Tax News

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INCOME TAX

Reminder For January 2012

Action Due	Due Date
TDS / TCS for Dec. 2011	07-01-12
PF for Dec. 2011	14-01-12
ESI for Dec. 2011	21-01-12
Form 24C for the quarter ending 31st Dec.2011.	14-01-12 *(*)*

(*)Due date 15th Jan-12 being Sunday, so it is advisable to pay by 14th Jan-12.

SERVICE TAX

Action Due	Due Date
Service Tax for the month of Dec. 2011 in case of company	05-01-2012
Service Tax for the month of Dec. 2011 in case of a company for which e-payment is mandatory.	06-01-2012
Service tax for Quarter ending 31st Dec-11 in case of assessee other than company that makes payment electronically.	06-01-2012
Service tax for Quarter ending 31st Dec-11 in case of assessee other than company that does not make payment electronically.	05-01-2012

Tribunal Judgments

- **TDS on commission paid to a non resident:** The assessee was in the business of manufacturing and export of readymade garments. While computing its income from export of readymade garments, it had claimed deduction of amount paid as commission to a non-resident - 'SB' - who according to the assessee was its agents and represented it in connection with procurement of garment by foreign buyers in America, Canada and Mexico. The assessee claimed that the payments made by it to SB were not chargeable to tax under the Act because the services were rendered by SB outside India and it had no Permanent Establishment in India. However, the Assessing Officer observed that certain parties in USA and Canada were assessee's clients even before the written agreement was signed with SB, which contradicted the assessee's claim that it was only because of SB's efforts that export to USA and Canada increased. Also, the agreement was not signed before a notary. In view of the above discrepancies, the AO held that the agreement was sham and not genuine. Also the AO was of the view that even assuming that payment of remuneration to SB was genuine, the assessee ought to have deducted tax at source, because it was in the nature of salaries, and since the assessee had failed to do so, the payment was liable to be disallowed under section 49(a)(iii).

  The Tribunal held that if the services rendered were established, then the assessee would be entitled to claim deduction on the commission paid. The existence or non-existence of written agreement was not important. Therefore, the AO's observation that the agreement was a sham was irrelevant. Since the services were rendered by SB outside India, so no tax was required to be deducted as per CBDT Circular No. 786 dated 7-2-2000. There was no obligation to deduct tax at source and, therefore, provisions of section 195 were not applicable. Regarding applicability of article 15 of India - US DTAA, since the details of professional skills of SB had not been set out, therefore, the matter was sent back to the AO for fresh consideration. Also, the payment in question could not be considered as salary as there was no relationship of employer employee between the assessee and SB. *(2011) 16 taxmann.com 219 (Mumbai - Trib.) in case of Meru Impex vs. ACIT.*

- **Taxability of payments made by Electricity Board** The assessee, a SEB, entered into an agreement with NTPC for purchase of power and another with Power Grid Corporation for transmission of the power from NTPC's bus bars to the delivery point. The AO & CIT (A) took the view that the transmission charge paid by the assessee to Power Grid was rent for use of plant, and tax ought to have been deducted u/s 194-I. On appeal by the assessee, the Tribunal held that:

  (i) S. 194-I defines rent to include any payment, under any lease agreement or arrangement for the use of any machinery or plant. For a payment to be construed as rent, the payer should have some control over the asset. In this case, the

transmission lines were under the possession & control of Power Grid. The assessee was merely enabled to use the services of transmission of electricity and not the use of transmission wires per se. The transmission wires were also used by other customers of Power Grid. Consequently, the payments were not rent u/s 194-I;

(ii) Under the Explanation to s. 191, a person can be treated as an assessee in default u/s 201(1) only when, apart from the lapse in deduction of tax at source, the recipient of income had failed to pay such tax directly. If the tax liability was discharged by the recipient of income, the liability of the payer cannot be invoked. *Chattisgarh State Electricity Board vs. ITO (ITAT Mumbai)* 2011-TIOL-757-ITAT-MUM.

