Tax News

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INCOME TAX

Reminder for Apr-2014

Action Due	Due Date
TDS/TCS for Mar 2014	30.4.14
PF for Mar 2014	15.4.14
ESI for Mar 2014	21.4.14

SERVICE TAX

Action Due	Due Date
Due date of filing of Service Tax Return ST-3 for the half year from Oct. '13 to Mar. '14	25.4.2014

INCOME TAX

▪ Important Circulars/ Notifications

➢ **Amendment to Rule 6AAD** (Guidelines for approval of agricultural extension project under Sec 35CCC) of the Income tax Rules, 1962. The key features of the Amendment are:

- The project shall be undertaken by an assessee for training, education and guidance of farmers,
- The project shall have prior approval of the Ministry of Agriculture, Government of India, and,
- An expenditure (not being expenditure in the nature of cost of any land or building) exceeding the amount of Rs 25 lakh is expected to be incurred for the project.
- Before undertaking any agricultural extension project, an assessee shall make an application in Form No. 3C-O to the Member(IT), CBDT for notification of such project under sec 35CCC(1).

Further details of the project are in *Notification No. 18/2014 dated March 21, 2014.*

➢ **Extension of due date for filing TDS/TCS statements for FYs 2012-13 and 2013-14:** The CBDT has received several petitions from deductors/collectors, regarding delay in filing of TDS/TCS statements due to late furnishing of the Book Identification Number (BIN) by the Principal Accounts Officers (PAO) / District Treasury Office (DTO) / Cheque Drawing and Disbursing Office (CDDO). This has resulted in consequential levy of fees under section 234E of the Income-Tax Act, 1961. The Board has decided to, ex-post facto, extend the due date of filing of the TDS/TCS statement prescribed under subsection (3) of section 200 /proviso to sub-section (3) of section 206C of the Act read with rule 31A/31AA of the Income-tax Rules, 1962. The due date is hereby extended to 31.03.2014 for a Government deductor and mapped to a valid AIN for -

- FY 2012-13 - 2nd to 4th Quarter
- FY 2013-14 - 1st to 3rd Quarter

However, any fee under section 234E of the Act already paid by a Government deductor shall not be refunded. Timely filing of TDS/TCS statements is essential to ensure timely reconciliation of Government accounts and for providing tax credit to the assessees while processing their Income-tax Returns. Therefore, it is clarified that the above extension is a one time exception in view of the special circumstances referred to above. Since the Government deductor and the associated PAO/ DTO/ CDDO belong to the same administrative setup that regulates the clearance of expenditure, the deductors/collectors may be advised to co-ordinate with the respective PAO/DTO/CDDO to ensure timely receipt of BIN/filing of TDS/TCS statements. *Circular No. 7/2014 dated March 4, 2014.*

- **SC/HC Judgments**

➢ **Interest on refund of excess TDS from date of payment:** The assessee made an application u/s 195(2) for permission to remit technical service charges and reimbursement of expenses to a foreign company without deduction of tax at source. The AO directed the assessee to deduct TDS at the rate of 20% before making remittance. The assessee effected the deduction and filed an appeal before the CIT(A) in which it claimed that the said remittance was not subject to TDS. The CIT(A) upheld the claim with regard to the reimbursement of expenses with the result that the TDS thereon was refunded to the assessee. However, the AO declined to grant interest u/s 244A on the said interest by relying on Circular Nos 769 dated 06.08.1998 and 790 dated 20.4.2000 issued by the CBDT. The CIT(A) upheld the AO's stand though the Tribunal and High Court upheld the assessee's stand. On appeal by the department, the Supreme Court held:

