Tax News

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INCOME TAX

Reminder for Sep 2013

Action Due	Due Date
TDS/TCS for Aug 2013	07-09-13
PF for Aug 2013	15-09-13
ESI for Aug 2013	21-09-13
Advance Tax	15-09-13
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SERVICE TAX

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Service Tax for Aug 2013 in case of company	05-09-2013
Service Tax for Aug 2013 in case of a company for which e-payment is mandatory.	06-09-2013

INCOME TAX

Important Circulars/ Notifications

- **Amendment to Rule 37BB of the Income Tax Rules, 1962:** The Central Board of Direct Taxes (CBDT) hereby makes the following rules further to amend the Income-tax Rules, 1962, namely the Income-tax (12th Amendment) Rules, 2013, which shall come into effect from Oct 1, 2013. The rule pertains to furnishing of information by the person responsible of making payment to a non-resident, not being a company, or to a foreign company. Details are in the *Notification 58/2013 F.No.149/119/2012-SO dated 5-Aug-2013.*
- **Amendment to Rule 12C of the Income Tax Rules, 1962 :** The CBDT hereby makes the following rules further to amend the Income-tax Rules, 1962, namely the Income-tax (13th Amendment) Rules, 2013.
  For rule 12C, the following rule shall be substituted, namely:–

  " **Statement under sub-section (2) of section 115U.**
  12C. (1) The statement of income paid or credited shall be furnished by the 30th November of the Financial year following the previous year during which such income is paid or credited, to the Chief Commissioner or Commissioner of Income-tax, within whose jurisdiction, the principal office of the Venture Capital Company or the venture Capital Fund, as the case may be, is situated.

  (2) The statement of income paid or credited which is to be furnished under sub-section (2) of section 115U by the Venture Capital Company or the Venture Capital Fund, as the case may be, shall be in Form No. 64, duly verified by an accountant in the manner indicated therein and shall be furnished electronically under digital signature.

  (3) The Director General of Income-tax (Systems) shall specify the procedure for filing of Form No. 64 and shall also be responsible for evolving and implementing appropriate security, archival and retrieval policies in relation to the statements so furnished.";

  Appendix-II, for Form No. 64, the new Form has been provided in this notification. Notification No. 59/2013/ F.No.142/17/2013-TPL dated 5-Aug-2013.

Tribunal Judgments

- **Payment of Royalty: The** assessee, M/s Maruti Suzuki India Limited (MSIL), a subsidiary of Japan-based Suzuki Motor Corporation (SMC), was engaged in the manufacture of passenger cars in India. The assessee had started its business in 1982 as a 100% Government of India owned company. As on 31.3.2005, SMC held 54.21% share in MSIL and approx. 18.30% was held by

the GOI and the balance was held by Indian public and others.

The assessee had entered into a licensing agreement with SMC, for which it had paid lump sum royalty and technical fees to SMC. For benchmarking of the international transactions, the assessee had selected TNMM method. The assessee had selected three comparables, Hindustan Motors, Tata Motors and Mahindra & Mahindra. Therefore it was claimed that the international transaction undertaken was at arms' length price (ALP). However, the TPO proposed transfer pricing adjustment in relation to advertisement, marketing and sales promotion expenses (AMP expenses) incurred by the assessee. He also proposed adjustment on account of payment of royalty for use of brand name. The DRP affirmed the action of the TPO. Upon appeal by the assessee, the Tribunal held:

- The co-brand trade mark Maruti -Suzuki is being used since inception of the company. At the time of entering into this agreement assessee was an independent 100% Govt. of India owned entity. The decision to continue the joint trade mark was taken in the Company's business interest. It is noted that royalty paid under all these licenses have never been disputed and have been accepted as at arm's length. Thus, the decision taken in 1993, 12 years before the year under consideration, could not have been influenced by the need to manipulate and thereby erode the Indian tax base. Hence, the same terms and conditions of agreement are in place during FY 2004-05, the license agreements can be said to be at arm's length.
- The analysis of the license agreement shows that payment of royalty is a consideration for use of ‘technical assistance and license'. The license agreement confers upon the assessee right to manufacture of specific models of Suzuki cars and for the use of all of SMC's IP rights in respect thereof. The assessee's entire manufacturing activity and business is based and founded on this license agreement.
- Royalty paid by the assessee to SMC constitute a single / inserverable / indivisible contract/ package which provided assessee the exclusive right and license to manufacture and to sell the licensed product for a specified limited duration. All others rights vested in the license agreement including technology, technical know how and trade mark are linked to the core right to manufacture and sell licensed products. Thus, the primary intent of the license is transfer of technology and not trademark usage. Technology is the key driver in the industry in which MSIL operates. The Technology transfer from SMC has allowed the assessee to manufacture certain critical components required for manufacturing these cars.