- **Capital Gain exemption u/s 54F:** The assessee made payment from his own account for purchase of a new house but got the same registered in joint name with his wife. The IT Department contended that exemption u/s 54F could be availed by him not on the entire amount, but only to the extent of his share in the property. The High Court held that:
  - It would be treated as property purchased by the assessee in his name. Merely because he had included the name of his wife and the property was purchased in the joint name, would not make any difference.
  - Section 54F mandates that the house should be purchased by the assessee and it does not stipulate that the house should be purchased in the name of the assessee only. Objective of Section 54 is to provide impetus to the house construction and so long as the purpose of house construction is achieved, such hyper technicality should not impede the way of deduction which the legislature has allowed. *2011-TIOL-818-HC-DEL-IT in Income Tax.*

- **Transfer Pricing:** The assessee-company was a subsidiary of Mauritius-based 'L' group that had export trading network in several countries. The assessee-company provided buying/sourcing services by sourcing garments, handicrafts, *etc.* in India for its associated enterprises (AE). These goods were then exported by the AE to the purchasers in other countries. The AE was charging from the purchasers on the basis of FOB value of exports. The assessee was paid on the basis of cost plus 5 per cent. The matter was referred to TPO for working out compensation at arm's length price for services rendered by assessee to AE. The TPO concluded that the free on board (FOB) value of goods should form the basis for calculating the assessee's remuneration. The TPO applied the markup of 5 per cent because the assessee was operating on a cost plus 5 per cent model. The Assessing Officer upheld the said order. The assessee approached DRP against said adjustment wherein, the DRP considered the mark up of the 5 per cent as excessive and considered 3 per cent as reasonable, as 3% mark up would adequately cover the valuable intangibles that had been used and developed by the assessee as also the location saving that the assessee was passing on to its AE.

On appeal, the Tribunal held that:

- The AE had been receiving the mark up as 5% of the FOB value of exports, while it was paying back to the assessee only as 5% mark up on the cost of

goods. Such an arrangement could not be said at arm's length. The critical and all crucial work was done by assessee. Over the years, the assessee had developed a technical capacity and owned manpower which had developed human intangibles to perform all the critical functions. The mark up must be on the basis of FOB value of the exports. Since the AE received 5% of FOB value, so the attribution between assessee and AE must be from this amount.

- The assessee's claim that no agreement was entered between the assessee and the AEs shall not justify the cost plus mark up.

- The adjustment amount added to assessee's income should not exceed the amount which could have been received by the AE. The AO as well as the DRP had proceeded on a wrong footing which had given absurd results of adjustments. In view of the fact that majority and crucial services were rendered by the assessee, the compensation received by AE from ultimate purchasers (i.e FOB + 5%) should be distributed in the ratio of 80:20 between the assessee and the AE. *[2011] 16 taxmann.com 192 (Delhi – Trib).*

- **Transfer Pricing for High Seas transaction:** The assessee-company was an associate of a multinational group 'M'. It imported edible oil from 'G', another associate of 'M' having its headquarter in Singapore, and sold the same on high seas sale basis, and also in local markets. For the assessment year in question, the assessee reported such transactions as international transactions. According to it these transactions had been entered into at arm's length price (ALP) and computed as per Comparison of Uncontrolled Price (CUP) Method. Although the method of price fixation as CUP was accepted by the TPO, however, while comparing the prices, it observed that rate paid by the assessee was USD 572 per metric ton whereas the tariff rate by the customs at Kandla Port (destination port of import) on an average worked out at USD 504/metric ton. Thus, the TPO took the customs rate at Kandla Port on the entry dates of the assessee's consignment and worked out its average to come to the rate of US $ 504.61 per metric ton.

