Tax News

PKF SRIDHAR & SANTHANAM
Chartered Accountants

In this issue…

INCOME TAX

Reminder For June 2011

Action Due	Due Date
TDS/TCS for the month of May 2011	07-06-11
PF for the month of May 2011	15-06-11
ESI for the month of May 2011	21-06-11
First Instalment of Advance Tax in case of companies	15-06-11

Important Circular/ Notifications **1**

Recent decisions of Supreme Court / High Courts / **Tribunal Judgments** **2-5**

SERVICE TAX

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

Important Circular/ Notifications **5-10**

Recent decisions of Supreme Court / High Courts **/CESTAT Judgment** **11-12**

INCOME TAX

Important Circular/ Notification

- **1. Issuance of TDS Certificates in Form No. 16A downloaded from TIN Website and option to authenticate the same by way of digital signature:**

Currently, a deductor has an option to authenticate TDS certificate by using a digital signature in Form No.16, but not in Form No. 16A. Therefore, Form 16A needs to be authenticated by a manual signature. The Central Board of Direct Taxes (the Board) has received representations to allow using digital signature in Form No.16A as well, especially for deductors who are required to issue a large number of TDS certificates. The Department has already enabled the online viewing of Form No.26AS by deductees which contains TDS details of the deductee based on the TDS statement (e-TDS statement) filed electronically by the deductor. Ideally, there should not be any mismatch between TDS certificate in Form No. 16A issued by the deductor and figures contained in Form No.26AS which has been generated on the basis of e-TDS statement filed by the deductor. However, in few cases the figures do not tally, mainly on account of wrong data entry by the deductor or non-filing of e-TDS statement by the deductor. To overcome the challenge of mismatch, a common link has now been created between Form No.16A and Form No.26AS through a facility in the Tax Information Network website (TIN Website) which will enable a deductor to download TDS certificate in Form No.16A from the TIN Website based on the figures reported in e-TDS statement filed by him. As both Form No.16A and Form No.26AS will be generated on the basis of figures reported by the deductor in the e-TDS statement filed, the likelihood of mismatch between Form No.16A and Form No.26AS will be completely eliminated.

2. Issue of TDS Certificate in Form No. 16A:

(i) For deduction of tax at source made on or after 01/04/2011:
(a)The deductor, being a company including a banking company, **shall** issue TDS certificate in Form No.16A generated through TIN central system and downloaded from the TIN Website with a unique TDS certificate number in respect of all sums deducted on or after April 1, 2011 under any of the provisions of Chapter-XVII-B other than section 192.

(b) The deductor, being a person other than the person referred to in item (a) above, has the **option** to use the above method.

(ii) For deduction of tax at source made during financial year 2010-11:

All deductors have the **option** to use the above method for TDS deducted during the financial year 2010-11.

3. Authentication of TDS Certificate in Form No. 16A:

(i) The deductor, issuing the TDS certificate in Form No.16A by downloading from the TIN Website shall authenticate such TDS certificate by either using digital signature or manual signature.

(ii) The deductor being a person other than a person referred to in item 2(i)(a) above, and who do not issue the TDS Certificate in Form No.16A by downloading from the TIN Website, shall continue to authenticate TDS certificate in From No.16A by manual signature only.

Circular no. 3 /2011 dated 13th May 2011.

Income tax exemption rate for interest on recognized provident fund: Income tax exemption rate for interest on recognized provident fund has been fixed at 9.5% with effect from 1st September 2010. *Notification no. 24/2011 dated 13th May 2011.*

Supreme Court / High Court Judgments

Taxability of imports by Non resident promoter: The assessee was a company jointly promoted by Samsung Electronics Company (SEC), Korea (74% controlling stake) and its Indian associate (26% stake). As per agreements entered into between SEC, Korea and the assessee, SEC had granted a non-exclusive and non-transferable licence to the assessee to use the technical information to produce the products at the facility of the assessee in India, for sale in Indian as well as international markets. SEC had also obtained overriding and non-rectifiable rights to nominate 5 out of every 7 directors in the assessee company. In addition, even the Managing Director to be appointed by the Board of Directors in the assessee company was designated by SEC. For the manufacturing of various products, the assessee had imported raw materials from its parent company, i.e., SEC, Korea.

