Tax News

PKF SRIDHAR & SANTHANAM
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INCOME TAX

Reminder for Sept. - 2014

Action Due	Due Date
TDS/TCS for August 2014	07.09.2014
PF for August 2014	15.09.2014
ESI for August 2014	21.09.2014
Advance Tax	15.09.2014

SERVICE TAX

Action Due	Due Date
Service Tax for the month of August 2014 in case of company	05.09.2014
Service Tax for the month of August 2014 in case of a company for which e-payment is mandatory.	06.09.2014

INCOME TAX

▪ Important Circulars/ Notifications

➢ **Committee for approving cases regarding prior-period transfer of capital asset:** The key points of the CBDT announcement with regard to Sec 119 of the Act are:

- Committee consisting of following officers of the CBDT as Members is being constituted: Joint Secretary (FT&TR-I), Joint Secretary (TPL-I), Commissioner of Income-tax (ITA).
- Where any Assessing officer considers that any income is deemed to accrue or arise in India before 1st April, 2012 through transfer of a capital asset situated in India in consequence of the amendments introduced with retrospective effect, and as on the date of this order,—

(*i*) no proceeding of assessment or reassessment in relation to the said income is pending; or

(*ii*) no notice for proposed assessment or re-assessment in relation to the said income has been issued; or

(*iii*) no proceeding under section 201 of the Act is pending, or no notice for initiation of such proceeding has been issued in relation to the said income,

then, before proceeding with any action in relation to the said income, the Assessing Officer shall seek prior approval of the above Committee. The Assessing Officer shall forward a copy of the reference to the assessee.

- The Committee, on receipt of the reference from the Assessing Officer, shall examine the proposed action of the Assessing Officer and, after providing an opportunity to the assessee, take a decision on the proposed action, within 60 days of its receipt by the Committee. However, the Committee shall have due regard to any limitation period involved in the proposed action. The Assessing Officer shall thereafter proceed in accordance with the directions of the Committee. *Order [F.NO.149/141/2014-TPL], Dated 28-8-2014.*

➢ **Due Date extension for submitting audit report:** CBDT has extended the due date for obtaining and furnishing of the report of audit under section 44AB of the Act for Assessment Year 2014-15 in case of assessees who are not required to furnish report under section 92E of the Act from 30th day of September, 2014 to 30th November, 2014. It is further clarified that the tax audit report under section 44AB of the Act filed during the period from 1st April, 2014 to 24th July, 2014 in the pre-revised Forms shall be treated as valid tax audit report. *Order [F.NO.133/24/2014-TPL], Dated 20-8-2014.*

➢ **Amendment to Public Provident Fund Scheme:** Central Government hereby makes the following further

amendments to the Public Provident Fund Scheme, 1968, namely :—

- This Scheme may be called the Public Provident Fund (Amendment) Scheme, 2014. It shall come into force from the date of its publication in the Official Gazette.
- In the Public Provident Fund Scheme, 1968,—

(*i*) in paragraph 3, in sub-paragraph (1), for the letters and figures "Rs.1,00,000", the letters and figures "Rs.1,50,000" shall be substituted;

(*ii*) In Form-A, in paragraph (iv), for the letters and figures "Rs.1,00,000", the letters and figures "Rs.1,50,000" shall be substituted.

Notification No. GSR 588(E) [F.NO.1/2/2014-NS.II], Dated 13-8-2014.

▪ SC / HC Judgments

➢ **Loan to sister concern for setting up new line of business:** The assessee, M/s United Brewries Ltd, was a public limited company carrying on the business of manufacture and sale of beer and liquor. It established a wholly owned subsidiary company, M/s.U.B.Resorts Ltd., to put up resorts at important tourist destinations. The said company was referred to as a division of the assessee for all practical purposes. During the FY ending 31.3.2001, the assessee informed the Registrar of Companies to strike off the name of M/s.U.B.Resorts Ltd., as the same had become defunct. It also made a claim of bad debts written off, including the amount which was given as a loan to the subsidiary company.