- A "tax refund" is a refund of taxes when the tax liability is less than the tax paid. When the said amount is refunded it should carry interest in the matter of course. It is a kind of compensation of use and retention of the money collected unauthorizedly by the Department. When the collection is illegal, there is corresponding obligation on the revenue to refund such amount with interest. There is no reason to restrict the same to an assessee only without extending the similar benefit to a deductor who has deducted tax at source and deposited the same before remitting the amount payable to a non-resident/ foreign company.
- Providing for payment of interest in case of refund of amounts paid as tax or deemed tax or advance tax is a method now statutorily adopted by fiscal legislation. The said interest has to be calculated from the date of payment of such tax. *Union Of India vs. Tata Chemicals Ltd (Supreme Court) dated March 20th, 2014.*

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➢ **Exemption for charitable and religious trust:** The issue was whether a charitable or religious trust which does not benefit any specific religious community, is eligible to claim exemption u/s 11 or not.

The assessee had filed an application for registration u/s 12A/ 12AA to avail exemption u/s 11. The CIT held that though the assessee was a charitable trust, since its object and purpose was confined only to a particular religious community (Dawoodi Bohra), the bar in sec 13(1)(b) was attracted. On appeal, the Tribunal held that as the objects of the trust are wholly religious in nature, the provisions of sec 13(1)(b) which are otherwise applicable to charitable trusts were not applicable, and so the assessee was held entitled to claim registration u/s 12A & 12AA. On appeal by the department, the High Court declined to entertain the appeal on the ground that the Tribunal had given a finding of fact that the assessee was a religious trust. On further appeal by the department the Supreme Court held:

- The determination of nature of Trust as wholly religious or wholly charitable or both charitable and religious under the Act, depends on the objects of the Trust as contained in the Trust deed. In certain cases, the activities of a trust may contain elements of both religious and charitable and thus, both the purposes may be over lapping. More so when the religious activity carried on by a particular section of people would be a charitable activity for or towards other members of the community and also public at large.
- On facts, the objects of the assessee are not indicative of a wholly religious purpose but are collectively indicative of both charitable and religious purposes. The objects reflect the intent of the trust as observance of the tenets of Islam, but do not restrict the activities of the trust to religious obligations only and for the benefit of the members of the community. Neither the religious tenets nor the objects as expressed limit the service of food on religious occasions only to the members of the specific community, but extends the benefit of free service of food to public at large irrespective of their religion, caste or sect and thereby qualifies as a charitable purpose which would entail general public utility. Even the establishment of Madarsa or institutions to impart religious education to the masses would qualify as a charitable purpose qualifying under the head of education u/s 2(15). The institutions established to spread religious awareness by means of education though established to promote and further religious thought could not be restricted to religious purposes. The assessee is consequently a public charitable and religious trust eligible for claiming exemption u/s 11. *CIT vs. M/s Dawoodi Bohara Jamat (Supreme Court) dated March 19th, 2014.*

▪ Tribunal Judgments

➢ **Transfer Pricing – selection of Comparables:** The issue to be considered was, whether, for determining the Arm's Length Pricing under TNMM, (i) a company performing (high-end) KPO functions is comparable with a company providing (low-end) back-office support services, given that both are in the "ITES" sector, and (ii) whether companies earning abnormally high profit margin have to be discarded from the list of comparables. The Tribunal held that:

- In view of the peculiarity of the ITES sector, the problem of performing a comparability analysis has to be solved by splitting the exercise into two steps in order to attain relatively equal degree of comparability. First, select the potential comparables at ITES sector level by applying the broad functionality test. Second, though further classification of IT enabled services may be required to be done, it cannot be on the basis of BPO (low end) and KPO (high end) services because the line of difference between them is very thin. There are a large number of services falling under ITES

with significant overlap and it is difficult to classify these services either as low-end BPO services or high-end KPO services. Instead, the purpose of attaining a relatively equal degree of comparability can be achieved by taking into consideration the functional profile of the tested party and comparing the same with the entities selected as potential comparables on broad functional analysis taken at ITES level. The principal functions performed by the tested party should be identified and the same can be compared with the principal functions performed by the entities already selected to find out the relatively equal degree of comparability.