- TPO has arbitrarily divided the license agreement of the assessee without appreciating that all the license agreement is a single in-severable agreement. No disallowance is required in payment of royalty by MSIL to SMC.
- Expenditure in connection with sales cannot be brought within the ambit of advertisement, marketing and promotion expenses for determining the cost/value of international transaction. The TPO has to decide the rate of AMP expenses by applying the proper comparables. Thus, the issue pertaining to transfer pricing adjustment in respect of AMP expenses stand remitted to the file of the TPO. ***2013-TII-163-ITAT-DEL-TP.***

➢ **Transfer Pricing: The** assessee, General Motors India Pvt Ltd (GMI) was engaged in the manufacture and trading of automobiles and its parts. It had built up a dealer network and was responsible for the overall sales and marketing function for competing in the Indian market. The dispute involved two assessment years, 2006-07 and 2007-08 and the main issue in both the years was whether for the purpose of TP analysis, the case of the assessee was more comparable to General Motors Daewoo & Auto Technology Limited [GMDAT] and not to Mahindra & Mahindra (M & M) as attributed by the TPO/DRP.

The assessee had purchased completely knocked down (CKD) kits and components from GMDAT for assembling the cars, and had imported spare parts and accessories, as finished goods, from GMDAT for resale in India, without any value addition. The assessee also distributed these imported spare parts and accessories through its dealership network. For transfer pricing analysis, the assessee had adopted the Transactional Net Margin Method (TNMM) and selected three comparable companies, Force Motors Ltd, Hindustan Motors Ltd and Mahindra & Mahindra Ltd.

The TPO, applied comparability filters to reject two of the three comparables adopted by the assessee, while retaining only M/s Mahindra and Mahindra. He also rejected the normalised profitability worked out by the assessee, by concluding that adjustment had to be made as differences existed in respect of details of the comparables vis-à-vis the assessee.

The DRP directed the AO to enhance the income of the assessee for the A.Y 2006-07. With regard to the selection of tested party, the DRP held that in most cases the tested party will be the least complex of the controlled tax payers and will not own valuable intangible property or unique assets that distinguish it from potential uncontrolled comparables. GMDAT was not only a complex entity owning valuable intangibles, the data for

comparability of GMDAT or the comparables was also not available.

As for selection of comparables, the DRP rejected the assessee's claim to include Force Motors as it was showing consistent losses. Mahindra & Mahindra Ltd was selected as it was similar to the assessee in most aspects. **Having heard the parties, the Tribunal held that:**

- Contrary to TPO's claim, the assessee has furnished all financial information of the comparable companies. The United Nation's Practical Manual on Transfer Pricing also contradicts the TPO's argument that GMDAT should not be selected as the tested party as the comparable companies selected by the assessee do not fall within its jurisdiction and it can neither call for any additional information nor scrutinize its books of accounts etc.
- There is inconsistency in the stand of the TPO to the effect that while rejecting the assessee's approach for selecting GMDAT as the tested party by citing a reason that there was no reliable data available for both GMDAT and comparables and, therefore, GMDAT cannot be taken as the 'tested party', however, on the same breath, as rightly highlighted by the assessee, the TPO had taken GMDAT as the tested party while making adjustment to transaction relating to payment of royalty by GMI to GMDAT.
- Revenue's allegation that the segmental financial statement of GMDAT was not reliable, cannot be upheld, as the assessee has also furnished a report on factual findings certified by the statutory auditors – Deloitte Anjin LLC.
- The TPO is directed to adopt GMDAT as the 'tested party' for analyzing the inter-company transactions of the assessee for both the AYs under consideration. **2013-TII-162-ITAT-AHM-TP.**

➢ **Taxability of lease payments by the SEZ developer:** The a**ssessee** paid lease premium to CIDCO in order to acquire land at Navi Mumbai on lease basis. By virtue of said lease deed(s), assessee had acquired leasehold rights in the land for the purpose of developing, designing, planning, financing, marketing, developing necessary infrastructure, providing necessary services, operating and maintaining infrastructure administering and managing "SEZ". Assessee had also acquired the rights to determine, levy, collect, retain, utilize user charges fee for provision of services and /or tariffs in accordance with terms and conditions provided in the Development Agreement and the lease deed (s). Assessee had also acquired sole rights for marketing of the NMSEZ.