According to the assessee, the raw materials were procured from SEC, Korea because the same were the best possible material available in the market and at the most competitive rates. It was also submitted by the assessee that the prices procured by it for importing of these very raw materials had been accepted by the Customs authorities after appropriate verification. The assessee had even produced order, in original, passed by the custom authorities satisfying itself that the prices of various materials were at arm's length.

The Assessing Officer was of the opinion that since SEC was a controlling hand of the assessee company, it was a person specified under Section 40A(2)(b) of the Income Tax Act. Further, the price at which the raw material was imported was not arm's length price, as it was an exclusive price paid by the assessee to its parent company.

The Tribunal held that the assessee had placed the material on record evidencing that the purchase price was in accordance with the prevailing market price, and it was accepted by the Customs department as well. So, now the onus to prove that the pricing was excessive or not reasonable, as per sec 40A(2)(a) of the Act, was on the Income Tax Department.

The High Court held that it was a matter of looking into the facts placed on record to determine whether the price paid was exclusive or not, and the onus was on the Revenue to disprove the facts placed on record by the assessee. *2011-TIOL-313-HC-DEL-IT in Income Tax.*

Taxability on expenses incurred in relation to theft of raw materials which was allowed in the past: It was held that if assessee claims expenses incurred with respect to theft of raw materials, then Assessing officer should have definite findings from the material on record, to disprove the assessee's claim, before it disallows the expenses.

The Tribunal, without discussing the matter in detail, had doubted the claim of loss of materials by the assessee, and held that in the last two assessment years also, the assessee made the similar claims which were allowed, and thus, looking at the modus operandi of the assessee, it was unable to accept the case of the assessee as genuine.

However, the High Court held that it can not be suggested that there cannot be further theft in a subsequent year when in the last two years there were similar theft of materials. There is no finding either of the Police or of the Insurance Company brought on record to disbelieve the allegation of theft. The fact that the police could not recover the goods or that the guilty persons were not punished cannot go against the claim of the assessee. For the inability of the police to recover the stolen goods or to find out the culprit, the assessee cannot suffer. *2011-TIOL-300-HC-KOL-IT in Income Tax.*

Excess deposit of TDS in the previous year: The assessee had made an excess deposit of tax which was intimated to the ITO, TDS. Subsequently, the assessee deducted tax on payments made to various parties on account of certain sub-contracting expenses but did not deposit this tax within the financial year or before the due date. The assessee had adjusted this current year tax liability against the excess deposit of TDS made in the immediately preceding financial year.

The Tribunal held that Circular no. 285, created a vested right in favour of the deductor for refund of the TDS. The assessee had the right to claim the refund of the excess payment of TDS. However, the assessee was not entitled, not to deposit the TDS deducted by it from the payments made, and adjust it against the excess TDS deposited in the earlier years. In case of failure of deduction of tax or failure to deposit the same under section 194C or any other provision, the assessee had to face the consequences provided under chapter XVII inviting the penalty or interest.

The High Court held that when the TDS was deducted on the payment, the said payment could be allowed as expenditure only when the assessee fulfilled the conditions as prescribed under section 40(a)(ia). Therefore, although the assessee had deducted the tax but to the extent that the same was not deposited with the government, section 40(a)(ia) was attracted and the claim of the deduction of such expenditure would be disallowed. *2011-TIOL-308-ITAT-MUM in Income Tax*.

Taxability of tips paid by the customers in restaurants: It was held by the High Court that tips paid by the customers to the employees of the restaurants would be taxable as salary u/s 17 of the Income Tax Act. Section 17 defines “salary”, “perquisites” and “profits in lieu of salary” only for the purposes of Section 15 and Section 16. Under sub-Section (1), “Salary” includes not only wages, pension, gratuity, etc., but under the sub-clause (iv), it includes any fees, commissions, perquisites, or profits 'in lieu of' or 'in addition to salary or wages'. The income of tips in all cases may not strictly fall within the “profits in lieu of salary”, but in any case, it would be 'profit in addition to salary or wages' at the hands of the recipients.

