# Tax News

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## INCOME TAX

### *Reminder For September 2011*

| Action Due | Due Date |
|---|---|
| TDS / TCS for Aug. 2011 | 07-09-11 |
| PF for August 2011 | 15-09-11 |
| ESI for August 2011 | 21-09-11 |
| Advance Tax | 15-09-11 |



## SERVICE TAX

| Action Due | Due Date |
|---|---|
| Service Tax for the month of August 2011 in case of company | 05-09-2011 |
| Service Tax for the month of August 2011 in case of a company for which e-payment is mandatory. | 06-09-2011 |

# INCOME TAX

## Important Changes/Notification

**Deduction of Tax at Source from Salaries u/s 192 of the IT Act during the FY 2011-12:** Details are in the *Circular No. 05/2011 dated Aug 16, 2011.*

**Procedure for regulating refund of excess TDS deducted:** The circular no. 2/2011 dated 27-4-2011 is hereby modified by adding the following words at the end of paragraph 4.2: "However, the refund claims pertaining to the period upto March 31, 2009 may be submitted to the Assessing Officer (TDS) upto 31-12-2012." *Circular No. 06/2011 dated Aug 24, 2011.*

## Supreme Court / High Court Judgments

**Taxability in case of having business connection but no business operations in India:** Star Isle of Man (SCML), a company registered in Isle of Man, provided sales, marketing, and promotional services for the cruise vessels owned, managed, operated or chartered through the Star Cruise Group of Companies. Star Isle of Man appointed Star India, the assessee, as its canvasser in India mainly to canvass business for its operations and for marketing its cruise packages and shore excursions. For its services, the assessee was to receive a retainer fee, which was 3 per cent of net cruise charges remitted to SCML. The issues were:

a) When a non resident has a business connection in India, even if no business operations are carried out in India, whether any part of income of such business can be deemed to have accrued or arisen in India.

b) Whether when a sales agency - dependent or independent - which constitutes its 'business connection' in India, is paid a fair and arms-length remuneration for the services rendered by it, or operations carried out by it, can a non-resident's tax liability under section 9 (1)(i) read with section 5(2)(b), still come into play.

c) Whether the vicarious withholding tax liability of the assessee gets extinguished once it is held that the non-resident is not liable to tax in India.

It was held by the Tribunal that:

a) 'Business connection', does not really enlarge the scope of non resident's taxability in India. What matters is whether or not there is a 'permanent establishment'. In this case there was no PE.

b) A non-resident's tax liability cannot come into play in a situation in which a sales agency which constitutes its 'business connection' in India, is paid a fair and arms-length remuneration.

c) As Star India's tax withholding liability is only a vicarious liability under section 195, once Star Isle of Man did not have any principal tax liability in India, the impugned vicarious tax withholding liability of Star India must also not exist. *2011-TII-113-ITAT-MUM-INTL dated July 22, 2011*.

**Agency Agreement**: The assessee company, engaged in the business of sales and manufacture of vibration analysing equipments, had entered into a joint venture agreement with IRD

Mechananalysis Inc. USA, whereby the assessee was entitled to make use of the trade name / patents of IRD, USA and its associate concerns besides being licensed to manufacture and sell certain products in India. The company had thus established its market presence in India under the name of "IRD Mechanalysis". The assessee had also entered into a separate Sales Representative Agreement with Entek IRD, U.K. in respect of goods and products produced by the UK company, which were not manufactured by the assessee in India. The joint venture agreement with the US company had expired in 1992 but continued thereafter without the approval of the Central Government until it was terminated in 2000-01, whereby no further royalty was paid, and the assessee was duly compensated for the termination of the joint venture. The sales representative agreement with the UK company was terminated during the assessment year 2003-04.

The assessee had claimed the compensation received for termination of the joint venture as a capital receipt exempt from tax as it was for loss of capital or intangible asset. Following the end of collaboration, in view of the non-availability of technical assistance hitherto rendered by M/s Entek IRD UK, the assessee had made payment to its sister concern M/s Concast India Ltd, towards design engineering consultancy and technical support for submission of quotations for large value tender enquiries and claimed this amount as professional fees. The assessee had also claimed deduction on commission payments made to M/s Mistry Engineers, a proprietary concern of the relative of one of the directors.