The Assessing Officer held that there was no entity by name M/s. U.B.Resorts Ltd. that was in existence, and since such expenditure incurred by writing off bad debts, did not relate to any of the existing activities of the company, it was not allowable. The CIT (A) ruled in gavour of Revenue, while the Tribunal ruled in favour of the assessee. Upon further appeal, the High Court held:

- What is relevant is whether the assessee advanced such amount to its sister concern as a measure of commercial expediency. Once it is established that there was nexus between the expenditure and the purpose of the business (which need not be necessarily be the business of the assessee itself), the Revenue cannot decide how much is reasonable expenditure. No businessman can be compelled to maximize its profit. The IT authorities must not look at the matter from their own viewpoint but that of a prudent businessman.
- As a caution, it is to be noted that not in every case interest on borrowed loan has to be allowed if the assessee advances it to a sister concern. It all depends on

the facts and circumstances of the respective case. Where it is obvious that a holding company has a deep interest in its subsidiary, and hence if the holding company advances borrowed money to a subsidiary and the same is used by the subsidiary for some business purposes, the assessee would, ordinarily be entitled to deduction of interest on its borrowed loans.

- In this case, it cannot be said that the money lent by the assessee to its subsidiary company could be characterized as an expenditure wholly and exclusively for the purpose of business of the assessee. In fact, the entire money is lent and spent only towards payment of salary and travelling expenses over a period of four to five years and no deductions were claimed in each year when such payments were made.
- If the argument of the assessee is to be accepted, whenever a holding company lends money to a subsidiary company, then the holding company would be entitled to the said benefit. That is not the intent of law. There is no merit in the appeal of the assessee. *2014-TIOL-1489-HC-KAR-IT*.

➢ **Gains from sale of CCDs :** Vatika Limited, an Indian company engaged in the business of developing real estate, was the owner of 1 million square feet of land in Gurgaon, reserved for being developed as a cyber-park. It had a 100% subsidiary - SH Tech Park Developers Pvt Ltd. In 2007, the Petitioner, a company incorporated in Mauritius, acquired 35% ownership interest in SH Tech Park by making a total investment of Rs. 1 billion. The investment was made partly by subscribing to equity shares and partly in zero percent Compulsorily Convertible Debentures (CCDs). Vatika transferred the exclusive development rights, entitlements and interest in the Land to the JV Company for development of the Land, with the right to retain the sale proceeds thereof exclusively.

In April 2010, Vatika acquired the entire CCDs subscribed by the Petitioner. The Petitioner requested for a 'nil' withholding tax certificate to receive the total consideration from Vatika for transfer of equity shares and CCDs without deduction of tax. The Income Tax Officer held that the entire gain on the transfer of equity shares and CCDs should be treated as interest and tax at the rate of 20% (plus surcharge and cess) should be withheld on the same.

The Petitioner approached the AAR for advance ruling. The AAR held that the gains arising on the sale of CCDs being interest within the meaning of Section 2(28A) of the Act and Article 11 of the DTAC, are taxable.

Before the High Court, the petitioner submitted that the AAR had erred in not appreciating that there was no debtor and borrower relation between Vatika and the petitioner. The CCDs were held as capital assets by the petitioner and the transfer of the said investment was a transfer of a capital asset and any gains arising therefrom were liable to be treated as capital gains.

Consequently, such gains could not be subjected to income tax in India in terms of the DTAA between India and Mauritius. The petitioner further contended that the AAR erred in concluding that the transaction entered into between the petitioner, Vatika and the JV company was essentially a loan transaction, disguised as an investment in shares and CCDs. It was contended that the AAR erred in holding that the corporate veil ought to be lifted and in proceeding on the basis that Vatika and the JV Company were, essentially, a single entity. Based on this conclusion, the AAR had held that the debt owed by the JV company was in reality Vatika's debt and the amount received by the petitioner in excess of the investment made by the petitioner would amount to 'interest' paid/payable by Vatika for borrowing funds from the petitioner.