The employer, by virtue of employment, allows the employee to receive tips from the customers and in case the employer himself collects, that is also disbursed by the employer to the employees. Once the tips are paid by the customers either in cash directly to the employees or by way of charge to the credit cards in the bills, the employees can be said to have gained additional income. When the tips are received by the employees directly in cash, the employer hardly has any role and it may not even know the amounts of tips collected by the employees. That would outrightly be out of the purview of responsibility of the employer under Section 192 of the Act. But, however, when the tips are charged to the bill either by way of fixed percentage of amount, say 10% or so on the total bill, or where no percentage was specified and amount is indicated by the customer on the bill as a tip, the same goes into the receipt of the employer and is subsequently disbursed to the employees depending upon the nature of understanding and agreement between the employers and the employees. So the tips would constitute income within the meaning of Section 2(24) and thus taxable under the head “salary” under Sec 15.

The High Court held that it was obligatory upon the assessees to deduct taxes at source from such payments under Section 192 of the Act. In the given circumstances, the HC gave the benefit of bonafide belief to the assessees for the periods upto the assessment years. Therefore it was ruled that only interest would be charged and there would be no penalty for the default. *2011-TIOL-287-HC-DEL-IT in Income Tax.*

Taxability of Excise interest refund and Subsidy received from Government: The Tribunal considered the Excise interest refund and Subsidy as production incentive and held that it would be taxable as revenue receipt. While arriving at this decision, the ITAT was influenced by the following factors viz., the Excise Refund and Interest Subsidy had not been given to the assessees to establish industrial units because the industry already stood established; the incentives were not available unless and until commercial production had commenced; the incentives in the form of Excise Duty Refund and Interest Subsidy were not given to assessees for purchasing Capital asset or for purpose of machinery; and the incentives were given for easy market accessibility and to run the business more profitably.

The High court referred to the decision of Supreme Court in case of Ponni Sugars and Chemicals Ltd., which held that:

“If the object of the subsidy scheme was to enable the

assessee to run the business more profitably then the receipt is on revenue account. On the other hand, if the object of the assistance under the subsidy scheme was to enable the assessee to set up a new unit or to expand the existing unit then the receipt of the subsidy was on capital account. Therefore, it is the object for which the subsidy/assistance is given which determines the nature of the incentive subsidy. The form or the mechanism through which the subsidy is given are irrelevant."

The main objective of the Central Government in providing the incentives to the new industrial units and substantial expansion of existing units is generation of employment through acceleration of industrial development to deal with the social problem of unemployment in the State of J & K as per the new Industrial policy. Therefore in this case such incentives designed to achieve a public purpose cannot be construed as production or operational incentives designed for the benefit of assesses, as held by ITAT. So they need to be treated as capital account. *2011-TIOL-269-HC-J&K-IT in Income Tax.*

Tribunal Judgments

Sachin Tendulkar is also an artist: The World famous cricketer, Sachin Tendulkar had shown gross receipts of Rs. 19.95 crore from sports sponsorships and advertisements, of which Rs. 5.92 crore was received in foreign exchange from ESPN Star Sports, PepsiCo Inc and VISA. The cricketer had claimed a deduction on the foreign exchange component under section 80RR amounting to Rs. 1.77 crore.

Section 80RR is one of the deductions under Chapter VIA which allows professionals including author or playwright, artist, musician, actor or sportsman, to avail of a deduction ranging from 15 to 65 per cent on their professional income from foreign sources, subject to certain conditions. But to enjoy the deduction, the assessee must satisfy the main condition that the income from foreign sources was earned in the exercise of his profession.

For Sachin Tendulkar to enjoy this deduction, it was claimed that his profession was sports sponsorship and modelling. It was also claimed that he was not a professional cricketer and income from playing cricket was shown as 'income from other sources.' The Revenue department had been allowing him this deduction for several years now. But in the relevant year Assessing Officer did not allow the deduction claiming that Sachin did not spend more than one or two days in a year on modeling activities.

