Tax News

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INCOME TAX

Reminder For February 2012

Action Due	Due Date
TDS / TCS for Jan. 2012	07-02-12
PF for Jan. 2012	15-02-12
ESI for Jan. 2012	21-02-12

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SERVICE TAX

Action Due	Due Date
Service Tax for the month of Jan. 2012 in case of company	05-02-2012 *(*)*
Service Tax for the month of Jan. 2012 in case of a company for which e-payment is mandatory.	06-02-2012

(*)Since 5th Feb.2012 is Sunday, the due date is the next working day (i.e. 6th Feb.12).

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Important Notification

- **Insertion of Rule 11-OA and Form no. 3CN:** Through Notification dated 2-1-2012, the Central Board of Direct Taxes has inserted some rules in Part II, sub part F, after Rule 11-O, pertaining to guidelines for notification of affordable housing projects. The key points of the notification are as follows:

  - These rules would be called the Income-tax (First Amendment) Rules, 2012.
  - Procedure for applying for an affordable housing project as a specified business under sec 35 AD (8) (c) (vii), through Form No. 3CN, has been described in the notification.
  - Eligibility criteria for getting the project approval has been specified, particularly with regards to earmarking of area for Economically Weaker Sections, Low Income Groups, Middle Income Groups, etc. within the project.
  - Procedure for Board's approval / rejection / withdrawal of approval, is specified.
  - Accounting and reporting norms have been specified.
  - Form No. 3CN has been specified.

  Details are in *Notification No. 1/2012[F.No.142/24/2011-SO(TPL)]/S.O. 5(E), dated 2-1-2012.*

- **Processing of Returns:** Through Notification dated 4-1-2012, the Central Government has provided some guidelines regarding applicability of certain provisions pertaining to processing of Income Tax returns by the Central Processing Centre (CPC) (sec 139 and sec 143). The main points of the notification are as follows:

  - Procedure for submitting duly verified ITR-V (acknowledgement) forms (both electronically as well as by post) to the CPC, have been specified.
  - Procedure to be followed in case of rejection/ defect/ delay in submission of Form ITR-V is described.
  - Procedure for informing the tax amount payable by, or refund due to, the tax payer is specified.
  - Procedure for appeals and notifications has been clarified.

  Details are in *Notification No. 3/2012 [F. NO. 142/27/2011-SO (TPL)] SO 17(E), DATED 4-1-2012*

- **DTAA with Georgia** – DTAA has been signed by Government of India with the Government of Georgia. The DTAA came into force from December 8, 2011. It shall have effect in India in respect of the taxes withheld at source, to income paid or credited on or after April 1, 2012. The details are in *Notification No. 4/2012 dated Jan 6, 2012*

SC / HC Judgments

Vodafone vs Government of India: Hutchison Essar Ltd (HEL), an Indian company was engaged in mobile telecom business in India. CGP Investments (CGP), a Cayman Island company, controlled 67% of HEL through various intermediate companies. The shares of CGP were in turn held by another Cayman Island company called Hutchison Telecommunications (HTIL). In 2007, the assessee - Vodafone

International Holdings BV (Vodafone) - a Dutch company, acquired from HTIL, 100% shares in CGP for a total consideration of US$ 11.08 billion (approx Rs. 55,000 crore). The acquisition resulted in Vodafone acquiring control over CGP and its downstream subsidiaries, including, HEL.

The IT department issued a show-cause notice to the assessee u/s 201, taking the view that as the ultimate assets acquired by the assessee were in an Indian company, the assessee ought to have deducted tax at source u/s 195, on the capital gains, while making payment to HTIL. The tax liability was assessed at approx Rs. 11,000 crore. The main contention of the Revenue was that CGP was inserted at a late stage in the transaction, in order to bring in a tax-free entity, and thereby avoid capital gains tax. The Bombay High Court dismissed the assessee's appeal in 2008. In 2009, the Supreme Court remanded the matter to the Revenue to first determine whether the transaction came under the jurisdiction of Indian tax authorities. In May 2010, the Revenue opined that since CGP was a mere holding company and did not conduct business in Cayman Islands, the situs of the CGP share existed where the underlying assets were situated, that is, in India. Hence, the transaction was under the jurisdiction of Indian tax authority. The assessee challenged this but was dismissed by the Bombay High Court (329 ITR 126 (Bom) in 2010. The assessee then went in appeal to the Supreme Court. Meanwhile, the assessee was asked to deposit Rs. 2,500 crore as interim tax liability, along with a bank guarantee for Rs. 8,500 crore. The main issues to be considered were:

- Is this a case of tax planning or tax avoidance?
- Was the CGP holding structure created for the purpose of avoiding tax payment on the transaction, and had no commercial or business substance?
- Was the off-shore transaction under the jurisdiction of the Indian tax authorities?

