Tax News

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INCOME TAX

Reminder for Aug 2013

Action Due	Due Date
TDS/TCS for July 2013	07-08-13
PF for July 2013	13-08-13
ESI for July 2013	20-08-13

SERVICE TAX

Action Due	Due Date
Service Tax for July 2013 in case of company	05-08-2013
Service Tax for July 2013 in case of a company for which e-payment is mandatory.	06-08-2013

INCOME TAX

Important Circulars/ Notifications

- **Circular on Sections 10A, 10AA, 10B and 10BA:** It has been brought to the notice of the Board that the provisions of 10A/10AA/10B/10BA of the Income-tax Act, with regard to applicability of Chapter IV of the Act and set off and carry forward of losses, are being interpreted differently by the Officers of the Department as well as by different High Courts. In this circular, various provisions of the above sections of the Act have been clarified. ***07/DV/2013, Dated: July 16, 2013.***

SC / HC Judgments

- **Advance from real-estate developer: A)** The assessee, engaged in manufacture of ceramic tiles, owned a piece of land and factory building at Goregaon, Mumbai. As the assessee suffered losses, a lock out was declared in the factory, and an Industrial Court passed an order restraining the assessee from selling the factory land. Several years later, the assessee entered into a joint Development Agreement with M/s. Sheth Developers Ltd (SDL). The Assessing Officer took a view that the land had been transferred to SDL, and subjected the consideration received to capital gain tax. This was on the ground that under the above agreement, transfer of the land could be said to have taken place under Section 2(47)(v) of the Act.

In appeal, the CIT(A) held that section 2(47) of the Act could not be applied in this case as no possession of the factory land could be given by the assessee to SDL. Further no construction activity had commenced during the year under consideration. Thus, the assessee was not liable to capital gain tax. On appeal, the Tribunal upheld the order of the CIT(A) and further held that the amounts received by the assessee from SDL was only in the nature of advance subject to settlement of labour and other disputes so as to make the factory land free from encumbrances. If for some reason, the assessee was unable to fulfill its obligations, then it was required to refund the amounts to SDL. The High Court upheld the ruling of the CIT(A) and the Tribunal.

B) Soon after the restraint was put on the assessee preventing it from seeling the factory land, the assessee decided to convert its factory land at Goregaon into stock-in-trade for the purpose of engaging in the business of real estate development. For that purpose, the assessee inducted three new directors, having experience in real estate business. Immediately thereafter, the assessee took consent from the shareholders to enter into business of real estate development and for that purpose converting its factory land into stock-in-trade. Thereafter, the assessee sought permission to shift its factory from Goregaon to Taloja, and to convert the Gurgaon factory land from industrial zone land to residential zone land. The assessee also obtained an NOC from the BMC for change of user of the factory land in 1992. However, the Assessing Officer did not accept the case of the assessee that the factory land had been converted into stock-in-trade, as there was no activity on the factory land since 1992 to 1999.

In appeal, the CIT(A) concluded that the assessee had converted its factory land into stock-in-trade in 1992. The Tribunal upheld the CIT(A) ruling. that the factory land was converted into stock-in-trade in 1992. The grievance of the Revenue was that the resolution passed in 1992 were mere paper entries and did not establish conversion of factory land into stock-in-trade. On appeal, the HC held that the Revenue has not been able to prove that conversion of land into stock-in-trade in 1992, did not happen. So the order of the Tribunal was upheld. *2013-TIOL-554-HC-MUM-IT*.

