Tax News

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INCOME TAX

Reminder for June - 2014

Action Due	Due Date
TDS/TCS for May 2014	07.06.2014
PF for May 2014	15.06.2014
ESI for May 2014	21.06.2014
Advance Tax	15.06.2014

SERVICE TAX

Action Due	Due Date
Service Tax for the month of May 2014 in case of company	05.06.2014
Service Tax for the month of May 2014 in case of a company for which e-payment is mandatory.	06.06.2014

INCOME TAX

▪ Important Circulars / Notifications

➢ Revised Forms 49A & 49AA: The Central Board of Direct Taxes has amended the Income-tax Rules, 1962, which shall be called the Income –tax (5th Amendment) Rules, 2014. Under this amendment, in Appendix II of the Income-tax Rules, 1962, the Forms 49A and 49AA, have been revised, and the revised forms are given in this notification. *Notification No. 26/2014 dated 16-May-2014.*

▪ SC / HC Judgments

➢ **Disallowance u/s 14A & Rule 8D:** In AY 2009-10, the assessee had investments in tax-free securities on which it had earned no income. It claimed that as there was no tax-free income, no disallowance u/s 14A read with Rule 8D could be made. However, the AO & CIT(A) rejected the claim. On appeal, the **Tribunal** accepted the claim and held that as the assessee had not claimed any exemption, no disallowance u/s 14A & Rule 8D could be made. On appeal by the department, the High Court held:

- Sub-section (1) of s. 14A provides that for the purpose of computing total income under chapter IV of the Act, no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income under the Act. In the present case, the assessee did not make any claim for exemption of any income from payment of tax. It was on this basis that the Tribunal held that disallowance u/s 14A of the Act could not be made.
- The Tribunal relied on the decision of the P&H High Court in case of CIT vs. Winsome Textile Industries Ltd 319 ITR 204 (P&H) where it was held that s. 14A could have no application to a case where the assessee did not make any claim for exemption. Tax Appeal is therefore dismissed. *CIT vs. Cortech Energy Pvt. Ltd (Gujarat High Court) dated May 24th, 2014.*

➢ **Reopening a case solely on the basis of a clarificatory retrospective amendment:** In AY 2005-06 the assessee claimed deduction u/s 80IA(4) which was allowed u/s 143(3). Thereafter, within 4 years, the AO reopened the assessment on the basis that the retrospective amendment to s. 80IA(4) w.e.f. 1.4.2000 prohibited deduction to an assessee who carried on business in the nature of a works contract. The assessee challenged the reopening on the ground that the retrospective amendment was merely clarificatory of the existing law. Upon appeal, the High Court held:

- If an Explanation is added to a statute for the removal of doubts, the implication is that the law was same from the beginning and the same is further explained by way of addition of the Explanation.

- Therefore, it is not a case of introduction of new provision of law by retrospective operation, but when all the materials regarding activities of the assessee are available on record and the benefit of the provision is already made available to such assessee, reassessment proceedings cannot be initiated only on account of addition of such Explanation. *Sadbhav Engineering Ltd vs. DCIT (Gujarat High Court) dated May 23rd, 2014.*

➢ **Strict guidelines laid down to streamline procedure for reopening of assessments:** In large number of cases pertaining to reopening of assessments, it was noticed that different stages of the assessees demanding reasons recorded by the AO, supplying of such reasons, the assessees raising objections and the AO disposing of such objections, consumed considerable time. In many cases, the last stage of disposing of the objections raised by the assessee was reached only a few days, before the assessment would be time-barred. This situation was quite unsatisfactory, both from the point of the assessee as well as the department. In the last minute rush, the AO framed assessment in a most hurried manner, which resulted in errors that could have been avoided forcing the assessee to prefer appeals which further created needless strain on the system. In view of the above, the following directions are issued:

