Tax News

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INCOME TAX

Reminder For March 2012

Action Due	Due Date
TDS / TCS for Feb. 2012	07-03-12
PF for Feb. 2012	15-03-12
ESI for Feb. 2012	21-03-12
Advance Tax	15-03-12

SERVICE TAX

Action Due	Due Date
Service Tax for the month of Feb.2012 in case of company	05-03-2012
Service Tax for the month of Feb. 2012 in case of a company for which e-payment is mandatory.	06-03-2012
Service Tax for the quarter Jan 2012 to March 2012 in case of individuals or partnership	31-03-2012
Service Tax for the month of March 2012 in case of company	31-03-2012

Important Circulars/ Notifications

- **Income-tax (Second Amendment) Rules, 2012 - Insertion of rule 114DA and Form No.49C:**
  - These rules may be called the Income-tax (2nd Amendment) Rules, 2012, and shall come into force on the 1st day of April, 2012.
  - As per the notification, after rule 114D, the rule 114DA shall be inserted, which shall specify the provisions regarding furnishing of Annual Statement by a non-resident having Liaison Office in India. The annual statement as provided under section 285 for every financial year, shall be furnished in Form No. 49C. The format of form 49C has been given in the Circular. *Notification No.5/2012[F.No.142/25/2011-SO(TPL)], dated 6-2-2012.*
  - **Tax Exempt Bonds: Section 10(15), item (h) of sub-clause (iv) of the Income-tax Act, 1961 -** The Central Government has authorised the Rural Electrification Corporation, to issue, through a public issue, during the financial year 2011-12, tax free, secured, redeemable, non-convertible bonds of rupees 1,000 each, aggregating to rupees three thousand crores u/s 10(15)(iv)(h). *Notification No. 7/2012 [F.No.178/56/2011-(ITA.I)], dated 14-2-2012.*
  - **Exemption to specified persons from requirement of furnishing a return of income under section 139(1) for assessment year 2012-13:** The Central Government hereby exempts the following class of persons, subject to the conditions specified hereinafter, from the requirement of furnishing a return of income under sub-section (1) of section 139 for the assessment year 2012-13, namely:-

    1. Class of persons. - An individual whose total income for the relevant assessment year does not exceed five lakh rupees and consists of only income chargeable to income-tax under the following head,-

    (A) "Salaries";

    (B) "Income from other sources", by way of interest from a saving account in a bank, not exceeding ten thousand rupees.

    2. Conditions,- The individual referred to in para 1,-

    (*i*) has reported to his employer his Permanent Account Number (PAN);
    (*ii*) has reported to his employer, the incomes mentioned in sub-para (B) of para 1 and the employer has deducted the tax thereon;
    (*iii*) has received a certificate of tax deduction in Form 16 from his employer which mentions the PAN, details of income and the tax deducted at source and deposited to the credit of the Central Government;
    (*iv*) has discharged his total tax liability for the assessment year through

tax deduction at source and its deposit by the employer to the Central Government;
(*v*) has no claim of refund of taxes due to him for the income of the assessment year, and
(*vi*) has received salary from only one employer for the assessment year.

3. The exemption from the requirement of furnishing a return of income tax shall not be available where a notice under section 142(1) or section 148 or section 153A or section 153C of the Income-tax Act has been issued for filing a return of income for the relevant assessment year.

4. This notification shall come into force from the date of its publication in the Official Gazette. *Notification No. 9/2012 [F. No.225/283/2011-ITA(II)], dated 17-2-2012.*

SC / HC Judgments

Deduction for bad debts and provision for bad & doubtful debts: The issue was whether a bank was eligible to claim a deduction for bad debts u/s 36(1)(vii) in respect of its advances, and also claim a provision for bad and doubtful debts u/s 36(1)(viia) in respect of its rural advances. The question arose in view of the Proviso to s. 36(1)(vii) which provides that only the excess over the credit balance in the provision for bad and doubtful debts account made u/s 36(1)(viia,) can be claimed.