- **Clubbing of annual receipts of all educational institutions run by an assessee society:** The assessee, M/s. Children's Education Society is a society registered under the Karnataka Societies Registration Act, 1960. The society was formed with the object of promoting, establishing and maintaining all types of educational institutions. The assessee society over the years has promoted 28 educational institutions. The assessee filed the return claiming exemptions and allowances under several grounds, which were all rejected by the AO, and thereafter, confirmed by the CIT(A). On appeal, however, the Tribunal upheld all the contentions of the assessee. Upon appeal, the High Court held that:

  - If an assessee society is running several educational institutions, if some of them are wholly or substantially financed by the Government in terms of sub-clause (iii)(ab), the income on behalf of such educational institution received by the assessee is exempted from being computed the total income of the assessee. If the assessee is running other educational institutions which are not wholly or substantially financed by the Government, then the benefit of that exemption is also extended to the income derived from such educational institutions and received by the assessee under sub-clause (iii)(ad) reading with sub-clause (iii)(ad) along with Rule2BC;

  - Every educational institution existing solely for educational purpose and not for the purpose of profit, if the aggregate annual receipts of such educational institution exceeds Rs.1 crore, then the income from such educational institution received by the assessee is excluded from his total income. *2013-TIOL-519-HC-KAR-IT*.

ITAT Judgments

- **Commission paid to foreign agent outside India:** The assessee had availed the services of a foreign agent outside India for securing export orders and made payment of export commission to this non-resident, towards services rendered outside India for procuring the order and pursuing the payment from the foreign buyer. According to the assessee, as no services were rendered in India, there was no liability on the assessee to deduct any tax at source.

The AO, however, held that the services rendered by the foreign agent outside India for securing export orders, shall be deemed to accrue or arise in India within the meaning of Section 9.Therefore, in view of the provisions of section 40(a)(i), he disallowed the entire export commission paid by the assessee to the non-resident. On appeal, the CIT(A) confirmed the AO's order.

The assessee had also paid commission in addition to salary to two of its full time working directors, who were also shareholders in the assessee company. According to the AO, the bonus / commission paid to its directors, was not allowable as a deduction under section 36(1)(ii), if it could have been paid as profit or dividend. On appeal, the CIT(A) deleted this addition. Upon appeal, both by the assessee and the Revenue, the Tribunal held:

- Revenue has not made any attempt to establish a case of business connection between the appellant and the foreign agent, as stipulated in section 9(1)(i). Therefore, the disallowance is deleted.

- In terms of the board resolution of the appellant company, the directors were entitled to receive commission for services rendered to the company. It was a term of employment, and so they were entitled to the amount. Commission was treated as a part and parcel of salary and tax had been deducted at source. The payment of dividend was made in terms of the Companies Act, 1956. The dividend had to be paid to all shareholders equally, as per their shareholding. On all these facts, the decision of Jurisdictional High Court in the case of AMD Metplast P.Ltd. would be squarely applicable. So, following the same, the appeal filed by the Revenue is dismissed. 2013-TII-126-ITAT-DEL-INTL.

- **Arranger's Fee for collecting Indian Millennium Deposits: The** assessee was the Indian branch of Abu Dhabi Commercial Bank Ltd, UAE. It was appointed as a collecting Bank by the State Bank of India for mobilizing deposits under the Indian Millennium Deposits (IMD) Programme, for which it was paid 0.25 per cent as commission on the amount collected by the designated branches. M/s SBI Capital Markets had also appointed the assessee as an arranger for mobilising deposits from eligible depositors for the IMD programme, for which the assessee was entitled to appoint arrangers or agents. The assessee had thus received an arrangers fee. It also claimed to have incurred various expenses on this account, including payments made to sub-arrangers for procuring the deposits, and incentive payments made to certain customers for placing the deposits as well as related staff costs in doing the activity outside India. The assessee had remitted the entire arrangers fee to its head office and overseas branches without deduction of tax at source. The assessee had filed its return declaring loss.