Revenue contended that the transaction entered into between Vatika and the petitioner was essentially in the nature of an External Commercial Borrowing (ECB). It was claimed that, the petitioner was entitled to receive a fixed rate of return and that the duration of the investment would determine the quantum of return receivable by the petitioner. It was, thus, a loan transaction and the returns on the investment were simply interest, liable to be taxed in India. The HC held that:-

- There was a fixed rate of return on the investment made by the petitioner. The Board of Directors of the JV Company was not in control of its affairs which were managed by Vatika/its shareholders. The entire transaction was structured as an investment into equity and CCDs to avoid the incidence of tax.
- There is sufficient commercial reason for the petitioner to have routed its investment in the real estate project through equity and CCDs. The pre-mature exit options as recorded in the Agreement and the minimum return assumed by Vatika on its investment are clearly commercial agreements between the parties. These by itself do not change the legal nature of the transaction entered into between the parties.
- The terms of the arrangements between Vatika and the petitioner reveal that the JV was a genuine commercial venture, in which both partners had management rights. Thus, there is no reason to ignore the legal nature of the instrument of a CCD or to lift the corporate veil to treat the JV Company and Vatika as a single entity.
- However, the entire gains on the sale of equity shares and CCDs held by the petitioner are not exempt from income tax in India by virtue of the DTAA with Mauritius and that the gains arising on the sale of CCDs are interest within the meaning of Section 2(28A) of the Income Tax Act, and Article 11 of the DTAA and are taxable as such. *[2014] 47 taxmann.com 247 (Delhi), HC Delhi - Zaheer Mauritius vs Director of Income-tax (International Taxation) –II.*

➢ **Commission paid to the non-resident agent:** The assessee, a company engaged in the business of manufacture and export of articles of leather, entered into an Agency Agreement with a non-

resident agent to secure orders from various customers, including retailers and traders, for the export of shoes. As per the terms, the business was transacted by opening letters of credit or by cash against document basis. The non-resident agent was responsible for prompt payment in respect of all shipments effected on cash against document basis. The assessee undertook to pay commission of 2.5% on FOB value on all orders procured by the non-resident agent. The said commission paid by the assessee was claimed as expenditure in terms of Sec 37 of the Income Tax Act. The AO held that the payment made to non-resident agent abroad was deemed to have been arisen in India, and since the assessee had not deducted tax at source on the payments made to the non-resident agent, as required under Sec 195 of the Act, the claim made by the assessee that the amount paid over to the nonresident agent was expenditure was disallowed under Sec 40(a)(i) of the Act. CIT(Appeals) ruled in favour of the assessee. Upon appeal by the Revenue, the Tribunal held that:

- the non-resident agent was only procuring orders for the assessee and following up payments and was not providing any technical services to the assessee.
- the commission payment made to non-resident agent does not fall under the category of royalty or fee of technical services and, therefore, the Explanation to Section 9(2) of the Act has no application to the facts of the assessee's case.
- the commission payments to non-resident agents are not chargeable to tax in India and, therefore, the provisions of Section 195 of the Act are not applicable.

Upon further appeal by Revenue contending that the services provided by the non-resident agent were in the nature of technical services, the High Court held that:

- What is the nature of technical service that the so-called nonresident agent has provided abroad to the assessee is not clear from the order of the AO. The opening of letters of credit for the purpose of completing export obligation is an incident of export and, therefore, the non-resident agent is under an obligation to render such services to the assessee, for which commission is paid. The non-resident agent does not provide technical services for the purposes of running of the business of the assessee in India. The services rendered by the non-resident agent can at best be called as a service for completion of the export commitment. Therefore, the commission paid to the non-resident agent will not fall within the definition of "*fees for technical services*".

- There is no reason to differ with the findings of the CIT(A) and the Tribunal. Revenue's appeal is dismissed. *[2014] 48 taxmann.com 48 (Madras)*

High Court of Madras:Commissioner of Income-tax, Chennai v Faizan Shoes (P.) Ltd.