The AO disallowed the professional fees paid to Concast India on the ground that there was no evidence to prove whether such services were taken by the assessee. It was held that the assessee merely handled Sales Representation for Entek IRD and had not obtained any consultancy from them towards designs for tender quotation in the last few years. Besides being unable to prove the genuineness of the transaction, the assessee company already employed a good enough number of engineers and technical personnel as its own employees whereby there was no business requirement for such consultancy. The entire technical fees paid to Concast India were disallowed.

The AO also disallowed the sales commission paid to Mistry Engineers on the ground that the assessee failed to furnish the bills as required, besides it had its own large team of qualified personnel to carry out the job of sales and services. This payment of commission was thus unreasonable and unwarranted and disallowed under section 40A(2).

The AO also disallowed the compensation received by the assessee on termination of the joint venture. The assessee being unable to file a copy of the joint venture agreement which expired in 1992, the AO held that the assessee had no joint venture with the foreign collaborator during the year 2001-02 and 2002-03, the period when the separation from M/s Entek IRD International Ltd., U.K. had occurred. Thus the assessee company had been acting as trading agent on behalf of Entek IRD International of UK and the termination was of the agency and not that of any joint venture, corroborated by the non-payment of any royalty, as required in the case of joint venture.

In appeal before the CIT(A) the assessee submitted that while the consultancy fees paid by the assessee were assessed to tax as income in the hands of Concast India, as business expenses these were disallowed. The CIT(A) allowed the claim holding that Concast India had rendered the services as

there was no engineer engaged for designing in the assessee company. Payment had been made for business purpose and was hence allowable as business expenditure. Similarly, the commission paid to M/s Mistry Engineers had been allowed earlier and accepted as genuine, whereby there was no justification for making this disallowance. Both these disallowances were deleted.

However, ruling in favour of the Revenue, the CIT(A) confirmed the taxability of the compensation received by the assessee towards termination of collaboration under section 28(ii), holding that there was no joint venture collaboration in existence during the relevant assessement years as no royalty had been paid by the assessee to Entek IRD of UK. Therefore the sum, received from Entek IRD U.K. was not on account of a termination of joint venture which had already expired in the year 1992.

Both parties appealed before the Tribunal. The Tribunal held that:

- The order of the CIT(A) deleting the disallowance is being upheld on account of consultancy charges paid to M/s Concast India and on account of commission paid to M/s Mistry Engineers. Thus the appeal filed by the Revenue is dismissed;

Regarding the taxability of the compensation, the assessee had claimed that the income earning apparatus of the company had been lost on the termination of the joint venture agreement, impairing the complete manufacturing apparatus and trading structure of the assessee company from gaining any income. But the facts proved otherwise. The assessee had not renewed the collaboration agreement but taken the help of M/s Concast India for providing the technical knowhow for continuation of the business. This showed that the termination of collaboration was replaced by technical consultancy support from M/s Concast India. The royalty payable to M/s Entek IRD, UK for the technical assistance was replaced by technical fees, which had been upheld as business expenditure. Under the circumstances therefore, the end of joint venture had not resulted in any serious impairment of the profit making apparatus of the assessee, which had continued the business. Further, the collaboration agreements did not provide for payment of compensation on termination. Therefore, the payment made by M/s. Entek IRD was towards the termination of the agency agreement which was terminated during the year under appeal. Hence the amount received by the assessee was business income under section 28(ii). The CIT(A) order, upholding the payment as a revenue receipt, was therefore confirmed and the appeal of the assessee dismissed. *2011-TIOL-522-ITAT-MUM.*

**Establishing the genuineness of a Gift transaction:** The assessee (Ms. Mayawati) filed her Income Tax return for the Assessment Year 2003-04 stating the income earned from salary, house property and other sources. The AO, on perusal of the return, found that during the year under consideration, the assessee had received gifts from certain persons vide cheques and also received immovable assets as gifts from Ashok Jain and Veena Jain, husband & wife. Ashok Jain was an Advocate by profession and Veena Jain was his wife. The AO wanted to examine the genuineness of the aforesaid gifts. For this purpose he summoned the donors and recorded their statements and also recorded his observation on the creditworthiness of the donors. It was seen that Veena Jain herself had taken loan for purchase of property as she was not having sufficient funds for this purpose. She had sold her jewellery for purchase of

the house. Therefore, he opined that the creditworthiness of the donor was not proved. The AO also observed that there was no relation between the donors and the donee. Consequently, the AO added the value of the gifts (immovables as well as cheques) to the income of the assessee.

