Tax News

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INCOME TAX

Reminder For December 2011

Action Due	Due Date
TDS / TCS for Nov. 2011	07-12-11
PF for Nov. 2011	15-12-11
ESI for Nov. 2011	21-12-11
Advance Tax	15-12-11

SERVICE TAX

Action Due	Due Date
Service Tax for the month of Nov. 2011 in case of company	05-12-2011
Service Tax for the month of Nov. 2011 in case of a company for which e-payment is mandatory.	06-12-2011

Tribunal Judgments

- **TDS on payments made to foreign companies on services rendered outside India:** The assessee company was engaged in the business of foreign forwarding and custom house clearing. It had made payments to foreign companies, without deducting TDS, partly towards freight charges for moving the goods, and partly for clearing/forwarding at the foreign ports. The remittances were for services rendered outside India. The Assessing Officer disallowed the foreign operation payments by invoking sec 40(*a*)(*i*). The assessee submitted that services were rendered outside India and the companies to whom payments were made did not have any branches in India. Also, the necessary chartered accountant's certificate was in place to confirm that no tax was deductible in India and the payments were made in accordance with the RBI's circular as also the CBDT Circular No. 10/2002 dated 9-10-2002. Therefore, the payments were not liable for TDS under section 195. So, no disallowance by invoking provisions of section 40(*a*)(*i*) was called for.

  The Tribunal upheld the assessee's claim and ruled that the said expenditure was not disallowable by invoking the provisions of section 40(a)(i). *Leaap International (P.) Ltd.[2011] 15 taxmann.com 251 (Chennai - Trib.)*

- **(a) Capitalization of Foreign Exchange Loss:** The assessee had taken foreign currency loans for acquiring ships and machinery. During the relevant previous year, the loss arising from foreign exchange fluctuation was capitalized. The Assessing Officer was of the opinion that loss worked out by assessee based on the balances outstanding as on the date of balance-sheet, and which arose on account of exchange rate fluctuation could not be considered for valuing the fixed assets, since it would result in year to year fluctuation of such value. He took the view that loss arising on foreign exchange fluctuation could not be capitalized on notional basis, but it has to be only on payment basis, or as per the proviso to section 43A. On appeal, the Commissioner (Appeals) observed that the increase in liability arising on account of foreign exchange fluctuation as on the last day of the financial year was neither notional nor contingent and, therefore, he allowed depreciation on the increased cost of the assets arising out of foreign exchange fluctuation as on the last day of the previous year. On appeal, it was held by the Tribunal that the assessee was justified in taking the view that the value of the asset would move in accordance with change in foreign exchange rates as on the last day of the previous year, and so, assessee would be eligible for claiming depreciation based on such value.

- **(b) Leave Encashment:** The assessee made a provision for leave encashment. The Assessing Officer disallowed it on the ground that the assessee had changed the accounting method for leave encashment in the relevant previous year, for the first time, and so the claim could be allowed only on payment basis. The assessee contended that it was an ascertained liability based upon actuarial valuation. On appeal, the Commissioner (Appeals) accepted assessee's contention. On appeal, it was held by the Tribunal that the Revenue was unable to produce anything to show that there could be any better method for valuing the liability on account of leave encashment other than the actuarial valuation. Though the assessee had made such provision for the first time, but this by itself would not be a reason to make a disallowance as long as the change made was bona fide. In view of the decision of the Court in the case of Bharat Earth Movers, the Commissioner (Appeals) was justified in deleting the disallowance made by the Assessing Officer.

- **(c) Treatment of Provision for bad and doubtful debt in determining MAT Laibility**: The Assessing Officer had, while computing book profits for the purpose of ascertaining MAT liability, added back provision for bad and doubtful debts considering such provision to have been made against unascertained liability. The AO relied upon an amendment by Finance Act, 2009 with retrospective effect from 1st April, 1998 whereby clause (*g*) was added to *Explanation* to sub-section (2) of section 115JA of the Act, stating that any provision for diminution of value of assets, has to be added to the book profit for working out the MAT liability. On appeal, the Commissioner (Appeals) deleted the addition observing that provision for bad and doubtful debt went to decrease the value of the asset and it was not a provision for liability whether ascertained or unascertained. On appeal, it was held by the Tribunal that the Parliament in its wisdom had made the above amendment and so retrospective insertion of clause (g) had to be considered. Provision for bad debt is to be added back to the net profit while working out MAT liability. The order of the Commissioner (Appeals) was quashed in this regard and order of Assessing Officer was restored.