The AO held that the assessee had a business connection in India on account of the services rendered by way of marketing and collection by the assessee bank and its overseas branches. The fees arisen from this activity were directly attributable to the operations carried out by the assessee in India, and it represented the income of the bank arisen in India. The AO also held that the Indian branch was taxable under the provisions of Articles 5 and 7 of the tax treaty. Therefore the assessee was required to deduct tax at source on the commission payments as envisaged by the provisions of section 40(a)(i). The AO thus disallowed the claim of the assessee on the payment made to its head office and overseas branches under the head, arrangers fees, which was paid without deduction of tax at source as well as taxed the commission received on account of mobilization of deposits. Upon appeal, the **Tribunal held that:**

- As decided in the Credit Lyonnais case, the amount paid by the assessee to the non-residents sub-arrangers is not a fees for managerial or technical or consultancy services. Hence, the same cannot be brought within the ambit of ‘fees for technical services' as per section 9(1)(vii) of the Act.
- If this payment is not fees for technical services but only commission, the provisions of section 195 requiring the assessee to make deduction of tax at source before remitting or crediting the amount to the accounts of sub-arrangers, cannot apply. ***2013-TII-125-ITAT-MUM-INTL.***

- **Commission income on Indent sale:** The assessee, Varian India Pvt. Ltd. (VIPL), a 100% subsidiary of Varian USA, had entered into a distribution and representation agreement with five Varian group companies (VGC) overseas, for supply and sale of analytical lab instruments to Indian customers directly. Under its agreement with these overseas group companies, the assessee carried out two types of sale of Varian products in India – a direct sale and indent sale. Under a direct sale, the assessee directly imported spare parts from the group companies and sold them to Indian customers directly on its own account on principal-to-principal basis. In the indent sale, the group companies sold their products directly to Indian customers and the assessee only carried out pre-sale activities like liaisoning and other incidental post-sale support activities for which it was entitled for commission. The assessee would collect orders from Indian customers on behalf of these five companies and pass on these purchase orders to them. The assessee earned commission on the indent sale on the orders booked, where it was required to do marketing, business development and liaisoning activities. It was claimed that the sale with Indian customers was executed directly by the Varian group companies and all the market risk and credit risk from such sales was taken by these companies.

The assessee had offered the commission income as well as the income from direct sales for taxation in India. The assessee submitted that it was not a dependent agent and, hence, not a PE of any of the Varian companies under Article 5. According to the assessee, as per the provisions of section 9(1)(i), it had shown the income which had been reasonably attributed to the operations carried out in India. The TPO had confirmed that the assessee had been compensated at arm's length for its activities and functions performed in India. The AO however held that the assessee was a dependent agent and so was a PE in respect of the business done in India, and therefore, the profits of these companies, attributable to business in India, was also taxable in the hands of the assessee. On appeal, the CIT(A) held that the "Force of Attraction Rule" was applicable in the assessee's case and all the essential conditions given in Article-7(1) were applicable. Upon appeal, the Tribunal held:

- An agent is deemed to be PE if it is dependent on the enterprise. It was found that indent sale orders booked through the assessee were not binding on the VGCs as they could accept or reject the orders completely at their own discretion. The assessee had no authority and also could not negotiate or conclude contracts on behalf of the VGCs. It only provided marketing support for pre-sale and incidental and ancillary post-sale activities.
- The assessee did not maintain any cost of analytical instruments supplied by the VGCs to the customer in India. The title of the goods supplied by the VGCs was directly passed on to the customers and the assessee neither undertook any risk or title of the product at any point of time. The assessee mainly facilitated the process of sale. The assessee kept stock of spare parts which it sold in India on its own account and this transaction was on principal-to principal basis and no inventory of cost was maintained for indent sales.
- The order relating to indent sale were only introduced and liaised by the assessee and not secured by it. The sale orders were not binding on the VGCs until accepted by them. Thus, none of the three conditions in Article 5(4) stood fulfilled so as to hold that the assessee was a dependent agent of various VGCs in India. Hence, the test of dependent agent PE failed in this case.
- The basic condition for application of "Force of Attraction Rule" was that, it had to be established that the foreign enterprise had a P.E. in India and then only it could be brought within the fiscal jurisdiction of another country to such a degree that such another country could tax the profits which the enterprise derived from that country. To fall within the realm of "Force of Attraction Rule" two basic requirements which would satisfy is that (i) the foreign enterprise has a P.E. in the other State for the purpose of selling goods and merchandise and (ii) the direct sale by the foreign enterprise is the same or similar kind of goods or merchandise as sold by the P.E. in India. In this case, the assessee did not constitute a P.E. of

various VGCs, therefore, "Force of Attraction Rule", will not be applicable in this case.