The AO stated that lease premium fell within the ambit of section 194-I of the Act, but no deduction of TDS had been made by assessee for any of such payments. The

assessee contended that pre-dominant objective for the payment of lease premium under lease deed(s) was acquisition of leasehold rights in the said land and not for the use of the land. Hence, the lease premium paid to CIDCO Ltd. for acquisition of leasehold land was clearly distinct from rent, and was taxable in the form of capital gain u/s 45 of the Act in the hands of the lessor. **After hearing both the parties, the ITAT held that:**

- The development agreement has assigned to the assessee, leasehold right which includes bundle of rights. The assessee has paid the premium for lease deed(s) for the said land to acquire entire rights of the land for a period of 60 years. Therefore, the payment of lease premium is a payment for acquisition of leasehold land and not merely for use of land.
- The said lease premium paid by the assessee is not refundable and is not in the nature of advance rent or merely for use of land.
- When the interest of the Lessor is parted with for a price, the price paid is called lease premium or salami. But the periodical payments made for the continuous enjoyment of the benefit under the lease are in the nature of rent. In this case, there is a transfer of substantive interest of lessor for the leasehold land in favour of the assessee.
- The lease premium paid by the assessee to CIDCO for acquiring leasehold land is capital expenditure to acquire capital asset and not an advance payment of rent, and so, it does not fall within the ambit of rent under section 194-I of the Act.

- Hence, the provisions of section 194I to deduct TDS on the lease premium paid by the assessee are not attracted. *2013-TIOL-744-ITAT-MUM*.

- **Payments made towards reservation of school seats:** The assessee, State Bank of India, a nationalized bank had paid to various schools towards reservation of seats for the children of the officers of the Bank. It was submitted that such amounts paid were in the nature of staff welfare expenses to mitigate the hardship faced by the officers of the Bank for children's education during transfer/re-location. However, the AO disallowed the same and observed that the assessee had committed irregularity by not including those payments in the perquisite of the employees. Upon appeal, the Tribunal held that:

  - As per the policy of the bank, the arrangements are made for the reservation of seats in the schools for the children of the officers who are frequently transferred. Thus there is no discrimination in the policy as far as the officers subjected to transfer. This claim of the assessee is allowed. *2013-TIOL-693-ITAT-MUM.*

HC / SC Judgments

- **TDS credit reflected in 26AS:** The assessee filed return of income claiming refund of Rs. 2.11 lakhs. Return was processed at centralized processing unit (CPU) in which TDS credit was not given of Rs. 3.78 lacs resulting into demand of Rs. 1.67 lacs. An application was made u/s 154 pointing out the mistake. However, since no reply / communication was received and no rectification was made, assessee went in writ.

  Revenue contended that since the assessee failed to furnish all the relevant information as was required u/s 139(1), adjustment of TDS was not allowed. Also, the rectification application was attended by CPU in which it was observed that tax payments had not matched as proper details like BSR Code, Date of Deposit, Challan sequence number, Exact amount paid in case of multiple payments, Details of each payments to be furnished had not been furnished by the assessee.
  Assessee contended that all relevant details for claiming the TDS amount were submitted including Form 16A and revenue was aware that TDS credit was required to be given. Moreover, the system was online and all details of TDS were available on the net. Tax had been deducted by the public limited companies/government companies and the complete details, which match with the payments with BSR code, deposit challans, etc. had been furnished. Revenue did not controvert the facts as mentioned by assessee. It was further contended that despite extensive computerization in the IT Department, no fruitful benefits were available to the assessee. After hearing both the parties, the High Court held that:

  - The return has been filed electronically, wherein, the petitioner has made a claim for deduction of TDS as per Form 26AS u/s 203AA. This is also visible from the website of the Department. Form 26AS, available on the net, clearly reflects different dates on which payment had been credited and total tax deducted at source by various companies.
  - Revenue has not indicated any default on the part of the petitioner to furnish any of the documents that have been directed.
  - Computerization in every Department is objected with a view to facilitate easy access to the assessee and make the system more viable and transparent. If the CPC meant for return processing, accounts, refund, storage of data etc. adds to the difficulties of the Tax payers, due to lack of proper distribution of work between back office and front office, and that too, after having been pointed out the actual error, a serious relook is expected.
  - Revenue is directed to take into account the total sum of TDS as is reflected in Form 26AS and after computing such TDS amount, issue refund in the name of the petitioner. *2013-TIOL-637-HC-AHM-IT*.