The Supreme Court in its judgment dated Jan 20, 2012, held that:

- The offshore transaction between HTIL (a Cayman Islands company) and Vodafone (a Dutch company), for transfer of CGP (a Cayman Islands company) shares, is a b*onafide,* structured, FDI investment into India. It falls outside India's territorial tax jurisdiction, hence is not taxable in India.
- The 2010 judgment of the Bombay High Court is to be set aside. The IT Department needs to return the sum of Rs. 2,500 crores, and the Bank Guarantee of Rs. 8,500 crores, which was deposited by the appellant in terms of SC's interim order, with interest at the rate of 4% pa.

➢ **Rebate entitlement for STT when total income is computed u/s 115JB:** The High Court held that t*he assessee was liable to pay securities transaction tax (STT) at the time of realizing the consideration of the security transaction. However, if that transaction was included in the total income of the assessee, which was assessed under the provisions of section 115JB of the Act, the assessee would be given the benefit of tax deduction of the amount, which was already paid u/s 88E, by virtue of Section 87. The tax amount already paid was to be handed back to the assessee, thereby avoiding double payment of tax on the same income. 2012-TIOL-67-HC-KAR-IT.*

➢ **Taxability of profit on sale of shares held for trading:** The issue was whether when the sale and purchase of shares was done in the ordinary line of business and not with an object to earn dividend, or enhancement

of value of shares, the profit arising on sale of shares was to be treated as business income and not capital gains.

Assessee had filed its returns declaring income from investment in shares, interest on income, salary and capital gains, and had classified its income from trading of shares into categories (i) business income and (ii) short term capital gains. Segregation of business income and short term capital gain before 1.10.2004 was accepted as the tax rate was same. However, the assessee's claim for the transactions after 1.10.2004 that those transactions should be treated as "short term capital gains" and taxed u/s 111-A, was rejected and treated as business income, by the Assessing Officer. On appeal, both CIT (A) as well as ITAT rejected the claim of the assessee.

The assess, in its appeal to the High Court, contended that sale of shares, invested in companies for a period of less than 12 months, were liable to be taxed only as short term capital gains. The assessee had classified certain shares in his books of accounts as investment, and certain others as stock-in-trade, was proof that it was the intention of the appellants to treat certain shares as investment, and not as stock-in-trade.

The High Court held that:

- The factors which ITAT had considered were as follows – (a) the frequency of buying and selling of shares by the appellants were high, (b) the period of holding was less, (c) the high turnover was on account of frequency of transactions, and not because of huge investment, (d) the assessee had dealt in delivery trading purely with the intention of making quick profits on a huge turnover, (e) the period of holding of a majority of the stock was between one to seven days, (f) the intention of the assessee in buying shares was not to derive income by way of dividend on such shares, but to earn profits on the sale of the shares, (g) the assessee had indulged in multiple transactions of large quantities with very high periodicity. (h) the assessee was purchasing and selling the same scrips repeatedly, and was switching from one scrip to another.

- The dominant impression left on the mind was that the assessees had not invested in shares. Mere classification of these share transactions as investment in the assessee's books of accounts was not conclusive. The intention of the assessees at the time of purchase was only to sell the shares immediately after purchase. It was only for the purpose of claiming lower rate of tax, under Section 111A of the Act, that the assessee had claimed certain shares to be investment, though these transactions were only in the nature of trade.

- If the Court, on a fair reading of the judgment of the Tribunal, finds that it has taken into account all relevant material, and has not taken into account irrelevant material in basing its conclusions, the decision of the Tribunal is not liable to be interfered with unless, of course, the conclusions arrived at by the Tribunal are perverse. No interference with the order of the ITAT is called for in this case. *2012-TIOL-30-HC-AP-IT in 'Income Tax'.*

- **Taxability of Conversion charges paid on imported gold converted to jewellery:** The issues was whether when assessee imported gold for converting the same into jewellery for exports purpose, such jobwork amounted to manufacture, and conversion charges earned were eligible for Sec 10A benefits.