The assessee appealed against the above order passed by the AO. The CIT (A) observed that the donor had paid the stamp duty, the assessment of the donor had not been disturbed, and the donor and donee both accepted the fact of gift. Further the gift was also evidenced by documentary evidences like gift deeds, sworn affidavits, declaration before AO etc. The donor also gave an explanation for immediate source of gift. The CIT (A), thus, accepted the genuineness of gift inasmuch as the identity and capacity of the donors were proved and came to the conclusion that fact of gift stood established. He thus, partly allowed the appeal of the assessee.

The ITAT also confirmed the order of the CIT(A). On further appeal by Revenue, the High Court held that:

- Considering the assets owned by Ashok Jain, the court was of the considered view that he had the capacity to make gifts in question. Therefore, there is no force in the arguments of the AO that Ashok Jain had no capacity to do the same.

- Further in the case of Veena Jain, details of assets proved on record show that she had capacity to borrow first, and then to gift as per her desire. The capacity does not mean what you are earning monthly or annually. The capacity includes how much total assets a person owns. On perusal of the record it is revealed that she has stated before the Department that the assessee is a Rakhi sister of her husband and she is great admirer of the assessee because she is working for the upliftment of the down trodden and poor persons of the society. Sometimes a person does not have to be related to a particular trust or a charitable institution, but in their view that trust or institution is doing a great service to the particular section of the society. Therefore, there is no force in the arguments advanced by the counsel for the Revenue.

- All the donors appeared before the Department, submitted material including affidavits on oath, confirms the gifts made, established their old relations with the assessee and proved their capacity to make the gifts. We have noted that in earlier years also they had made gifts to the assessee and her family members, which were accepted by the Revenue. The assessee has fully discharged her legal obligations by disclosing the identity of all the donors. All gifts are absolute and without any lien of anyone. There is no evidence on record to prove that the assessee has favoured the donor in any manner whatsoever by acquiring the gifts in question. All the formalities, as per law are met by the assessee and donors as well. In the light of above facts and circumstances, no substantial question of law arises from the instant appeal. Therefore, the judgment passed by the ITAT was confirmed and the instant appeal of the Revenue was dismissed. *2011-TIOL-480-HC-DEL-IT*

**Interest income accrued needs to be disclosed even if TDS Certificate was not available at the time of filing the return:** The Assessee, in his return had shown income from salary, interest income, and long term capital gain. The AO observed from the AIR information that the assessee had not shown interest income of approx Rs.2 lacs received from UCO Bank, City Bank and ICICI Bank Ltd. Assessee could not explain the issue and agreed on the proposed addition. Penalty proceedings were initiated. In reply to the same, the assessee

submitted that he had not shown the interest income received from banks in the statement of total income since the TDS certificates were not received from the bank in time and therefore, the income for the same and also the TDS amount was not considered. There was no concealment of income and accordingly, no penalty should be levied.

AO levied penalty u/s 271(1)(c) stating that the assessee had failed to offer interest income, and since the assessee had been availing facilities of skilled professionals, therefore, such inaccurate particulars filed by the assessee cannot be ignored. The statement of the assessee that no TDS certificates were received from Banks in time was also not found correct as the two TDS certificates submitted by the assessee revealed that both the certificates were duplicate and the original certificates had already been issued to the assessee.

Before CIT (A), the assessee contended that the appellant was following the cash system of accounting' in respect of income earned by way of interest. Though the bank might have credited the amount of interest that was accrued, the assessee was not aware of such credit to his account at the time of filing the return of income. The AO himself had passed an order u/s. 154 wherein he acknowledged that the assessee had not claimed credit for the TDS for the reason that the TDS certificates were not received at the time of filing the return of income. The AO was therefore, not justified in imposing the penalty u/s 271(1)(c).

