to place of work

As the employer incurs expenditure as necessity, it tantamount to 'consideration for employment by way of reimbursement or otherwise' and provisions of clause (a) of sub-section (1) of section 115WB would not be attracted

For the purpose of applicability of Section 115WB(1)(a) the employee concern need not be resident in India. If expenditure incurred is found to be as consideration for employment,

the same would also bring within its purview the employees who have been hired from outside country. Assessee having a PE carrying on business in India and paying income tax in India, having for its business activities engaged persons from India and outside India, if makes any expenditure for bringing any employee from abroad, the same would also liable to be taken into consideration for the purpose of sub-section (1) of section 115WB. Exemption under sub-section (3) is available only for the purpose of providing transport to employees from their residence to the place of work and from place of work to residence and not for any other purpose.

CBDT has the requisite jurisdiction to interpret the provisions of IT Act and the interpretation of CBDT being in the realm of execution construction, should ordinarily be held to be binding, save and except where it violates any provisions of law or is contrary to any judgment rendered by the courts

CIT v. Shree Ambica Flour Mills Corporation (2008) 6 DTR 169 (Guj.)

It is a common trade practice to make payment on behalf of sister concerns. Section 269SS and section 269T has been introduced with specific intention to curb black money.

The Tribunal having deleted penalty u/s 271D and 271E on the basis of above observation holding that transactions between sister concerns are not covered by either provisions of section 269SS or section 269T or that the default was of venial nature, no interference is called for. The Tribunal has merely appreciated the facts and evidence on record which is not shown to be incorrect or perverse.

Sumit Bhattacharya v. ACIT (2008) 112 ITD 1 (Mum. SB)

Stock appreciation rights plan is a method for companies to give their management or employees a bonus if company performs well financially and therefore said plan is nothing other than a form of deferred cash compensation which is contingent upon financial performance of the company. In case of redemption of stock appreciation rights redemption amount being dependent on market price of shares which can move in any direction at any time, income arises only when stock appreciation rights are redeemed.

Therefore income/benefit earned on account of redemption of SAR can only be taxed in the year of redemption and not the year of grant or vesting.

The assessee was employed as Managing Director of Procter & Gamble India Ltd. (PGI) which was a part of group companies headed by Procter & Gamble Co., USA (PGU).

In January 1998, assessee received certain amount from PGU on account of redemption of certain stock appreciation rights in terms of Procter & Gamble 1983 stock plan.

The assessee did not admit any tax liability on the said amount and submitted that since he did not have any employer-employee relationship with PGU, amount received by him on redemption of SAR could not be considered as perquisite in his hands and therefore could not taxed as income from salaries.

It was held that since stock appreciation rights were granted to the assessee in recognition of his contribution to long term success and development of business of Procter & Gamble Group and these grants were in accordance with Procter and Gamble 1983 stock Plans, it could be said that the amount received by the assessee on account of stock appreciation was consideration for services for services rendered by assessee which was in nature of income.

Further since assessee has no other connection with PGU than connection as an organization connected with the company PGI with which he had entered into employment contract, any thing that assessee received from PGU could not be anything but reward of his employment and hence amount in question received by assessee on redemption of share appreciation rights was taxable under the head Income from salaries'.

ICICI Bank Limited v. DCIT (2008) 20 SOT 453 (Mum.)

Amount remitted to credit rating agency for the purpose of obtaining rating in respect of issue of floating Rate Euro notes (FRENs) is not fees for included services in terms for Article 12(4) of India-US treaty and is therefore not chargeable to tax.

Gulf Oil Corporation Ltd. v. ACIT (2008) 111 ITD 124 (Hyd.)

Extra-ordinary items appearing in the Profit & Loss account is to be deducted in computing tax liability u/s 115JB. The contention of the department that the same is generally classifiable as a part of P&L appropriation account and not P&L account is not sustainable.

Judicial pronouncements

JCIT v. I.T.C. Ltd. (2008) 115 TTJ 45 (Kol. SB)

Employee's contribution to provident and pension fund is deductible only if payment is made before the due date as prescribed in the respective act, rule, order or notification governing such funds or within grace period allowed there under.