- Hence, the attribution of 10% profit margin on the basis of global accounts of VGCs, as applied by the AO does not apply, and the addition made by the AO stands deleted. *2013-TII-158-ITAT-MUM-TP.*

➢ **Foreign Agency Commission: The** assessee was engaged in the business of leather tanning and export of finished leather goods and had made payments towards agents commission. The AO made additions in the income returned by the assessee u/s. 40(a)(ia) on account of short deduction of TDS, and u/s. 40(a)(i) on account of non-deduction of TDS on agency commission. On appeal, the CIT(A) deleted the addition. The Revenue appealed before the Tribunal and argued that there was a short deduction of tax at source by the assessee in respect of freight charges. As per Rule 28AA(4), lower Deduction Certificate was valid only with regard to the person responsible for deducting the tax and named therein. Since the name of the assessee was not mentioned in the certificate, the assessee ought not to have deducted tax at lower rate. Also, it was contended that the income of the foreign agents had accrued in India and as such the provisions of Section 40(a)(i) were attracted. **The Tribunal held that:**

- The assessee made several payments where the amount was below threshold limit to deduct TDS and there were certain cases where the respective parties had produced certificates issued by concerned Assessing Officers u/s. 197 to deduct 'nil' tax at source. The assessee had acted on the basis of certificates produced by the parties to deduct TDS at lower/NIL rate. Therefore, the contention of the Revenue that the assessee had deducted short TDS was not tenable.
- The foreign agency commission had been paid in respect of the services rendered abroad. Since the agents had no PE in India, therefore, there was no requirement to deduct TAS on the payments made to them. Accordingly, the provisions of Section 40(a)(i) of the Act were not applicable on such payments. ***2013-TII-121-ITAT-MAD-INTL.***

➢ **Applicability of Section 68 in the case of non-residents**: The assessee was a subsidiary of M/s Russian Technology Centre Holding Ltd (RTCHL). During the years under consideration various amounts were received by the assessee company from its holding company RTCHL and a couple of other companies in Seychelles. The AO asked the assessee *to prove the identity, capacity and genuineness of the persons related with the increase in the share capital.* He was of the view that the share capital was not genuine and the amount was channelized by assessee through tax haven. Accordingly, he made addition u/s 68. The CIT(A) confirmed the addition.

In appeal before the ITAT, the assessee argued that it had provided all possible information in the matter to discharge primary onus cast by Sec. 68. The moneys had undisputedly come through banking channels, approvals by the highest investment board i.e. FIPB had been sought before bringing capital in the country, all statutory compliances relating to share capital received from foreign company had been duly made, and the source of the source had also been established in as much as the Balance Sheet of RTCHL clearly showed that the investment in the assessee company was funded out of loans from share holders. It was argued that all the moneys received by way of share capital had been utilized for as establishment cost and towards selling and marketing expenses. Although the assessee had procured orders running into many crores of rupees, but the same could not fructify into revenue because of various business exigencies. **The ITAT held that:**

- The availability of balance-sheet, certificate of incorporation, confirmations and certificates of good standing etc. filed by the assessee in respect of shareholders, establish that they are non-resident entities, having independent and legal existence. The moneys have come to assessee through banking channels as is evident from FIRC, which also mentions the purpose of remittance and also the particulars of the remitting bank. FIPB approval that too with a liberty to collect share capital up to Rs 600 crores and ROC compliance etc. clearly indicate the stand of the assessee. The evidence filed by the assessee amounts to discharge of primary burden cast on the assessee in terms of sec. 68 of the I.T. Act for identity and creditworthiness of the creditors and genuineness of transaction.