- **Representative Agent:** Mr Francis Daly was an employee with the petitioner, CSG Systems India Pvt. Ltd. For AY 2003-04, Mr Daly had submitted his return of income under the residential status of "Resident & Ordinarily Resident". Revenue contended that the petitioner should be treated as a representative agent in respect of Mr Daly. The petitioner claimed that it could not be treated as a representative agent under Section 163(1)(c) of the said Act as Mr Daly was a resident during the period under consideration. The Commissioner of Income Tax observed that the applicant's submission that the notice under Section 163(2) of the Act is not valid because it is issued after the expiry of two years is not acceptable as Section 149(3) lays down the time limit for issue of notice under Section 148 of the Act and not the notice under Section 163 of the Act. Upon appeal, the High Court held that:

  - The relevant accounting year is the previous year ending on 31.03.2003. At that point of time Mr Francis Daly was not a non-resident. Therefore, in relation to that accounting period the petitioner cannot be appointed as a representative assessee. This is notwithstanding the fact that subsequently Mr Francis Daly attained the status of a non-resident and that when he was a non-resident the notice under Section 163(2) were issued. The relevant period for consideration would be the relevant accounting period which in this case happened to be the year ending on 31.03.2003.

  - In Section 160(1)(i) of the Act, its clear that the expression "representative assessee" has to seen "in respect of the income of a non-resident" in a particular previous year. The income of that year must be of a non-resident. If that be so, the agent of the non-resident or the deemed agent under Section 163 of the said Act would be the representative assessee. The petitioner is thus, not an agent of Mr Francis Daly. *[2014] 48 taxmann.com (Delhi) High Court, Comverse Networks Systems India (P.) Ltd. v. Commissioner of Income-tax, Delhi.*

Tribunal Judgments

- **Royalty:** The assessee was a non–resident company incorporated in Thailand and a tax resident of Thailand. It was engaged in the business of providing services to various GE Group companies, including GEMFSL. The assessee received a consideration from GEMFSL under the Master Service Agreement for providing the aforesaid services. In its Return of income, the assessee stated its income at "nil" on the ground that its income qualified as business income and the same could not be taxed under Article-7 as it had no Permanent Establishment (PE) in India as defined in Article-5 of India-Thailand DTAA.

The Assessing Officer held that consideration received was on account of business connection in India and, hence, taxable under Indian Income Tax Act. He also held that services rendered by the assessee would fall within the definition of "fees for technical services" as envisaged under section 9(1)(vii) of the Act and, hence, the same was taxable in India. Alternatively, he held that the services rendered by the assessee would also fall within the definition of "royalty" under the Article–12(3) of the treaty and, hence, would be taxable in India. Upon assessee's appeal, the DRP directed the AO to tax the receipts as "royalty". Upon further appeal, the Tribunal held that:

- The only issue of dispute which remains to be adjudicated after the direction of the DRP is, whether the payment received by the assessee in lieu of services rendered to GEMFSl is taxable as "royalty" under Article–12(3), or not.
- It needs to be seen whether the supplier undertook to perform services which required the use of special knowledge, skill and expertise but not the transfer of such special knowledge skill or expertise to the other party.
- Since neither the AO nor the DRP has examined the nature of service rendered by the assessee from this angle therefore, the matter should be restored back to the AO to examine the nature of services in line of the principles discussed above. Assessee's appeal is partly allowed. *[2014] 48 taxmann.com Mumbai – ITAT, GECF Asia Ltd. v. Income-tax, International Taxation -3(1), Mumbai.*

- **Business Income vs Royalty:** The assessee, M/s Reuters Transaction Services Limited was a UK based company, engaged in the business of providing electronic deal matching systems enabling authorized dealers in foreign exchange such as banks etc., to effect deals in spot foreign exchange with other foreign exchange dealers. The main server of the assessee was located in Geneva and the assessee had executed a Dealing Services Marketing Agreement with M/s. Reuters India Pvt. Ltd ('RIPL') whereby RIPL would market the services of the assessee to the subscribers in India. The assessee claimed that the revenue earned from its subscribers in India was in the nature of business profit and as per Article -7 of the India-UK DTAA, business profits of the assessee were taxable in India only if it had a Permanent Establishment (PE) in India to the extent the profits are attributable to the PE in India. The assessee claimed that for the AY under consideration, it did not have PE in India, and so its revenue from the Indian subscribers was not liable to tax in India in terms of provisions of DTAA. The assessee had also claimed that the revenue earned by it was not in the nature of royalty or fee for technical services and accordingly not liable to tax under Article -13 of DTAA. The AO contended that the revenue received by the assessee during these years was in the nature of "Royalty" as well as Fee for Technical Services(FTS) which was subjected to tax in India under the provisions of Income Tax Act as well as DTAA. Alternatively, the AO had also held that RIPL constituted an agency PE of the assessee as well as the assessee was having equipment in India which constituted a fixed base PE.