On Appeal the Tribunal held that the assessee, while appearing in advertisements and commercials, had to face lights and camera. No doubt, being a successful cricketer, had added to his brand value as a model but the fact was that as a model, the assessee had to bring to his work a degree of imagination, creativity and skill. Every sportsman did not possess that degree of talent or skill or creativity. Therefore income received by the assessee from modelling and appearing in T.V. commercials and similar activities could be termed as income derived from the profession of "an artist". The assessee could have more than one profession. Therefore, income derived by the assessee in the exercise of his profession as an artist was entitled to deduction under section 80RR. *2011-TIOL-327-ITAT-MUM in Income Tax.*

Whether Interest Income can be connected with the PE under India-Australia DTAA: The assessee, an Australian Company, having a PE in India, declared income which included interest on refund received by it from the tax department. The assessee claimed that such interest should be taxed under the Interest article of the DTAA which prescribes a maximum rate of 15%. The A.O, however, came to the conclusion that such interest was effectively connected with the PE of the assessee and hence was liable to be taxed as business income on net basis but at a higher rate. In the first appeal, the CIT(A) noted that the assessee was carrying on business through its PE in India and since interest income was not covered by the provision contained in section 44BB of the Act , AO was right in assessing the interest income as business income.

On Appeal, Tribunal held that interest income (need not) be necessarily business income in nature for establishing the effective connection with the PE, because that would render provision contained in paragraph 4 of Article XI

redundant. Thus, there may be cases where interest may be taxable under the Act under the residuary head and yet be effectively connected with the PE. The bank interest in this case is an example of effective connection between the PE and the income, as the indebtedness is closely connected with the funds of the PE. However, the same cannot be said in respect of interest on income-tax refund. Such interest is not effectively connected with PE either on the basis of asset-test or activity-test. Accordingly, it is held that this part of interest is taxable under paragraph no. 2 of Article XI. *2011-TII-64-ITAT-DEL-SB-INTL.*

Transfer Pricing: The assessee, a subsidiary of M/s Sapient Corporation, USA, rendered customized software development services to associated enterprises and also provided post-sales support services. The assessee determined the arms' length price of the international transactions of software development and related services by applying TNMM as most appropriate method. The assessee had benchmarked its international transactions with 10 comparable companies with an average operating profit ratio (OP/TC) of 9.31%. Since the operating profit margin of the assessee at 12.5% was higher than the average operating profit margin earned on similar transactions with unrelated third parties, the international transactions were claimed to be at arms' length. The TPO however, rejected five comparables identified by the assessee on the ground of (i) decreasing profitability trend and sales since 3 years,(ii)non comparability due to wages to cost ratio being 0.24% as against 65% of the assessee,(iii) non-availability of segmental data and limited FOREX earning, and (iv)negative net worth. The TPO benchmarked the operating profit margin of the assessee company with the margin of the rest of the 4 high profit making companies. Accordingly, the TPO made an upward adjustment.

The assessee objected the TPO's action of considering one company, Zenith Infotech as a comparable since it was earning supernormal profits margin of 49.73% during the financial year 2005-06 and there was sharp increase in profitability and sales. The assessee further contended that when loss-making companies were taken out from the comparables by the TPO, the super profit earning company, Zenith Infotech Ltd. should also be removed from the comparables.

On appeal, the ITAT held that:

a. when the loss making companies have been taken out from the list of comparables by the TPO, Zenith Infotech Ltd. which showed super profits should also be excluded.

b. the fact that assessee has himself included it in the list of comparables initially, cannot act as estoppel particularly in light of the fact that Assessing Officer has only chosen the companies which are showing profits and has rejected the other companies which showed loss.

c. it is noted that Zenith Infotech is predominately software product company, while the assessee is engaged in rendering software development services. It is found that software product company shows higher margin. This is also corroborated by the fact that wages to cost ratio of Zenith Infotech is only 37.5% as opposed to 65% of assessee company.

d. since the OP/TC of the appellant at 12.5% is within the safe harbor range of (+/-) 5% as per the proviso to section 92C(2) of OP/TC margin of 3 comparable companies at 13.01%, no adjustment is warranted on account of difference in arm's length price of the international transaction. *2011-TII-50-ITAT-DEL-TP*.