- **(d) Losses from generation of wind-power:** The assessee had incurred a loss on account of its windmill operations in its books. The Assessing Officer on basis of clause (*iv*) of *Explanation* to sub-section (2) of section 115JA held that losses on account of generation and distribution of power had to be added back to the net profit as per P&L A/c for arriving at book profit. The assessee contended that Assessing Officer could not disturb the P&L a/c, which was prepared in accordance with Companies Act, 1956. On appeals, the Commissioner (Appeals) deleted the additions. On further appeal, it was held by the Tribunal that the amount of profits derived by the industrial undertaking from the business of generation and distribution of power had to be reduced from the net profit, irrespective of the fact that whether such profit appeared in the P&L a/c or not. However, it could not be extended to say that if there were losses then they had to be considered as an addition. Therefore, the Commissioner (Appeals) was justified in deleting the addition made to the net profit of the amount of losses arising to it on windmill operation, for the purpose of MAT.

- **(e) Construction in other's premises:** The assessee constructed a silo in premises of 'M' thermal power plant for collecting fly-ash from that thermal station and same ash was one of the raw material used by the assessee. The assessee spent certain amount on construction of the silo and the same was claimed as revenue expenditure. The Assessing Officer was of the view that even if assessee was not owner of the land, expenditure incurred by it for construction of a silo therein would result in an enduring benefit and, structure constructed by assessee was a capital asset and accordingly, he disallowed the claim. The assessee contended that according to its MoU with TNEB for the installation of fly-ash collection system, the equipment installed becomes the property of TNEB and assessee had no right over the equipment installed. On appeal, the Commissioner (Appeals) allowed the expenditure. On appeal, it was held by the Tribunal that the assessee for the purpose of collecting the fly-ash had made a construction in a property not owned by it on a condition agreed with TNEB, that the construction and the equipment would become latter's property. So it could not be considered as capital asset of the assessee. Just because, it facilitated the smooth procurement of an essential raw material, it could not be said that any enduring benefit had come to the assessee. Especially so, when the equipment became the property of another company. Thus, the Commissioner (Appeals) was justified in holding that the expenditure would be revenue in nature. *Chettinad Cement Corporation Ltd. [2011] 15 taxmann.com 262 (Chennai - Trib.)*

- **Income from sale of revenue of advertisement - India and Netherland DTAA:** The assessee, a company incorporated in Netherlands, and subsidiary of STAR Ltd., was granted exclusive rights for sale of advertising time on Indian channels. The assessee had appointed SIPL as its collecting agent in India for collecting advertising charges from India advertisers. SIPL was entitled to a commission of 15 per cent on the receipts from Indian advertisers net of advertising agency commissions. The assessee had been returning income in India on receipt basis on deemed profit rate of 10 per cent under the provisions of Circular No. 742 dated 2-5-1996 of the CBDT. In the assessment year 2000-01, though no income had accrued to the assessee, it had received advances relating to advertisement released prior to 1-4-1999 and in its return of income, it had reserved its rights to be taxed as per provisions of the India-Netherlands DTAA. The Assessing Officer held that the assessee was a conduit for its holding company, STAR Ltd., therefore, the income from sales revenue of advertisement did not belong to the assessee and could not be assessed in the assessee's name. On appeal, the Commissioner (Appeals) confirmed the order of the Assessing Officer. On second appeal, it was held that where a non-resident's sale to Indian customers are secured through an agent, the assessment in India of the income arising from the said transaction will be restricted to amount of profit which is attributable to the agent's services. The advertisement revenue, in the instant case, had been generated through commission agent, i.e., SIPL and income in case of SIPL had already been taxed. Therefore, in terms of Circular No. 23 which was in force in that year taxability in respect of such sales cannot extend beyond that income. Therefore, whether advertisement revenue was taxed in the hands of the assessee-company or STAR Ltd. there was no tax avoidance. The Tribunal further observed that the assessee-company was formed not only for procuring advertisement business from India but also from other countries and, therefore, it was not driven by Indian-tax considerations alone. So, it was held that the assessee was not a conduit of STAR Ltd. and that income from sales revenue of advertisement belonged to the assessee and had to be assessed in its name. *[2011] 15 taxmann.com 197 (Mumbai - Trib.) International Global Networks BV.*