Upon appeal by the assessee, the Tribunal held that:

- The limited issue to be examined is the nature of income whether it is business income or royalty or fee for technical services.
- As per the terms and conditions stipulated in the agreement, the Indian clients/subscribers accept the individual non-transferable and non-exclusive license to use the licensed software programme for the purpose of carrying out the purchase and sale of foreign exchange. Thus, what is granted under the agreement is license to use the software for internal business of Indian clients.
- Its not the license to use the software alone but the Assessee has made available the computer system along with the software. The Indian clients are paying for use and right to use of equipment (scientific, commercial) along with software for which license was granted by assessee. The Indian clients are not permitted to access the portal of the Assessee from any other computer system other than the computer provided by the Assessee and by use of software provided in the said computer system. Therefore, it is not a case of payment for access to the portal by use of normal computer and internal facility but the access is given only by use of computer system and software system provided by the Assessee under license.
- This amounts to imparting of information concerning technical, industrial, commercial or scientific equipment work and payment made in this respect would constitute Royalty, and hence taxable in accordance with the IT Act as well as the DTAA.
- Once it has been decided that the receipts were in the nature of Royalty, then there is no need to go into the question of assessee having PE in India or not. Appeal of the assessee is dismissed. *[2014] 47 taxmann.com 10 (Mumbai - Trib.) in the ITAT Mumbai: Reuters Transaction Services Ltd .v. Deputy Director of Income-tax (International Taxation).*
- **Transfer pricing:** Assessee, a subsidiary of CW Mauritius Holding Inc., was engaged in providing variety of real estate related consulting services to its clients in India and overseas. In transfer pricing proceedings, TPO found that assessee had made reimbursement of its share of salary for common manpower resource to two group companies namely CWI, Hongkong and CWI, Singapore. TPO took the view that assessee had failed to substantiate that services had actually been rendered to it and benefit had actually been derived by it on basis of documentary evidence. It determined ALP of said transaction at nil, and made an addition to the taxable income. The Tribunal observed that:
- the assessee had applied Transactional Net Margin Method for benchmarking the transactions relating

to payment of referral fee, receipt of referral fee and provision of portfolio administration services.

- No adverse material had been brought on record to show that either the evidence submitted by the assessee in this respect was incorrect or the contention of the assessee that expenditure relating to transaction entered into with AE's were less costly was incorrect. Therefore, there is no justification in upholding the disallowance. *[2014] 47 taxmann.com 380 (Delhi - Trib.) ITAT Delhi, Cushman & Wakefield India (P.) Ltd. v. Assistant Commissioner of Income-tax,Delhi.*

- **Deduction of tax at source**: The assessee, an Indian company, was engaged in on-site and off-site offshore software development/process outsourcing. It was providing on-site services to its US clients abroad by engaging manpower from US company for execution of works at customer's work place in USA. Since on-site expenses were incurred abroad and the clients were not assessed/assessable in India, the assessee claimed that provisions of TDS were not applicable on such expenditure. However, the Assessing Officer was of the opinion that *Explanation* 2 to section 195 inserted by Finance Act, 2012 with effect from 1-4-1962 makes it clear that payments made to non-resident is subject to TDS whether or not, the non-resident person is having a residence or place of business or business connection in India. On appeal, the Tribunal held:

  - Just because the expenditure was debited to the Profit & Loss account in the books of account in India, the amounts cannot be considered as payments made from India. It is a fact that amounts are paid abroad and the services are rendered abroad. Those companies who received the amounts have no permanent establishment in India or even the business connection in India. Therefore, the payments made to them abroad cannot be brought to tax in India as the jurisdiction of IT Act extends only to territory of India.