- The assessee is a captive contract service provider mainly rendering back office support services and incidental services involving some degree of special knowledge and expertise. It is not comparable to Mold-Tek & eClerx which are engaged in providing high-end services involving specialized knowledge and domain expertise in the field.
- Potential comparables cannot be excluded merely on the ground that their profit is abnormally high. In such cases, the matter would require further investigation to ascertain whether earning of high profit reflects a normal business condition or whether it is the result of some abnormal conditions prevailing in the relevant year. If it is found on such investigation that the high profit margin earned by it does not reflect the normal business condition, the high profit margin making entity should not be included in the list of comparables. Otherwise, the entity satisfying the comparability analysis with its high profit margin reflecting normal business condition should not be rejected solely on the basis of such abnormal high profit margin. *Maersk Global Centres (India) Pvt. Ltd vs. ACIT (ITAT Mumbai Special Bench) dated March 8th, 2014.*

➢ **Transfer Pricing for a Corporate Guarantee:** The assessee issued a corporate guarantee to Deutsche Bank on behalf of its associated enterprise, Bharti Airtel (Lanka), whereby it guaranteed repayment for working capital facility. The assessee claimed that since it had not incurred any cost on account of issue of such guarantee, and the guarantee was issued as a part of the shareholder activity, no transfer pricing adjustment could be made. However, the TPO held that as the AE had benefitted, the ALP had to be computed on CUP method at a commission income of 2.68% plus a mark-up of 200 bp. This was upheld by the DRP by relying on the retrospective amendment to sec 92B which specifically included guarantees in the definition of "international transaction". On appeal by the assessee, the Tribunal held:

- A transaction between two enterprises constitutes an "international transaction" u/s 92B (including giving of guarantees under clauses (c) as mentioned in the Explanation to sec 92 B) only if it has a bearing on profits, incomes, losses, or assets of such enterprises.
- The onus is on the revenue to demonstrate that the transaction has a bearing on profits, income, losses or assets of the enterprise. The said impact has to be on real basis, even if in present or in future, and not on contingent or hypothetical basis. There has to be some material on record to indicate, that an intra AE

international transaction has some impact on profits, income, losses or assets.

- When an assessee extends assistance to the AE, which does not cost anything to the assessee and particularly for which the assessee could not have realized money by giving it to someone else during the course of its normal business, such an assistance or accommodation does not have any bearing on its profits, income, losses or assets, and, therefore, it is outside the ambit of international transaction u/s 92B (1). *Bharti Airtel Limited vs. ACIT (ITAT Delhi) dated March 19th, 2014.*

➢ **Transfer Pricing:** The question was that after the TPO determines the AMP expenditure incurred for benefit of Associated Enterprise, whether the balance is deemed to be incurred for assessee's business & is automatically allowable u/s 37(1). The Tribunal held:

- The general proposition that if an expenditure is deductible u/s 37(1) as having being incurred wholly and exclusively for business purpose, the same has to be allowed in entirety notwithstanding the fact that some third party (being the foreign AE in the present case) also got some advantage by such expenditure, undergoes change because of the operation of Chapter X of the Act, which requires the computation of income from international transactions having regard to arm's length price.
- When there is an international transaction, the TP provisions prevail over other regular provisions governing the deductibility or taxability of an amount from such transaction. The exercise of separating the amount spent by the assessee in relation to an international transaction of building brand for its foreign AE for distinctly processing as per s. 92 cannot be considered as a case of disallowance of AMP expenses u/s 37(1).
- Both sections i.e. 37(1) and s. 92 operate in different fields. As held in the case of *L.G Electronics*, the overall amount of AMP expenses should be processed to find out the amount spent on the brand building for the foreign AE and then disallowance should be made for such amount with the appropriate mark-up by way of TP adjustment. The remaining amount has to be considered as incurred by the assessee for its own business purpose eligible for deduction subject to the regular provisions of the Act. *Whirlpool of India Ltd vs. DCIT (ITAT Delhi), March 19th, 2014.*