CIT (A) confirmed the penalty stating that since appellant was having FDR, it was obvious that interest income would accrue on the same. By not disclosing interest income accrued on FDRs, appellant had definitely concealed the particulars of income which came to be noticed only after AIR information was compared. The appellant's claim of bona fide mistake was not relevant since there was a concealment of income and furnishing of inaccurate particulars of income in the return filed.

Upon hearing the assessee's appeal, the ITAT held that:

- There is no dispute about the fact that the said interest income was not shown by the assessee in his return of income. Had the case been not taken into scrutiny and the A.O. was not having information through AIR, this income would have gone untaxed. Therefore, there is clear concealment of income to the extent of interest income not offered for tax on the part of the assessee and the provisions of Section 271(1)(c) of the Act are attracted.

- The explanation given by the assessee that he did not disclose the interest income as he did not receive TDS certificates has also been found false as is clear form the duplicate TDS certificates received by the assessee that originals were sent well before the date of filing of return.

- When the assessee received TDS certificate in respect of some FDRs, and not in respect of other FDRs as claimed by him, he should have obtained the duplicate certificates and should have filed them with the return of income showing total interest received by him. Instead, he chose not to show the interest income. When the A.O. on the basis of AIR information taxed this amount, to take the credit of TDS he obtained the duplicate certificate. This exercise should have been done by him before filing the return. This conduct of the assessee creates doubt about the bona fides of the assessee and so the appeal is dismissed. *2011-TIOL-492-ITAT-AHM dated Aug 5, 2011.*

- **Taxability of interest on interest earned on Foreign Exchange assets:** The assessee originally made an

investment in a bank out of the funds brought by him from abroad. Periodically, the assessee renewed the matured deposits along with the interest amount. The interest accrued thereon on the interest portion of the deposit was also taken as foreign investment eligible for concessional rate of tax in the returns filed for the A.Y 1996-97. The assessee made the said claim u/s 115H. Originally, the return was processed and passed u/s 143(3), accepting the claim made u/s 115H for concessional levy. In exercise of the powers u/s 263 the CIT issued notice that acceptance of the claim of the assessee u/s 115H had resulted in an erroneous assessment detrimental to the interests of the Revenue and thus the CIT sought to revise the order of assessment to cancel the concessional levy claim u/s 115H.
After hearing the assessee's objection, the notice was confirmed by the CIT(A) and the AO was directed to redo the assessment in accordance with law. The CIT(A) viewed that even though interest along with the original deposit was reinvested, since the interest, an interest on the investment out of foreign funds, had accrued in India, the same did not acquire the status of an investment made with foreign exchange.

The Tribunal rejected the appeal and held that the special treatment given to the interest on foreign investment could not be extended to the interest on interest redeposited with the original sum.

Before the High Court in Appeal, the assessee pointed out that the benefit available to the assessee in respect of the income derived from the foreign exchange asset would equally be available to the interest earned on the redeposit of interest along with the original investment. Being a beneficial provision, the assessee should have been granted the benefit under the above said provision. He further submitted that the assessee had not withdrawn the interest which originally accrued to the foreign exchange asset.

On appeal, the HC held that:

- so long as the asset retained its character as foreign, the income derived there from would continue to enjoy the concessional levy u/s 115H. The assessee's contention is that as in the case of interest income derived from foreign exchange asset, the interest on the deposit made out of the interest income also qualified for concessional rate as the investment income derived from foreign exchange asset, since the same is traceable to the foreign exchange asset originally made. The Court does not think the Section allows such elasticity in interpretation.

Thus, going by the wording in Section 115H, there is no ground to accept the assessee's case. *2011-TIOL-455-HC-MAD-IT dated Aug 2, 2011.*

# SERVICE TAX

## Important Circulars / Notification:

- **Service tax on fee charged for issuance of Country of Origin Certificate (COOC) by Chambers of Commerce:** Board has received representations seeking clarification as to whether service tax is leviable on the fee charged by the Chambers of Commerce for issuance of COOC.

These representations have been examined. Service provided by a Chamber of Commerce by way of issuance of COOC appears to fall under two different headings, namely, 'club or association service' [Finance Act, 1994, section 65(105)(zzze)], or 'technical inspection or certification service' [Finance Act, 1994, section 65(105)(zzi)].