- Once the AO serves to an assessee a notice of reopening of assessment u/s 148 of the IT Act, and the assessee files his return of income in response to such notice within the specified time, the AO shall supply the reasons recorded by him for issuing such notice within 30 days of the filing of the return by the assessee without waiting for the assessee to demand such reasons.
- Once the assessee receives such reasons, he would be expected to raise his objections, if any, within 60 days of receipt of such reasons.
- If objections are received by the AO from the assessee within the time permitted hereinabove, the AO would dispose of the objections, as far as possible, within four months of date of receipt of the objections filed by the assessee.
- This is being done in order to ensure that sufficient time is available with the AO to frame the assessment after carrying out proper scrutiny. This, however, would not mean that if in either case, the assessee misses the time limit, the procedure provided by the Supreme Court in GKN Driveshafts (India) Ltd would not apply. It only means that the time frame provided hereinabove would not apply in such cases.
- The Chief Commissioner of Income Tax and Cadre Controlling Authority of the Gujarat State, shall issue a circular to all AOs for scrupulously carrying out the directions contained in this judgment. *Sahkari Khand Udyog Mandal Ltd vs. ACIT (Gujarat High Court) dated May 23rd, 2014.*

- ***Exchange* of the undertaking for shares under scheme of arrangement:** The assessee transferred its Lift Division to Tiger Elevators Pvt. Ltd under a scheme of arrangement u/s 391 & 394 of the Companies Act, 1956. The transfer of the undertaking took place in exchange of preference shares and bonds issued by Tiger Elevators as per a valuation report. The assessee claimed that the transfer was not liable to tax on capital gains on the basis that there was no "cost of acquisition" of the undertaking. The AO held that the transaction was a "slump sale" as defined in s. 2(42C) and that the gains had to be computed u/s 50B. This was upheld by the CIT (A). On appeal, the Tribunal accepted the claim of the assessee. On further appeal by the department, the High Court held:
  - The definition of the term "*slump sale*" in s. 2(42C) means the transfer of one or more undertakings as a result of the sale for a lump sum consideration without values being assigned to the individual assets and liabilities in such sale. In Motors & General Stores (P) Ltd 66 ITR 692 (SC) it was held that a "*sale*" meant a transfer for a monetary consideration and that an "*exchange*" would not amount to a "sale".
  - In this case, the scheme of arrangement shows that the transfer of the undertaking took place in exchange for issue of preference shares and bonds, and there was no monetary consideration for this transaction. Thus, it was a case of exchange and not a sale. Therefore, s. 2(42C) of the Act was inapplicable. If that was not applicable and was not attracted, then, s. 50B was also inapplicable. *CIT vs. Bharat Bijlee Ltd (Bombay High Court) dated May 15th, 2014*

- **Judge is entitled to alter the draft judgment: Despite pronouncement of verdict in open court & signing of draft judgement, the Judge is entitled to alter verdict until judgement is signed & sealed.** Up to the moment the judgment is delivered Judges have the right to change their mind. Therefore, however much a draft judgment may have been signed beforehand, it is nothing but a draft till formally delivered as the judgment of the Court. Only then does it crystallize into a full-fledged judgment and become operative. ***Kushalbhai Ratanbhai Rohit vs. State of Gujarat (Supreme Court) dated*** *May 14th, 2014.*

- **Distinction between *"contract for sale of goods"* and *"works contract":*** A Constitutional Bench of the Supreme Court has given its judgment regarding whether a contract for manufacture, supply and installation of lifts in a building is a "contract for sale of goods" or a "works contract":
  - In the case of a "contract for sale of goods", the entire sale consideration is taxable under the sales tax or value added tax enactments of the State legislatures. In the case of a "works contract", the consideration paid for the labour and service element has to be excluded from the total consideration received and only the balance is chargeable to sales tax or value added tax.

- In this case, there is a composite contract for the purchase and installation of the lift. The price quoted is a composite one for both. Various technical aspects go into the installation of the lift. There has to be a safety device. The installation requires considerable skill and experience. The nature of the contracts clearly exposit that they are contracts for supply and installation of the lift where labour and service element is involved. Individually manufactured goods such as lift car, motors, ropes, rails, etc. are the components of the lift which are eventually installed at the site for the lift to operate in the building. In constitutional terms, it is transfer either in goods or some other form. In fact, after the goods are assembled and installed with skill and labour at the site, it becomes a permanent fixture of the building. However, if there are two contracts, namely, purchase of the components of the lift from a dealer, it would be a contract for sale and similarly, if separate contract is entered into for installation, that would be a contract for labour and service. But, when there is a composite contract for supply and installation, it has to be treated as a works contract. ***Kone Elevator India Pvt. Ltd vs. State of T. N (Supreme Court – 5 Judge Bench) dated May14, 2014.***