  Assessee received gold supplied by 'R' from Dubai and the same after conversion into jewellery

was "exported" back to 'R', who remained the legal owner of the gold and had not sold the gold to the assessee, and no sale consideration for purchase of gold was paid. AO disallowed the deduction claimed by the assessee u/s 10A stating that the assessee was not manufacturing ornaments/ jewellery and was not an exporter as he was paid making charges for the job work/services for making ornaments as per specification of third parties. Assessee was being paid making charges and not sale consideration.

CIT (A) allowed the assessee's appeal stating that the assessee was engaged in the activity of production of jewellery, which was covered by Section 10A. The AO had only considered whether or not assessee was engaged in manufacturing. Whether or not assessee's activity was manufacture or not, was independent of the question of ownership of the gold.

ITAT held that the requirement of Section 10B was that the assessee should have exported articles or things. In this case, the primary gold was put to mechanical, physical and chemical process before it was converted into gold jewellery. The assessee for the purpose of said deduction, had taken value of the jewellery exported and from the same reduced the cost of the material, which was provided by the customer. So Sec 10B conditions were getting fulfilled. The High Court held that:

- The activity for converting gold into jewellery amounted to "production or manufacture" of a new article and therefore, qualified for deduction under Section 10A/10B.
- The term "export" has not been defined in the IT Act. The said term, therefore, has to be interpreted and given a meaning for the purpose of Section 10A/10B based on its interpretation in other acts like the Customs Act 1962. When standard gold was brought into India, it was imported and when jewellery/ornaments were sent out of India, they were exported.
- Mere ownership is not the sole criteria to determine whether a person is an importer or exporter. Keeping in view the nature of transactions in question, it is held that the assessee exported the jewellery/ornaments and that the transactions was to be regarded as export for the purpose of Section 10A/10B of the Act. *2012-TIOL-12-HC-DEL-IT in 'Income Tax')*

- **Distinction between capital & revenue expenditure:** The assessee incurred expenditure on removal of encroachments and claimed the same as a revenue deduction on the ground that the *expenditure was incurred in the normal course of the business*. The AO, CIT (A) & Tribunal rejected the claim on the basis that the assessee had acquired an advantage of an enduring nature. The High Court in an earlier year (**Airport Authority of India vs. CIT** 303 ITR 433) had ruled that the expenditure was capital in nature. For the present year, however, the Full Bench reversed the order of the lower authorities, and held that:

- The question that has to be considered is whether the expenditure is incurred for initiating the business or for removing an obstruction to facilitate an existing business. While expenditure for acquisition of a source of income would ordinarily be capital expenditure, expenditure which merely enables the

profit making structure to work more efficiently would be in the nature of revenue expenditure.

Tribunal Judgments

- **Taxability of a slump sale:** The assessee acquired a cement plant on "as and where" basis i.e., as a going concern. The cement plant along with the land-holding and all current assets, such as raw-material, semi-finished goods & finished goods, sundry debtors, spares & tools and other movable and immovable assets were acquired, for a consolidated lumpsum of Rs.751 crore. This consideration was allocated towards fixed assets and towards goodwill. Assessee incurred certain expenses towards further modification and improvisation and capitalized the pre-operating expenses incurred by it and claimed depreciation on the same. The issues were :

- Whether the excess price paid over and above the book value of the assets can be treated as price paid for goodwill, and therefore no depreciation allowed on it.
- Whether WDV as per books of seller, could be treated as the cost of acquisition of assets in the hands of the assessee, for the purpose of calculating depreciation.
- Whether valuer's report can be rejected alleging collusion in the deal, even when the seller and the purchaser are not related parties.

- Whether the one time settlement premium paid to financial institutions in consideration for reduction in the interest rates is allowable as revenue expenditure in the year of expenditure.