- **Sec.80 IA benefits in case when warehouse is necessary part of infrastructure:** The assessee company carried on two activities, namely, operating a 'Container Freight Station' (CFS) and operating a 'bonded warehouse'. Commissioner of Customs declared the premises of the assessee as 'Customs Area' and appointed the assessee as custodian for cargo. Similarly, two covered godowns and an open area were notified as 'Public bonded Warehouses' and the assessee was appointed as Warehouse Manager. They were two separate facilities meant for two different purposes. While a CFS is a place where the containers meant for import or export are stuffed and unstuffed as in a Customs Areas, a bonded warehouse, on the other hand is a place where the goods after their import are stored before payment of Customs Duty. While both are infrastructural facilities, only a CFS had been notified to be an infrastructural facility for the purposes of section 80IA(4)(i). The AO further observed that the income from bonded warehouse was not part of income of CFS and disallowed deduction u/s 80IA.

  ITAT held that - CFS presupposes adequate infrastructure towards warehousing and the income therefrom cannot be contended as non-CFS income. Warehousing activity outside CFS does not qualify for deduction under section 80-IA. Warehousing facilities alone may not get any deduction, but when they are part of CFS as a necessary infrastructure, then such warehousing facility is different from the stand alone warehousing facility operated outside CFS. There can be a warehouse without CFS but not a CFS without warehousing. Hence, in such a situation warehousing income has to be treated as part of CFS income and eligible for the deduction under section 80-IA. *2011-TIOL-718-ITAT-MAD in Income Tax.*

- **Brand promotion expenses:** The assessee, engaged in the business of colour cosmetics, was a joint venture collaboration between MMPL, India and Revlon, USA. The assessee neither manufactured the goods on its own nor did it sell or market the products on its own. The assessee had an agreement with Revlon Mauritius, since July 1994, under which it had been granted the right to use the know-how, necessary to manufacture Revlon products, besides patents and improvements. Under this agreement, the assessee paid royalty to Revlon, Mauritius. The agreement subsisted for 10 years after which it was novated in September 2003. The new agreement was open-ended with various terms and conditions being the same as in the original agreement. An improvement clause in the novated agreement placed an obligation on the assessee to provide free of cost all modifications and improvements made to the know-how. The assessee had claimed a tax deduction against the payment of royalty to Revlon Mauritius. However, the AO considered 75 per cent of the royalty payable as revenue expenditure and 25 per cent as capital expenditure. The AO held that the computation of royalty was not correct as per the agreement, as the expenditure on royalty had not been incurred wholly and exclusively for the purpose of business as the assessee neither manufactured the goods nor sold them on its own. Thus, a part of the expenditure was capital in nature.

The assessee had paid consultancy charges to Mr Modi, a representative of one of its JV partners – MMPL, and claimed deduction. However, the AO following his earlier order took the position that the agreement was an arrangement to siphon off part of the profits and divert the same to JV partners. Therefore, a portion of the consultancy charges was disallowed with the AO holding that only the fair market value of the services rendered by Mr Modi to the assessee-company on behalf of joint venture partner, could be allowed.

The assessee had an agreement with MMPL whereby it had to bear the cost of advertising and sales promotion expenses related to the consumer sector, as the benefit of promotion of the brand 'Revlon' accrued only to the assessee. The assessee had claimed a tax deduction against these advertisement and sale promotion expenses which was disallowed by the AO on the ground that this expenditure was in respect of brand promotion, which pertained not only to the assessee, but also conferred benefits to other associate concerns. Therefore, the assessee was entitled to the deduction of proportionate expenditure only. The allocation was made on the basis of the assessee’s turnover and the total turnover of the group concerns.