- **Special audit warranted u/s 12A(b):** The assessee was a trust having as its main object imparting of education and medical treatment to the general public at large. For achieving its objects, the assessee managed various entities in the form of Hospitals, Nursing College and schools. The assessee had filed its return of income, declaring its total taxable income at Rs. Nil .The books of account of the assessee were subjected to audit and audit report in form 10B under section 12A(b) were also filed. The statutory auditors did not pass any adverse remarks with respect to the books of account maintained by the assessee.

  The AO put up a proposal for special audit of the petitioner's account under Section 142 (2A) , which was confirmed by the CIT. On appeal, the assessee submitted that a Special Audit could not have been directed under section 142(2A) as the complexity of the accounts can only be determined if and when AO examines the books of accounts and the AO had not examined/verified the books of accounts. The Revenue submitted that the books of account had been verified by the AO and it was during the course of the examination of the accounts that special audit was called for taking into account the nature and complexity of the accounts. The AO had found that the auditor had not discharged its obligations of reporting on related party transactions in the audit report on the ground that according to the auditor, the related parties transactions were at arm's length. In view of the above, the AO concluded that there could be other transactions which are not reported by the petitioner as well as the auditor. These facts warranted the examination of the accounts by the Special Auditor. After having heard the parties, the High Court held that:

  - At no stage prior to the filing of this petition, has the assessee taken up the plea that the AO had not examined the books of accounts of the petitioner. Even before the CIT, the assessee's only submission was that the accounts are not complex. Therefore, in view of the above, there is no reason to disbelieve the statement made on oath by the AO, that the Accounts have been verified and taking into account the complexity of the Accounts, the Special Audit has been directed.
  - The statutory auditor, in terms of the prescribed form, has to report related parties transactions which have taken place. However, the related party transactions were not referred to in the form 10B furnished in the audit report. In that view of the matter, it is natural for doubt to arise about the correctness of the audit done by an independent auditor and in particular, the satisfaction of Section 12A (1) (b). Therefore, the condition precedent for exercising powers under Section 142(2A), viz: nature and complexity of accounts of the assessee have been satisfied.
  - The absence of a Special Audit in the present facts, could have brought the exemption enjoyed under Section 11 by assessee in jeopardy. This is because the Audit as

required under Section 12A (1)(b) is not found satisfactory then it is the special audit which would determine the correct position. Therefore, we find that no prejudice is caused to the petitioner by subjecting its accounts to special audit.

- In this case, looking at large number of the transactions, covering 10 entities and having turnover of Rs 100 crores, the AO is justified in asking for a special audit under sec 142. *2013-TIOL-633-HC-MUM-IT.*

➢ **Taxability of land given as consideration for rendered services:** The assessee, an advocate by profession entered into an agreement with one Chakravarthy and E.Umapathy in respect of the property situated in Kodambakkam. The said Chakravarthy was the absolute owner of 3 grounds of land measuring about 7,200 sq.ft. The said Umpathy was the absolute owner of 2 grounds measuring about 4,800 sq.ft in the same property. At the time of registration of the document in favour of the above two persons, the vendor promised to furnish the copy of the proper layout plan to them. However, when the said parties found that there were no proper layout or even a rough sketch, leading to difficulties in identifying the boundaries, the purchasers approached J.Mahalingam, the assessee herein, seeking his services for getting necessary patta as well as for getting the necessary layout of the properties purchased by them. The agreement stated that the assessee would undertake the job of preparing a sketch of the entire area and obtain patta from the Revenue Authorities. For the services to be rendered by the assessee herein, the owners agreed to transfer 3 grounds of land in the said property.