ITAT held that:

- ITAT had considered a similar issue last year, arising out of acquisition of cement unit of TISCO. There, it was held that as per section 43(1), the actual cost to be considered for the purpose of section 32 should be the actual cost paid by the assessee. Since the cost had not been directly or indirectly met by any other entity, the actual cost paid by the assessee for acquisition of the assets of the units was the cost under section 43(1). However, Explanation (3) made it clear that if the same assets were used at any time by any other person for the purpose of his business or profession, and the AO was satisfied that the main purpose of the transfer of such assets, directly or indirectly to the assessee, was reduction of tax liability by claiming depreciation with reference to enhanced cost, the AO should determine the actual cost of the assets considering all the circumstances of the case.
- In this case, CIT(A) had rightly considered that the parties were unrelated and the transaction was at arm's length basis. The registered valuer had also valued the assets at the cost of acquisition and the balance to the current assets including the current liabilities. There was no reason to invoke Explanation (3) as the AO nowhere stated that the main purpose of such a valuation was for reduction of tax liability. It was a direct acquisition by the assessee company from another public limited company in an open bid, after being the highest bidder.
- As per Accounting Standard 10 para 35, the assessee was supposed to take the value on the fair basis as determined by

competent valuers. Since the assets were acquired on slump sale basis and individual assets were not priced or purchased item-wise, the assessee as per AS 10 had obtained a valuation report which had taken the net replacement cost method and had adopted the value in the books of account. Thus, the AO's observation that the value adopted by the assessee was exactly tallying with the subsequent valuation by the surveyor was without any basis.

- The AO had not analysed the actual WDV in the hands of TISCO. What he had adopted was the book value in the books of TISCO which was different from the actual WDV for the purpose of income tax. The computation in the hands of TISCO was quite different from the computation to be made in the hands of the assessee. Thus, AO had not examined the facts and arrived at wrong conclusions without any basis.
- Since the deal was at arms length price and the parties were not related and there was no evidence that the transaction was a collusive one or done with an intention to reduce the tax liability, and also since there was no clause for payment of goodwill by the assessee in the Business Transfer Agreement, the AO's action in considering the price paid for acquiring the assets at more than the book value in the hands of the seller, to be treated as goodwill, had no basis at all.
- The assessee apparently calculated the amount of interest, that it would be paying over the years at the agreed rate of interest and compared it with the foreclosure premium together with the interest that it would pay on the revised rate basis and found it to be advantageous to the company by paying the foreclosure premium. This advantage that the company wanted to benefit from was clearly a well-judged business decision. This itself was sufficient for allowing the claim in full in the year in which it was incurred. Thus, the expenditure was allowed in the assessment year in full.

The assessee had at one place stated that the excess payment made, over and above the value of tangible asset acquired, was for licences, quotas, business rights etc. and whereas on the other hand it stated the excess amount should be taken as that paid for factors like locational advantage, contracts with dealers and customers attached to the business etc. This second limb, could not be a business or commercial right but only goodwill. While tangible assets were valued, intangible assets were not valued in this case. A separate valuation, asset-wise need to be undertaken and appropriate conclusions drawn. Assessee had not challenged the finding of CIT(A) that depreciation was not allowable on goodwill. Thus, the only issue was to determine the value of intangible assets other than goodwill for which the matter was referred back to the AO. *2012-TIOL-31-ITAT-MUM in Income Tax*.

Applicability of sec. 194H on the discount offered for lab testing services to sample collection centres: Assessee, a specialised medical laboratory, entered into non-exclusive agreements with domestic and international Collection Centres comprising of hospitals, nursing homes, clinics and other laboratories/ entrepreneurs. The Collection Centres collected samples from patients/customers seeking various laboratory testing services which were forwarded to the specialized testing laboratories like the

assessee. Centres issued their own bills/invoices to the patients/customers and collected the fees for the tests conducted and issued receipts for the fees collected. Collection Centre acted as an Authorized Collector and availed the professional services of the laboratories like the assessee. In cases where the tests were done by the assessee, the assessee raised periodical invoices on the Collection Centre which in turn, made the payment to the assessee after deducting tax at source u/s 194J. The assessee, in terms of its agreements with the Collection Centres, extended its laboratory testing services at a discounted price, as compared to the standard price list.

AO treated the said discount offered by the assessee to the Collection Centres as commission paid by the assessee on which tax was required to be deducted u/s 194H. Since no tax was deducted, the AO made a disallowance relating to discount offered by the assessee to Collections Centres/Franchisees u/s 40(a)(ia).