SERVICE TAX

Important Circular/ Notification:

Auxiliary Service of Processing agricultural produce on behalf of client: It has been clarified that the agricultural produce, namely tobacco or raw cashew, which are subject to client processing, retains its essential characteristics at the output stage and therefore, the processes undertaken on behalf of client should be considered as covered by the expression 'in relation to agriculture'. In the light of the above principle (i) process of threshing and drying of tobacco leaves and thereafter packing the same and (ii) processing of raw cashew and recovering kernel, undertaken for, or on behalf of, the clients by processing units, are covered

by the expression "... processing of goods for, or on behalf of, the client.....and provided in relation to agriculture,..." appearing in the said notification. *Circular No. 143/12/ 2011 dated 26th May 2011.*

SEZ - Service Tax refund: Subsequent to the issuance of Notification 17/2011-ST dated 01. 03. 2011, representations have been received seeking clarification on certain doubts. These doubts and clarifications are as follows (see next page):

S.No.	Questions	Clarifications
1.	To claim the refund arising out of service tax paid under section 66A, no proforma is prescribed in the notification; how to claim it?	In the notification, there is no difference in treatment of service tax paid under section 66 and section 66A of Finance Act, 1994. Where refund arises, Table – A, in Form A-2 can be used for making a refund claim.
2.	(i) In the notification, what is the treatment for service tax paid on taxable services which do not fall in the category of "wholly consumed services", and also are not 'shared services' ? Is refund available? (ii) Whether in the case of category (iii) services referred in paragraph 2(a) of the notification, 'proportionate refund' applies to only 'shared services' i.e. services that are used both for SEZ (Special Economic Zone) authorised operations as well as DTA (Domestic Tariff Area) operations?	All taxable services (under section 66 or section 66A) received by a SEZ Unit/Developer for the authorised operations, have been exempted in the first paragraph of notification 17/2011-ST, subject to conditions. In Paragraph 2, conditions attached to this exemption are prescribed. In terms of paragraph 2(a), refund route is the default option for all who intend to claim the exemption granted by the notification in its first paragraph. However, an exception is provided in the form of *ab initio* (upfront) exemption, to the 'wholly consumed' services. Services which fall outside the definition of 'wholly consumed' services can be categorized as those which are used exclusively by the SEZ Unit/Developer, for the authorised operations in SEZ or shared with DTA operations. Para 2(d) of the notification is applicable to refund arising from 'shared services' only. Thus exemption to services exclusively used for the authorised operations of SEZ Unit/Developer, will continue to be available by way of refund, as specified in paragraph 2(a) itself, subject to other conditions. To claim this refund, Table-A, provided in Form A-2 may be used. It is clarified that only such services shall be considered as exclusively used by SEZ Unit/Developer, for the authorised operations, as they satisfy the following criteria: (i) Invoice is raised in the name of the SEZ Unit/Developer or in the invoice, it is mentioned that the taxable services are supplied to the SEZ Unit/Developer for the authorised operations; (ii) Such services are approved by the 'Unit Approval Committee(UAC)', as required for the authorised operations; Receipt and use of such services in the authorised operations are accounted for in the books of accounts of the SEZ Unit/Developer.