The assessee was a scheduled commercial bank that filed its return of income for the assessment year 2002-03. In its return it had claimed deduction for an amount of about Rs. 12.66 crore representing the bad debts. The Assessing officer contended that since the bad debts (Rs. 12.66 crore) did not exceed the provision for bad and doubtful debts (Rs. 15.01 crore), so the deduction was not available to the assessee. This amount was added back to the taxable income of the assessee. Upon appeal, the Supreme Court held:

- The provisions of Sections 36(1)(vii) and 36(1)(viia) of the Act are distinct and independent items of deduction.
- The bad debts written off, other than those for which the provision is made under clause (viia), will be covered under the main part of Section 36(1)(vii).
- The Proviso will be applicable in cases under clause (viia), to limit deduction to the extent of difference between the debt written off in the previous year, and credit balance in the provision for bad and doubtful debts account, made under clause (viia). The Proviso will have to be read with Section 36(2)(v) of the Act. Thus, the Proviso would not permit benefit of double deduction with reference to rural loans. *2012-TIOL-16-SC-IT*

Taxability of payment made by a tenant to the developer of property, for repair and reconstruction: Assessee was a tenant in a building which was declared unsafe for occupation by the Municipal Corporation, and an eviction notice was served. A developer agreed to repair and reconstruct the building at his costs and agreed to handover certain area in the newly constructed and renovated building to the co-owners. A Court Receiver was appointed to execute a conveyance, or a long term lease of the property, in favour of the cooperative society of the owners and/or tenants of the building. Under the agreement with the developer, the tenancy of the assessee was confirmed and the assessee undertook to contribute a sum of

Rs.1.50 Crores for the work of repair and restoration of the structure. As per the agreement the rent would not increase. The High Court held that:

- This case was similar to the case of M/s Madras Auto adjudged by the Supreme Court. In that case, the assessee had incurred the entire cost of construction of a new building but obtained no title to the new construction. The benefit which the assessee obtained was a long lease on low rent thereby getting an enduring business advantage by saving a considerable amount of revenue expenditure over the term of the lease. However, since the asset which was created belonged to someone else, it could not be termed as capital expenditure.

- In the present case, the assessee was, and continued to be, a tenant. The assessee by contributing an amount of Rs.1.50 crore to the reconstruction of the building had obtained an enduring advantage but the ownership of the new structure had not been transferred to the assessee nor had the assessee acquired any capital asset. Thus, like in the case of M/s Madras Auto, it could not be termed as capital expenditure.

- As per Explanation I to Sec 32 of the Act, where the business or profession of the assessee was carried on in a building not owned by him but where he held a lease or other right of occupancy, and any capital expenditure was incurred by the assessee for the construction, renovation or extension of the building, the provisions of the clause would apply, as if the said structure or work was a building owned by the assessee. In order that Explanation I became applicable, it was necessary that any capital expenditure was incurred by the assessee. In the present case, the assessee had not incurred any expenditure of a capital nature. The expenditure did not result in the acquisition of a capital asset by the assessee. The assessee continued as before to be a tenant in respect of the premises. Thus the expenditure could not be regarded as capital nature, and so Explanation I was not attracted. *2012-TIOL-124-HC-MUM-IT.*

- **Can share trading loss be adjusted against income from service charges:** It was held by the High Court that:

Ordinarily, income which arises from one source that falls under the head of profits and gains of business or profession, can be set off against the loss which arises from another source, under the same head. However, sec 73(1) provides that a loss which has arisen on account of speculation business can be set-off only against the profits and gains of another speculation business.

For sec 73(1) to apply, the loss must arise in relation to a speculation business. The Explanation to sec 73(1) provides a definition of when a company is deemed to be carrying on a speculation business. The Explanation is designed to define a situation where a company is deemed to carry on speculation business. It is only thereafter that sub section (1) of section 73 can apply. Applying the provisions of Section 73(1) to determine whether a company is carrying on speculation business would reverse the order of application. That would be impermissible.

In the present case the gross total income of the assessee was required to be computed inter alia by computing the income under the head of profits and gains of business or profession as well. Both the income from service

charges in the amount of Rs.2.25 crores and the loss in share trading of Rs.2.23 crores, would have to be taken into account in computing the income under that head, both being sources under the same head.