The ITAT held that:

Where the dealing between the parties was not on a Principal to Agent basis, Sec 194H was not attracted. In this case, there was no Principal-Agent relationship between the assessee and the collection centres. It was the assessee which rendered lab testing services to the collection centres, on which necessary tax was deducted under section 194 J of the Act. The collection center had no authority to bind the assessee in any form. The expenditure on salary / staff of the collection centers was to be borne by the collection centers on their own and the collection centers were free to charge any amount from the customers / patients. The assessee had not credited any income to the account of the collection centers.

The disallowance in terms of section 40(a)(ia) read with section 194H of the Act could be made only in respect of expenditure in the nature of commission paid/credited to the account of the recipient. In the present case, the assessee received the amount of the invoice raised, net of discount, from the Collection Centres. This, discount, could not, in any manner, be said to be expenditure incurred by the assessee and so, sec 40(a)(ia) of the Act was not attracted. *2012-TIOL-19-ITAT-DEL in Income Tax.*

Transfer Pricing - differences in comparables: In a Transfer Pricing matter, the Tribunal held that:

Rule 10B(e)(iii) provided that "*the profit margin arising in comparable uncontrolled transactions has to be adjusted to take into account the differences, if any, between the international transaction and the comparable uncontrolled transactions, or between the enterprises entering into such transactions, which could materially affect the amount of net profit margin in the open market*". While the "differences" were not specified, **it covered "***any differences***" which could materially affect the amount of net profit margin.**

The litmus test to be applied was if the 'difference', if any, was capable of affecting the NPM in open market. If yes, then the TPO was under statutory obligation to eliminate such differences. The Revenue could not say that difference was likely to exist in all accounts and so the demands of the assessee should be ignored.

The revenue's stand that the assessee was ineligible for any adjustments if he himself had provided the set of comparables was not correct because under Rule 10(3**)** it was the duty of the Revenue to minimize/eliminate the difference which was likely to materially affect the price**.**

The Revenue's contention that the 'differences' specified should refer to only (i) the factor of demand and supply; (ii) existence of marketable intangibles i.e. brand name etc; (iii) geographical location and the like was not acceptable. It was a settled proposition that 'working capital' adjustment was an adjustment that required to be made in TNMM. *Demag Cranes & Components (I) vs DCIT (ITAT Pune), Jan 14, 2012.*

Permanent Establishment under India-France DTAA: The assessee, a French company, engaged in the operation of ships in international traffic, claimed that it did not have a PE in India and that no part of its income was chargeable to tax in India. The Revenue held that *as the assessee had an agent in India which concluded contracts, obtained clearances and did the other work, there was a PE in India under Articles 5(5) & 5(6) of the DTAA*. On appeal by the assessee, the ITAT held:

In order to constitute a PE under Article 5(1) & 5(2), three criteria were required to be satisfied viz; physical criterion (existence), functionality criterion (carrying out of business through that place of physical location) & subjective criterion (right to use that place). There must exist a physical "location", the enterprise must have the "right" to use that place and the enterprise must "carry on" business through that place. An "agency" PE did not satisfy that condition because the enterprise did not have the "right" to use the place of the agent.

Under Article 5(6) of the India-French DTAA **(***which is at variance with the UN & OECD Model Conventions*), even a wholly dependent agent is to be treated as an independent agent unless the transactions between him and the enterprise are at arms' length**.** The Department's argument that as the AO had not examined whether the transactions were done in arm's length conditions, the matter should be restored to him, is not acceptable because the onus was on the Revenue to demonstrate that the assessee had a PE**.** Since the transactions with the dependent agent were not proved to be not at ALP, it can be held that the PE did not exist under the India-France DTAA**.** The AO could not be granted a fresh inning for making roving and fishing enquiries whether the transactions were at arm's length conditions or not. *Delmas, France vs ADIT (ITAT Mumbai), Jan 11, 2012.*

SERVICE TAX

HC Judgments

Construction Service: By the Finance Act of 2010 an Explanation had been inserted into clause (zzq) and clause (zzzh) of Section 65(105). Clause (zzq) related to a service provided in relation to commercial or industrial construction and clause (zzzh), a service in relation to the construction of a complex.

