

## TAX

### A. Supreme Court on Withholding Tax on Expatriate Salaries

Commissioner of income Tax, New Delhi<sup>1</sup>

Vs

1. M/s Eli Lilly and Co. (India) Pvt. Ltd.
2. M/s Ericsson Communications Pvt. Ltd.
3. M/s Mitsui & Co. Ltd

Issue-

Whether the withholding tax provisions under the Income Tax Act, 1961("Act") apply to the foreign earned salaries received

by the expatriate employees working in India.

Facts-

Case 1:

- M/s Eli Lilly & Co. (India) Pvt. Ltd. was incorporated in India and was a joint venture between M/s Eli Lilly, Netherlands B.V. ("Foreign Co.") and Ranbaxy Laboratories Ltd.
- The Foreign Co. seconded four expatriate employees to its Indian Joint Venture Co. ("JVCo").
- The four expatriates were employed in the JVCo but continued to remain on the rolls of the Foreign Co.
- The expatriates received home salary outside India from the Foreign Co.

<sup>1</sup> 2009- TIOL-45-SC-IT

- JVCo deducted tax in respect of the salary paid by it to the expatriates in India.
- However, no tax was deducted in respect of the home salary paid by the Foreign Co.
- The tax authorities claimed the tax to be withheld not only on the domestic salary paid to the expatriates in India by the JVCo but also on the home salary paid by the Foreign Co. outside India.

Case 2:

- In the case of M/s Ericsson Communications Pvt. Ltd., the tax authorities claimed that the Indian subsidiary of a Swedish company should withhold tax on certain “child education incentive” payments made outside India by the Swedish company to certain expatriates working with the Indian company at the pertinent time.

Case 3:

- In the case of Mitsui & Co. Ltd., the respondent is a foreign company with its Head Office (“HO”) in Tokyo.
- The respondent had a Project Office and a Liaison Office in India.

- The Japanese Expatriates were deputed to these establishments in India as employees.
- As per the terms of deputation, the said expatriates were to be paid “salaries” for the services rendered in India by the respective establishment.
- In addition, a retention/ continuation fee was paid in Japan by the HO to ensure continuity in service.
- Tax at source was deducted by the respective establishment.
- However, no tax was deducted on the retention/ continuation fee paid in Japan by HO.
- The tax authorities argued that the Indian Project Office/ Liaison Office of Japanese Company should withhold tax on the certain retention/ continuation payments made by the HO to the expatriate employees working in the respective establishments.

Held-

The Court held that the obligation of the Indian employer to withhold tax extends to any salary income earned by the expatriate employee, whether in India or outside India as long as nexus could be established that the income is earned in respect of the services provided by the expatriate employee in India.

The Court also observed that the Act would have extra territorial operation to the extent permitted by the machinery provisions which seek to enforce the charging provisions of the Act.

In light of the facts of the pertinent cases, the Supreme Court observed that the expatriate employees did not provide any service to the Foreign Companies. The total remuneration whether in the form of home salary or other special allowances paid by the foreign companies was found to be in consideration of services rendered in India.

Therefore, the Court held that the Indian employer is liable to withhold tax on the domestic as well as offshore components of the salaries received by the employees.

B. Clarification on filing of claim for refund of service tax under Notification No. 41/ 2007- ST<sup>2</sup>

Notification No. 41/ 2007- ST dated 6/10/2007 allows refund of service tax paid on specified services used for export of goods. In order to resolve certain procedural difficulties arising in

implementation of this refund scheme, the Board, inter alia, issued the pertinent circular clarifying the following aspects:

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<sup>2</sup> Circular No. 112/06/2009 - ST., Dated : March 12, 2009

TABLE

S. No.	Issue Raised	Clarification
I	<p>Notification No. 41/07-ST has been amended by notification Nos. 32/2008-ST, dated 18.11.2008 and 33/2008-ST, dated 7.12.2008 to (i) extend the limitation period from 60 days from the end of quarter to six month; (ii) to omit the condition of non-availment of drawback. Whether, in view of amended conditions, refund for the quarter Mar-Jun 08 would be allowed to be filed till Dec 08?</p>	<p>It is clarified that consequent upon revision of limitation period, any refund claim that is filed within such revised limitation period would be admissible if it is otherwise in order. Therefore, refund claims of service tax on specified taxable services used for exports of goods made in the quarter Mar-Jun 08 could be filed till 31st Dec 08.</p>
II	<p>The bank deducts certain commissions from the export remittance in lieu of service provided by them. Refund is not allowed on such deduction. Refund should be allowed on</p>	<p>Refund is admissible on the basis of gross amount received for the exports and deductions made by the banks from export remittances, in lieu of services provided by bank, should not be deducted while granting refund.</p>