  On appeal Tribunal held that:

  - The TPO had no objection to the method of price analysis adopted by the assessee. There was no doubt that the assessee-company had entered into purchase contracts of sale with its AE. After negotiations, a contract price was agreed upon and the invoice raised by the AE on the basis of that contract price. That contract price was comparable to the market rate available on the day of contract. Once the contract was entered into, the goods were moved from export destination to the import destination (Kandla Port). Since there was a time gap between the contract date and the date of entry, there would be price fluctuation and the tariff rate furnished by the Customs need not be comparable to the price reflected in the import invoices.

  - As rightly argued by the assessee, instead of comparing the price with the customs tariff rate on the date of entry into the port, the TPO

should have compared the price declared by the assessee with the customs tariff rate at Kandla Port as it stood on the day of contract of sale entered with its AE. Therefore, compared to the illogical comparison made by the TPO, the price fixed by the parties on the basis of sale contract is more authentic and acceptable. The difference between the contract rate and the average customs rate at Kandla Port on the contract date, is nominal. So, there is no reason to disturb the price disclosed by the assessee as the ALP for which the imports have been made. Therefore, the additional adjustment made by TPO is not sustainable and is accordingly deleted. *[2011] 16 taxmann.com 174 (Chennai - Trib.)*

- **Sale of copyright in software:** The assessee, a US company, was a leading provider of information solutions. The company operated globally through the presence of subsidiaries in other countries. In India, it entered into joint venture with 'NIPL' which acted as a distributor for the company. NIPL imported certain software from the assessee and duplicated and sold, or sometimes resold, the same in the Indian sub-continent. It was noticed by the Assessing Officer that in the relevant assessment year, the assessee received royalty as per the distribution agreement amounting to Rs. 1.76 crore towards sales made by NIPL which was offered by the assessee as royalty income. The Assessing Officer accepted the said amount as royalty income and taxed it accordingly. The assessee was also found to have received a sum of Rs. 58.29 lakhs from NIPL towards the direct sale of software, which were subsequently resold by NIPL to its end customers. The assessee claimed such amount from sale of software as business income and in the absence of it having permanent establishment in India as per article 5 of India-USA treaty, not chargeable to tax.

  The A.O. held that a sum of Rs. 58.29 lakh declared by the assessee as business income from the sale proceeds of software also represented royalty income covered under article 12(3) of the DTAA. In his opinion there was no difference between two situations *viz.*, firstly, in which the NIPL acquired the right to duplicate for which the assessee received income of Rs. 1.76 crore and; secondly in which NIPL acquired software as such from the assessee for a sale consideration of Rs. 58.29 lakh. He, therefore, treated the entire amount of Rs. 2.34 crore as royalty income and charged tax accordingly. The Commissioner (Appeals) echoed the assessment order. On appeal, the Tribunal held:

  - The question to be decided is whether the sum of Rs. 58.29 lakh is royalty or business profits. If it is held as business profits, then it is not taxable because assessee has no PE in India. If, however, it is held as royalty income, then it is taxable.

  - Under first agreement, the assessee has granted a license to NIPL to duplicate,

distribute and market the duplicated products in the definite area. Under second agreement, the product as such has been acquired by NIPL from the assessee which is further sold without any modification or alteration. Thus, under first agreement, the assessee does not supply its computer software products to NIPL but grants license to duplicate from its intellectual property in the software for making sales in the market. On the other hand, under second agreement no license is granted to NIPL for duplicating computer software products of the assessee but the products as such are sold to NIPL who then sells them to the end users on profit. By acquiring the products from the assessee, neither the end users nor NIPL acquired any copyright over the computer software of the assessee. Since the consideration of Rs. 58.29 lakh in question is sale price of the copyrighted product and not a consideration for transfer of copyright in the software of the assessee, Revenue authorities were not justified in treating it as royalty income.

- It is held that the entire amount of Rs. 58.29 lakh be considered as business profits and it cannot be charged to tax in India since assessee does not having any PE in India.