- Under s. 5(2), the income accruing or arising outside India is not taxable unless it is received in India. Similarly, if any income is already received outside India, the same cannot be taxed in India merely on the ground that it is brought in India by way of remittances. Provisions of s. 68 or 69 would be applicable in the case of non-resident only with reference to those amounts whose origin of source can be located in India.

- In the absence of any evidence to show that the money remitted by the non-resident accrued in India, it cannot be held to be taxable in India. Hence, moneys remitted by non-residents whose identity is not in question through their bank accounts outside India have to be held as capital receipts not exigible to tax. The ***assessee's appeal was allowed. 2013-TII-118-ITAT-DEL-INTL.***

➢ **Issue of shares to employees under ESOP:** The assessee, a manufacture of pharmaceutical ingredients, set up a trust under the name "Biocon India Limited Employees Welfare Trust" for giving effect to the ESOP. The assessee granted option of shares of market value Rs 919 each, at exercise price of Rs.10 each (thereby claiming the total discount per option at Rs.909). The difference between the alleged market price and the exercise price, was claimed as compensation to the employees to be spread over the vesting period of four years. A deduction was claimed for the AY 2003-2004 on the strength of the SEBI Guidelines.

The AO disallowed the said claim on the ground that there was no specific provision entitling the assessee to deduction u/s 37(1) in this regard. He held that SEBI's Employee Stock Option Scheme Guidelines, 1999, would not apply as these cannot supersede the taxing principles. The AO observed that the options received by the employees were subject to risk of its forfeiture as the eligible employees were required to fulfill number of conditions in an ongoing manner before becoming absolutely entitled to such shares. It was opined that the deduction could be allowed only in respect of real expenditure and not the hypothetical or notional or imaginary expenditure. As no actual expenditure was incurred, the claim for such deduction was denied. The CIT(A) upheld the disallowance of ESOP expenditure. Upon appeal, the Tribunal held:

- It is important to understand the concept of ESOP. When a company issues shares to its employees at a discounted premium on a future date, the primary object of this exercise is not to raise share capital but to earn profit by securing the consistent and concentrated efforts of its dedicated employees during the vesting period. Such discount is construed, both by the employees and company, as nothing but a part of package of remuneration. Such discounted premium on shares is a substitute to giving direct incentive in cash for availing the services of the employees.
- The contention of the department that by issuing shares to employees at a discounted premium, the company got a lower capital receipt, is not correct. The sole object of issuing shares to employees at a discounted premium is to compensate them for the continuity of their services to the company. Such discount cannot be termed as either a short capital receipt or a capital expenditure. It is nothing but the employees cost incurred by the company.

- Normally it is provided in the schemes of ESOP that the vested options that lapse due to non-exercise and/or unvested options that get cancelled due to resignation of the employees or otherwise, would be available for grant at a future date or would be available for being re-granted at a future date. If we consider it at micro level, for each individual employee, it may sound contingent, but if view it at macro level, for the group of employees as a whole, it loses the tag of 'contingent' because such lapsing options are up for grabs to the other eligible employees. In any case, if some of the options remain unvested or are not exercised, the discount hitherto claimed as deduction is required to be reversed and offered for taxation in such later year. Hence, the discount in relation to options vesting during the year cannot be held as a contingent liability. Thus, discount on shares under the ESOP is an allowable deduction. *2013-TIOL-625-ITAT-BANG-SB.*

➢ **Deduction u/s 43B:** Assessee was engaged in the business of manufacture of integrated circuits. It had declared a total loss. During the course of scrutiny, it was found that the assessee had received some interest waiver as One Time Settlement [OTS] during the previous year. As per the provisions of section 43B interest payable on loans taken from financial institution could be claimed only on payment basis. In this case, since, the financial institutions had waived the interest payable by the assessee company, there was benefit accrued to the assessee, which had not been offered to tax. Since the financial institution had waived the interest, the question of payment did not arise and hence assessee's claim of deduction towards waiver of interest under OTS required to be taxed.