ACIT v. Goldmine Shares & Finance Pvt. Ltd. 2008-TIOL-220-ITAT-AHM-SB

It was held that in the terms that in view of the specific provisions of Section 80IA(5) of the Income Tax Act, 1961, the profit from the eligible business for the purpose of determination of the quantum of deduction u/s 80IA of the Act has to be computed after deduction of the notional brought forward losses and depreciation of eligible business even though they have been allowed set off against other income in earlier years.

Glaxo Smith Kline Consumer Healthcare Limited v. ACIT (2007) 112 TTJ 94 (Chd.)

Expenditure incurred on introducing and developing new products enables the assessee to remain in the market and retain the customer preferences and loyalty towards its brand of products. The assessee was earlier engaged in the business of manufacture and sale of food and health products. The line of business remains the same. Product development expenditure is of revenue in nature.

Expenditure on new ERP package for recording of manufacturing and accounting transactions does not result in acquisition of any asset. Resultant benefits in the shape if carrying business more efficiently and smoothly is advantage in the revenue field and not in capital field and hence expenditure is of revenue in nature.

Circulars/Notifications/Press Release

Instruction No. 5/2008

Revision of monetary limits for filing appeals by the Department before Income tax Appellate Tribunals, High Courts and Supreme Court- measures for reducing litigation

In supersession of the earlier instructions, it has been decided by the Board that departmental appeals will be filed before Appellate Tribunals, High Courts and Supreme Court as per monetary limits and conditions specified below.

Appeals will henceforth be filed only in cases where the tax effect exceeds monetary limits given hereunder :—

Sl. No.	Appeals in Income- tax matters	Monetary Limit (In Rs.)
1.	Appeal before Appellate Tribunal	2,00,000/-
2.	Appeal under section 260A before High Court	4,00,000/-
3.	Appeal before Supreme Court	10,00,000/-

For this purpose, "tax effect" means the difference between the tax on the total income assessed and the tax that would have been chargeable had such total income been reduced by the amount of income in respect of the issue against which appeal is intended to be filed (hereafter referred to as "disputed issues"). However, the tax will not include any interest thereon. Similarly, in loss cases notional tax effect should be taken into account. In the cases of penalty orders, the tax effect will mean quantum of penalty deleted or reduced in the order to be appealed against.

In the past, a number of instances have come to the notice of the Board, whereby an assessee has claimed relief from the Tribunal or the Court only on the ground that the Department has implicitly accepted the decision of the Tribunal or Court in the case of the assessee for any other assessment year or in the case of any other assessee for the same or any other assessment year, by not filing an appeal on the same disputed issues. The Departmental representatives / counsel must make every effort to bring to the notice of the Tribunal or the Court that the appeal in such cases was not filed or not admitted only by reason of the tax effect being less than the specified monetary limit and therefore, no inference should be drawn that the decisions rendered therein were acceptable to the Department. Accordingly, they should impress upon the Tribunal or the Court that such cases do not have any precedent value.

Adverse judgments relating to the following should be contested irrespective of the tax effect.

(a) Where the Constitutional validity of the provisions of an Act or Rule are under challenge.

Judicial pronouncements

(b) Where Board's order, Notification, Instruction or Circular has been held to be illegal or ultra vires.

(c) Where Revenue Audit objection in the case has been accepted by the Department.

The monetary limits will not apply to writ matters.

This instruction will apply to appeals filed on or after 15th of May 2008. However, the cases where appeals have been filed before 15th of May 2008 will be governed by the instructions on this subject, operative at the time when such appeal was filed.

India signs DTAA with Luxembourg

India on Monday entered into an agreement with Luxembourg, a member of the European Union, for the avoidance of double taxation and prevention of tax evasion.

Double Taxation Avoidance Agreement (DTAA), which also aims at promoting economic cooperation between the two countries will come into effect from the date of notification, said an official statement.

INDIRECT TAXES

Judicial pronouncements

Hare Krishna Developers In Re: 2008 (10) S.T.R. 341 (A.A.R.)