This Explanation had the net impact of bringing the construction of a new building which was intended for sale by a builder, before, during or after construction, under the purview of taxable service (except where no sum was received by the builder from the prospective buyer before grant of completion certificate by a competent authority).

Also, Clause (zzzzu) had been introduced in Section 65(105) as a result of which a service provided, or to be provided, in the nature of preferential location (but not including services covered under sub-clauses (zzg), (zzq), (zzzh) and in relation to parking place), was also brought in within the purview of a taxable service. For the purposes of this sub-clause, "preferential location" meant any location having extra advantage which attracted extra payment over and above the basic sale price.

The constitutional validity of the Explanation which was inserted into clauses (zzq) and (zzzh) of Section 65 (105) and of clause (zzzzu) was questioned on the following grounds:

- The explanation indicated that it was a transaction of sale or an agreement to sell an immovable property, yet to be constructed or, under construction and not certified to be complete by the appropriate authority, which was sought to be taxed. Since transaction of sale of property was under the State List, so the Parliament did not have the legislative competence to pass this amendment.
- By the explanation to clauses (zzq) and (zzzh), the construction of a new building or complex was treated to be a service, though the tax was in substance not on construction, but on the sale of land.
- The provisions of Section 65(105)(zzzzu) were unconstitutional because - (a) No element of service was involved since the advantage that was sought to be taxed was the preferential location i.e land, (b)There was no voluntary act of rendering service, and (c) There was no clarity on what was the extra advantage or a payment over and above the basic sale price. The provision was therefore vague and suffered from an excessive delegation of legislative power, since the enforcement of the provision was left to the unguided discretion of the administrative authority.

Between a builder and a contractor who constructed a building, there might be a service element involving a service provider and receiver. However, between the builder and a buyer, there was no provision of service.

The title to the building which was under construction vested in the builder. After construction was complete and a final transfer of title took place, there could be no provision of service.

The Government of India contended as follows:

- The Explanation to clauses (zzq) and (zzzh) did not tax a transfer of property at all. The subject matter of the tax was the service rendered during the course of construction, which did not fall within the ambit of State List.
- The Explanation to clauses (zzq) and (zzzh) was enacted to plug a loop hole and to stop leakage of tax from the value addition involved in the course of construction.
- Even if the Explanation was to be construed to bring within the ambit of the tax a transfer of property, it was a settled principle of law that, tax on the transfer of property did not fall under State List.
- Clause (zzzzu) was introduced to cover diverse services which builders provide under different heads for which charges were levied separately. Parliament has intervened in order to ensure that they do not slip out of the value added tax net.

High Court's Observations:

- Parliament has the right to issue an Explanation to statutory provisions which may expand the scope of the original provision.
- A tax on a transaction involving a transmission of title to or a transfer of land and buildings is not a tax on land and buildings under State List.
- The taxable event is the rendering of a service which falls within the description set out in sub-clauses (zzq), (zzzh) and (zzzzu). The fact that a taxable service is rendered in relation to an activity which occurs on land does not render the charging provision as imposing a tax on land and buildings.

- A preferential location is defined to mean any location having extra advantages which attracts extra payment over and above the basic sale price. Clause (zzzzu) only intends to obviate a leakage of revenue and plugs a loophole which would have otherwise resulted. If no separate charge is levied, the liability to pay service tax does not arise and it is only where a particular service is separately charged that the liability to pay service tax arises. There is no vagueness and uncertainty. The legislative prescription is clear. Hence, there is no excessive delegation.
- There is no merit in the constitutional challenges raised in the Petitions. The Petition shall accordingly stand dismissed. *2012-TIOL-78-HC-MUM-ST in 'Service Tax'.*

CESTAT Judgments

- **Cost of free electricity to be included in the value of taxable service:**

  The appellant entered into an agreement with their customer *M/s Sunflag Iron & Steel Co. Ltd.,* and *M/s Lloyds Steel Industries Ltd.,* for plant operation and maintenance. For the services rendered it received consideration from the clients on which service tax liability was discharged. On scrutiny of the accounts maintained by the party, it was observed that the appellants was receiving electricity free of cost from its clients and without supply of electricity it could not have undertaken the operation and maintenance of the plants.