- **Sale proceed of scrap is not "turnover" for sec 80HHC: The Supreme Court has held that:**
  - The word "turnover" means only the amount of sale proceeds received in respect of the goods in which an assessee is dealing in.
  - So far as the scrap is concerned, the sale proceeds from the scrap may either be shown separately in the Profit and Loss Account or may be deducted from the amount spent by the manufacturing unit on the raw material.
  - When such scrap is sold the sale proceeds of the scrap cannot be included in the term 'turnover' for the reason that the unit is engaged primarily in the manufacturing and selling of steel utensils and not scrap of steel. Therefore, the proceeds of such scrap would not be included in 'sales' in the Profit and Loss Account of the assessee (The situation would be different in the case of a person who is primarily dealing in scrap). ***CIT vs. Punjab Stainless Steel Industries (Supreme Court)*** *May 10th, 2014.*

- **Tax implications of employee secondment contracts:** The High Court had to consider whether the consideration for secondment of employees by British Gas Trading Ltd, UK, ("BSTL") and Director Energy Marketing Limited, Canada ("DEML") to Centrica, India, for providing "business support services" constitutes "fees for technical/ included services" under Articles 12 & 13 of the India-Canada and India-UK DTAAs and whether the presence of the seconded employees

created a "service PE" in India for the foreign employers. The High Court held:

- The overseas entities required the Indian subsidiary, CIOP, to ensure quality control and management of their vendors of outsourced activity. For this activity to be carried out, CIOP required personnel with the necessary technical knowledge and expertise in the field, and thus, the secondment agreement was signed since CIOP did not have the necessary human resource. The secondees are not only providing services to CIOP, but rather tiding CIOP through the initial period, and ensuring that going forward, the skill set of CIOP's other employees is built and these services may be continued by them without assistance. In essence, the secondees are imparting their technical expertise and know-how onto the other regular employees of CIOP. The activity of the secondees is thus to transfer their technical ability to ensure quality control vis-à-vis the Indian vendors, or in other words, "make available their know-how of the field to CIOP for future consumption.
- CIOP's arguments that it is not liable to deduct income tax u/s 195 on the ground that (i) there is no service PE, since CIOP is the economic employer, whilst the overseas entities are only the legal employers, (ii) the payment made by CIOP to the overseas entities is only by way of reimbursement, which does not form part of the income of those entities, and (iii) that payment is not the income of the overseas entities on account of the doctrine of "diversion of income by overriding title" are not acceptable.
- The argument that there is no "service PE" is not acceptable because though CIOP has operational control over these persons in terms of the daily work, and is responsible (in terms of the agreement) for their failures, these are limited and sparse factors which cannot displace the larger and established context that the persons continue to be employees of the foreign parties.
- The argument that the payment is a "reimbursement" on the ground that it is described as such in the secondment agreement and that there is no mark-up, is not acceptable. The nomenclature or lesser-than-expected amount charged for such services cannot change the nature of the services. Once it is established that there was a provision of services, the payment made may indeed be payment for services.
- The argument that the payment made to the overseas entity is not income that accrues to the overseas entity, but rather, money that it is obligated to pass on to the secondees is also not acceptable since the payment is not in the nature of reimbursement, but rather, payment for services rendered. The money paid by CIOP to the overseas entity accrues to the overseas entity, which may or may not apply it for payment to the secondees, based on its contractual relationship with them. This, is independent of the relationship and payment between CIOP and the overseas entity. *Centrica India Offshore Pvt. Ltd vs. CIT (Delhi High Court) dated May 8th, 2014.*