➢ **Issue of bonus & rights shares:** The question was whether Sec 56(2)(vii)(c) is applicable on the issue of bonus and rights shares that are offered at a price lower than the FMV of the shares. The AO held that as the book value of the shares was higher than the offered price, the difference per share was "inadequate consideration" and assessable to tax u/s 56(2)(vii)(c). This was upheld by the CIT(A). On appeal by the assessee to the Tribunal held:

- S. 56(2)(vii)(c) (ii) provides that where an individual or a HUF receives any property for a consideration which is less than the FMV of the property, the difference shall be assessed as income of the recipient. S. 56(2)(vii) does not apply to the issue of bonus shares because there is a mere capitalization of profit by the issuing-company and there is neither any increase nor decrease in the wealth of the shareholder as his percentage holding remains constant.
- The same argument applies to the issue of additional shares to the extent it is proportional to the existing share-holding because to the extent the value of the property in the additional shares is derived from that of the existing shareholding, on the basis of which the same are allotted, no additional property can be said to have been received by the shareholder. The fall in the value of the existing holding has to be taken into account. As long as there is no disproportionate allotment, i.e., shares are allotted pro-rata to the shareholders, based on their existing holdings, there is no scope for any property being received by them on the said allotment of shares; there being only an apportionment of the value of their existing holding over a larger number of shares. There is, accordingly, no question of s. 56(2)(vii)(c) getting attracted in such a case.
- A higher than proportionate or a non-uniform allotment though would attract the rigor of the provision to the extent of the disproportionate allotment and by suitably factoring in the decline in the value of the existing holding. *Sudhir Menon HUF vs. ACIT (ITAT Mumbai) dated March 17th, 2014.*

➢ **Transfer Pricing provisions for an AE assessed in India:** The AE, IJM Corporation Berhad, has a Project Office at Delhi which constitutes a PE. The AE has established a place of business in India u/s 592 of the Companies Act, 1956. As the principal company had executed a Power of Attorney in favour of the Indian resident Director to manage the branch operations in India, it was established beyond any doubt that the entire control and management in relation to operations in India is situated in India. Consequently, the PE has to be assessed as a "resident" u/s 6(3)(ii).

Moreover, under the provisions of the DTAA with Malaysia, a PE is treated as a separate legal entity, independent of its foreign principal enterprise. Further, Article 24 of the DTAA contains a non-discrimination provision, which means that same tax treatment is to be given to the PE as the country would give to its own nationals.

Also, the Joint Venture between the assessee and IJM Corporation Berhad, Malaysia is also a resident, as this JV was formed in India by an agreement between the respective parties and assessed in the status of AOP. The JV agreements provide that all decisions relating to the JV are taken in India. U/s 6(2) an AOP is "resident" in India in every case except where during that year the control and management of its affairs is situated wholly outside India. The Revenue has not brought any evidence on record suggesting that these AOPs are controlled from Malaysia. Whereas the assessee led the

conclusive evidence on record to show that the AOPs are residents in India.

The object behind enactment of transfer pricing regulations is to prevent shifting of profits outside India as is brought out by the case *Morgan Stanley 292 ITR 416 (SC) & Circular No. 14 to the Finance Act 2001*. In the present case, there is no possibility of shifting of profits outside India or erosion of country's tax base because the PE profits of the AE are assessable to tax in India. Therefore, the transactions with the AEs are outside the purview of the transfer pricing regulations. *IJM (India) Infrastructure Ltd vs. ACIT (ITAT Hyderabad) dated February 26th, 2014.*