Chambers of Commerce, Export Promotion Councils

(EPC), some Trade Associations have been authorised by the Government to issue COOC to the exporters. General practice followed is that the exporter makes an application to the Chamber or any authorised agency for issuance of COOC, in the prescribed form, along with a copy of commercial invoice and other documents and pays the prescribed fees. On the basis and verification of the information provided in the application for COOC and the supporting documents with reference to the goods sought to be exported, the Chamber or the authorised agency issues a COOC. The above activity carried out by the Chambers, involving certification of the national character of the export goods, squarely falls under 'technical inspection or certification', as defined in section 65(108) of Finance Act, 1994.

Hence, service tax paid on 'technical inspection and certification' of export goods is eligible for refund under Notification 17/2009-ST dated 7th July, 2009.

*Circular No. 145/14/ 2011 – ST.*

## SC / HC Judgments

- **Taxability of Broadband Services** - The appellant, M/s Bharti Airtel Limited, one of India's leading telecom conglomerates, was providing broadband services to its customers and duly paying Service Tax on it. The appellant had also registered as a dealer both under the Karnataka Sales Tax Act and Karnataka Value Added Tax Act. However, it did not disclose the receipts in respect of broadband services for the assessment year 2005-06. On completion of assessment, the authorities levied VAT on the broadband services. The appellant filed the statutory appeal before the Karnataka Appellate Tribunal. During the pendency of the aforesaid appeal, again notices were issued for the period 2007-08 proposing to levy taxes on broadband services on the premise that the same resulted in sale of ACLE - Artificially Created Light Energy. The appellant contested the said claim, inter alia contending that ACLE was not 'goods' and broad band service was a contract for service and thus outside the purview of the KVAT Act. However, overruling the said objections, the Department passed the impugned order levying sales tax.

  In its appeal to the High Court, the appellant contented that the Supreme Court in the *BSNL's case* (2006-TIOL-15-SC-CT-LB) had categorically held that electro magnetic waves were not goods. The judgment in BSNL's case squarely applied to the facts of this case and so, the impugned order of the Department was arbitrary and illegal.

  The High Court observed:

  - As per the Forty-sixth Amendment, an indivisible works contract can be altered into a contract which is divisible into one for sale of goods, and the other for supply of labour and services. The State can levy sales tax to the extent of goods involved in works contract. Therefore, the question is that if it is a composite contract, what is the dominant nature of the contract? Since the consideration is paid for the services rendered to the subscriber, so it is clear that it is a service contract, which in fact is admitted by the assessing officer. In that view of the matter, the State is not empowered to levy sales tax under the said legislation for the broadband services.
  - The essence of these networks lies not in the energy transfer but in the transfer of information. Energy is simply a vehicle for all such information transmissions systems. Therefore, it is clear this artificially created light energy is a form of energy wave used as a data or information carrier by a service provider in telecom service.

  Assuming for the argument sake that ACLE

is 'goods', it does not give any right to the State to levy the sales tax. It is only when the goods are sold or any repurchase takes place, the taxing event happens and the tax could be levied. In the instant ease, the agreement entered into between the subscriber and the service providers does not mention sale of this Artificially Created Light Energy On the contrary, in the entire agreement what is agreed upon is providing the service.

The High Court ordered:

All the writ appeals and writ petitions are allowed to the following extent :-

- The light energy which is used as a carrier in telecommunication service for rendering service is covered by the Finance Act, 1994 read with Section 65 (109-a). It does not fall within the Entry 54 of List-II of VII Schedule.
- The contract in question is not a composite contract. It is an indivisible contract and a contract of service simplicitor. There is no element of sale at all to any extent. It is not a contract of sales simplicitor as contended by the State.

- The SC judgment on *BSNL* case (2006-TIOL-15-SC-CT-LB) clearly applies to this case, wherein it was decided that the light energy is not 'goods', as defined in Article 366 (12) of the Constitutions of India or under Section 2(m) of the Karnataka Sales Tax Act, 1957 or Section 2 (15) of the Karnataka Value Added Tax, 2003. Consequently, there is no sale of goods as held by the Assessing Authority. So, they have no power to levy tax.