- **Commission paid to an agent for services rendered abroad is not taxable in India:** The assessee deducted tax at source on fees paid to the international artists in India, but did not deduct tax on the commission paid to an agent between the assessee and the artists. The High Court held that:
  - The agent did not act as a performing artist or entertainer, but rendered services outside India, by contacting the overseas artists and negotiating with them for their performance in India in terms of the authority given by the assessee.
  - Since the services were rendered outside India, therefore, commission income to the agent is not liable to tax in India and there was no obligation on the part of the assessee to deduct the tax at source at the time of making of payment.
  - In so far as payment or reimbursement of expenses in connection with the visit and performance of the artists in India, the amount reimbursed to them was towards air travel and was supported by documents. On that tax need not be deducted. *DIT vs. Wizcraft International Entertainment Pvt.Ltd (Bombay High Court) May 8th, 2014.*

Tribunal Judgments

- **Taxability of agricultural land situated beyond municipal limits: T**he assessee purchased land with standing crops thereon and then sold it at a profit within 13 months. It was shown in the records as land cultivated throughout the period of holding by the assessee. No efforts were made by the assessee to change the nature of land. Income from standing crops was offered for tax as agricultural income. The department claimed the income to be treated as capital gain and therefore taxable at a higher tax rate. Upon appeal, the Tribunal held:
  - The land cannot be treated as capital asset since it is situated beyond eight kilometers from the municipal limits and it was purchased as agricultural land and sold accordingly without making any changes such as conversion in the land records, plotting of land, etc.
  - The assessee earned agricultural income in the immediately preceding year on sale of standing crop and the same was offered as agricultural income and accepted by the AO for rate purposes. It is thus clear that it is a case of sale of agricultural land and the land being situated beyond eight kilometres from the municipal limit, it cannot be subjected to tax under the Income Tax Act either as business income or capital gains. *Smt. Supriya Kanwar vs. ITO (ITAT Jodhpur – Third Member) dated May 23rd, 2014.*

SERVICE TAX

▪ SC/HC Judgments

➢ **Repair of motor vehicle parts is a service:** The appellant was asked to pay service tax on the income received from the customers for repairing vehicle engines and other parts. The appellant contested that the activity of rebuilding or repair of engines and other parts of motor vehicles *inter alia* meant maintenance or repair service of motor vehicles, and was, therefore, excluded from the purview of service tax liability. The Tribunal observed that if vehicles were brought to the appellant's premises, the same amounted to maintenance or repair of motor vehicles, whereas if the engine or any other part was brought in a knock down condition for repair/maintenance/reconditioning etc., the appellant was not entitled for any exemption. Upon appeal, the High Court observed -

- As per the Act, service tax is payable on maintenance or repair of any goods or equipment, however exclusion is granted to persons involved in maintenance or repair of motor vehicles.
- A motor vehicle has several parts and if only a part of the motor vehicle requires maintenance or repair, can it be said that it is not maintenance or repair of a motor vehicle? The motor vehicle in question has to be dismounted at some place either in the workshop of the appellant or in the workshop of any other person. Once a part is repaired and it is thereafter fitted to the motor vehicle, it will have the character of a motor vehicle, which can be used on road.
- It is not in dispute that if the motor vehicle was brought to the service centre of the appellant and they themselves had dismounted the engine and repaired it and then refitted it to the motor vehicle, they are entitled for the exclusion. But exclusion is not given by stating that dismounting has taken place at a different place. Such a view, cannot be accepted on account of the fact that motor vehicle apparently includes all its parts as well.
- Therefore, if any service centre or maintenance centre or workshop does maintenance or repairs to any part of the motor vehicle, it is also entitled to get the benefit of exclusion, as provided under Section 65(64) of the Finance Act, 1994. *2014-TIOL-825-HC-KERALA-ST.*

➢ **Service tax liability under a composite contract:** The appellant provided taxable service of erection, commissioning and installation of power stations to various Electricity Boards. The contract entered into by the appellant with its customers was a composite contract including supply of goods and rendering of services. Appellant was paying service tax on 10% of the value of the materials used in respect of the erection, commission or installation where the service was provided to the State Electricity Boards. Further, they were paying ST on 15% of the contract amount received from other customers. The department raised a service tax

demand along with imposition of penalties and interest. The appellant contested that the Revenue had taken into consideration the balance-sheet figures but since they were also undertaking activity of trading which was reflected in the balance sheet, the activity of trading was incorrectly included in the service tax liability. The cost of material was not to be taken into consideration for the purpose of levy of service tax in view of Notification No. No.12/2003-ST or in the alternative the benefit of abatement prescribed in notification 1/2006-ST should be extended. Upon appeal, the High Court observed:

- If the appellant is able to show from the documents including its Running Account Bills and returns filed with the Sales Tax Authorities, the value of goods sold and supplied to the satisfaction of the authorities, it would be complying with the condition provided in Notification No.12/2003-ST dated 20 June 2003.
- The Tribunal has committed a fundamental error in insisting only upon production of Invoices, as evidence of goods being sold and ignoring the contract, Running Account Bills etc. to arrive at the value of goods sold.
- The matter was referred back to the Tribunal. *2014-TIOL-693-HC-MUM- ST*.

➢ **Shortfall in depositing 50% declared tax dues by Dec 31:** The appellant filed a VCES-1 declaration u/s 107 of the Finance Act, 2013 declaring an unpaid tax due of about Rs.16.42 lacs. As per the VCES, 2013, the declarant was required to pay not less than fifty per cent of the tax dues so declared on or before the 31st day of December, 2013. However, the appellant deposited a sum of about Rs.8 lacs before December 31, 2013 and, therefore, there was a shortfall of about Rs. 0.20 lacs towards the first installment of fifty percent of the declared tax dues. Revenue rejected the VCES-1 declaration and imposed penalty. The appellant contested that the amount of shortfall was small, and was due to a calculation error, and so it should be adjusted in the 2nd installment, without rejecting the eligibility under the scheme, altogether. Upon appeal, the High Court observed:

- The scheme requires a declarant to deposit 50% of the tax dues latest by December 31, 2013 and the remaining 50% would have to be paid latest by June 30, 2014.
- Under the circumstances, the petitioner not having fulfilled the essential requirement of the scheme, the authority committed no error in rejecting such declaration.
- The scheme makes no difference between tax dues which are shortpaid due to bona fide error and one which flows from deliberate inaction. There is no power for waiving or relaxing the condition of depositing 50% tax dues flowing from section 107. Therefore, if the declarant fails to pay atleast 50% of the declared tax dues by 31 st Dec,

2013, he would not be eligible to avail of the benefit of the scheme. *2014-TIOL-678-HC-AHM-ST.*

- **Recovery of demand when Tribunal delayed the judgment:** Adjudicating authority had confirmed a Service Tax demand, while the Tribunal had granted stay subject to pre-deposit of 15% of the tax demanded. After expiry of six months a notice was served upon petitioner from the office of Commissioner that the interim protection was for a period of six months and appeal is still pending but the stay granted by the CESTAT automatically stands vacated and called upon the petitioner to deposit the balance towards service tax along with interest and penalty. Then the petitioner filed an application seeking extension of order of pre deposit passed by the Tribunal. The Department wanted to pre-empt this and they sent a notice to the petitioner's bank to freeze account of the petitioner, and a day prior to the date on which the application for extension of stay was coming up for hearing, the bank account was debited and the total money lying in the bank account of the petitioner was credited by the Department to their own bank account.

  The Tribunal heard the matter and extended the operation of the stay *during pendency* of the appeal. Even after the Stay was granted by the Tribunal, the Department refused to return the money collected from the Bank. Upon appeal, the High Court held:

  - If due to no fault of the assesse there is a delay in disposal of the pending appeal by the Tribunal, some consideration needs to be made to protect the right and interest of the assesse. If the matter has not been taken up for consideration on a given date at least the litigant cannot be left to suffer for such reason over which he has no control.
  - The hasty action of the Department in debiting the petitioner's bank account a day prior to the date on which date the application for extension was coming up before the Tribunal cannot be appreciated and it tantamount to overreaching the process of law which cannot be approved by this Court.