- **Distinction between 'hire of vehicles' & 'transportation contract':** The assessee paid 'hire charges' for hiring helicopter & aircraft services and deducted TDS at 2% u/s 194C. The AO & CIT (A) held that the assessee ought to have deducted TDS at 22.44% u/s 194-I on the ground that vehicles were 'plant and machinery' and the assessee had 'hired' the vehicles and not merely taken services for carrying passengers or goods. The assessee was held liable to pay the deficit u/s 201. On appeal by the assessee, the Tribunal held:

  - The department's argument that the assessee had hired helicopter/air craft vehicle was incorrect because these were not hired on a periodic basis or on day-to-day basis. Instead, the transport services provided by the transporters were availed of. The assessee paid charges on the basis of flying hours, landing charges and refuelling charges, etc.

  - The crew, fuel, maintenance operation licences, etc. were all under the control of the service providers and not under the control of the assessee. If the assessee did not enjoy control over the vehicles and if the running and maintenance expenditure was borne by the transport service providers, the contract was not for 'hiring' but was for availing transportation services, and payment for transportation services was not covered by s. 194-I (Accenture Services 44 SOT 290 (Mum), Tata AIG 43 SOT 215 (Mum) and Ahmedabad Urban Development Authority). The assessee's appeal was allowed. *Skill Infrastructure Ltd. Vs. ITO (TDS)(Mumbai)(ITAT ONLINE, 15th Dec 2011)*
  - **In absence of 'legal right' to bind the Principal, a Dependent Agent is not 'PE'**: The assessee, a company registered in the Netherlands but

resident in Ireland for tax purposes appointed Dell AS, a Norwegian company, as its "commissionaire" for sales to customers in Norway. Dell AS entered into agreements in its own name and its actions under the commission agreement and Commission Act did not bind the Principal. The assessee claimed that it was not taxable in Norway in respect of the products sold through Dell AS on the ground that Dell AS was not its "Dependent Agent Permanent Establishment" (DAPE) under Article 5(5) of the Norway-Ireland DTAA as (a) the agent had no authority to enter into contracts "in the name of the assessee" and legally bind the assessee and (b) the agent was not a "dependent" agent. However, the income-tax department took the view that Dell AS constituted a PE under Article 5(5) of the DTAA and that 60 percent of Dell Products' net profit on sales in Norway was attributable to the PE. This was confirmed by the Oslo District Court. On appeal by the assessee, the Court of Appeal held that for Article 5(5) of the DTAA, the question whether the agent has the authority to conclude contracts on behalf of the enterprise had to be considered, not from a literal sense whether the contracts are "in the name of the enterprise", but from a functional sense whether the agent "in reality" binds the principal.

On further appeal, the Tribunal held:

- There is no dispute that Dell AS is not an independent agent. In Article 5(5), the expressions "on behalf" and "have authority to conclude contracts on behalf of" mean that the contracts must be legally binding**.** These expressions must be given their normal meaning as per the Vienna Convention. This is also supported by the Commentary on the OECD Model Convention on which the DTAA is based.

➢ As the language of the Article is clear, it is not possible to adopt the "functional approach" proposed by the Revenue**.**

Consequently, Dell Products does not have a PE in Norway. *Dell Products vs States (SC Norway) 8th Dec.*

SERVICE TAX

Important Notifications/ Circulars

- **Documentary requirement for Registration with Central Board of Excise and Customs**: In this circular, the CBEC has specified the documents that are required to be submitted by the person who has made an application for registration under Rule 4(1) of the Rules. These documents must be submitted to the concerned authority within a period of 15 days from the date of filing of the application for registration. Failure to do so would lead to rejection of the registration application. It is also clarified that the time limit of seven days from date of receipt of application or intimation under Rule 4(5A), within which the registration is to be granted by the Superintendent of Central Excise or Service Tax, as referred to in Rule 4(5) shall be reckoned from the date the application for registration is complete in all respects. *Order no. 2 /2011 – Service Tax.*