In appeal, the CIT(A), following the decision of the Tribunal in the assessee’s own case, held in favour of the assessee. The CIT(A) deleted the disallowance of royalty expenses as well as the addition on account of the disallowance of consultancy charges and advertisement expenses. In appeal before the Tribunal, the Revenue side submitted that the agreement was open ended and, therefore, various benefits of an enduring nature were derived by the assessee. In view of the improvement clause in the agreement, the tribunal’s finding was not correct, that royalty payments were made for the continued use of brand name and patent owned by the foreign company and there was no question of any fresh input of know-how or technology. The department had thus not accepted the decision of the Tribunal, which required reconsideration. Regarding consultancy charges, the Revenue submitted that the CIT(A) had not asked for proof of services availed of by the assessee. After hearing both the parties, the Tribunal held that - there was sufficient evidence that MMPL was actively involved in the day to day activities of the assessee company. As MMPL had incorporated the consultancy charges in his income and paid due taxes thereon, it could not be said that agreement was entered for siphoning of income of the sister concern. Also, the assessee was not precluded from incurring advertising expenses as it was a purely commercial decision taken by the assessee. As the brand owner, the assessee had vested interests and incurring of expenditure for brand promotion was in the interest of the business of the assessee company only. Besides, similar expenditure had been allowed consistently in the past and no disallowance had been made towards these expenses. Following this decision of the Tribunal, there was no interference required in the decision of the CIT(A). *2011-TIOL-687-ITAT-DEL in 'Income Tax'.*

Advance Rulings

- **Taxability of Software Products:** The applicant (Millenium Software, Sri Lanka) had entered into a software license and maintenance agreement with Indian Commodity and Exchange Limited (ICEL).

  - Under the agreement, the applicant had allowed ICEL to use the software product called Licensed Programme owned by it. The Licensed Programme was developed and installed into the computer machines designated by ICEL. Also, the applicant deployed its personnel to ICEL's site to train the employees. After the installation was complete, the applicant provided, at its own cost, maintenance and support services, via a help desk that operated 24x7 to fix or bypass programme errors.

  - For installation and implementation of the Licensed Programme, applicant was paid Rs. 40 million by ICEL. The license to use the Licensed Programme was for 4 years and thereafter its renewal was left to the discretion of ICEL. The agreement provided for payment of License Maintenance Fee for 4years.

  - The applicant contended that the Implementation fee and Licence and Maintenance fee were not chargeable to tax under Income-tax Act or under DTAA with Sri Lanka, since providing maintenance service to ICEL did not create a Permanent Establishment (PE) in India.

  - Also, since the payments were not liable to tax in India, ICEL was not required to withhold any tax under section 195 of the Act and would not be obliged to file a tax return in India.

  - To support the above proposition, the applicant had placed reliance on the following judgements – Tata Consultancy Services, Dassault Systems, Infrasoft Ltd. & Sonata Information Technology.

  - However, the Revenue contended that the payments to the applicant were taxable as Royalties under the Act and under the DTAA with Sri Lanka.

  - The applicant had granted a license to use the software developed by it. Software was not goods or tangible property but intangible intellectual property. The ownership of the property remained with the developer and only a limited right was given to the user. The updating of software, removal of programme errors and maintaining performance standards under the maintenance services amounted to supply of software. The onsite training to employees and maintenance service to ICEL could be treated as PE of the applicant in India. So, the payments to the applicant were taxable in India and ICEL was required to withhold tax under section 195 of the Act.

  - Also, the applicant was liable to file a return of its income in India. For these propositions, reference was made to the decisions in the cases of Tata Consultancy Services, Airport Authority of India, Davy Ashmore India Ltd., Citizen Watch Co. and New Skies Satellites.

- The AAR ruled that:

- Fees paid by ICEL to the applicant is taxable as royalty under clause (v) of Explanation 2 to Section 9(1)(vi) of the Act.
- As the fees payable by ICEL to the applicant arose in India, it is taxable under Article 12.2 of the DTAA in India.
- The applicant does not have a PE in terms of Article 5 of the DTAA.
- The applicant is taxable on the fees paid by ICEL. The provision of withholding tax under Section 195 would apply.

As the applicant is liable to tax in India, it is required to file a return of income under the provision of the Act.

Comments: This case needs to be reconsidered in the light of other judgments like M/s Dynamic Vertical Software India Pvt Ltd in which the High Court had held that payment made to Microsoft towards purchase of software for distributing in India was not taxable as Royalty. Similarly, in the case of Dassault, the judgment has been that a mere non-exclusive license to use computer software would not be covered under the definition of Royalty. However, in case of Gracemac Corp (which is favourable to the above case), it was held that consideration received from licensing of computer software would be in the nature of Royalty under the IT Act and did not accept the distinction between 'use of copyright' and 'use of copyrighted article'. Issue is whether it can be said that if the payment is for the use of 'off the shelf' software, it will not be taxable as Royalty under the Act, while, if payment is for the use of customised software, it is possible that licence may be exclusive in nature and hence, covered under clause 5 of Royalty definition under the Act. Hence, it is a controversial issue in which clarity can be reached only once the judgment is received from the highest level authority, and only then litigation over taxability of software payments may reach an acceptable conclusion. *AAR No. 835 of 2009, New Delhi, dated Sep 28, 2011, ITATonline.org*