SERVICE TAX

▪ Important Circular / Notification

➢ **Clarification on issue of Discharge Certificate under VCES and availment of CENVAT credit:** Trade and Industry has sought clarification as to whether the first installment of tax dues paid under Voluntary Compliance Encouragement Scheme (VCES), 2013 would be available as Cenvat Credit immediately after payment or Cenvat credit can be availed only after payment of tax dues in full and receipt of Acknowledgement of Discharge in form VCES-3. The issue has been examined. As per VCES, under Section 108 (2) of the Finance Act, 2013, a declaration made under Section 107 (1) shall become conclusive only upon issuance of acknowledgement of discharge under Section 107 (7), and such acknowledgement shall be issued within a period of 7 working days from the date of furnishing of details of payment of tax dues in full along with interest, if any, by the declarant. *Circular No. 176/2/2014 dated February 20, 2014.*

▪ SC/HC Judgments

➢ **Vocational training:** The assessee at the relevant time in 2003 was running courses which is to impart procedural and practical skill based training in areas such as export import management, retail management and merchandising. Concededly, these courses were not accredited or certified by any Central or State Government or statutory authority such as AICTE. The appellant-Service Tax Department issued a notice alleging that the respondent had not paid service tax for the relevant period even though the activities carried on by it are taxable service under Section 65 (zzc). The High Court held:

- The levy was sought to be introduced for the first time w.e.f . 1.7.2003. Simultaneously, vocational training institutes defined specifically by a Notification No.9 were exempted. This exemption continues even till date. The only difference being that by the latest Notification of 2010, the expression had been narrowed to mean those institutes affiliated to the National Council for Vocational Training and offering courses in designated trade as noticed in the Apprentice Act. As to what is “vocational” has been left advisedly open to the authorities.
- It is evident that the term "vocational training institute" included the commercial training or coaching centers which provide vocational coaching or training meant to "impart skills to enable the trainees to seek employment or to have self employment directly after such training or coaching". The notion of such training institute having been recognized or accredited to, nowhere emerges from such a broad definition. Had the intention been to exempt only such class or category of institutions, the appropriate authority would have designed such a condition in the original Notification of

2003 and Notification No.10 of 2004 which had been relied upon in this case.

- Revenue's appeal is dismissed in favour of the assessee. *2014-TIOL-379-HC-DEL-ST.*

▪ CESTAT Judgments

➢ **Export of services:** The appellant, a company registered in India and a subsidiary of M/s GAP International Sourcing, Inc., U.S.A., entered into a service support agreement with M/s GAP , U.S.A. for rendering various services relating to procurement of goods, recommending fabrics and vendors, inspecting export consignments and issuing inspection certificates, etc. for export of the purchased products out of India.

The Department was of the view that the services being rendered by the appellant were Business Auxiliary Service covered by Section 65 (105) (zzb) readwith Section 65 (19) of the Finance Act, 1994. However, the Department was of the view that since the service has been rendered in India and is not export of service in terms of Export of Service Rules, 2005, the appellant would be liable to pay service tax in respect of the same. Upon appeal, the Tribunal held:

- Though the services have been performed in India, these services being Business Auxiliary Services are in respect of the business of the appellant's principal located abroad, and so as per Clause (iii) of Rule 3 (1) of Export Service Tax Rules, 2005, read with sub-rule (2) of Rule 3, these services would be treated as exported out of India if the recipient is located outside India and the same have been delivered outside India, and payment for the same has been received in convertible foreign exchange.
- The department's contention, that the conditions of delivery outside India and "use outside India" are not satisfied, as the services have been performed in India, is not acceptable. It would be absurd to say that the recipient and user of these services are the persons in India and not M/s GAP, U.S.A.
- Service tax, though levied on commercial activities, is a destination based consumption tax. Therefore, when the service provided by a person in India is consumed and used by a person abroad, it is treated as export and is not taxed in India as the destination of the service provided and its use is outside India.
- In this case, M/s GAP, U.S.A. does not have any branch or project or business establishment in India. The service in relation to procurement of goods being provided by the appellant are entirely meant for M/s GAP, U.S.A. and the service in question is business auxiliary service, and the same would have to be treated as exported out of India. The appeal is allowed in favour of the appellant. *2014-TIOL-465-CESTAT-DEL*.