The Tribunal was justified, in coming to the conclusion that the assessee fell within the purview of the exception carved out in the Explanation to Section 73 and consequently, the assessee would not be deemed to be carrying on a speculation business for the purpose of Sec. 73(1). *2012-TIOL-116-HC-MUM-IT.*

- **Taxability of profit arising from transfer of DEPB:** In this case, on the issue of taxability on sale of DEPB , the Supreme court held that:
  - As per section 28(iiib), cash assistance received or receivable by any person against exports under any scheme of the Government of India is by itself income chargeable to income tax under the head "Profits and Gains of Business or Profession".
  - DEPB is a kind of cash assistance given by the Government of India to an exporter to pay customs duty on its imports and it is receivable once exports are made and an application is made by the exporter for DEPB. Thus, DEPB falls under clause (iiib) of Section 28 and is chargeable to income tax under the head "Profits and Gains of Business or Profession" even before it is transferred by the assessee.
  - Under section 28(iiid), any profit on transfer of DEPB is chargeable to income tax under the head "Profits and Gains of Business or Profession" as an item separate from cash assistance under clause (iiib). As DEPB has direct nexus with the cost of imports for manufacturing an export product, any amount realized by the assessees over and above the DEPB on transfer of the DEPB would represent profit on the transfer of DEPB.
  - While the face value of the DEPB will fall under clause (iiib) of Section 28 of the Act, the difference between the sale value and the face value of the DEPB will fall under clause (iiid) of Section 28 of the Act.

- The High Court was not right in taking the view in the impugned judgment that the entire sale proceeds of the DEPB realized on transfer of the DEPB, and not just the difference between the sale value and the face value of the DEPB, represent profit on transfer of the DEPB. *2012-TIOL-11-SC-IT-LB* .

ITAT Judgments

- **Taxability of cash compensation received from property developer:** The assessee was an individual member of a housing society. This housing society, along with its members, entered into an agreement with a developer. Under the agreement, the developer was to demolish the residential building owned by the housing society, and reconstruct a new multistoried building. Under this arrangement, the assessee, received a slightly larger flat in the new building, a displacement compensation of Rs.6,12,000, and an

additional cash compensation of Rs.11,75,000. The issue was whether this cash compensation was taxable as income. The Tribunal held that:

- A capital receipt is outside the scope of income chargeable to tax and a receipt cannot be taxed as income unless it is in the nature of revenue receipt or is brought within the ambit of income by way of a specific provision in the Act. The distinction between capital receipt and revenue receipt cannot be ignored.

- The residential flat owned by the assessee in society building was a capital asset in the hands of the assessee and the cash compensation was related to the same, and so the receipt of Rs.11,75,000 by the assessee could not be a revenue receipts.
  Accordingly, it was outside the ambit of income u/s 2(24) of the Act. *2012-TIOL-100-ITAT-MUM*.

- **Taxability in case of finance lease:** The assessee received lease charges and claimed a reduction towards "lease equalization charges" on the ground that reduction was in accordance with the Guidance Note dated 20.09.1995 issued by the ICAI on 'Accounting for Leases'. The AO & CIT (A) disallowed it on the ground that it was a "notional charge" and that the accounting guidelines could not override the Act. On appeal, the Tribunal held:

  - As the method for accounting for lease rentals was based on the Guidance Note issued by the ICAI, the AO was not entitled to disregard the same. The Guidance Note reflected the best accounting practices the world over, and the fact that it was not mandatory was irrelevant.