	the gross remittances.	
III	<p>For exporters exporting to a customer regularly, the foreign exchange remittance certificates (FIRC) are made on running account basis by the banks. Therefore, it is often not possible to show the linkage between the export invoice and the remittance. This has resulted in denial of refund.</p> <p>Further in case where payments are received by cheque, banks do not issue FIRC and refunds are denied.</p>	<p>In such cases where FIRCs are issued on consolidated basis, the exporters should submit self-certified statement along with FIRC showing the details of export in respect of which the FIRC pertains. Refunds should be allowed on such certified statements. However, exporters should maintain a register showing running account which should be reconciled between the export and the remittance periodically.</p> <p>In cases where banks do not issue FIRC for the reason that payments are received by cheque, refund may be allowed on the basis of duly certified bank statement.</p>
IV	Whether the limitation period of six month would be counted from the date of exports or from the date of receipt of remittances?	It is clearly prescribed in the notification that limitation period of six month is to be computed from the date of exports.
V	Whether refund would be admissible on specified taxable service received prior to the	Being prospective in nature refund is not admissible on such services received prior to the date they are notified in the said notification, even if the goods, in relation to which these

	<p>date it is notified in the said notification, if such services are used in relation to goods which are exported subsequent to the date on which such taxable services are notified under notification No. 41/2007-ST.</p>	<p>services are used, are exported after the date when such services are notified under notification No. 41/2007-ST.</p>
VI	<p>Authorities granting refund are insisting on original documents such as invoice, BL, SB, BRC etc. Such documents are required under the law to be kept in the Head office for audit. Refunds are denied on this ground.</p>	<p>Normally certified copy of the documents should be accepted. Only in case of in-depth enquiry original documents can be verified.</p>
VII	<p>The service provider providing services to the exporter provides various services. But he has registration of only one service. The refund is being denied on the grounds that the taxable services that are not covered under the registration are not eligible for such refunds.</p>	<p>Notification No. 41/2007 ST provides exemption by way of refund from specified taxable services used for export of goods. Granting refund to exporters, on taxable services that he receives and uses for export do not require verification of registration certificate of the supplier of service. Therefore, refund should be granted in such cases, if otherwise in order. The procedural violations by the service provider need to be dealt separately, independent of the process of refund.</p>

VIII	Whether refunds under notification No. 41/2007-ST, dated 6.10.2007 would be admissible for the quarter July-Sep 2007.	The notification No.41/2007-ST exempts service tax on specified taxable services used for export of goods. This exemption is operated through the route of refund. Being prospective in nature, refund could only be sanctioned on taxable services provided on or after the date they are notified in the said notification, i.e., 6.10.2007.
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C. Exemption to taxable services provided to a developer or unit of Special Economic Zone (“SEZ”)<sup>3</sup>

The Central Government vide the pertinent Notification exempts the taxable services as specified in section 65 (105) of the Finance Act, which are provided in relation to the authorised operations in an SEZ, and received by a developer or units of an SEZ from the whole of the service tax, irrespective of the fact that such taxable services are provided inside the SEZ or not.

However, in order to avail the benefit of the notification, certain conditions prescribed in the notification need to be complied with, few of which are:

- The developer or units of SEZ need to pay service tax and subsequently, will be able to claim the refund of service tax

paid on specified services.

- The developer or units of SEZ will file the claim for refund to the jurisdictional Assistant Commissioner/ Deputy Commissioner of Central Excise.
- The claim for refund should be filed within six months or such extended period as the Assistant Commissioner/ Deputy Commissioner of Central Excise permits, from the date of actual payment of service tax by such developer or unit.

Note-

The exemption contained in this notification is applicable in respect of service tax paid on the specified services on / after the date of publication of this notification in the Official Gazette.

Also, this notification supersedes Notification No. 4/2004- S.T., dated 31.03.2004.

<sup>3</sup> Notification No. 9/2009 - S.T., dated 3-3-2009

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