S.No.	Questions	Clarifications
3.	Meaning of the expression 'who does not own or carry on any business other than the operations in the SEZ' appearing in paragraph 2(a)(iii) of the notification, which creates a difference between 'standalone' and 'non-standalone' SEZ Unit/Developer, may be clarified.	The expression refers to an entity which is carrying out business operations in SEZ and also DTA. Merely having an office in the DTA for purpose of liaison/business promotion, does not restrict a SEZ Unit from availing benefit extended to a standalone unit.
4.	Whether Approval by UAC is necessary, to claim benefit under the notification?	Yes. Unit Approval Committee (UAC) of the SEZ determines goods and services required for the authorised operations of a Unit/Developer, under the SEZ law. Hence approval of the UAC is necessary for availing the notification benefit, on the taxable services.
5.	(i) Does condition (c) prescribed in paragraph 2 of the notification, restrict the non-standalone Units/Developers, from availing upfront exemption for wholly consumed services, which fall under category (i) and (ii) of para 2(a) of the notification? (ii) For whom and for what purpose, Declaration in A-1 is required?	In respect of category (i) and (ii) services listed in paragraph 2(a), upfront exemption is made available to all SEZ Units/Developers, who fulfill the conditions of notification; only in the case of category (iii),difference is created between standalone and non-standalone SEZ Units/Developers. Declaration in Form A-1 is required to be produced, to a service provider, to claim upfront exemption (after striking out the inapplicable portion). This is a one-time Declaration. Original Declaration can be retained with the SEZ Unit/Developer for business record or for production to the jurisdictional Central Excise/Service Tax authorities, if need be, for any verification; a copy has to be retained by SEZ Specified Officer; self-attested photocopies of the Declaration can be submitted to service provider to avail upfront exemption, subject to fulfillment of other conditions mentioned in the notification.
6.	Meaning of the expression "total turnover" found in para 2(d) of the notification is not clear: whether it refers to turnover of SEZ Unit or the entity (incl. DTA & SEZ Unit). This may be clarified.	Total turnover includes turnover of DTA Unit and also export turnover of SEZ Unit. This is the way to calculate proportionate refund. Table-C in Form A-2, illustrates this aspect.
7.	A Developer may not have export turnover; therefore, he cannot get refund of service tax based on the formula provided for shared services in paragraph 2(d) of the notification: therefore, it may be explained how a Developer can claim exemption under the notification?	Generally, SEZ Developers will be using category (i) services listed in paragraph 2(a), relating to immovable property located within SEZ; upfront exemption is available for these services, and category (ii) services, irrespective of whether the Developer is standalone or not. As another option, refund route is also available. In the case of category (iii) services if Developer is standalone, upfront exemption is available. If Developer is not standalone, on service tax paid on category (iii) services, which are exclusively used for the authorised operations in SEZ, he can avail exemption through refund route. 'Exclusive use' explained in clarification for question No.2. may also be referred in this connection.

S.No.	Questions	Clarifications
8.	Whether proportionate amount of service tax paid on shared services that have not been refunded after applying the formula in paragraph 2(d), shall be available to the DTA Units of the entity as cenvat credit?	Yes. Available.
9.	Whether consolidated refund claim under 17/2011-ST can be filed by an entity having more than one SEZ unit and a centralized service tax registration.	If an entity is having multiple SEZ Units with a centralized service tax registration, consolidated refund claim can be filed, provided separate accounts are maintained for receipt and use of services for the authorised operations in SEZ Unit.
10.	Whether certified copies of invoices can be used for claiming refund, if originals are needed for other statutory purpose; Whether on the basis of single invoice, one can claim proportionate refund for SEZ Unit and balance as cenvat credit.	In terms of the notification, original invoices are needed for claiming refund; after receiving the refund, originals can be taken back on submission of copies certified by Chartered Accountant. On a single invoice, if proportionate refund (by SEZ Unit) and cenvat credit (by DTA Unit) needs to be obtained, then also similar system shall be followed.

Circular No.142/11/2011 - ST

Applicability of the provisions of the Export of Services Rules, 2005 in *certain situations:*

1. The Circular clarifies that the words, "used outside India" should be interpreted to mean that "the benefit of the service should accrue outside India". Services, being largely intangibles, are capable of being paid from one place and actually used at another place. Such arrangements commonly exist where the services are procured centrally eg audit, advertisement, consultancy, and other business auxiliary services. For example, it is possible to obtain a consultancy report from a service provider in India, which may be used either by the customer in any other place outside India or even in India. In a situation where the consultancy, though paid by a client located outside India, is actually used in respect of a project or an activity in India the service cannot be said to be used outside India. *Circular No.111/05/2009-ST dated 24th February 2009.*