Clarification on levy of service tax on distributors/sub-distributors of films & exhibitors of movie: The normal business practice in the industry is that the producer of the film, who owns the intellectual property rights of the film, temporarily transfers the rights to a person [normally distributor or any other person] who directly or indirectly enters into an agreement with the exhibitor [normally theater owner] for screening of the film. There are also other variant modes of transaction in the industry. Depending upon the arrangement whether the theatre owner has merely let out its premises to the distributor or is also involved in giving support services for the business of the distributer, there can be a case of leviability of service tax on the remuneration retained by such theatre owner under "Business Support service" or "Renting of Immovable Property". This circular clarifies the service tax implication of the various models adopted in the industry. *Circular No.148 / 17 / 2011 – ST dated 13th Dec 2011.*

Service Tax Refund to exporters through the Indian Customs EDI System (ICES) - So far Service Tax Refund (STR) was made available to exporters (other than SEZ Units/Developers) on specified services used for export of goods covered in Notification 17/2009-ST dated 07.07.2009 (as amended) subject to certain conditions. Government has proposed to introduce a simplified scheme for electronic refund of service tax to exporters, on the lines of duty drawback. With the introduction of this new scheme, exporters now have a choice: either they can opt for electronic refund through ICES system, which is based on the 'schedule of rates' or they can opt for refund on the basis of documents, by approaching the Central Excise/Service Tax formations. Details are in *Circular No. 149/18/2011-ST dated 16th December, 2011.*

HC Judgments

Tax with interest paid before Show Cause Notice: The assessee was a cable operator. He was remitting the service tax payable for the amounts he received from his customers. In pursuance of an enquiry by the department, he gave information regarding the number of subscribers, the amount charged, amount collected and the period for which it was collected and also stated that he would pay the differential tax after quantification by the department as he had not maintained any accounts. A communication was sent pointing out that he was liable to pay a sum of Rs. 539,830/-. On receipt of the said communication, he promptly paid the said amount on 23.11.2005.

Proceedings were initiated under Section 73 of the Finance Act asking him to show cause why penalty under Section 76 and 78 should not be imposed for suppression of facts and for willful misstatement. He gave a reply contending that he had not maintained accounts and he had not received the subscription from the consumers. He paid service tax in respect of payment received and he had not paid service tax in respect of the amount he had not received. However, on computation he had paid the tax even before issue of show cause notice. However, the assessing authority did not accept the explanation and proceeded to levy penalty both under Section 76 and 78 of the Act.

Aggrieved, the assessee appealed to the Commissioner of Central Excise Appeals, who accepting the cause shown by the assessee set aside the order of the assessing

authority imposing penalty. The Revenue challenged the order of the Appellate Commissioner before the Tribunal. The Tribunal set aside the order of the Appellate Commissioner on the ground that once suppression of facts was established, the penalty is liable to be imposed under Section 76 and 78 of the Act even though the duty and interest was paid even before the issue of show cause notice. Aggrieved, the assessee went to the High Court.

The High Court observed:

- It was clear that the assessee had filed returns regularly since 2002. Therefore, he was aware of the liability to pay tax. On the ground that some of the subscribers did not pay the money due to him, he had not remitted any service tax in respect of money, which he had not received. Not maintaining records could not constitute a sufficient cause under Section 18 to avoid the liability to pay penalty. Therefore, once he had registered himself, filed returns, was aware of the liability under the Act, the returns which he filed did not truly represent the facts which constituted a willful mistake. Therefore, the contention of the assessee that he was not liable to pay penalty as he had paid the differential duty with interest before issue of show cause notice was unsustainable.
- At the same time, it is now well settled that the liability cannot be imposed both under Section 76 and 78. Therefore, in this case the liability to pay penalty is only under Section 78. A person who is liable to pay penalty in addition to payment of tax and interest, if he pays the said tax and interest within 30 days from the date of determination of the liability by way of an order, the penalty payable is only 25%. *2011-TIOL-802-HC-KAR-ST in 'Service Tax'.*