➢ **Commercial or Industrial Construction Services:** The appellant was engaged in the activity of lowering, laying,

jointing and testing GRP pipes (manufactured by the appellant) at the customers' site. Its customers were M/s Videocon Narmada, Birla Copper, IVRCL Infrastructure, Gujarat Industrial Development Corporation (GIDC), Surat Municipal Corporation and Vizag Municipal Corporation. The appellant paid service tax for the service rendered to the first three parties, but not for the service rendered to GIDC & the Surat & Vizag Municipal Corporations.

Revenue agreed that the service rendered to the municipal corporations was not taxable inasmuch as these customers were not 'commercial' concerns. However, in respect of service rendered to GIDC, since it was covered by the definition of 'Commercial or Industrial Construction Service' given under section 65(25b) of the Finance Act, 1994, tax was payable. The appellant submitted that GIDC is not a profit making institution and hence the service rendered to it would not come within the ambit of the above definition. Upon appeal, the HC held that:

- GIDC has been set up to establish and organize industry in industrial areas and industrial estates and for establishing commercial centres. In other words, the activity undertaken by the GIDC relates to commerce or industry.
- From the definition (s. 65(25b) of FA, 1994), construction of pipelines which is used or to be used primarily for commerce or industry, would fall within the purview of Commercial or Industrial Construction Service, therefore, the appellant is liable to discharge Service Tax liability on the consideration received in respect of such activities.
- The plea that activity included both supply of pipeline as also laying of pipelines and, therefore, it would come within the purview of Works Contract and a composite contract cannot be vivisected is not sustainable. A composite contract can be vivisected and service portion of composite contracts can be subjected to levy of Service tax. The appeal was rejected. *2014-TIOL-433-CESTAT-MUM*.

➢ **Service Tax amount kept in escrow account:** The appellant was engaged in development and construction of residential apartments. It did not charge and collect service tax on the activity of development and construction of apartments during the period 2006 to 2009. The properties in dispute (residential apartments) were constructed and completion certificate was obtained in 21.8.2009. Since the appellant had no clarity on liability of service tax while settling the accounts finally with the buyers of the apartments, it collected certain amount which was in the interest of protecting both the buyers and the appellant from any future exposure to service tax liability if its service fell under the category of ‘works contract', and the amounts collected were kept in a separate escrow account. Revenue took the view that the collection of amount and deposit in bank account, is equivalent to collection of service tax and this amount should have been paid to the Government as per the provisions of Section 73A of the Finance Act, 1994. The appellant claimed that it had not collected service tax but had collected only a ‘caution deposit' which was kept in separate account to be

paid to the Government if held to be liable to pay, or otherwise, to be returned to the party. The Tribunal observed that:

- The meaning of 'escrow account' is that amount is kept with a third party and has to be disbursed to a person who is eligible to get the same as and when the issue attains finality. The amount collected by the appellant was kept in escrow account and he had given an assurance to the buyer that if the amount was not liable to be paid, the same shall be returned with interest.
- Revenue should have determined the liability and if there was liability, the amount in escrow account would have been paid to the Government. Therefore, at this stage, we cannot say that the amount has been collected as service tax and therefore, the clause (2) of Section 73A is not applicable. *2014-TIOL-458-CESTAT-BANG*.