2. The Circular clarifies that the words "accrual of benefit" are not restricted to mere impact on the bottom-line of the person who pays for the service. These words may be interpreted in the context where the effective use and enjoyment of the service has been obtained. The effective use and enjoyment of the service will of course depend on the nature of the service. For example effective use of advertising services shall be the place where the advertising material is disseminated to the audience, though actually the benefit may finally accrue to the buyer who is located at another place. This however, should not apply to services which are merely performed from India and where the accrual of benefit and their use outside India are not in conflict with each other. The relation between the parties may also be relevant in certain circumstances, for example in case of passive holding/ subsidiary companies or in case of associated enterprises. In order to establish that the services have not been used outside India, the facts available should inter-alia, clearly indicate that only the payment has been received from abroad while the service has been used in India. It has already been clarified that in case of call centers and similar businesses which serve the customers located outside India for their clients who are also located outside India, the service is used outside India. *Circular no. 141/ 2011 dated 13th May 2011.*

Clarification on Short Term Accommodation Service and Restaurant Service:

Since the levy of service tax on the two new services relating to services provided by specified restaurants and by way of short-term hotel accommodation came into force with effect from 1st May 2011, a number of queries have been raised by the potential tax payers, about the interpretation of several terms like 'declared tariff', applicability of different rates for same accommodation for different clients and during different seasons, etc. The Department has issued clarifications in FAQ format. The details are in *Circular no. 138 / 2011 dated 10th May 2011.*

Exemption to sub-contractors providing services to the Works Contract Service provider – a representation by M/s Jaiprakash Associates Ltd: The Works Contract Service (WCS) in respect of construction of Dams, Tunnels, Road, Bridges etc. is exempt from service tax. WCS providers engage sub-contractors who provide services such as Architect's Service, Consulting Engineer's Service, Construction of Complex Service, Design Services, Erection Commissioning or Installation Service, Management, Maintenance or Repair Service etc. The representation by Jaiprakash Associates Limited seeks to extend the benefit of such exemption to the sub contractors providing various services to the WCS provider by arguing that the service provided by the sub contractors are 'in relation to' the exempted works contract service and hence they deserve classification under WCS itself.

The matter has been examined.

(i) Section 65A of the Finance Act, 1994 provides for classification of taxable services. When for any reason, a taxable service is prima facie, classifiable under two or more sub-clauses of clause (105) of section 65, classification shall be effected under the sub-clause which provides the most specific description and not the sub-clauses that provide a more general description.

(ii) In this case the service provider is providing WCS and he in turn is receiving various services which are

used by him in providing output service. The services received by the WCS provider from its subcontractors are distinctly classifiable under the respective sub clauses of section 65 (105) of the Finance Act by their description. When a descriptive sub clause is available for classification, the service cannot be classified under another sub clause which is generic in nature. As such, the services that are being provided by the sub contractors of WCS providers are classifiable under the respective heads and not under WCS.

(iii) Attention is also invited to Circular No. 96/7/2007-ST, dated 23rd August, 2007 regarding clarification on technical issues relating to taxation of services under the Finance Act, 1994. The relevant portion is reproduced below-

"A sub-contractor is essentially a taxable service provider. The fact that services provided by such sub-contractors are used by the main service provider for completion of his work does not in any way alter the fact of provision of taxable service by the sub-contractor. Services provided by sub-contractors are in the nature of input services. Service tax is, therefore, leviable on any taxable services provided."

(iv) Therefore, it is clarified that the services provided by the subcontractors / consultants and other service providers are classifiable as per Section 65 A of the Finance Act, 1994 under respective sub clauses (105) of Section 65 of the Finance Act, 1944 and chargeable to service tax accordingly. *Circular no. 138 /2011 dated May 2011.*