On appeal, the CIT(Appeals) observed that the waiver of the interest, which was not allowed as deduction in earlier assessment, could not be taxed under section 41(1). Therefore, interest payable to the banks to the extent they had not been allowed as deduction in earlier assessment cannot be taxed under section 41(1) of the Act. On appeal, the Tribunal held that:

To apply section 41(1), the assessee should have claimed earlier year any benefit. In the present case, the Assessing Officer had not allowed deduction under section 43B to the assessee. Therefore, section 41(1) of the Act cannot be applied in assessee's case. *2013-TIOL-592-ITAT-MAD*.

- **Can Forex loss be treated as capital loss:** Assessee gave a forex loan (in South African Rands) to its wholly owned subsidiary based in Mauritius, to help the subsidiary acquire Dunlop Tyres International (Pvt) Ltd, South Africa. According to the assessee, the loan given by it exposed it to risk of increasing rupee liability due to exchange rate fluctuation. Therefore, the assessee entered into foreign exchange forward contract with Citi Bank N.A. to avoid increase in its liability for payment to be made to Mauritius subsidiary company by way of loan in foreign currency. According to the assessee the purpose for which the forward contract was taken did not materialize. Therefore, the forward contract had to be settled on due date, because of which, the assessee suffered a loss.

  Assessee pointed out that since the loss was incurred in the course of advancing loan to the subsidiary company, therefore, it was allowable u/s 37(1) of the Act. The loan was advanced to Mauritius subsidiary to acquire the benefit by way of expanding its distribution network in South Africa. The assessee has not acquired any capital asset by advancing loan to Mauritius subsidiary company. The benefit, if any, acquired by the assessee was only in the revenue field. Therefore, according to the assessee, the entire loss due to foreign exchange fluctuation had to be allowed as revenue expenditure. The Revenue contended that any expenditure incurred by the assessee for acquisition of capital asset is not an allowable expenditure. Therefore, the loss incurred by the assessee in entering into forward contract with Citibank cannot be allowed as business loss. Upon appeal, the ITAT held that:

  - The assessee, instead of acquiring the company directly, established a company in Mauritius as 100% subsidiary company and the said subsidiary company established another company in South Africa. The motive and intention behind the establishment and creation of two intermediary companies was for the purpose of acquiring Dunlop Tyres International (proprietory) Ltd. The loan in foreign exchange was granted to achieve the above object of acquiring the company in South Africa.

- By acquisition of a company in South Africa, the manufacturing base and distribution network, in other words, the capital base of the company, expanded considerably and the profit making apparatus also expanded.

- The loss suffered was in the process of acquisition of Dunlop Tyres International (proprietory) Ltd in South Africa. In other words, the loss was suffered in the process of acquisition of a capital asset. Therefore, the loss was a capital loss which could not be allowed as a revenue loss or as an item of expenditure. Accordingly the order of CIT(A) was confirmed. *2013-TIOL-576-ITAT-COCHIN.*

SERVICE TAX

Important Circulars/ Notifications

- **Exemption under Sec 66B:** The Central Government has exempted the services on which service tax is leviable under section 66B of the said Act, received by a unit located in a Special Economic Zone (SEZ Unit) or Developer of SEZ (hereinafter referred to as the Developer) , from the whole of the service tax, education cess, and secondary and higher education cess leviable thereon. The exemption shall be provided by way of refund of service tax paid on the specified services received by the SEZ Unit or the Developer and used for the authorised operations, provided that where the specified services received by the SEZ Unit or the Developer are used exclusively for the authorised operations, the person liable to pay service tax has the option not to pay the service tax ab initio, subject to the conditions and procedure as stated in the notification. *NOTIFICATION NO. 12/2013-ST., Dated: July 1, 2013.*