  - As long as the method employed for accounting of income met with the basic principles of accountancy, including offering only revenue income for tax, no fault could be found with the assessee debiting lease equalization charges in its profit and loss account. *CIT vs Virtual Soft system Ltd. (High Court) Itatonline.org.*

Permanent Establishment: DTAA between India and USA: The assessee company, incorporated in USA, was engaged in the business of money transfer world-wide. In India, the assessee had entered into agreements with various agents including the Department of Posts, commercial banks, non-banking financial companies and tour operators. The agent was reimbursed the money it had paid out to the transferee, along with the due commission. The agent had the power to appoint sub-agents and representatives. While the agent was paid by the assessee, the sub-agents were paid by the agents. The assessee retained the power to terminate the services of a sub-agent if it acted in a manner prejudicial to the interests of the assessee. For its business in India, the assessee had, with RBI approval, opened liaison offices in Mumbai, Banglore and Gurgaon. Subsequently, the assessee closed down its liaison office and established a subsidiary company in India, Western Union Services India Pvt. Ltd. Following a notice, the assessee submitted its return, declaring nil

income. The assessee had claimed that the activities of its liaison office were preparatory and auxiliary in nature, and the whole income earned as commission was not taxable in India as the fee had not been received in India.

The AO concluded that the assessee's liaison offices were actively engaged in marketing for the assessee, negotiating and appointment of agents, brand building, besides providing and installing the assessee's software for the agents and providing them with training in India. Accordingly, the AO held that the assessee was liable to tax in India as it was carrying on business in India through a permanent establishment within the meaning of Article 5 of the India-USA tax treaty. The AO also held that the assessee had a PE in India in the form of various dedicated systems installed in the premises of various agents through which the business was carried on. Besides the technology and software provided by the assessee, most of the agents were also economically dependent on the assessee, as nearly 50 per cent of their total income came from the assessee. The AO thus held that these agents were "dependent agents" within the meaning of article 5.4(a) of the tax treaty. However, the compensation paid to the agents was not adequate in comparison to the revenue received by the assessee for the work. The AO therefore concluded that as the compensation paid was not adequate, the transaction was not at arm's length and the assessee was liable under section 9(1) to pay income-tax on the profits arising from its activities in India.

The AO accordingly held that as fees were paid for the service in India, the amount was taxable in India alone. However, as the entire money transfer operation was not in India, only 50 per cent of the assessee's income was brought to tax in the three assessment years. In appeal by the assessee, the CIT(A) held that the assessee had a business connection but did not have a PE in India.

In appeal before the Tribunal, the Revenue relied on the Tribunal's decision in the case of Amadeus Global Travel contending that the vital facts were similar. The assessee, on the other hand, distinguished the decision and explained that whereas the Amadeus case dealt with the initiation of contract in India, Western Union's case dealt with the execution of contract outside India. In Amadeus's case, the source of income was in India due to the order booking activity carried out by the travel agents through CRS systems in India. However, in the case of Western Union, the contract was entered outside India between the remitter abroad and the assessee.

Having heard the parties, the Tribunal held that:

- Since the agents had their own or hired premises from which they operated, so there was no fixed place PE of the assessee in India within the meaning of article 5.1 of the DTAA.
- The agents' activities were not devoted wholly or almost wholly to the foreign enterprise. The transactions were under arm's length, as they were independent agents under article 5.5 of the treaty.
- The contract was between the remitter abroad and the assessee and entered into outside India. The agents were not party thereto. The agents merely carried out the concluding step. The contract was already concluded outside India. By making payment to the

beneficiary, the agent in India was only performing his duty under the agreement of agency, for which he was remunerated.

- There was business connection and hence the assessee was liable to tax under sec 9(1) of the IT Act, but since there was no PE in India under Art. 5 of the DTAA between India and the USA, no profits could be attributed to the Indian operations of the assessee and taxed in India.
- However, the assessee exercised complete control over the computers installed at the premises of the subscribers and this amounted to a fixed place of business. Accordingly, the ITAT concluded that the assessee had a PE in India.

Advance Ruling

- **DTAA with Singapore:** The assessee - Global Industries Asia Pacific Pte Ltd – was a Singapore based company. During the year under consideration, it had entered into contracts with Indian Oil Corporation Ltd (IOCL) and L&T. It was claimed that the assessee did not have an office or any other premises in India for executing these contracts. The contract with IOCL involved residual offshore construction work in the navigational waters of Paradip Port Trust, Orissa, and the contract with L&T involved installation work in the waters of Mumbai High South field. For undertaking these operations resources including vessels were mobilized to India. It was claimed that the presence of the assessee in India during the relevant years was less than the threshold period, and so it would not constitute a Permanent Establishment (PE) in terms of the Tax Treaty with Singapore.