CESTAT Judgments

Job of cutting and transportation of sugarcane: Assessee was a trust registered under 'Bombay Public Trust Act'. Under an agreement with M/s Samarth Sevabhavi Sahakari Sakhar Karkhana (SSK) Ltd., they agreed to harvest sugarcane grown by members of the SSK Ltd and also by others. The assessee, during the aforesaid period, got the work done through sub-contractors. This agreement was entered into on **2.6.2006**. In terms of the said agreement the assessee undertook the job of cutting and transportation of sugar cane grown by members and non-members of the factory for the sugar seasons 2005-06 to 2009-10. The full responsibility of cutting and transportation of the cane upto the factory gate was on the assessee. The equipments, tools and labourers required for the job were to be arranged by the assessee with the help of the factory. The assessee was liable to follow the instructions of the factory in regard to the harvesting and transportation of the sugar cane. The plan of cutting of sugarcane and supervision of the job was the responsibility of the factory and the assessee was not responsible for the same. In relation to cane cutting and transportation, the assessee was liable to follow the orders of the factory. For this job, factory agreed to pay some consideration to the assessee.

As per the agreement any tax that might be payable as per statutory provisions was to be paid by the factory and, otherwise, the assessee would pay up and recover from the factory. The Revenue department raised a demand of service tax for the period from 16.6.2005 to 25.6.2007 under the head 'Manpower Supply' service which became a taxable service with effect from 16.6.2005.

Since the same was confirmed along with penalty, the assessee appeared before the CESTAT with an application for Stay because as per assessee, activity undertaken by the assessee, did not constitute 'Manpower Supply' service. Revenue argued that the job undertaken by the appellant through their sub-contractors would constitute 'manpower supply' services for the purpose of levy of service tax. It was further submitted that the labourers engaged for the purpose of harvesting and transporting sugarcane from the fields to the factory were indisputably under the effective control and supervision of the factory and, therefore, the appellant was virtually supplying manpower to the factory.

The CESTAT after considering the submissions held that :

It is a fact that there was no formal agreement between the assessee and the sugar factory prior to ***2.6.2006***. The raised demand of service tax is partly for the period prior to ***2.6.2006***, for which period, no evidence whatsoever, has been submitted by the assessee to show that their

activity did not constitute 'manpower supply' service. Hence a pre-deposit of the tax demand is required from the assesse.

At this stage, the counsel for the assessee has come forward with an offer to pre-deposit of Rs.10 lakhs. In this context, the learned council has produced copies of the accounts of the Trust for the year ended 31.3.2010, which indicate that there was an amount of Rs.13,295.92 as excess of expenditure over income as on 31.3.2010 and further that the cash and bank balances with the trust total to only Rs.6.4 lakhs as on the said date. These records are outdated for our purpose, and do not reflect whether the trust has been able to improve its bank balances and their general financial position over the year from 1.4.2010.

The Bench directed the appellant to pre-deposit an amount of Rs.15,00,000/- and report compliance. *2011-TIOL-658-CESTAT-MUM in Service tax.*

Our Offices:

Head Office

KRD Gee Gee Crystal, 7th floor,
No.91/92 Dr. Radhakrishnan Salai, Mylapore
Landmark: Sri Krishna Sweets,
Chennai 600 004
Phone # + 91 44 28112985/86/87/88
Fax # + 91 44 2811 2989

Branches:

Bangalore

T8 & T9, Third Floor,'
GEM PLAZA,
No 66, Infantry Road
Bangalore 560 001
Tele Fax : (+91) 080 25590553
Email : bangalore@pkfindia.in

Mumbai

No.406, Madhava Building
4th floor, Bandra Kurla complex
Bandra (E), Mumbai – 400 051
Phone : +91-22-26591730/
26590040

Delhi

No. 512, Charanjee Towers,
Nehru Place,
New Delhi 110049
Phone : +91 11 40543689
Email: delhi@pkfindia.in

Hyderabad

6-3-609/140/A
No.402, Annapurna Enclave
Ananda Nagar Colony
Khairatabad, Hyderabad–500 004
+Mobile:+91-9490189743

Coimbatore

No.38/1, Raghupathy Layout,
Coimbatore 641 011.
Mobile: +91-94430 49677

Disclaimer

Information of this news letter is intended to provide highlight on the subjects covered. It should neither be regarded as comprehensive nor sufficient for making decisions, nor should it be used in place of professional advice. PKF Sridhar & Santhanam accepts no responsibility for any financial consequence for any action or not taken by any one using this materials.