CESTAT JUDGMENT

- **'Manpower Recruitment' service vs Business Auxiliary Service:** The appellant, a private limited company whose share holders were mainly farmers, entered into an agreement with M/s. Sanjivini SSK Ltd., for harvesting of sugar cane at the fields of member-farmers and transporting the same to the sugar factory. Remuneration for harvesting and transportation were paid on a tonnage basis. The department was of the view that the act of providing harvesting sugar cane and transporting the harvested sugar cane from the farmers' fields to the factory site was classifiable as 'manpower recruitment or supply agency service' and was chargeable to service tax.

  The appellant submitted that it was coordinating between the sugar factory and the labour contractors, who supplied labour for harvesting and for transportation. It received consideration from the sugar factory towards supervision charges, and the activity of harvesting and transportation was incidental to the sale, and should be classified as 'Business Auxiliary Service'. It was notable that the charges for harvesting and transportation were paid on tonnage basis and not on the number of labour employed. The CESTAT observed:

- In this case, there was no supply of labour per se, to the sugar factory. The work undertaken was harvesting of sugar cane and transporting the same to the sugar factory for which labour was employed.
- The sugar cane belonged to the sugar factory in terms of the agreement of sale executed between the farmers and the sugar factory. Therefore, the activity undertaken by the appellant was one of procuring or processing of the goods belonging to the client which was classifiable under 'Business Auxiliary Service' and not under 'Manpower Recruitment of Supply Agency Service.
- On the supervision charges paid to the appellant for the said activity, it had already discharged service tax liability under Business Auxiliary service. *2013-TIOL-1097-CESTAT-MUM.*

➢ **Management, maintenance or repair services:** The appellant was engaged in the construction of residential flats. During the sale of the flats, before handing over the possession, the appellant collected the development and maintenance fees from the flat buyers as the promoter was liable to take care of expenses including any municipal local taxes, property tax, water charges, electric charges, revenue assessment or interest or any mandatory charges under the provisions of Section 5 of Maharashtra Ownership flats (Regulation) Act, 1963. On completion of construction while handing over the possession, the developer was to return the balance amount, if any, after debiting the expenses.

The department was of the view that the activity undertaken by the appellant came under the category of 'Management, maintenance and repair services', and so a Service Tax demand was confirmed by the department. The appellant submitted that it had collected the amount from flat owners as it was obliged to discharge property tax, water and electricity tariff etc. on behalf of the flat owners. It had undertaken these activities in the capacity of an executor, and so had not rendered any management, maintenance or repair services and hence demand was not sustainable.

- The CESTAT Bench observed that the appellant had made a strong case in its favour, and granted unconditional waiver from pre-deposit of the dues. *2013-TIOL-1051-CESTAT-MUM***.**

➢ **Placement of shares:** The appellant was registered with the department under the "stock broking service". The appellant collected placement fee for private placement of unlisted shares but did not discharge any service tax on the unlisted shares. A show-cause notice was issued to the appellant demanding service tax on the above transaction. The appellant replied that the above proceeds had been received by the appellant in respect of sale or purchase of securities not listed in a recognized stock exchange and therefore, they were not liable to discharge any service tax on the said activity undertaken by them under the category of 'stock broking service'.

The Adjudicating authority held that the activity undertaken by the appellant came under the category of "Management Consultancy Service" and, therefore, the appellant was liable to pay service tax on it. Upon appeal, the CESTAT held that:

- From the show-cause notices issued, it is seen that no attempt has been made by the Revenue to classify the service first and then demand service tax thereon. Therefore, the principles of natural justice have been clearly violated.
- The activity undertaken by the appellant is private placement of shares which have not been listed in any recognized stock exchange. This activity comes under the category of Merchant Banking activity. By placing shares in the private domain, no advice or technical assistance, relating to conceptualizing, devising, development, modification, rectification or up-gradation of any working system of any organization could said to have been rendered by the appellant. In view of the above, the classification done by the department of the transaction of private placement of shares under management consultancy service has no basis and is not in accordance with the law. *2013-TIOL-1010-CESTAT-MUM* .