  The Revenue opined that the cost of electricity supplied free by the client, should also be included in the value of taxable services, and accordingly, a show-cause notice was issued to the appellant demanding service tax amounting to Rs. 3.31 crores. The CCE, Nagpur confirmed the demand along with penalty and interest. Upon appeal to CESTAT, the appellant submitted it discharged the service tax on the consideration received by it from its clients and since clients had not charged any amount towards electricity supplied, it was not liable to pay service tax on the cost of electricity supplied free by the clients. The CESTAT held that:

  - When electricity is supplied free of cost by the service receiver and such electricity is required for rendering the service of operation and maintenance of the plant, then the cost of supply of electricity is a consideration for the service rendered and such cost will have to be included in the value of the taxable services rendered.
  - The appellant was directed to make a pre-deposit of Rupees One Crore and report compliance. *2012-TIOL-135-CESTAT-MUM in 'Service Tax'.*

Passenger Service Fees and Airport Taxes: M/s Turkish Airlines was engaged in the business of operating airlines and providing passenger air transportation services in India. While issuing tickets to the passengers, it collected Passenger Service Fees (PSF) and Airport Tax on behalf of the International Airport Authority of India (IAAI) and remitted it to IAAI. It did not include these amounts in the value of its services while paying service tax believing that it was not part of the value of services rendered by it.

- Revenue opined that without the landing, taking off and airport services extended by IAAI, the appellant could not have rendered its air transportation services and therefore, these charges levied on the passengers should form part of value service rendered by the appellant. Since the lower authorities confirmed the demand for service tax with interest and penalties, the Airline appealed to the CESTAT.
- The appellant submitted that PSF was collected by it on behalf of IAAI to reduce the point of contact of the passengers with different agencies and hence the same could not be considered as value of services rendered by it. Also, airport tax was a statutory levy, and the same did not form part of its revenue. The CESTAT held:
- As per sec 67, the value of any taxable service was the gross amount charged by the service provider for such service. The amounts in question were not paid for the services provided by the appellant and therefore, these could not be considered as value of service rendered by it.

In a similar case of Sri Lankan Airlines, the Madras Bench had given full waiver vide decision *2010-TIOL-1758-CESTAT-MAD.* Hence, waiver of pre-deposit of the disputed due was granted, and recovery stayed. *2012-TIOL-110-CESTAT-DEL in 'Service Tax'.*

Clearing & forwarding services: The appellants were engaged in facilitating clearance of export/import cargo at various Ports/ICDs/CWC-CFS and for which they did the work of freight booking of ocean going vessels, co-ordination with shipping lines for terminal handling of containerized cargo, coordinating with CHAs for customs clearance of documents etc, shifting of empty containers from container yards to CWC-CFS, facilitating fumigation required for agro products, employment of labour for stuffing of the cargo into containers etc.

- It was the conclusion of the lower authorities that the appellants were providing handling, clearing and forwarding service to the clients. The adjudicating authority confirmed the demand along with interest and imposed penalties under various Sections of Finance Act, 1994. Upon appeal to CESTAT, it was held that:
- The adjudicating authority had incorrectly interpreted the definition of clearing & forwarding operation. As per the definition, services rendered by a person would fall under the category of clearing & forwarding operation if both the operations i.e. clearing & forwarding were undertaken by the person simultaneously.
- An essential characteristic of any service, to fall in the category of C & F agent, was that the relationship between the service provider and receiver should be in the nature of principal (owner) and agent. The C & F agent carried out all activities in respect of goods right from stage of their clearances from the premises of the principal to its storage and delivery to the customers. The appellant in this case, was not engaged in any activity which could be attributable to clearing & forwarding agent service.
- Tribunal found that the Department had relied heavily on the judgment of High Court of Karnataka in the case of *Mahavir Generics*. However, in that case, the agreement between the principal and M/s Mahavir Generics

clearly indicated that M/s Mahavir Generics would act as 'consignment agent' of the principal, and so it got covered under the inclusive definition of clearing & forwarding agent. This was not the case in present case.

- The order which held that the appellant had been providing service of clearing & forwarding agent, was set aside and appeal allowed with consequential relief. *2012-TIOL-81-CESTAT-AHM in 'Service Tax')*.

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