  - Moreover, as defined in section 5, no income accrues or arise or deemed to accrue or arise in India on the payments made in USA by branch there. Therefore, the payments made abroad cannot be considered as income chargeable under the provisions of the Act.

  - As seen from the contracts, assessee is not asking the other company to render any personal services in the field of computers but assigned the contract for development of information systems so as to manage the on-site employee work for which various amounts were paid. There is no dispute with reference to the fact that those packages are to be developed by vendors. In fact, A.O. as well as the CIT(A) accepts that the relationship is vendee-vendor, as referred in

order. Considering that nature of agreement and the work undertaken on behalf of assessee, the payments made to the vendor companies do fall under 194C.

- Even though assessee is in the software business and services rendered/work undertaken are also on the field of software services, these cannot be considered as per professional services as they have not rendered any personal services to the company. It is a contract between a company and company. Even though the nature of contract differs from activity to activity, assessee's nature of work do indicate that those companies have not rendered any technical / professional services so as to come within the definition of section 9(1)(vii). Categorization of works contract as agreement for services cannot be accepted. In view of this, assessee's contentions are to be upheld.

- Since assessee is an Indian company, the net of the amounts after considering the expenditure was remitted to India and was incorporated in the books of accounts. Just because the expenditure was debited to the P & L account in the books of accounts in India, the amounts cannot be considered as payments made from India. It is a fact that amounts are paid abroad and the services are rendered abroad. Those companies who received the amounts have no permanent establishment in India or even the business connection in India. Therefore, the payments made to them abroad cannot be brought to tax in India as the jurisdiction of IT Act extends only to territory of India.

- Therefore, the action of the AO, is not justified and cannot be supported by provisions of the Act. Therefore, Assessee's appeals are allowed. *[2014] 47 taxmann.com 214 (Hyderabad - Trib.), ITAT Hyderabad, Information Solutions Ltd. v. Income-tax Hyderabad.*

SERVICE TAX

▪ Important Circulars / Notifications

➢ **Determination of Rate of Exchange -** The Central Government hereby makes the following rules further to amend the Service Tax Rules, 1994, namely:

- These rules may be called the Service Tax (Second Amendment) Rules, 2014.
- They shall come into force on the 1st day of October, 2014.
- In the Service Tax Rules, 1994, after rule 10, the following rules shall be inserted, namely:

The rate of exchange for determination of value of taxable service shall be the applicable rate of exchange as per the generally accepted accounting principles on the date when point of taxation arises in terms of the Point of Taxation Rules, 2011. *Notification No. 19 /2014-Service Tax, New Delhi, 25th August, 2014.*

➢ **Substituted reference to Authorities' Designation in Finance Act:** In exercise of the powers conferred by sections 83, 93 and 94 of the Finance Act, 1994, read with sections 37A and 37B of the Central Excise Act, 1944, and of all other powers enabling it in this behalf, the Central Government hereby directs that the references to the authorities specified in column (2) of the Table below, in the rules made or deemed to have been made under the said sections or in any other notification, instructions, decision or orders, issued or made under the said sections, or rules, or under any other section of the said Acts, shall, unless the context otherwise requires, be construed as references to the authorities specified in column (3) of the said Table.

Sl. No	Existing reference	Substituted reference
(1)	(2)	(3)
1.	Chief Commissioner	Principal Chief Commissioner or Chief Commissioner, as the case may be
2.	Commissioner	Principal Commissioner or Commissioner, as the case may be

Notification No. 16/2014- Service Tax, New Delhi, the 6th August, 2014.