Booking and construction of residential units by the builder with own labour is taxable service. Construction of complex is qualified by "in relation to" widening the scope. Further point of time at which ownership gets transferred or control over supervision does not determine liability. Activities were performed as per agreement with prospective buyers and not to be viewed in isolation. Facilities and amenities cannot be dissociated from construction and incidental activities also taxable. Construction of residential complex service being more specific, impugned construction is classifiable under such service and not under works contract service.

The Applicant builder engaged in construction of residential complex accountable to buyer and remains service provider vis-à-vis the buyer for construction by engaging own labour or by sub-contracting. Impugn activity is not one of self service as service recipient is buyer of flat as per agreement. Engagement of sub-contractor not absolves applicant of the responsibility of providing services in relation to construction of residential unit agreed to be sold to customer ultimately.

Construction of residential complex activities is more specifically classifiable under construction of residential complex service than works contract service because category providing specific description to be preferred over entry with general description.

Departmental clarification in C.B.E. & C Master Circular No. 96/7/2007-S.T., dated 23-08-2007 clarify that liability of builders pertaining to outright sale of residential unit after construction without any reference to agreement with the buyer. Service provider and service recipient come face to face after completion of construction as per circular *ibid*.

Harekrishna Developers In *Re: 2008* (10) S.T.R. 357 (A.A.R.)

Sale of plots was made to prospective buyers and construction of residential units under works contract. The Applicant contesting liability on the ground that impugned works contract is for construction of individual residential unit and not for residential complex. Condition on transfer of property in goods leviable to sales tax is satisfied. There were records indicating construction of at least 12 residential units with common infrastructure and hence same is covered under residential complex as per provisions. Works contract is not for construction of isolated house but for common facilities also and hence impugned activity covered under works contract service.

Find solutions at the roots of the problems rather than giving piecemeal dosages to treat symptoms.

Value of transfer of property in goods involved in execution of works contract is not excludible under composition scheme.

Payment of tax @ 12% on value as per Rule 2A of service Tax (Determination of value) Rules, 2006 and payment of 4% under composition scheme is mutually exclusive.

The Applicant is providing service of construction of residence as per works contract entered with the buyer. Main service provider is not absolved of liability merely because sub-contractor is also liable for specific services. The Applicant liable to pay service tax even when sub-contractors pay service tax for service rendered in the course of execution of works contract

Circulars/Notifications/Press Release

Circular No. 102 /5/2008-ST F.No. 137/96/2008- CX.4

Guidelines in respect of Dispute Resolution Scheme, 2008 has been notified.

COMPANIES ACT, 1956

Notification of Accounting Standards by the Central Government under the Companies Act, 1956 Press release, dated 14-5-2008

The Central Government notified 28 Accounting Standards (AS 1 to 7 and AS 9 to 29) in December 2006 in the form of Companies (Accounting Standard) Rules, 2006, after receiving recommendations of NACAS. These Accounting Standards are to be applied with effect from company financial year 2007-08, the accounts with respect to which are to be finalized during 2008-09.

CENTRAL SALES TAX

Notification No. S.O. 1277(E), Dated 30-5-2008

Central Sales Tax (CST) reduced to 2% from 1st June, 2008. In exercise of the powers conferred by the proviso to sub-section (1) of section 8 of the Central Sales Tax Act, 1956 (74 of 1956), the Central Government hereby reduces the rate of tax as specified in sub-section (1) of section 8 of the said Act from three per cent to two per cent with effect from 1st June, 2008.

[No. 1/2008-CST-F.No. 28/11/2007-ST]

SEBI

Circular No. SEBI/IMD/CIR No. 5/126096/08, Dated 23-5-2008

Simplification of Offer Document and Key Information Memorandum of Mutual Funds Scheme

AMFI had set up a committee to examine the ways of simplification of OD and KIM to make it more reader friendly. The committee recommended that the existing OD may be split into two parts i.e. Statement of Additional Information (SAI) and Scheme Information Document (SID). SAI shall incorporate all statutory information on Mutual Fund.