- The Department was directed to refund the amount, and quash the freezing of the assessee's account, within two weeks. *2014-TIOL-647-HC-RAJ-ST*

CESTAT Judgment

- **Cenvat credit of the service tax paid on insurance services:** The Department claimed that the appellant had wrongly availed Cenvat credit on service tax paid for insurance of plant and machinery, marine insurance, insurance of cash in transit, vehicle and laptop insurance, as these services were not covered by the definition of 'input service', as given in Rule 2 (l) of the CENVAT Credit Rules, 2004. "Input Service" must have nexus with process of manufacture and for determining the eligibility of 'service' for cenvat credit, it must be shown that the service is used in or

in relation to the manufacture of final products. The insurance services do not meet this test. Upon appeal, the Tribunal held:

- Department's view that a service for being cenvatable must be used in or in relation to the manufacture of final product whether directly or indirectly is not correct. Any service having nexus with the business of manufacture which has been used by a manufacturer would qualify as an input service.
- Insurance of plant and machinery, goods in transit, cash in transit and insurance of vehicles, and laptop, is an integral part of manufacturing business, as no manufacturer would carry on manufacturing operations without insurance of plant & machinery, cash in transit, goods in transit, vehicles & computers, etc. against any loss due to accident, natural calamities, etc. In view of this, the services of plant and machinery, transit insurance of goods, insurance of cash in transit, laptop, etc. have to be treated as an activity related to the business and would be eligible for cenvat credit. *2014-TIOL-855-CESTAT-DEL*.

➢ **Management Consultancy Service:** The respondent was a group company of *Zee Telefilms Ltd.* It was created as a central hub for all the group companies in connection with various matters of common interest to the group, policy decision, facilitate and co-ordinate group activities at a common corporate platform, facilitate agreements for corporate requirements with local or foreign parties, equity participation etc. A demand notice was issued to the respondent demanding service tax under the category of "Management Consultancy Services", on the above mentioned activities. The adjudicating authority dropped the demand on the ground that the activity of Liaison & Representation are not consultancy services and hence not liable to service tax. Upon appeal by Revenue, the Tribunal held:

- There was no written/formal agreement to give any service to the group companies.
- No separate invoice was raised as the amount was charged on monthly basis and not item wise or for any specific service/activity.
- What was being done was not executory routine or operational functions but the management function wherein the respondent was advising its other group companies to handle a particular issue in a particular manner and it also undertook such discussion with various other organizations such as financial organizations, banks, BCCI, Govt. bodies etc. These services provided by the respondent would be covered within the scope of "Management Consultancy Services", and so service tax is payable. *2014-TIOL-832-CESTAT-MUM*.

➢ **Business Support Service:** The appellant had provided concrete pumps on rental basis to other companies for

pumping operation, and got compensation on the basis of cubic meter of concrete pumped. It had also deployed certain manpower to ensure the proper functioning of the pumps. Pumps were deployed at various sites where the construction activities were going on. Appellant's rates per cubic meter were consolidated and included all taxes, VAT etc. It was also paying service tax on the said activity under Business Support Service [Infrastructural Support Service] from May 2007 to January 2008 and filing the service tax returns. Never was the taxability disputed by the appellant. In the Union Budget 2008, a new service under the name "supply of tangible goods service" was introduced. Consequently, the appellant took the view that the service rendered by it would be covered by the newly introduced service and not by Business Support Service and so for the period May 2007 to January 2008 it filed refund claim. In the balance sheet for the year 2007-2008 which was prepared after filing the refund claim, it showed the amount as "receivable from the department". The original authority accepted the classification issue but rejected the refund claim on the ground of unjust enrichment. Upon appeal, the Tribunal held:

- The agreement very clearly states that the rate mentioned are inclusive of all taxes and levies. The appellant has been charging based upon the quantity of the concrete pumped through the equipment installed by them and the rate is fixed on that basis. Thus, the charges are not in the nature of rental for a particular day or particular period but with reference to the work performed. Invoices do not indicate any tax element separately. Under the circumstances, it has to be held that the rates quoted and amount collected are inclusive of service tax.
- Since the appellant has not brought any evidence to indicate that it has refunded any service tax to its customers, the doctrine of unjust enrichment would be applicable in the facts and circumstances of the case.
- Appellant had no doubt about the applicability of tax during the relevant period. The fact that the balance sheet for 2007-08 shows the service tax amount as receivable will not make any difference in the present case. The appeal was dismissed. *2014-TIOL-818-CESTAT-MUM.*