▪ SC / HC Judgments

➢ **Payments to agents abroad:** The assessee was engaged in transport of cargo through owned or chartered ships, and made payments to its agents located abroad. The Department

sought service tax on certain remittances made by assessee to its agents abroad alleging that said payments were made in respect of the Ship Management Services, Maintenance and Repair Services, Technical and Analysis Service, Business Auxiliary Service and Business Support Service under section 66A of the Finance Act, 1994, The assessee argued that services, if any, were rendered outside India and could not, therefore, be regarded as 'received' in India for purposes of section 66A. The High Court upheld the assessee's appeal. *[2014] 48 taxmann.com 164 (Madras) High Court of Madras, Goodearth Maritime (P.) Ltd. v. Commissioner of Service Tax, Chennai.*

- **Services provided by Tour Operator:** Assessee was providing transport services under contract with Principal Tour Operators (PTOs) and was also providing supplementary services (Air and Railway Tickets booking, food and lodging, porter services, monuments visit services, guide services, food services and general assistance services) for which amount was collected from PTOs. Assessee was paying service tax on transport services only claiming abatement in respect of package tour but did not pay service tax on supplementary services arguing that same were provided on behalf of PTOs and service tax must have been paid thereon by PTOs only. It was held that:

  - The Assessee failed to provide assessment order of PTOs or any other document to show that service tax had been paid by PTOs on entire amount including amount paid to assessee.
  - Mere certificates issued by PTOs could not be relied, where it was doubtful whether they were furnished before lower authorities.
  - Supplementary services or allied services form part of tour operator's services and were, therefore, liable to service tax.
  - Since assessee was claiming abatement in respect of package tour, entire package would form part of taxable value.
  - Value of any taxable service is 'gross amount charged' and therefore, amount received towards supplementary services, being a part of gross amount, is to be treated as value of taxable service and liable to service tax. *[2014] 48 taxmann.com 235 (Allahabad) High Court of Allahabad, Touraids (I) Travel Services v. Commissioner of Central Excise.*

▪ Tribunal Judgments

- **Substance of the Agreement:** The appellant had entered into agreements with Computerized Reservation System (CRS) facility providers like *M/s. Galileo India Pvt. Ltd., M/s. Abacus Distribution System (India) Pvt. Ltd., M/s. Amadeus and M/s. Sabre*. Under these agreements, the CRS companies provided IT software for booking of airline tickets, car

rentals and hotels and for the usage of this software, the appellant received consideration called 'support fee'. Revenue raised a service tax demand by classifying the service rendered by the appellant to computerised reservation system (CRS) companies under the taxable service category of 'Business Auxiliary Service'.

The appellant contended that it was not promoting the business of the CRS companies and the software was used for booking of tickets for travel by air, therefore, if at all services were taxable they would merit classification under 'Air travel agent service' and not under 'Business Auxiliary Service'. It also placed reliance on the decision in *Airlines Agents Association vs. Union of India 2003-TIOL-143-HC-MAD-ST*. Upon appeal, the Tribunal observed:

- The question is why is the appellant getting paid by way of incentives and for what purpose? There is no dispute about the fact that it is for usage of the CRS software the appellant is getting paid. What is the service provided in the transaction? The service provider gains by marketing the CRS software and by also advertising that the appellant is using their software which would enable other similarly situated persons to buy their software. In other words, the sale or marketability of the product of the service provider is enhanced / improved by the usage of the software: otherwise, there is no need for any agreement in this regard. It is a settled position in law that it is not the wordings of the agreement that is relevant but the substance of the agreement. as held by the apex Court in the case of Bhopal Sugar Industries Ltd vs Sales Tax Officer 1977 AIR 1275 // 1977 SCR (3) 578. If one sees the substance of the agreement, it is for the promotion of the software of the CRS companies and not for any other purpose.
- The CRS software can be used not only for booking of air tickets but also for hotel booking, car rental and for other purposes. Therefore, merely because the software is used in the booking of air tickets, it cannot be said that services rendered is in relation to the air travel agent's services.
- The decisions relied upon by appellant were rendered in a different context altogether and the issue of transaction between CRS companies and air travel agent was not one of the issues therein. It is a settled position in law that when the facts are different and distinguishable, the ratio of a decision cannot be blindly applied.
- The services rendered by the appellant would merit classification under 'business auxiliary services', and therefore, the appellant is required to make a pre deposit. *2014-TIOL-1581-CESTAT-MUM.*