Supreme Court / High Court Judgments

Deduction for discharging liability from unapproved pension scheme: The assessee claimed deduction on account of unfunded actuarial liability for pension in respect of certain categories of employees. The assessee maintained its account on mercantile basis. Out of the aforesaid amount claimed, the amount actually paid was much less, and the same was included under Staff Welfare Expenses. The AO disallowed the aforesaid claim of deduction by holding that the amount of death pension was not admissible. On appeal, the CIT(Appeal) also denied the relief.

Before the Tribunal, the assessee contended that after the company decided to grant pension to its executives, the persons who had retired prior to introduction of the pension scheme, and were not in receipt of any pension, the liability had arisen and crystallized during the previous year. Since the company was following the mercantile system of accounting, the company was entitled to claim deduction of such pension liability determined on actuarial basis in the relevant previous year in which such liability arose. The Tribunal, however, overruled the aforesaid claim of the assessee. On further appeal, the High Court held that - expenditure in the nature of those mentioned in Sections 30 to 36, but actually not coming within their purview, cannot get the benefit of Section 37 of the Act. Since a board resolution can be modified or reversed by a subsequent resolution, by taking aid of an “avoidable” promise, an assessee cannot claim the benefit of the expenditure provided in Section 36 of the Act and that too, without complying with the requirement of Section 40 A(9) of the Act. *2011-TIOL-712-HC-KOL-IT in 'Income Tax'.*

Deduction u/s 10A without setting-off brought forward loss and unabsorbed depreciation of other units: Assessee, engaged in the business of manufacture and trading of Process Control Instruments, claimed exemption u/s 10-A for its STP unit, before setting-off brought forward losses and depreciation. AO held that the deduction u/s 10-A had to be allowed from the total income of the assessee as per section 80B(5), after setting off of all brought forward losses within the context of Section 32(1) r.w.s. 72(2). Accordingly, after re-computation, the assessee was held to be not entitled for exemption u/s 10-A. CIT (A) allowed the claim of the assessee stating that the income of 10-A unit had to be excluded before arriving at the gross total income. ITAT also confirmed the order of the CIT (A) and allowed the deduction.

After hearing both the parties, the High Court held that - A literal reading of section 10A requires deduction from the total income. However, there cannot be deduction from the total income which is the final result of the computation process. The phrase ‘total income’ used in Section 10-A need not necessarily mean the total income as computed in accordance with the provisions of the Act. The relief under this Section is with reference to the STP undertakings and not to the assessee. The relief travels with the undertaking irrespective of who owns the same. The phrase "total income" used in Section 10-A(1) is, therefore, to be understood as the total income of the STP unit. The twin conditions of Section 14 are that income is subject to charge of income tax and is includible in the total income. As the relief under Section 10-A is in the nature of exemption although termed as deduction, and the said relief is in respect of commercial profits, such income is neither subject to charge of income tax nor includible in the total income. Thus, the income of 10-A unit has to be deducted at source itself and not after computing the gross total income. As the income of 10-A unit has to be excluded at source itself before arriving at the gross total income, the loss of non 10-A unit cannot be set off against the income of 10-A unit u/s 72. Similarly, as per Section 72(2), unabsorbed business loss is to be first set off and thereafter unabsorbed depreciation treated as current years depreciation under Section 32(2) is to be set off. As deduction under Section 10-A has to be excluded from the total income of the assessee, the question of unabsorbed business loss being set off against such profit and gain of the undertaking would not arise. *2011-TIOL-711-HC-KAR-IT in 'Income Tax'.*

TDS on payments made to stock exchange as fees for managerial services: Assessee was engaged in the business of share broking, depositories, mobilization of deposits and marketing of public issues. Trading was carried out online through various stock exchanges, including the BSE's On-line Trading (BOLT) system. Trading and settlement activities of the member brokers were monitored through On-line Real Time System known as BSE on-line surveillance system ('BOSS'). As per the ruandles framed by BSE duly approved by SEBI, the BSE was entitled to charge its members, who did transactions through the BOLT system, various fees, such as, listing fees, admission fees, arbitration fees, transaction charges, etc. The assessee paid BSE Rs. 51.8 million towards transaction charges without deducting tax at source. AO held that the transaction charges paid by the assessee were in the nature of 'fees for technical services' covered under Section 194J and since the assessee failed to deduct tax at source, in view of Section 40(a)(ia), the entire expenditure was disallowed.