- The impugned re-assessment orders and Assessment orders passed by the Assessing Authority levying tax on light energy are to be set aside. *2011-TIOL-518-HC-KAR-ST dated August 24, 2011.*

➢ **Taxability of Mobile SIM card as 'goods' or as 'service':** The issue in this case was whether the value of SIM cards sold by the appellant to its mobile subscribers was to be included in taxable service under Section 65 (105) zzzx of the Finance Act, 1994, which provided for levy of service tax on telecommunication service, OR, whether it was taxable as sale of goods under the Sales Tax Act.

The appellant was selling the SIM cards to its franchisees and was paying the sales tax to the State and activating the SIM card in the hands of its subscribers for a consideration and paying service tax only on the activation charges. The Department of Sales Tax, State of Kerala, included the activation charges as part of the sale consideration of SIM cards on the ground that activation is nothing but a value addition of the "goods" and thus comes under the definition of "goods" under the Kerala General Sales Tax Act, 1963 ("KGST Act") and accordingly levied sales tax on activation charges. The Department of Central Excise, Eranakulum (Service Tax Department) observed that a mere SIM card without activation is of no use and held that the appellant was liable to pay service tax on the value of SIM card also. In both the cases interest and penalty were levied.

The appellant filed appeal before the respective appellate authorities under the KGST Act and Central Excise Act, 1944. There were consequential recovery proceedings against the appellant and the appellant filed Writ Petition in the High Court of Kerala challenging the levy of service tax on the sale price of SIM cards and also challenging the levy of sales tax on the amounts recovered by the appellant by way of activation charges from its customers which was dismissed vide order dated 15.02.2002.

Subsequently, the appellant filed Civil Appeal No. 2408 of 2002 before the Supreme Court.

Supreme Court's Observations:

- A SIM Card or Subscriber Identity Module is a portable memory chip used in cellular telephones. Kerala High Court in its Judgment in the case of Escotel Mobile Communications Ltd. (2003-TIOL-132-HC-KERALA-ST) had held that a transaction of selling of SIM Card to the subscriber is also a part of the "service" rendered by the service provider to the subscriber.
- The sales tax authorities have themselves conceded the position before the High Court that no assessment of sales tax would be made on the sale value of the SIM Card supplied by the appellant to their customers irrespective of the fact whether they have filed returns and remitted tax or not. The appellant also accepts the position that activation is a taxable service.
- The position in law is therefore clear that the amount received by the cellular telephone company from its subscribers towards SIM Card will form part of the taxable value for levy of service tax, for the SIM Cards are never sold as goods independent from services provided. They are considered part and parcel of the services provided and the dominant position of the transaction is to provide services and not to sell the material i.e. SIM Cards. *2011-TIOL-71-SC-ST dated Aug 5, 2011.*

## Tribunal Judgments

**Taxability of work contract pertaining to maintenance of a road project** - The assessee - M/s Viva Highways Pvt Ltd (VIVA) - had entered into a "Concession Agreement" with M/s Madhya Pradesh Rajya Setu Nirman Nigam Limited ('NIGAM') for the construction, operation and maintenance of a stretch of Road Project on the State Highway, on "Build, Operate and Transfer" (BOT) basis. The scope of the project included performance and execution, by VIVA, of all detailed design, engineering, financing, procurement, construction, completion, operation, maintenance and transfer of the Project Highway. It also included reconstruction, strengthening and widening of the existing lane of the State Highway, in accordance with the prescribed specifications and standards, and also operation and maintenance as per the specifications and standards mentioned in the agreement. VIVA was entitled, under the agreement, to levy, collect and appropriate the fees from the users of the Project. After completing the construction of the road, VIVA started collecting toll from users of the Highway at the prescribed rates during the period of dispute.