The AO observed that role of the assessee was only that of a professional, consequently, the receipt was to be assessed as income from professional services. On appeal, the CIT(A) held that if the transaction was to be taken as for rendering professional services, then the receipt from the professional service would generally be limited to minimum 5% to 10% in most of the cases. However, to say that the receipt of 60% of total sale consideration as 'business income' and treating it as such was devoid of logic or merit. Upon appeal, the High Court held:

- In the absence of any material to show that the payment was made only for the services rendered by the assessee as an Advocate, the plea of the Revenue that the receipt was to be assessed as professional income cannot be accepted.
- The sale agreement makes it very clear that the transfer of 3 grounds of land to the assessee was intended by way of consideration for securing patta and lay-out and as such, the original owners had entrusted the entire land to the assessee.

- The assessee had rightly placed reliance on Section 2(47)(v) of the IT Act, read with Section 53A of the Transfer of Property Act, that the receipt would attract capital gains at his hands.

- Since the assessee had performed his part of contract when the sale was sought to be effected, the assessee acted as 'Confirming Party' as per the terms of the agreement and the assessee received the consideration. The Revenue's contention that on the mere incident of the assessee being a practising advocate, he is dis-entitled to claim the receipt as income assessable under capital gains, is not acceptable. *2013-TIOL-623-HC-MAD-IT*.

➢ **Expenses incurred towards performance of duty as Development Officer:** The assessee, a Development Officer in the LIC, claimed deduction of 40% of the incentive bonus paid to him prior to 1.4.1989, on the ground that he had incurred expenditure to the extent of 40% of the incentive bonus for canvassing business. CBDT affirmed that the incentive bonus paid by the LIC to the Development Officers formed part of their income towards salary. However, with effect from 01.04.1989, the LIC itself issued a clarification to the effect that the Development Officers would be entitled to claim reimbursement to the extent of 30% of the incentive bonus granted to them. Thus, the dispute was confined only to the period prior to 01.04.1989. Having heard the parties, the Bench held that:

- There is no dispute in this case that the incentive bonus paid to the employee by the employer is nothing but salary.
- What is excluded under Section 10(14) as it stood prior to 01.04.1989 is the expenses incurred in the performance of the duty. It is for the employer to certify the actual expenses incurred in the performance of duty, and to that extent, the same shall not be shown as part of salary. There is no claim by the employee either for reimbursement or exclusion of the actual expenditure incurred in performance of the duty. It was for the LIC of India to reimburse the actual expenditure involved in the performance of the duty by the Development Officers and to that extent the same was not to be shown as salary.

- The assessee being a salaried person, the incentive bonus received by him prior to 01.04.1989 has to be treated as salary and he is entitled only for the permissible deductions under Section 16 of the Act. The expenses incurred in the performance of duty as Development Officer for generating the business so as to make him eligible for the incentive bonus is not a permissible deduction and, hence, the same is taxable. *2013-TIOL-37-SC-IT*.

➢ **Sec 10B benefits cannot be denied**: The assesse, a 100% EOU, was a partnership firm and had claimed deduction u/s 10B of the Income Tax Act in respect of the income

earned on the export of handicraft items of dried flowers and parts of plants. On going through the nature of activity undertaken, the AO observed that there was no manufacturing of any goods, to qualify for 100% deduction u/s 10B. Also, the AO held that the firm was constituted through the division and splitting up of a business already in existence. Upon appeal, the High Court held that:

- The process which the assessee had undertaken satisfies the test of manufacture to qualify for relief under Section 10B. What is purchased as raw material and what is exported as a product for export are totally different items. The process that the assessee had undertaken clearly points out the irreversible nature of the final end product from a raw material purchased, and so it is 'manufacturing'.

- The mere presence of three of the Directors as partners, by itself, would not make the firm as one, split up from the company. Both the entities deal in different graded products. In the absence of any material to substantiate the contention of the Revenue that the firm was constituted by splitting up of the company, the plea of the Revenue was rejected. *2013-TIOL-605-HC-MAD-IT*.

➢ **Expenditure incurred in course of business:** The assessee, M/s Williamson Tea (Assam) Limited, was engaged in the business of growing, manufacturing and selling of tea. The assessee had claimed several deductions as business expenditure which were disallowed by the AO.