CIT(A) upheld the order of the AO stating that the stock exchange was not merely a mute spectator providing only physical infrastructure to the members but it was a supervisor, overseer, manager controller, settlor and arbitrator and provided managerial services. Thus, section 194J was applicable.

However, the ITAT held that the stock exchange did not render any managerial service or render any technical consultancy service, and therefore, transaction charges were not covered under Section 194J and deleted the disallowance made u/s 40(a)(ia).

After hearing both the parties, the High Court held that -there is direct linkage between the managerial services rendered and the transaction charges levied by the stock exchange. Under the screen based BOLT system the entire trading system is managed and monitored in all respects. The surveillance function involves price monitoring, exposure of the members, rumour verification on a daily basis and take remedial actions like reduction of filters, imposition of special margin, transferring scrips on a trade to trade settlement basis, suspension of scrips / members, etc. These are some of the identified managerial services rendered by the stock exchange for which transaction charges are levied. Therefore, the Tribunal was in error in holding that no technical or managerial services are rendered by the stock exchange, and the assessee was liable to deduct tax at source before crediting the transaction charges to the account of the stock exchange.

Though Section 194J was inserted with effect from 1/7/1995, till the assessment year in question both the revenue and the assessee proceeded on the footing that Section 194J was not applicable to the payment of transaction charges and accordingly, during the period from 1995 to 2005 neither the assessee had deducted tax at source, nor the revenue had raised any objection or initiated any proceedings for not deducting the tax at source. Thus, no fault can be found with the assessee in not deducting the tax at source, and consequently, no action could be taken under Section 40 (a)(ia) of the Act. The assessee's appeal was partly allowed. *2011-TIOL-693-HC-MUM-IT in 'Income Tax'.*

SERVICE TAX

SC/HC Judgments

Tax payable on services received from abroad: The assessee was engaged in the manufacture and sale of readymade garments bearing brand names like 'Wrangler' and 'Lee', belonging to foreign companies. The foreign companies provided Intellectual Property Service (IPS) to the assessee, and the assessee being the service provider in India, was made liable to pay service tax. The Service Tax liability was discharged by the assessee using Cenvat credit availed on IPS, which was objected to by the Department. The assessee filed a revised return and used credit relating to other input services such as advertisement, freight, manpower recruitment, courier services, maintenance, repair and construction services for discharging Service Tax under the category of IPS in the capacity of the service receiver. The Revenue proceeded against the assessee on the ground that Cenvat was wrongly used for paying Service Tax on IPS when it was not a service provider but the receiver of service.

The Tribunal held that though the assessee was a recipient of service, as the service provider was outside the country, it was deemed to be the service provider, and tax was levied on it. But to discharge that liability it can use the Cenvat credit. Aggrieved by the said order, the Revenue went in appeal. The High Court upheld the Tribunal's decision.

This case was prior to 19.04.2006. But now as per Rule 5 of the Taxation of Services (Provided from Outside India and Received in India) Rules, 2006**,** the taxable services provided from outside India and received in India shall not be treated as output services for the purpose of availing credit of excise duty paid on any input, or service tax paid on any input services, under CENVAT Credit Rules, 2004. *2011-TIOL-748-HC-KAR-ST in Service Tax.*

CESTAT Judgments

Restriction of credit utilization to 20% not applicable for capital goods: It was held by the Tribunal that the credit utilization restriction of 20% in terms of Rule 6(3)(c) is not applicable in respect of capital goods. *2011-TIOL-1554-CESTAT-DEL in Service Tax.*

Services to passengers in airport lounges: Assessees were engaged in providing food, beverages, amenities like TV, newspapers, magazines and internet facilities etc to passengers in lounges operated at IGI Airport, New Delhi. Revenue felt that these services would be covered under the category of Airport Services and issued show cause notice to the assessees. While the adjudicating authority confirmed the demand against one assessee, by holding that the services rendered by it would fall under the category of Airport services, demand against another assessee was dropped.