The Revenue sent a show-cause notice to the assessee alleging that service tax was liable to be paid on the toll collected by VIVA towards "management, maintenance or repair" service. The taxable value for levy of service tax was determined by deducting the amortized cost of construction of the Highway from the total toll collection. It was on this basis that the Show-cause notice demanded service tax of Rs.5.82 Crores.
The appellant submitted that:

- The projects undertaken by them were turn-key projects covered by works contract and that "works contract" service became a taxable service only with effect from 1.6.07.
- The construction of road would not come even within the ambit of 'works contract service' inasmuch as it was excluded from the purview of "commercial and industrial construction service".
- The legislative intent was to exclude the construction of roads, dams, bridges etc. from service tax net and maintenance or repairs of immovable properties like roads would not be liable to service tax under the head "management, maintenance or repair service".
- Following orders granting stay in similar matters by CESTAT were cited - Govindaswamy Balraj (2010-TIOL-1439-CESTAT-BANG), Swarna Tollway (P) Ltd. (2009-TIOL-2574-CESTAT-BANG) Karnataka Land Army Corpn. Ltd. (2009-TIOL-1114-CESTAT-BANG).
- The demand was also hit by limitation since even the department did not

have a clear view on the issue inasmuch as the Board had in Circular no. 110/4/2009 dated 23.02.2009 mentioned about divergent practices in the matter with regard to levy of service tax on maintenance and repairs of roads.

- Moreover, under the Service Tax Rules, a provider of taxable service was liable to raise an invoice on the service recipient and the taxable value of the service was required to be determined on the basis of such invoice. However, since the appellants were not required to raise any invoice on NIGAM under the relevant contracts, the determination of taxable value in these cases by deducting the amortized cost of construction of roads from the total toll collection was arbitrary.

The Revenue submitted that:

- CBEC's letter F.No. B 1/6/2005-TRU dated 27.7.2005 stated that "…since 16.6.2005, services relating to maintenance or management of immovable property (such as roads, airports, railways, buildings, parks, electrical installations and the like) have also been covered under the purview of service tax. Such services would be taxable when provided under a contract or an agreement by any person or by a manufacturer or any person authorized by a manufacturer".
- Vide Circular no. 110/4/2009-ST dated 23.2.2009 it is clarified that "management, maintenance or repair" provided under a contract or an agreement in relation to properties, whether immovable or not, is leviable to service tax under section 65(105)(zzg) of the Finance Act, 1994 and that there is no specific exemption under this service for maintenance or repair of roads etc." and the said Circular further clarified that "while construction of road is not a taxable service, "management, maintenance or repair" of roads are in the nature of taxable services, attracting service tax".

The Bench observed -

- Prima facie, the appellants are entitled to the benefit of the stay orders.
- Prima facie, the appellants have also made out a case on limitation. The circular cited by Revenue indicates that different practices were followed by different field formations in the department with regard to levy of service tax on "management, maintenance or repair" services in relation to roads and other immovable properties. These different practices and views in the department appeared to have prompted the Board to issue clarificatory circulars from time to time. Where the department itself maintained doubt on whether service tax could be levied on "management, maintenance or repair" of roads, highways etc. any bona fide belief on the part of the appellants that they might not be liable to pay service tax on such activities, cannot be suspect.
- Holding so, the Bench ordered for waiver of pre-deposit and stayed the recovery in respect of the adjudged dues. *2011-TIOL-1086-CESTAT-MUM dtd Aug 26, 2011.*

**Availability of Cenvat Credit when input service and the final output are in different geographical locations:** The appellant was engaged in manufacturing of excisable goods in Raigad District. It availed CENVAT credit on various services rendered for its wind mill farm situated in Satara District. The Revenue Department determined that these services could not be treated as Input Services, and issued a show cause notice which was confirmed by both the lower authorities. Against this order, the appellant appealed to the CESTAT.

The appellant contested that:

- It had availed CENVAT credit of service tax paid on input services for maintenance of windmill at Satara. The electricity generated at Satara was transmitted to MSEB

Power Grid at Satara and in turn equal quantum of electricity was provided by MSEB Pen Circle to the appellant for the manufacturing of finished goods in Raigad.

- In the definition of input services, there is no mandate that they should be used in the factory of manufacturing alone.

The Revenue submitted that -

- Electricity generated at wind mill at Satara had no nexus with the manufacture of final products.
- Services used at the site of the wind mills could not be held as input services by the unit situated at a different place.

The Bench observed -

- Input service was defined under Rule 2(1)(ii) of Cenvat Credit Rules, 2004, as "Any service,

(i) used by a provider of taxable service for providing an output service; or

(ii) used by a manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products upto the place of removal, and includes services used in relation to modernisation, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs, accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, security, business exhibition, legal services, inward transportation of inputs or capital goods and outward transportation upto the place of removal;"

From the above, it followed that the said definition not only covered services which were used directly or indirectly in manufacture of final products but also included other services, which had direct nexus or which were integrally connected in manufacture of final products.