➢ **Delay in depositing tax due to name change:** The appellant, a proprietary unit, was providing services of site formation & excavation etc. to M/s. Northern Coalfields Ltd. It was taken over by M/s. GSCO Infrastructure Pvt. Ltd. and so it applied to M/s. Northern Coalfield Ltd. for change of name in the agreement. As the said request was taking time at the end of M/s. Northern Coalfields Ltd., the appellant intimated its jurisdictional Central Excise Officers indicating that though it has surrendered its old service tax registration and has obtained new service tax registration in the name of M/s. GSCO Infrastructure Pvt. Ltd., it is unable to deposit the service tax liability on account of non-payment of the same by M/s. Northern Coalfield in the name of the new company.

Subsequently, service tax was deposited alongwith interest after a delay. Revenue imposed a penalty u/s 76 of the Finance Act. The appellant contested that it was not a case of any malafide intent, as it had kept the department in the loop as to the reasons for non-deposit of the tax on time and it had subsequently deposited the service tax with interest liability.

The Tribunal held that there was no justification for imposition of penalty. *2014-TIOL-808-CESTAT-DEL.*

- **Electricity is an input for manufacture & not an input for service:** The appellant entered into an agreement with its customers *M/s Sunflag Iron & Steel Co. Ltd.*, and *M/s Lloyds Steel Industries Ltd.*, for plant operation and maintenance and for the services rendered it received consideration from the clients on which service tax liability was discharged. The department observed that the appellant was receiving electricity free of cost from its clients and without supply of electricity it could not have undertaken the operation and maintenance of the plants. The department, therefore, took a view that the cost of electricity supplied free by the client should also be included in the value of taxable services, which was supported by the Tribunal. Upon appeal, the High Court held:
  - It is difficult to accept the argument of the Revenue that the electricity supplied free of cost is a consideration in kind received by the assessee from its customers. The electricity is meant to be consumed in the manufacture of oxygen which is then used by the customers in the manufacture of their final product. It is the customers of the assessee who clear the final product on payment of duty and no benefit accrues to the assessee on such clearances. Thus, the electricity supplied free of cost by the customers to the assessee does not in any way amount to additional consideration received by the assessee in kind.
  - Unless the cost of electricity supplied free of cost constitutes the consideration received by the assessee, the cost of electricity would not be includible in the value of taxable service.
  - The case is referred back to the Tribunal. The Tribunal reconsidered its decision and allowed the appeal of the appellant. *2014-TIOL-803-CESTAT-MUM*.

- **Service tax on financial leasing:** The appellant was a lease finance company and provided services of financial leasing under the category of 'Banking and Finance' services. The lower authorities raised a demand of additional Service Tax on the lease agreements entered by the applicant with their clients on the ground that the applicant had discharged the service tax liability @5% and 8%, whereas the rate prevailing at the time of receipt of the EMI was higher at 8% and 10.2% (including EC). The applicant submitted that the services were provided on the date of providing the assets on Hire purchase or Financial lease, which normally is the date of entering into the agreement with the hirer or lessee. All the terms of contract were directed at the time of entering into the contract, so the service tax rate prevailing at the time of

the agreement was the relevant rate, and not the rate at the time of collecting the EMI. The Tribunal held:

- When the Hire purchase contract is entered, the taxable event occurs.
- The installment payments are only obligations of the hirer.
- Therefore, the rate of Service Tax will be the rate prevailing on the date on which the contract is entered into. *2014-TIOL-794-CESTAT-MUM*.

➢ **Service tax on Security and Cleaning Services:** The assessee was engaged in providing various services which included Security services, House Keeping Services, Fire Fighting Services, Utility Services, Customer care Services, Liftmen Service, Attendants, gardening, receptionist, management facilities, Cleaning services etc. to its 422 clients across the country. Service tax demand was raised by the department. Upon appeal, the Tribunal held:

- Regarding valuation of security service, section 67 of the Finance Act, 1994 provides that for service tax purpose, gross amount charged will be the value. It is not in dispute that all the security guards were on the pay role of the appellant and various charges relating to provident fund, ESIC etc. were charged from its clients.
- As far as amounts received from ONGC is concerned, the fact that ONGC is not paying service tax to the appellant is of no consequence. As long as the appellant is providing the security service to ONGC, appellant is required to pay the said amount to the Government.
- Appellant was not declaring the value of the service correctly. It was based upon the painstaking exercise done by the Revenue covering 422 customers that the correct value of the services and the amount of service tax has been computed. This is a clear cut case of suppression of facts with willful intention to evade payment of duty. ST-3 returns filed during the period did not reflect the correct position, therefore, extended period of limitation is invokable in the facts and circumstances of the case and penalty under Section 78 of the Act is also imposable.
- In the case of security services it is not disputed that payments like salary of the security guards, provident fund, ESIC etc. are being collected/charged by the appellant/assessee from its customers. The said amount is being recovered by the appellant/assessee from the service receiver in addition to its own service charges. Therefore, the said amount will form part of the assessable value. *2014-TIOL-755-CESTAT-MUM*.

➢ **Leasing out Petro-product outlets is not Warehousing service:** The appellant owned Petroleum Products Outlets which were leased out to its dealers for sale of its petroleum products. In these outlets it had facilities to store the petroleum products, namely petrol, diesel etc. and also various equipments such as dispenser for selling the same. Appellant charged monthly license fee from the dealer for utilizing the said facilities. Revenue raised a demand on the

ground that the facility included storage and warehousing and, therefore, the appellant was liable to pay service tax. Upon appeal, the Tribunal held:

- All the operations of the outlets are under the control of the dealers and not of the appellant. It is not as if the dealers bring their goods to the appellant for storing or warehousing and thereafter clear the goods so stored.
- Appellant only owns and leases facilities to the dealers for their use. Keeping in view the nature of transaction the service provided cannot be considered as storage and warehousing service provided by the appellant. No service tax is payable. *2014-TIOL-729-CESTAT-MUM*.

➢ **Refund is not time barred when the payment made is not of Service Tax**: The assesse had rented out its premises to CESTAT, Mumbai. It paid service tax on the rent received under the category of renting of immovable property service. However, CESTAT, Mumbai did not pay the service tax to the appellant for the rented premises assuming that they are seeking clarification from CBEC as to whether they are liable to pay service tax or not. After the CESTAT received a clarification from the CBEC that it is not required to pay service tax for the said period, the appellant claimed refund of the service tax paid. The refund claim which was within one year was sanctioned but rest of the refund claim was rejected as time barred as per section 11B of the CEA, 1944. Upon appeal, the CESTAT held:

- In view of the clarification by the CBEC, the appellant is not required to pay Service Tax at all and, therefore, what has been paid is not service tax and hence provisions of section 11B of the CEA, 1944 are not applicable.
- The refund claim is not time barred, and the refund should be made within 30 days. *2014-TIOL-702-CESTAT-MUM*.

➢ **Transport Terminal**: The issue to be decided in this appeal was whether or not the "Onshore Terminal" developed by M/s Reliance Industries Ltd near Kakinada, Andhra Pradesh could be considered to be as "Transport Terminal" for the purpose of exclusion from levy of service tax under the category of "Commercial and Industrial Construction Service" as defined in section 65(25b) of the Finance Act, 1994. The appellant contested that since its facility on the onshore terminal, received gas from deep-sea and thereafter distributed it through pipelines to various destinations throughout the country, this facility was nothing but transport terminal. The main contention was that the term 'Transport Terminal' cannot be restricted to bus terminal or truck terminal. Gases and liquid also gets transported through pipelines and therefore any terminal where the gases/liquid are received and thereafter distributed through pipelines is to be considered as 'transport terminal'. The Tribunal held:

- In this case there is no arrival from different destination and dispersal to different destination. Movement of gas is unidirectional and is fixed. Here there is just one item. There is no arrival of freight. Extracted fluid is received.

Processed dry gas is sent to distribution pipeline- Recovered MEG is processed and again pumped to sub-sea facility. Thus, the concept of transport terminal is not relevant for transporting gases through pipelines.

- There is no requirement that the transport terminal should be owned by a public authority alone. However, since this onshore terminal cannot be considered as transport terminal, this argument though in favour of the appellant does not help in the present situation. *2014-TIOL-679-CESTAT-MUM*.

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