  Alternatively, it was submitted that if the benefits under the DTAA were not granted, then the receipts were taxable under 44BB of the Income-tax Act.

  Advance ruling was given as follows:

- The question that needs to be answered is the duration for which services or facilities were provided.

- The duration of performing the preparatory activities cannot be excluded while calculating the duration of provision of services or facilities under Article 5.5.
- The applicant has provided services or facilities in connection with the exploration, exploitation or extraction of mineral oils for more than 183 days during the fiscal year. Hence the applicant has a PE in India in terms of Article 5.5 of the DTAA and falls within the ambit of Section 44BB of the Act and not under as Fees for Technical Services under the Act or under Article 12 of the DTAA regarding this contract.

- Once an assessee comes under Section 44BB (1) of the Act, the provision itself deems its profits and gains as 10% of the aggregate of the amounts specified in sub-section (2).

- Sub-section 2 (a) specifies that that aggregate amount is the amount paid or payable whether in or out of

India to the assessee on account of provision of services in India. In the scenario, there is no scope for splitting up the amount payable to the assessee. If the assessee wants to seek such a splitting up it has to go under section 44BB(3) of the Act.

- **Taxability of gains made by a portfolio manager on trading of shares on behalf of client:** It was held by the Tribunal that:
  - In the case of an assessee, who purchases shares from the market and sells them frequently after getting them routed through the DEMAT account, such transactions will be in the nature of trading activity and the resultant profit will be assessed as business profits. Merely because the shares are credited to DEMAT account at the time of purchase and debited at the time of sale would not make the transactions in the nature of investment.
  - *In this case the shares have been traded frequently with a motive to maximize profit and not with a view to hold them as investment. The volume of the transaction is very high. All these facts indicate that the portfolio manager had in fact done trading on behalf of the assessee. Therefore, the profits arising on purchase and sale of shares are in the nature of business income and not as short term capital gain on investment. 2012-TIOL-117-ITAT-DEL.*

SERVICE TAX

Important Circulars / Notifications

Meaning of the expression 'gross amount' appearing in Rule 3(1) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007: A clarification regarding whether 'gross amount', for the purpose of payment of service tax under the Works Contract Composition Scheme, included the value of free of cost supplies, for the period prior to 07/07/2009, has been issued. It has been clarified that where execution of works contract had commenced prior to 07/07/2009 or where any payment(except payment through credit or debit) had been made towards a works contract prior to 07/07/2009, then in those cases 'gross amount' for the purpose of payment of service tax did not include the value of free of cost supplies. *Circular No. 150/1/2012-ST dated 8th Feb, 2012.*

Service tax on construction services: Clarification has been issued regarding the levy and collection of service tax on construction services [clauses (zzq),(zzzh) of section 65(105) of the Finance Act, 1994], in the light of varying business models existing in the country. Issues related to Taxability and Valuation have been clarified, for the following business models:

a) Tripartite Business Model
b) Redevelopment including slum rehabilitation projects
c) Investment Model
d) Conversion Model
e) Where completion certificate requirement is waived

a. Build-Operate-Transfer (BOT) Projects
b. Joint Development Agreement Model

The details are in *Circular No. 151/2/2012-ST dated 10th Feb, 2012.*

Toll in the nature of 'user charge' or 'access fee' paid by roads users: Clarification has been issued regarding leviability of service tax on toll fee paid by users, for using the roads. The key features are-

- Service tax is not leviable on toll paid by the users of roads, including those roads constructed by a Special Purpose Vehicle (SPV) created under an agreement between National Highway Authority of India (NHAI) or a State Authority and the concessionaire (Public Private Partnership Model, Build-Own/Operate-Transfer arrangement).
- 'Tolls' is a matter enumerated (serial number 59) in List-II (State List), in the Seventh Schedule of the Constitution of India and the same is not covered by any of the taxable services at present.
- Tolls collected under the PPP model by the SPV is collection on own account and not on behalf of the person who has made the land available for construction of the road.