CESTAT Judgments

Taxability of Prepayment or reset charges for loans: The appellant was registered with the IT Department under the category of 'Banking and other financial services' and was paying Service Tax on the services provided. The assessee provided finance for housing and urban development. Revenue noticed that the appellant was collecting reset charges from its customers but was not paying Service Tax on the same. It was also observed that the appellant was recovering prepayment charges, on prepayment of part/full loan during the loan period, under the Head 'Additional Interest' (prepayment) but was not paying any Service Tax on such charges.

A Show Cause Notice was issued for recovering the Service Tax payable on these reset and prepayment charges which was confirmed by the Commissioner of Service Tax. The appellant contended:

- Prepayment and reset charges were not in relation to Banking and other financial services and therefore not liable to Service Tax.
- The reset charges/prepayment charges were not the consideration for providing any value addition to the services, therefore not liable to Service Tax.
- Reset charges/prepayment charges were in the nature of additional interest only and, therefore, not liable to Service Tax.
- Extended period of limitation could not be invoked as they were a

wholly owned Government company.

The Tribunal observed:

- In this case, prepayment/reset charges are not in the nature of interest at all but are in the nature of charge for early closure of loan/resetting of loan and are relatable to lending since it either closes the loan or changes the terms and hence it cannot be equated with interest at all.
- The Tribunal did not see any difference between the liability of Service Tax in respect of application of a loan where the processing fee is charged over and above the interest, when here also it is over and above the interest. When the proposal is made for prepayment of loan or resetting, processing the application is involved. Therefore, there is an element of service in prepayment of loan or resetting of interest.

Tribunal observed that Charges collected for restructuring of loans and prepayment of loans is a way of value addition. The very fact that the cost that the customer has to pay for the facilities of prepayment/reset, is named as prepayment "charge" and reset "charge", immediately conveys that the same is in the nature of fee in lieu of some service/facility. Hence, these charges are liable for Service Tax. *2011-TIOL-1606-CESTAT-AHM in 'Service Tax'.*

Whether Input Services ought to have been used in factory where credit is taken: The Head Office of the applicant distributed the service tax paid on the input services to its Borivali plant. The case of the Revenue was that the input services were not for the services used in or in relation to the manufacture of the goods at the Borivali plant. The applicant appealed to the CESTAT with stay applications. It was submitted that in their own case, the Bench had set aside a similar demand and allowed the appeal. *(See 2010-TIOL-1851-CESTAT-MUM).* The Bench observed that like in the previous case.

- The combined reading of the Rule 7 and the clarificatory Circular dated 23-8-2007 clearly shows that there are only two restrictions regarding the distribution of the credit. The first restriction is that the credit should not exceed the amount of Service Tax paid. The second restriction is that the credit should not be attributable to services used in manufacture of exempted goods or providing of exempted services. There are no other restrictions under the rules.
- The restrictions sought to be applied by the Department in this case based on the location of usage of the input services, finds no mention in the relevant rules, and so it cannot be upheld. Hence the appeal was allowed. *2011-TIOL-1675-CESTAT-MUM in 'Service Tax.*

Whether activities provided as intermediary to GTA service provider taxable as GTA service – The issue was whether activities in the nature of loading, unloading, packing, unpacking, trans-shipping and transit warehousing, in respect of GTA services provided to transport the goods from origin to destination are taxable as GTA service.