Before the CESTAT, the assessees submitted that it was selling food and beverages in the lounge which are subjected to sales tax and not liable to service tax. In support of this contention, the returns filed with Delhi VAT authorities. Reliance was placed on the judgment of Apex Court in the case of *Associated Hotels Ltd.* It was further submitted that services which were liable to be taxed as Airport services were cargo and passenger handling such as security, transit facilities, landing charges, terminal navigation charges, parking and housing charges and route navigation facility charges. The Tribunal

As per agreement entered by the assessee with AAI, the said agreement provides for parting of a specified area to assessee for establishing a lounge on payment of a specified amount as licence fee for a specified period. AAI has provided only bare area within the airport premises and the assessees are required to organize for provision of lounge and other expenses. Assessees were rendering facilities to bonafide passengers of the airlines who produce lounge cards and hence, the airlines were offering the services to their customers through the assessee. The services offered by the assessee to the passengers is on behalf of the airlines and therefore, the services rendered have to be construed as 'Business auxiliary service' and not Airport service . *The appeal filed by the assessee was upheld and that of the Revenue was rejected. 2011-TIOL-1470-CESTAT-DEL in Service Tax.*

Date of amalgamation is the date from which High Court allowed amalgamation, not date of filing application with ROC: M/s ITC Hotels Ltd. and M/s Ansal Hotels Ltd. were subsidiary companies of ITC Ltd. and were paying service tax on services provided to the parent company. The High Court allowed the amalgamation of the two companies with the parent company, with effect from 1.4.2004 i.e. the appointed date as per Amalgamation Scheme. As such, M/s ITC Hotels Ltd. and M/s Ansal Hotels Ltd. ceased to exist as independent entities with effect from 1.4.2004 onwards. Accordingly, they filed refund claims of service tax paid during the period, on the ground that consequent upon amalgamation of the two with the holding company, they were one and the same entity and as such, the service provided by ITC Hotels Ltd. was to itself, and not liable to tax.

The adjudicating authority rejected the refund claim on the ground that the effective date for amalgamation was the last of the dates on which all the orders, sanctions, approvals, consents, conditions, matters or filings referred in the amalgamation had been filed with ROC. This date was 23.3.2005. Any service provided by ITC Hotels Ltd. prior to 23.3.2005 would be liable to service tax. On appeal filed before Commissioner (Appeals), the appellate authority accepted the assessee's stand and held that it was the appointed date i.e. 1.4.2004 which had to be considered as the date of amalgamation.

The Tribunal observed that in the case of *Marshall Sons & Co. (India) Ltd, the Supreme Court had held that* it was the date of amalgamation as presented in the Scheme which had to be taken as the 'transfer date', even though the Court's approval may come much later. Thus the assessee was entitled to a refund of the service tax paid subsequent to the date of amalgamation prescribed in the Scheme. ***2011-TIOL-1453-CESTAT-DEL* in 'Service Tax'.**

Money Transfer from abroad - whether Export or Service rendered in India: Paul Merchants Ltd (PML) entered into an agreement with M/s Western Union Network Ltd, Ireland, a company engaged in money transfer from persons in one country to persons in any other country. PML was executing part of the activities, in territory assigned to PML in India, necessary for Western Union to carry out its business. It executed only remittances from persons abroad to persons in India, and not vice-versa. No charges were levied from the recipient of money in India. PML got its remuneration from Western Union by sharing the commission collected from the person abroad. They also made some profits due to changes in exchange rate between the date of receipt of money

Rupees in India. However, this profit was subject to the risk of loss if the exchange rate moved adversely. PML did some promotional activities like advertising, organizing promotional programs, distributing promotional material etc. The amount incurred by PML for promotional activities was reimbursed by Western Union. Service tax was demanded on this amount.

The issue was whether service provided by PML was exported. PML's contention was that it was providing services to Western Union situated abroad. The ultimate beneficiary of the service was the person situated abroad who approached the office of Western Union abroad and who paid for the services. So this was a case of export of services. The Revenue contested that the activity of making payment to the recipient in India was the only service which PML was rendering and this service was rendered in India. The receiver of the service was the person receiving the remittance in India.

The case was referred to the third member of the Tribunal, as the first two members took opposite stand. The final decision is yet to come. ***2011-TIOL-1448-CESTAT-DEL** in 'Service Tax'.*

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