The formats of Standard OD and KIM specified through circulars dated March 31, 1998 and July 28, 2004 respectively stand revised. Henceforth, Mutual Funds shall prepare SID, SAI and KIM in the simplified format enclosed with the circular. Contents of SID, SAI and KIM shall follow the same sequence as prescribed in the format.

FOREIGN EXCHANGE MANAGEMENT ACT

Press release, dated 31-5-2008

Borrowers in Services Sectors eligible to avail ECB

The External Commercial Borrowing (ECB) policy is regularly reviewed by the Government in consultation with Reserve Bank of India (RBI) to keep it in tune with the evolving macroeconomic situation, changing market conditions, sectoral requirements, the external sector and lessons of experience. Consequent upon such a review, it has been decided to modify some aspects of the ECB policy as indicated below: At present, borrowers in the services sector are not eligible to avail ECB under the automatic route. It has been decided that henceforth borrowers in the services sector viz hotels, hospitals and software companies may avail ECB upto US$ 100 million for import of capital goods under the approval route.

A. P. (DIR Series) Circular No. 45, Dated 30-5-2008

Foreign Exchange Management (Deposit) Regulations, 2000 - Credit to Non Resident (External) Rupee Accounts

Attention of Authorised Dealer Category - I (AD Category – I) banks is invited to paragraph 3 of Schedule I to the Foreign Exchange Management (Deposit) Regulations, 2000 [Notification No. FEMA 5/2000-RB dated May 3, 2000], as amended from time to time, giving the permissible credits to the Non-Resident (External) Rupee (NRE) account. Further, in terms of Anti-Money Laundering guidelines [A. P. (DIR Series) Circular No. 14 dated October 17, 2007], FFMCs are permitted to encash foreign currency and make cash payment only up to USD 3000 or its equivalent. Amount exceeding USD 3000 or its equivalent has to be paid by way of demand draft or bankers' cheque.

As a measure of liberalization and also to meet the genuine needs of the NRE account holders, it has been decided that AD Category – I banks and authorized banks may credit proceeds of demand drafts / bankers' cheques issued against encashment of foreign currency to the NRE account of the NRI account holder where the instruments issued to the NRE account holder are supported by encashment certificate issued by AD Category – I / Category – II.

A. P. (DIR Series) Circular No. 50 /RBI., Dated 03-06-2008

Export of Goods and Services- Realization and Repatriation of Export Proceeds-Liberalization.

Attention of Authorised Dealer Category – I (AD Category- I) banks is invited to the provisions of sub-regulation (1) of Regulation 9 of the Notification No.FEMA.23 /2000-RB dated May 3, 2000, as amended from time to time, in terms of which the amount representing the full export value of goods or software exported should be realised and repatriated to India within six months from the date of export.

Reserve Bank has been receiving representations from Exporters / Trade bodies to extend the period of realisation of export proceeds in view of the external environment. It has, therefore, been, in consultation with Government of India, announced in the Annual Policy Statement for the Year 2008-09 (para 134) to enhance the present period of realization and repatriation to India of the amount representing the full export value of goods or software exported, from six months to twelve months from the date of export, subject to review after one year. The provisions in regard to period of realization and repatriation to India of the full export value of goods or software exported by a unit situated in Special Economic Zone (SEZ) as well as exports made to warehouses established outside India with the permission of Reserve Bank remain unchanged.

Necessary amendments to Notification No. FEMA.23/RB-2000 dated May 3, 2000 [Foreign Exchange Management (Export of Goods and Services) Regulations, 2000] are being notified separately.

Due Dates of key compliances pertaining to the month of June -08:

5th June	*Payment of Service Tax & Excise duty for May*
6th June	*Payment of Excise duty paid electronically through internet banking*
7th June	*TDS/TCS Payment for May*
10th June	*Excise Return ER1 / ER2 /ER6*
15th June	*PF Contribution for May, Excise payment by SSI*
15th June	*Due date for payment of Advance Income Tax and Fringe Benefit Tax*
15th June	*Filing of last quarter TDS return for the year 2008*
21st June	*ESIC Payment for May*