- However, if the SPV engages an independent entity to collect toll from users on its behalf and a part of toll collection is retained by that independent entity as commission or is compensated in any other manner, service tax liability arises on such commission or charges, under the Business Auxiliary Service [section 65(105) (zzb) read with section 65(19) of the Finance Act, 1994].

- Further, an SPV formed as a result of agreement between NHAI or State Authority and the concessionaire under the BOT arrangement, cannot be considered as an agent of the NHAI. Renting, leasing or licensing of vacant land by the NHAI or State Authority to an SPV for construction of road and such construction do not attract service tax.

Circular No. 152/3/2012-ST dated 22nd Feb, 2012

CESTAT Judgments

Service tax liability of a bank run by a Co-operative Society: The Appellant was a co-operative society and it provided banking services. The issue was whether a co-operative society could be held liable for service tax on banking service. More specifically, whether a co-operative society was covered by the expression "any other body corporate, or any other person" used in sub-section 65 (105) (zm) and sub-section 65 (12). The appellant argued that a co-operative society could not be considered as a "body corporate" for the purpose of section 65 (105) (zm) and 65(12). Also, a co-operative society could not come within the meaning of the expression "any other person" used in 65 (105) (zm) because the other expressions specified before the impugned expression were, (i) banking company (ii) financial institution (iii) non-banking financial company (iv) any other body corporate. So only an entity having similar nature (genus), could be brought in using the expression "any other person".

- The Tribunal agreed with the argument that the expression "any other body corporate" could not include co-operative societies. The issue to be examined was whether co-operative society would be covered by the expression "any other person".
- The fact that sec 2 (7) of the Companies Act specifically excluded co-operative society showed that in many respects co-operative society was of the same genus as a company. It was necessary to keep the co-operative society out of the many controls of the Companies Act, so it was specifically excluded, though both were of the same genus.

- The fact that co-operative societies were controlled not by the elaborate procedure of Companies Act but by similar, simplified controls, did not mean that for taxing the services rendered by co-operatives, such societies would be on a different footing as compared to a company, unless and until, it was specifically manifested in the taxing statute itself.

- Since no specific exclusion was made in Finance Act, 1994, co-operative societies would be covered by the expression "any other person" used in section 65(105) (zm) and 65(12) of Finance Act, 1994.

  Penalty for stop paying service tax: The appellant was registered as a service tax assessee and paying service tax. From one point of time it just stopped, on its own, paying such tax arguing that it had a new interpretation. Tribunal held that there was no ground for adopting a new interpretation and penalty under section 76 was rightly imposed. However, Tribunal found that the adjudication order had imposed penalty both under section 76 and section 78 of Finance Act, 1994. Option was given to the appellant to pay 25% of the penalty under section 78 within 30 days of receipt of the adjudication order. *2012-TIOL-234-CESTAT-DEL.*

- **Taxability of providing space on website for advertisement:**
  The appellants were receiving payments for making space available on their website for advertisement service. The Commissioner had confirmed the demand of service tax under Section 65 (105) (zzzm), as the section specified that "Any service provided or to be provided to any person, by any other person, in relation to sale of space or time for advertisement, in any manner; but does not include sale of space for advertisement in print media and sale of time slots by a broadcasting agency or organization".

  The Commissioner had opined that the appellants had made available space on their website for advertisement and that they had been paid for such services. The appellants argued that the language of Section 65 (105) (zzzm) required "any other person" to mean a third person causing or effecting sale of space. However, the Tribunal did not agree with this interpretation. Also, the Tribunal rejected the argument of the appellant that the service would amount to export of service because the service was provided within the territory of India. The appellant was asked to make a pre-deposit of Rs 35 lakhs. *2012-TIOL-200-CESTAT-MAD.*

Facilitation charges and additional handling charges are included in assessable value:
M/s Indian Oil Corporation (IOCL, the applicant) was having an agreement of sale with M/s Zuari Industries Ltd. (ZIL) for sale of Naphtha and Furnace oil. Under the agreement, IOCL imported the above goods and sold the same on High Seas Sale basis to ZIL. IOCL charged Rs.25 PMT on account of additional handling charges and 2.5% of CIF value on account of facilitation charges. The department took the view that these services rendered by the applicant were liable to Service Tax under the category of 'Business Auxiliary Service' and a demand was raised.