➢ **Tax paid on reverse charge basis:** The appellant was engaged in the business of providing General Insurance Service throughout India. The head office was located at Pune and was centrally registered with the service tax department for discharge of service tax liability on general insurance services. The appellant had appointed independent

insurance auxiliary agents to promote its business. These insurance agents were providing services to the appellant and the said service was taxable under the category of insurance auxiliary services under Section 65(105)(zl) of the Finance Act, 1994. Accordingly, the appellant discharged the service tax liability as a receiver of service from the insurance auxiliary agents. After paying the service tax on the said service, the appellant took CENVAT Credit of the service tax paid by them.

The appellant also rendered general insurance services for the clients and assets located in Jammu & Kashmir (J&K) through its own branches located in J&K. The appellant was not liable to pay service tax on the general insurance services so provided as the provisions of the Finance Act, 1994 did not extend to J&K. The appellant also appointed insurance agents in J&K who procured the policies for the clients/assets located in J&K. Though the services provided by the agents in J&K were also not taxable, the appellant had wrongly discharged the service tax as a recipient of service and taken CENVAT Credit of the same as input service. The department initiated proceedings for recovery and the demand was confirmed along with penalty and interest.

Upon appeal, the Tribunal held that the appellant was not liable to pay service tax for the said services of the insurance agents, and so, whatever Cenvat credit was taken by the appellant was nothing but the refund of tax erroneously paid by them. The demand of the Revenue was set aside. *2014-TIOL-1540-CESTAT-MUM.*

- **Input Services:** The assessee was engaged in providing taxable services falling under the category of "Information Technology Software Services". It exported services and claimed refund under the Rule 5 of the CCR, 2004. Revenue rejected the refund claim mainly on the ground that the invoices were raised in the name of different parties whereas the remitter of foreign exchange appeared to be different. The second ground of rejection was, values of taxable services did not tally with the amount received in the given quarter.

  The appellant explained that it had engaged payment handlers outside India, who chased the payment with the recipient of service and having collected the same, remitted the amount to the appellant after following the provisions under FEMA and accordingly, there was no ground for rejection of refund claim. Further, as regards the difference in the value of the services, it was stated that the value of services rendered and the value of invoices raised could never be the same, a common occurrence in business, with regard to remittance received during the relevant period, and was not a discrepancy. It was also common that the payments were received after few months from the raising of invoices, upon settlement.

  Upon appeal by Revenue, the Tribunal held that the respondent had adequately explained the reason for raising

invoices in the name of different parties, and also the difference in the value of the invoice and the remittances received. Thus Revenue's appeal was rejected. *2014-TIOL-1522-CESTAT-MUM***.**

- **Airport Service:** The appellant undertook the services of supply of manpower for cleaning of the aircrafts. The Revenue contended that the term "Airport services" as defined in section 65(105)(zzm) included any service provided, or to be provided, to any person by the airports authority, or by any other person authorised by it, in any airport or civil enclave, and so, the said services of manpower supply would be leviable to tax under "airport services". The Revenue cited the Board Circular 80/2004 dated 17.09.2004, explaining the coverage of "Airport Services" that were subject to service tax. Upon appeal, the Tribunal held:

  - Service tax in India prior to 2012 was selective in scope of levy and all activities were not taxed, but only taxable services as defined in law were liable to tax.
  - If any activity is not taxable service as defined in law, even if it is rendered within the airport, it would not be taxable. That is why the renting of immovable property in an Airport prior to 01.06.2007 was not taxable under the "Airport Services" since "renting of immovable property" was not a taxable service. Similarly, there are other services performed in the Airport, such as Porter Services, Escort services, Wheelchair Services and so on. It is not the case of the Revenue that they are collecting Service Tax on these services rendered in the Airport as these are not taxable services otherwise. On the same logic, supply of manpower services cannot be taxed prior to 01.06.2005 under the category of Airport Services. *2014-TIOL-1481-CESTAT-Mumbai.*

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