➢ **Restoration or similar services provided for 'new' building or 'old' building:** The applicant had undertaken interior work at the 9th floor of the State Bank Bhavan, Nariman Point, Mumbai. Revenue demanded service tax from the interior decorator. The applicant submitted that as per the work order, it had only undertaken interior renovation of a **part** of the building, and as per the definition of 'Commercial or Industrial Construction service', only construction of **new** building and civil construction or part thereof are covered under the scope of tax leviable under the commercial or industrial construction. Revenue submitted that a combined reading of definition of commercial and industrial construction means the construction of new building and part thereof and it also includes repair, alteration, renovation or restoration of the building and part thereof. The CESTAT held:

- The activity undertaken by the appellant falls under both clauses (c) and (d) of Section 65(25b). Both these clauses do not specify that they should be undertaken in respect of a new building only. Even if they are undertaken in relation to an old building, the provisions of these sections would apply. In fact repair, alteration, renovation or restoration or similar services would be mostly applicable to old buildings only. Therefore, the argument of the appellant that since the activities have been undertaken in respect of an old building and not a new building, service tax liability is not attracted, is not acceptable.
- Therefore, completion and finishing services, repair, alteration or renovation and restoration or similar services provided, whether in respect of a new building or an old building would attract service tax liability under Section 65(25b). *2014-TIOL-426-CESTAT-MUM*.

➢ **Service Tax on Information Technology software services:** In the case involving several issues related to the appellant - Infosys, CESTAT made the following decisions:

- **Liability to pay service tax in respect of information technology software services (ITSS) received from**

overseas sub-contractors to overseas branches of the appellant: If the service has been rendered in USA or Canada, received by the branch office of the appellant in USA or Canada, and utilised by the branch office at USA or Canada, and paid for out of the foreign exchange earned, unless the Revenue is able to show that the service has been received in India, or the benefit of service rendered abroad has been received in India, the tax, would not be payable. Revenue has not been able to show that ITSS has been received through appellant's branch office in India and in the absence of receipt of service, there is no taxable event and therefore there is no liability on the receiver to pay tax.

- **Liability for payment of service tax on services received in respect of International Private Leased Circuit (IPLC):** the service is correctly classifiable under "Tele Communication Service's and such services are taxable only when the same is provided by person who has been granted a licence under Indian Telegraph Act, 1985. It is not the case of the department that Foreign Service suppliers have been licensed under the Indian Telegraph Act. Therefore, the demand in this category is not sustainable and is set aside.
- **Insurance Premium in respect of Group Health Insurance Scheme for the employees**: On a specific query from the Bench as to whether Heath Insurance Policy covered the employees alone or the parents and others also, there was no categorical submission that it covers only employees. If the insurance policy covers persons other than employees and no contribution is required from the employees towards such coverage, the service tax paid on insurance premium to that extent on a proportionate basis will have to be reversed. It cannot be said that the insurance provided to the parents or family towards all the employees is relatable to output services provided by the appellant. Therefore, this matter is remanded to the assessing officer to further investigate and limit the demand to the extent admissible.
- **Admissibility of credit of service tax paid on various activities relating to construction of Hostel, Food Court, Gym & Global Education Centre which have been constructed at Mysore campus:** .Up to 1.4.2011, setting up of a premises of output service provider was also an activity for which services used were eligible for credit. Therefore, in respect of construction services used for setting up global training centre, would be covered by definition of input service up to 1/4/2011, since it is the claim of the appellant that the services were used for setting up a global training centre. Hence,
    - Credit is admissible in respect of 'global training centre' up to 1.4.2011.
    - After 1.4.2011, the services used for setting up of 'global training centre' would not be input service but services used for repairs, renovation or modernization would be admissible.
    - Cenvat credit of service tax paid on services used in respect of hostel and gym whether it is setting up or repair or renovation or modernization

cannot be considered as input service. *2014-TIOL-409-CESTAT-BANG.*

- **Activity ancillary to mining:** The appellant was engaged in business of mining and related works. It also provided services to M/s Rajasthan State Mines and Minerals Ltd., a Government of Rajasthan Enterprise [RSMML] in relation to mining of lignite. In this regard the appellant entered into an agreement with RSMML for clearing the site for mining, excavation of top soil and it's dumping at a specified place, removal of the overburden and raising of saleable lignite from a mine in Rajasthan. The payment for the services provided by the appellant, was on the basis of per M.T. of saleable lignite mined by them. The appellant emphasized that they receive payment from RSMML in terms of their agreement for the quantity of lignite mined and not for other activities like removal of over burden or excavation of top soil. The Department taking a view that the activity of the appellant was taxable as 'cargo handling' service till 15/06/05 and thereafter as 'mining service' issued a show cause notice. The CESTAT held:

  - Mining service became taxable w.e.f. 01/6/07 by insertion of (zzzy) to Section 65 (105) and therefore we have no doubt that w.e.f. 01/6/07 the appellant's activity was taxable under Section 65 (105) (zzzy). In fact, the levy of service tax for the period from 01/6/07 is not disputed and the dispute is only for the period prior to 01/6/07.
  - From the nature of the contract also, it cannot be said to be a contract for handling cargo and, hence, it would be absurd to classify the appellant's activity as cargo handling service and charge service tax. Therefore, service tax demand for the impugned period is not sustainable at all.
  - From the appellant's contract it is clear the contract is for mining of lignite of the required quality and in course of mining, while the appellant are also required to clear the site and remove the top soil and over burden, there is no separate payment for this activity. The activity of site formation and clearance, excavation of top soil and over burden, therefore, has to be treated as an activity ancillary to mining and since the overall contract is for mining and as such it is an indivisible contract, the entire contract has to be treated as a mining contract and not a contract for site formation, clearance, excavation and earth moving. Therefore, for this period also, the appellant's activity cannot be subjected to service tax. *2014-TIOL-387-CESTAT-DEL*.

- **Supply of manpower:** The appellant SSKL leased out their plant and machinery to M/s. Bajaj Organics Ltd., Mumbai. In addition to leasing out the plant and machinery, the agreement also provided that the lessee, namely, Bajaj Organics Ltd., shall endeavour to engage maximum possible technical and other staff from amongst the present staff on the roll of SSKL and salary of each such staff engaged by mutual consent, shall be fixed up between SSKL and Bajaj

Organics and the same shall be reimbursed to SSKL on a monthly basis. Staff of SSKL would work under the administrative guidelines of Bajaj and if any disobedience occurs, the same staff would be returned to SSKL.

The department was of the view that the appellant M/s. SSKL has supplied manpower to M/s. Bajaj Organics and, therefore, demanded Service Tax. Upon appeal by SSKL, the CESTAT held:

- For period prior to 16/06/2005, we notice that Section 65(21) read with Section 65(105)(k), as it stood at the relevant time, dealt with only recruitment of manpower for a client. In the present case, the appellant has not undertaken any recruitment activity for M/s. Bajaj and, therefore, for the period up to 16/06/2005 the activity of the appellant does not come within the purview of service tax under the category of 'manpower recruitment agency service'.
- However, w.e.f. 16/06/2005 the scope of the taxable service was widened bringing within the purview not only recruitment but also supply of manpower and the taxable service was also amended so as to levy on the activity of supply of manpower. Therefore, supply of manpower would be eligible to service tax effective from 16/06/2005. Though the appellant has argued that they received only 75% of the salaries to be paid to their employees from M/s. Bajaj and has not received any consideration for the supply of manpower, this argument is misplaced. Section 67 of the Finance Act, 1994 provides that service tax shall be paid on the gross amount received by the service recipient. The said section does not envisage that the service provider should always render the service on a profit basis. Even if loss is incurred in the provision of service, on the consideration received service tax liability would accrue. Therefore, merely because the appellant collected only 75% of the salary paid to the employees, it does not exempt the appellant from the service tax liability.
- In the present case, without the appellant's consent and without the agreement entered into between the appellant and M/s. Bajaj, the employees of the appellant could not have been employed by M/s. Bajaj. Therefore, there is a constructive supply of manpower by the appellant to M/s. Bajaj. Consequently, the appellant would be liable to pay service tax on the consideration received along with interest thereon. *2014-TIOL-355-CESTAT-MUM.*

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