The appellant submitted that the intermediary services neither being an independent one nor of a new character did not change the character of original GTA service. Reliance was placed on Notification No. 1/2009-ST dated 05.01.2009 and Circular No. 104/2008-ST

dated 06.08.2008. It was submitted that the impugned order was passed by the original authority before the issue of the above Notification and the Circular. On the other hand, Revenue submitted that the subsequent amendment, notification and circulars shall have no bearing on the order passed by original authority, which was passed after appreciating the applicable law on GTA service. The CESTAT observed:

- If intermediary service is subservient to the original transaction, mere breaking of original transaction does not bring out a different transaction. If the intermediary service is also GTA service in nature, without the original transaction coming to an end, the service provided by the intermediary may not be construed to be a different transaction. But all intermediate transactions may not necessarily be characterized as original transaction unless and until both the transactions are integrally related or connected to each other.

  The original authority needs to do a thorough verification of the contract and the nature of the services, in light of the above Notification and Circular before arriving at a rational conclusion. With these observations, CESTAT remanded the matter to original authority. *2011-TIOL-1664-CESTAT-DEL in 'Service Tax'.*

Service tax paid on services obtained from foreign commission agents: The appellant cleared finished goods on payment of excise duty on transaction value and availed credit on service tax paid on commission agent's service. Revenue was of the view that the appellant was not eligible to avail this credit as the said service had no nexus with manufacturing activity and with the clearance of final products from place of removal. A demand for the service tax credit availed was raised along with interest and penalty.

Before the CESTAT, the appellant contended that the issue was now settled in their favour in view of the decisions of Bombay High Court in *Coca Cola India Pvt Ltd (2009-TIOL-449-HC-MUM-ST) and Ultratech Cement Ltd (2010-TIOL-745-HC-MUM-ST).* However, Revenue referred to the order passed by the lower appellate authority wherein it was held that the commission agents of the appellant were not C & F agents and the commissions were actually paid to dealers and did not form part of the transaction value. The appellate commissioner observed that the dealers were getting commission on account of different types of discounts which were claimed as deductions by the appellant while paying excise duty. It was further contended that the service did not have any nexus with the manufacturing activity. Reliance was placed on *CCE, Mumbai vs. GTC Industries Ltd (2008-TIOL-1634-CESTAT-MUM-LB) and Chemplast Sanmar Ltd vs. CCE, Salem (2010-TIOL-180-CESTAT-MAD).*

The CESTAT observed that the lower authority had taken the view that service tax credit for commission agent services was not admissible because it had been given to the dealers and such commission was claimed as a discount. This aspect was not stated even in the show cause notice (SCN). The demand in the SCN was on the ground that the services received from selling agents did not have any nexus with the manufacture and clearance of final products and hence, it could not be considered as input service. The question as to whether the commission was in the nature of discount or not

was not at all discussed or brought out in the show cause notice.

CESTAT further observed that both the decisions of the High Court were applicable to the facts of the instant case. If service tax paid on services obtained from foreign commission agents was admissible as credit, then service tax paid on commission agent services within the country would also be admissible as credit. The appeal was allowed with consequential relief. *2011-TIOL-1645-CESTAT-AHM in 'Service Tax'.*

Taxability of NHAI fees: The appellant - M/s Ideal Road Builders Pvt. Ltd. ('IRBPL') - was engaged in the business of toll collection on behalf of M/s National Highway Authority of India (NHAI). It entered into a contract with NHAI wherein it collected the toll for the specified national highway and remitted the same to NHAI and for this service it received a fixed remuneration from NHAI. This was for the period from 01.07.2003 to 31.07.2006. For the period from 01.01.2006 to 31.07.2007, it also entered into a toll rights contract under which it paid a fixed monthly sum to NHAI on account of toll, and collected the toll from the users of the roads and retained the entire amount with itself. Revenue was of the view that the services rendered by IRBPL to NHAI would come under the category of 'Business Auxiliary Services' and it was liable to pay service tax under that category. The show cause notice demanding Service Tax was confirmed by the CCE along with imposition of penalties and interest. On appeal to CESTAT, the appellant submitted that:

- NHAI undertook the activity of development, maintenance and management of National Highways which was a statutory function. This activity could not be considered as a 'business activity'.
- Since IRBPL provided the services to NHAI, not in relation to any business, but for a statutory function, its activity could not be taxed as 'Business Auxiliary Services'.
- Reliance was also placed on the following decisions - *Intertoll India Consultants (P) Ltd. vs. CCE, Noida (2011-TIOL-1005-CESTAT-DEL)* wherein it was held that a sub-contractor collecting toll charges on Delhi-Noida toll-bridge was not liable to service tax and such services were liable to be taxed only from 16.06.2005 under the category of management, maintenance and repair of immovable property services. *Banas Sands TTCP Ltd. Vs. CCE (2011-TIOL-1429-CESTAT-DEL)* wherein it was held that collection of toll taxes on behalf of Municipal Corporation of Delhi on the entry of commercial vehicles in the State of Delhi was a sovereign function and could not be termed as 'Business Auxiliary Services'.

The Revenue made the following submissions –

- NHAI was only a statutory organization and the functions of NHAI were not sovereign functions. Service Tax in this case had been demanded from the appellant IRBPL for the services rendered by it to NHAI in respect of collection of toll charges.
- Reliance was placed on the CESTAT decision in the case of *Security Guards Board vs. CCE (2011-TIOL-1428-CESTAT-MUM)* where it was held that the activities undertaken by the Security Guards Board which was constituted under the State law would be liable to service tax under the category of 'Security Agency Services' as the same could not be considered as sovereign functions.

The CESTAT observed –

- NHAI was a statutory authority and collected fees on behalf of the Government of India for the services or benefits rendered at the rates specified by the Government. It was a statutory authority and not a constitutional authority. Therefore, the functions undertaken by such authority could not be sovereign in nature. Sovereign functions are undertaken by the State. To equate the toll fee collected by the NHAI with the tolls collected by the Municipal Corporation of Delhi would be illogical for the reason that while MCD was a democratically elected and constituted body under the Constitution and was empowered to collect tolls, entry fees etc., NHAI was only a statutory body constituted under the NHAI Act, 1988 and had been assigned the functions of collection of tolls. In view, of the distinctive nature of the functions and the amounts collected, we are of the view that the functions performed by NHAI or its contractor could not be considered as sovereign functions. NHAI was supposed to work on business principles and therefore it could not be stated that it did not perform business activities. Its business is development, maintenance and management of national highways. Any service rendered in relation thereto would be classified as 'Business Auxiliary Services'.
- Accordingly, the appellant was directed to make a pre-deposit of tax. *2011-TIOL-1658-CESTAT-MUM in Service Tax.*
- **Tax on accessories fitted at time of sale of motor vehicles:** The appellant, an authorized dealer of Maruti Udyog Ltd was also an authorized service station. In the course of its business, it also purchased and sold various accessories of motor vehicles sold by it. The bills for these accessories were raised showing gross total value received from the customers and it discharged sales tax on such gross value. Revenue contended that since it was fixing accessories in the motor vehicles, such fixing had to be treated as providing services under the category of 'authorized service station'. Taking 2% of the total value charged by them, Revenue confirmed demands against the appellant.

  Upon appeal to the CESTAT, the appellant contended that the total consideration received from the customers had to be considered as sale proceeds of the motor vehicles and accessories. Since there was no bifurcation in the invoice for fixing accessories, there could not be any deemed bifurcation for the purpose of levy of service tax on the same. On the contrary, Revenue contended that sales tax being a state subject and service tax being a central subject, they were mutually exclusive and merely because sales tax was paid on the gross amount it did not mean that no service tax was required to be paid by the appellant.

  CESTAT observed that the issue was covered by the Tribunal decision in the case of *Idea Mobile Communications Ltd (2006-TIOL-857-CESTAT-BANG*). Since the assessee had already paid sales tax on the entire gross value, demand of service tax and levy of penalty was not sustainable. *2011-TIOL-1630-CESTAT-DEL in 'Service Tax'.*

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