- M/s I.B.P Company and IOC had set up retail outlets at different places and had installed at those premises, apparatus for storage and delivery of petroleum prooducts and machines for air, cold water and other facilities. For running these outlets for retail sale of petroleum products and to render other services at the said premises I.B.P/IOC engaged the appellants as contractors. The appellants agreed to render the following services –

  -to operate the outlet for sale of petroleum products delivered by the Company.

  -to maintain accounts of daily transaction and carry out connected banking activities.

  -to maintain cleanliness at the outlet.

  -to ensure timely indenting of the product so that sufficient stocks are maintained at the outlet.

  -to arrange and provide fresh air/water/toilets etc. at the outlet and extend best customer services.

  -to provide health and safety measures for the staff working in the premises.

  -to maintain the apparatus in good working condition.

-to keep the outlet pollution and hazard free.

-to comply with requirements under Factory Act, Essential Commodities Act, Petroleum Act, Minimum wages Act. The Explosive Act and The Central Labour Act, etc.

-to engage security personnel and other staff required for security and operation of the outlet.

The Department was of the view that these services fell under the category of Business Auxiliary Service (BAS). Accordingly proceedings were initiated for recovery of Service Tax from the five appellants. Before the CESTAT, the appellants submitted that they had already paid the Service tax along with interest on commissions received by them from I.B.P/IOC. Appellant's charges included the payment received from I.B.P/IOC on account of commission, tea/coffee/consumable, and salary of employees. Similarly genset expenses, bank charges, electricity charges, were reimbursable by the I.B.P/IOC and were also borne by the appellant on behalf of the I.B.P/IOC. It was further submitted that I.B.P/IOC also paid for handling losses. The appellants contended that the department's demand of service tax on all these charges was against the provisions of Section 67 of Finance Act in view of Delhi High Court decision in case of *Intercontinental Consultants & Technocrats Pvt. Ltd.* (2012-TIOL-966-HC-DEL-ST). It was also submitted that Commission Agent under BAS was exempted from service tax under Notification 13/2003-ST dt. 20.06.03.

The Revenue representative submitted that the appellants had entered into agreement with M/s IBP/IOC for maintenance and handling of Retail outlets and as per agreement these contractors appellants were not only getting commission on sale of goods but also providing various services to increase the sales and which amounted to promotion of sales. The Bench observed:

- As per Section 67 of the Act, value of any taxable service shall be gross amount charged by the service provider for such service provided or to be provided. It does not provide for any deduction from the gross value for providing the service. We therefore do not agree with contention of the appellants that no service tax is payable on reimbursable expenses borne by the appellants and accordingly reject the same.

- Appellants have contended that they are Commission Agent and are exempted for levy of Service Tax under Notification 13/2003 dated 20.06.2013. We find that this exemption is applicable to Commission Agent only. But on going through agreement entered into by the appellants with I.B.P/IOC we find that appellants are providing various services to the appellants and are covered under Clause (i), (iii) & (iv) of the definition of Business Auxiliary Service apart from being Commission Agent. Therefore we are of the view that benefit of Notification 13/2003 has rightly been denied to them.

- Appellants relied on the decision of Delhi High Court in case of Intercontinental Consultants & Technocrats Pvt. Ltd. *(2012-TIOL-966-HC-DEL-ST)*. We find that in this case Court was examining the vires of Rule 5(1) of the Service Tax (Determination of Value) Rules, 2006. Since in this appeal, the period involved is prior to 2006, so that HC decision is not applicable to present case. So, all the *appeals were rejected. 2013-TIOL-1155-CESTAT-DEL*.

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