- The directors and executives of the assessee had undertaken foreign travels for promoting the sales of the business. The AO observed that the assessee had its selling agent, and also, three non-resident Directors of the assessee were permanently residing in U. K. Therefore, as per the AO, these foreign tours were unnecessary and liable to disallowed as non trading expenditure. The AO also disallowed the expenditure incurred on the spouse travelling along with the employees of the company.
- The assessee had also claimed 100% depreciation on the expenditure incurred in connection with erection of fencing at their tea garden. The AO observed that the company had acquired assets (tea bushes) with lasting value and, therefore, it was not entitled to 100% depreciation but to normal depreciation.
- The assessee had claimed deduction in connection with centenary celebrations of the clubs whose membership was held by the directors and the employees of the disallowed it on the ground that the assessee could not show any business connection with the business organizations to whom the concerned amount was shown to have been paid.

Upon appeal, the HC held that:

- When an expenditure is claimed to have been incurred by an assessee for promotion of his business, there is no legal obligation imposed on the assessee to prove that the expenditure was necessary for promotion of his business. So long as the expenditure is incurred by an assessee for promotion of sale of product, the assessee is entitled, under Section 37(1) of the Act, to claim exemption from tax on such amount of expenditure. The expenditure, on the visits by the garden managers, was wholly and exclusively for business purposes and is deductible.

- Since it is customary in the European countries for the wives to accompany their husbands, the travelling of the wives along with their husbands cannot be said to be personal visits of the wives, but such a visit has to be regarded as having been undertaken for the purpose of business of the respondent company.

- The expenditure, incurred in connection with sponsoring of the Centenary celebrations were also allowable, because the respondent company's banners, as sponsors of the events, were displayed at the said functions. Therefore, the said expenditures were held by the Tribunal to be wholly and exclusively incurred in connection with business. *2013-TIOL-601-HC-GUW-IT.*

➢ **Profitability of a Permanent Establishment: Th**e assessee, Hyundai Motors, which had a PE in India, carried-on business within and outside India. The assessee had been assessed to tax in India, as per the provisions of the India-Korea DTAA. Prior to the assessment year concerned, the tax liability of the assessee was determined on the basis of 10 per cent of the gross receipt minus (-) expenses established or accepted. The same method was also applied during the relevant assessment years. This method was adopted in relation to within India activities for which, payments were received within India. The assessee submitted returns wherein it claimed to have suffered loss for the Indian operations. It, accordingly, asked for return of tax deducted at source.

The Assessing Officer found that, in relation to certain expenditures, tax was deducted and deposited and so there was no dispute pertaining to those expenditures. He thus deducted those accepted expenditures from the undisputed gross receipt. 10 per cent of the amount, so determined, was assessed as the tax liability of the assessee. In addition to that, the assessee received certain payments from Indian Enterprises, in relation to certain work. The AO felt that those were pertaining to outside India activities of the assessee and, accordingly, those were not taxable.

Subsequently, the DIT held that the taxable liability should have been determined on the basis of receipt minus expenditure *established* and there was no scope of applying 10 per cent deemed profit of the receipt minus *accepted* expenditures. As for the amount received by the

assessee as revenue from outside India operation, the DIT observed that it was from projects in respect of which the assessee had also received revenue from inside India operation. Therefore, it was clear that the assessee had received a composite contract for the work to be performed in India and also related work from outside India. Upon appeal, the HC held that:

- The Tribunal, as a fact, has found that the assessee could establish only a part of the claimed expenditure. In income tax parlance, the expenditure that the assessee has not been able to account for, is the income of the assessee.
- The AO and the Tribunal have failed to record anywhere that the method that was adopted by the AO to attribute profit of the assessee, is recognised by any law in India. In the event, a method, unknown to the law, is adopted for years, that can certainly be corrected and that will be good and sufficient reason for doing so.
- In India, profit may be attributed by taking recourse to Section 144 of the Act only when the same is not ascertainable on the basis of cash or mercantile system, as is known in India. In the event, either of those systems is applied, but the assessee fails to satisfy that a particular expenditure has been incurred by it in course of business, the law permits the same to be added to the profit of the assesse.
- If the assessee had maintained the accounts and had established that its expenses were more than its income or receipt, it was not liable to pay any tax in India. In the event, however, it failed to establish all or any of its expenses, the expenses shown to have been incurred, which could not be established, would be treated as the income of the assessee.