The Tribunal held that ZIL had included facilitation charges and additional handling charges in the assessable value as per the agreement. Prima facie, these charges, were included in the assessable value, therefore, they were not liable for service tax.

2012-TIOL-180-CESTAT-MUM .

- **Taxability of advertisement tax collected by Municipal Corporation:**

The appellants, Jalandhar Municipal Corporation entered into a contract with M/s Shri Durga Publicity Service (SDPS), and certain other parties, for investing into the construction of certain Built, Operate, Own and Transfer (BOOT) projects.

In return, the said parties were granted permission to put up specified number of sky-signs, unipoles, kiosks, lollipops etc. at different parts of Jalandhar-Kaparthala railway over-bridge and also rent certain shops under the said railway over-bridge constructed during the period 1.04.06 to 31.03.09. Such places given to the parties under the contract were being used by them for putting advertisements or further allotting the same to the advertisers.

The lower authority had confirmed service tax demand against the appellant on the ground that the above activities resulted in providing services falling under the category of "Sale of Space and Time for advertisement services" u/s 65(105)(zzzm). There was a difference of opinion between the Members of the CESTAT.

One Member 's opinion was:

- SDPS had financed the project by Municipal Corporation. In lieu of that, they had got the space for placing various advertisements on the unipoles, sky-signs, street light poles etc. If the Municipal Corporation had itself constructed the railway line or bridges etc. with its own finances and by selling the sides of the bridge, it would have collected that amount from the other parties. So the said activity would have "prima-facie" amounted to providing sale of space or time for advertisements. In the present case, SDPS had given the entire finances to the Municipal Corporation for construction of the bridge and in turn had earned their right to space to be provided by the Municipal Corporation for putting up various advertisements etc. It can be concluded that the amount paid to SDPS was actually rent for land or pole being rented to them for advertisements.
- The fact that SDPS paid service tax on the advertisements being placed by them on such sky-signs or poles etc would not dilute the applicant's liability to pay service tax on renting the space for placing such advertisements.
- The appellants should pre-deposit an amount of Rs. 50 lakhs out of the total confirmed demand of Rs.1.25 crore, pending the appeal.

The second Member disagreed as follows:

- The actual space required for putting up unipoles, kiosks etc was very small. The advertising space whose sale could be taxed under Section 65 (105)(zzzm), was the space on bill boards, public places, buildings, bus shelters, conveyances etc and not the land on which bill boards, unipoles, kiosks, skysigns, etc. had been allowed to be erected. The person who permitted the use of his land was neither selling any space for advertisement nor was providing any service in relation to sale of space for advertisement. It had only permitted the use

of its property, and such transactions could not be treated as of service in relation to sale of time or space for advertisement.

- It was SDPS and others who had created the advertising space available for their use for advertising or for sale to other advertisers by putting up unipoles, kiosks, skysigns, etc at spots permitted by the Appellant and, therefore, the Appellant could not be treated as having sold the advertising space or having provided service in relation to sale of advertising space. Therefore, prima-facie the department had no case against the Appellant.
- The requirement of pre-deposit of service tax demand, interest and penalty for the purpose of hearing of this appeal, therefore, needed to be waived.

The issue was referred to the third Member, who had to decide on the following points**:**

- Is the activity of the Appellant covered by Section 65(105)(zzzm) for being subjected to service tax as service in relation to sale of time or space for advertisement?
- Can the advertisement tax collected by the Appellant from SDPS on its advertisement revenue, under the Appellant's resolutions ratified by Government of Punjab, be prima-facie called consideration for the service in relation to sale of advertising space alleged to have been provided by them? *2012-TIOL-240-CESTAT-DEL*

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