- It was not disputed that the Input services were rendered for maintenance of wind mills for generation of electricity. The electricity so generated was used in the manufacture of final product. Therefore, the service would come under the definition of input service. As regards input service being used at a different place it was pertinent that there was no mandate in law that it should be used in the same factory.

- In the case of Commissioner of Central Excise, Nagpur vs. Ultratech Cement Ltd. (2010-TIOL-1227-CESTAT-MUM), this Tribunal had held that the denial of CENVAT credit on the ground that services were not received by the respondent in factory premises was not sustainable.

The Tribunal held that the order of Commissioner (Appeals) was not sustainable in law, and the same was set aside and the appeal was allowed. *2011-TIOL-1059-CESTAT-MUM dated Aug 19, 2011.*

**Service Tax refund on transport of empty containers meant for stuffing export goods:** The appellant filed refund claim of Service Tax paid on GTA services on outward freight in relation to transportation of export consignment. The lower authorities rejected the refund claim on the ground that the claim included the refund of Service Tax paid on transportation charges to and fro i.e transportation of empty container from container yard at Mumbai to the factory premises at Waluj and from the factory premises to the port of export. The appellant appealed before

the CESTAT. The Tribunal observed –

- Undisputedly, the appellant had paid Service Tax on the transportation of to and fro movement of the container.
- Notification no. 3/2008-ST dated 19.12.2008 specifies "in relation to transport of export goods". This expression covers the transport of empty containers from the yard to the factory, and from the factory to the place of export of goods.
- This was also supported by the Tribunal's decision in a similar case (Tata Coffee Ltd. 2010-TIOL-1780-CESTAT-MAD).

The Tribunal held that the order of the Commissioner (Appeals) was not sustainable in law, so, the same was set aside and the appeal was allowed. *2011-TIOL-988-CESTAT-MUM dated Aug 5, 2011.*

**Applicability of Input Service Credits on various types of input services:** Appellant, a 100% EOU was the manufacturer of electrical goods. During the course of its business it availed several services and availed service tax paid thereon as input service credit. The input service credit on the following services availed by it was denied by the lower authorities on the ground that the same were not input service as defined under rule 2(l) of the Cenvat Credit Rules, 2004. The appellant appealed to the CESTAT. The Tribunal examined each of the Services and held as follows:

**Banking and Other Financial Services** – Lower authority had denied because Collection of Export Bills is a post manufacturing/export activity. However, the Tribunal held that these services have been availed in relation to the business of manufacturing of export goods. Therefore appellant is entitled to avail input service credit.

**Catering Services** – Lower authority had denied, because expenses were recovered from the employees and not borne by the appellant. The Tribunal also denied.

**Courier services** – Lower authority had denied because it could not be demonstrated that this service was used for manufacture and clearance of goods up to place of removal. However, the Tribunal held that the courier service has been availed in relation to the business of manufacturing. Therefore, the input service credit is allowed.

**Insurance services** – Lower authority had denied as insurance of the employees' family was a perquisites, and not an input service. The Tribunal also denied.

**Maintenance and Repair services (garden/photocopying)** – Lower authority had denied as this service was not related to manufacture. However, the Tribunal held that these services were in relation to the business of manufacturing, and allowed the credit.

**Management Consultancy** – Lower authority had denied as psychology assessment of the employees was not related to manufacture/business. However, the Tribunal held that as this assessment was done to test the ability of the employees, therefore this service is in relation to the business of manufacturing, and so the credit is allowed.

**Telephone services (land line)** – Lower authority had denied because the telephone instrument was installed outside the factory premises. However, the Tribunal held that since it is not disputed that the phone was being used in the business of manufacturing, so just because it was outside the factory premises, the credit cannot be disallowed.

**Business Auxiliary services** – Lower authority had denied because hiring a hall in a hotel was not in relation to manufacture/business. However, the Tribunal held that this hall had been hired for a training program of employees which is very much relating to the *2011-TIOL-965-CESTAT-MUM dated Aug 1, 2011.*

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