- The AO is hereby instructed to call upon the assessee to produce not only the books of accounts, but all relevant papers pertaining to each entry shown in respect of each expenditure, that the assessee has shown to have incurred in respect of such transactions. ***TII-27-HC-UKHAND-INTL.***

SERVICE TAX

Important Circulars/ Notifications

- **Service Tax Voluntary Compliance Encouragement Scheme:** This Circular provides clarifications regarding the Service Tax Voluntary Compliance Encouragement Scheme 2013. The details are in *Circular No. 170/5 /2013 – ST, dated 8-Aug-2013.*

CESTAT JUDGMENT

- **Relevant rate for levy of Service Tax:** The appellant was providing "Commercial Training or Coaching" services. The appellant contested that for the period prior

to 10.09.2004, the rate of Service Tax leviable was 8% and w.e.f 10.09.2004, the applicable rate was 10%. Therefore, for the services rendered prior to 10.09.2004, it was liable to pay Service Tax only @8% even though it raised bills after 10.09.2004. The lower authorities rejected the contention of the appellant. Upon appeal, CESTAT observed:

- It is the rate prevalent on the date of rendering of the service, which is relevant for levy of Service Tax. Recently, the High Court of Delhi in the case *2013-TIOL-403-HC-DEL-ST* held that the rate that should be applied for levy of Service Tax is the rate prevalent on the date of rendering the services and not the rate applicable on the date of receipt of payment.
- The appeal is allowed. *2013-TIOL-1273-CESTAT-MUM.*

➢ **Service of Commercial Training:** National Institute of Bank Management (NIBM), established by the RBI, conducted a number of training programs for the officials of various banks and also a post-graduate diploma programme for students in banking management. The appellant charged lumpsum amount for conducting these programmes from the participants or their sponsors. The department took the view that the service rendered by the appellant came under the category of 'Commercial Training or Coaching' and demand for service tax was raised, along with penalties. The applicant submitted that it had sought a clarification from the department earlier, and it had been clarified by the department that the applicant was not covered under 'Commercial Training' for the purpose of levy of Service Tax, as it was charging much less than the commercial rate for conducting such training. So the demand was hit by limitation. Upon appeal, the Bench observed:

- As per the newly inserted Explanation in section 65(105)(zzc) of Finance Act, 1994 by Finance Act, 2010, which was made effective from 1 st July, 2003, it is clear that any centre or institute, by whatever name called, where training or coaching is imparted for a consideration is liable to service tax. There is no dispute in the present case that the appellant herein is charging for the training programmes/courses conducted by them.
- In view of the decision of the Bangalore Tribunal in the ICFAI case, we are bound to follow the same as a matter of judicial discipline, as the facts/issues involved are identical in this case.
- In view of the above, we hold that the activity undertaken by the appellant falls within the definition of 'commercial coaching or training' as defined in Section 65(105)(zzc) of the said Finance Act.
- The department was aware of the activities undertaken by the appellant and the department was also of the view that the said activity did not come under the category of 'commercial or training or coaching'. However, after the amendment made in the Finance Act, 2010, the law underwent a change consequent to which the activity undertaken by the appellant became taxable. In such

circumstances, there cannot be any suppression of facts on the parts of the appellant and, therefore, the service tax demand has to be restricted to the normal period of limitation.

- The claim of the appellant that it had charged a lumpsum amount including the charges for boarding and lodging and the same should be excluded while computing the tax liability, merits consideration. However, the onus is on the appellant to substantiate its claim with regard to the amounts charged for boarding and lodging. On submission of such evidences, the same shall be considered by the adjudicating authority and the demand quantified after giving abatement for the boarding and lodging expenses. *2013-TIOL-1247-CESTAT-MUM.*

➢ **Trading of Cargo space in shipping lines: The** appellant was a freight forwarding agency, registered as a multi-modal transport operator. It booked cargo space in shipping lines and thereafter, it provided/allotted the space to its customers. The department was of the view that the activity undertaken by the appellant came within the category of "Business Auxiliary Services" and the appellant was promoting the service rendered by the shipping lines. The appellant submitted that it was in the business of *trading* of cargo space, and therefore, no service had been rendered to the shipping lines. Also, it submitted that it should be considered as "Carriers" and therefore, the amount charged by it should be considered as "freight". The Revenue contested that the appellant was rendering a service to the shipping lines and the consideration was received by it by way of mark-up in prices and, therefore, the services rendered came under "Business Auxiliary Service". Upon appeal, the Bench observed:

- Cargo space is not goods, therefore, booking of cargo space and trading in cargo space cannot be considered as supply/sale of goods and has to be considered as supply of services. Any activity other than supply of goods amount to supply of service.
- There is no force in the argument of the appellant that service has to be rendered always as an agent. As in the case of goods, service also can be supplied/rendered on a principal to principal basis.

- Thus, *the appellant has not made out a prima facie case for getting a waiver of pre-deposit of the adjudged dues. 2013-TIOL-1206-CESTAT-MUM.*

➢ **Franchisee Service*:*** The appellant - The Delhi Public School Society - was engaged in entering into agreements with different entities interested in establishing schools in different areas. As per the agreements, named as 'Education Joint Venture', the appellant (assessee) permitted, allowed and granted a revocable license to the party to the agreement to use the name DPS, its Logo and motto for the purpose of the school to be established. The school should be established, managed and run by a Board of Management (BOM) consisting of members nominated by the assessee and the parties. The parties were required to pay the

consideration, in advance, commencing from the year the school started functioning.

The Revenue contested that the consideration received by the appellant was taxable under the category of Franchisee service and confirmed the demands under extended period. The appellant contended that the agreement was a joint venture agreement and hence the services provided by the assessee would not constitute taxable service. Upon appeal, the Tribunal held:

- The assessee is wholly immune to any losses arising out of the enterprise i.e. the educational institution to be established pursuant to the agreement. Also, it has no entitlement to any share in the profits arising therefrom. Any accretions to the enterprise, accruing as a result of profitable running of the schools would constitute assets which would be transferred only to the other party (not the assessee).
- Since there is neither a contribution of assets nor a sharing of profits and/or losses provided in the agreements between the parties, the ingredients of a partnership or a joint venture are absent.
- The fact that the other party is required to pay a specified amount to the assessee indicates that the assessee is remunerated for services provided to the other party to the agreement. Therefore, there is a service provided by the assessee to another, for consideration. There is no element of service to the assessee itself.
- Hence, the assessee is liable to pay service tax under Franchisee service. *2013-TIOL-1282-CESTAT-DEL*.

ADVANCE RULING

➢ **Marketing and sales support in India to a firm in China and USA:** The applicant was a wholly owned Indian Subsidiary of M/s Tandus Flooring Asia Pte Ltd, Singapore. It was set up with the objective of strengthening and enhancing sales of the Tandus Group products to the Indian customers. The mandate of the applicant was to provide marketing and sales support for the distribution of floor coverings or carpet manufactured outside India and sold to the customers in India by Tandus USA and by Tandus China, through their own dealers or directly. The applicant proposed to enter into Marketing and Sales Support Services agreements, and receive service fees in freely convertible foreign exchange from Tandus US and Tandus China, as consideration. The fees will correspond to the operating costs of the applicant and arm's length markup determined in accordance with the transfer pricing laws in India. The fees would include any inter-company service fee paid by the applicant to group companies for any service received by them from such group companies. It was further clarified that the applicant would not receive any payment from the dealers of Tandus US or Tandus China (who are the service recipients) or from any other quarter in connection with the services to be provided under the proposed agreements. It was also clarified that the scope of dealer management under the proposed agreement was limited to the applicants acting as a

communication channel between the Indian dealers and Tandus US and Tandus China. On these facts, the applicant sought Advance Ruling on the following questions:

- **Q1:** What would be the place of provision of the marketing and support services provided by Tandus India to Tandus US and Tandus China in terms of the Place of Provision of Service Rules 2012.
- **Q2:** Whether the marketing and support services provided by Tandus India to Tandus US and Tandus China would qualify as export of taxable services under Rule 6A of the Service Tax Rules , 1994 (as amended from time to time)

The AAR ruled that:

- The place of provision of service to be provided by the applicant to Tandus China and Tandus US shall be the location of the service recipients, i.e. in China and US respectively, in accordance with Rule 3 of Place of Provision of Service Rules, 2012.
- The provision of service by the applicant to the two recipients named above will amount to Export of service within the meaning of Rule 6A of Service Tax Rules, 1994. *2013-TIOL-03-ARA-ST*.

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