Chairman's Communiqué Cont...

related activities were also organized like Seminar on Companies Act -2013, Quiz and Elocution Contest, Interactive meet with Toppers and a Full day Seminar on Tax Audit.

I have always believed in three rules and would like to share it with you and request you to follow it:

Rule 1: If we don't go after what we want, we will never have it

Rule 2: If we don't ask the answers will always be No

Rule 3: If we don't take a Step Forward, we will always be in the same spot

Joint Editor's Message

With feelings of national fervor high after the high pitched Independence Day, we go into the busy month of September in high spirits. It will indeed be a very hectic month as the new 3CD format will call for many challenges to finish the work before the deadline of 30th September. Though many representations are going to Finance Ministry & CBDT, it remains to be seen whether the assessee will have their way this time around.

The members will have to use their multi tasking skills this month as their attention will be demanded by their clients at office and by their family for the many festivals which are round the corner including the mega 10 day Ganesh Festival. As true professionals, we hope that we are able to do justice with everyone.

The Branch as usual has been doing great work on all fronts and everyone is delighted with the efforts being put by the Managing Committee to bring relevant topics in various seminars & vartalaap for the benefit of al the members.

We also look forward to your greater participation in Newsletter and request you to send your articles / analysis on important subjects to us.

Happy Reading,

Yours in profession,
CA. Tushar Singhvi.

The festive season has been started with the month of August, this month is a month of celebrations, joy & happiness. Starting with Independence Day, a flag hoisting programme was organized by Nagpur branch which was followed by a mega musical rally, large number of members as well as students participated and enjoyed it a lot.

As we move forward, we are heading towards the busiest month for our professional colleagues. Moreover the pressure is created by the various changes made by CBDT in the Tax audit report. To release some pressure Nagpur branch has organized a special half day seminar on Tax Audit Report, which got a good response by members.

Nagpur branch is always dedicatedly working for the betterment of our members and in this process branch has organized one of the very important programme, i.e certificate course on arbitration. It was the first time this programme was organized which got a very good response from all the members. There is also good news for cricket lovers as most awaited programme of the year CAPL – 14 is being organized on 1st of November, so I request all the participants to come up with their teams end enjoy.

At last I would like to extend my warm greetings for the upcoming festival of lights, joy & prosperity "DEEPAWALI" to all my professional colleagues and to our readers. Wish you a Happy Diwali !!!

With Warm Regards
CA. Ashish Agrawal

Income Tax Updates :
Compiled by CA. Tushar Singhvi

1. **CIT vs. HDFC Bank Ltd (Bombay High Court) 2014**

   No s. 14A disallowance of interest paid on borrowings if assessee's own funds and non-interest bearing funds exceeds investment in tax-free securities. In principle, if there are funds available, both interest-free and over draft and/or loans taken, then a presumption would arise that investments would be out of the interest-free funds generated or available with the company if the interest-free funds were sufficient to meet the investment. On facts, the assessee's own funds and other non-interest bearing funds were more than the investment in the tax free securities. Consequently, the ITAT rightly held that there was no basis for deeming that the assessee had used borrowed funds for investment in tax free securities

2. **Mithila Credit Services Ltd vs. ITO (ITAT Delhi) 2014**

   S. 68: Primary burden is on AO to show that share application money is assessable as unexplained cash credit. AO cannot sit back with folded hands & simply reject assessee's evidences. (i) Even if the reopening is sustained, the primary burden that income has escaped assessment is on the shoulder of the AO and after discharging this burden only, the onus shifts to the shoulder of the assessee. There are two types of cases. One in which the AO carries out the exercise which is required in law and the other in which the AO 'sits back with folded hands' till the assessee exhausts all the evidence or material in his possession and then comes forward to merely reject the same on the presumptions. On facts, nothing has been brought on record by the AO to substantiate his serious allegation that these two entries are accommodation entries which was the sole ground and basis for reopening;

3. **CIT VS. BHARAT BIJLEE LTD. (Bombay High Court) 2014**

   Transfer of division in exchange of shares only couldn't be held as slump sale: Section 2(42C) of the Income-tax Act defines slump sale as under: 'Slump sale' 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 sales. The Tribunal had rightly held that it was not a case where the consideration was determined and decided by parties in terms of money, rather its disbursement was made by way of allotment of bonds/preference shares. Thus, it was a case of exchange and not a sale. Accordingly, the impugned transaction was not a slump sale and the additions made by the Assessing Officer was not sustainable

4. **CIT vs. WorldWide Township Projects Ltd (Delhi High Court) 2014**

   Bar in S. 269SS/ 269T does not apply to loans/ advances accepted/ repaid via journal entries. On merits, no offence u/s 269SS is made out. S. 269SS applies to a transaction where a deposit or a loan is accepted by an assessee, otherwise than by an account payee cheque or an account payee draft. The section is restricted to transactions involving acceptance of money and not intended to affect cases where a debt or a liability arises on account of book entries. The object of the section is to prevent transactions in currency. This is also clearly explicit from clause (iii) of the explanation to s. 269SS which defines loan or deposit to mean "loan or deposit of money". The liability recorded in the books of accounts by way of journal entries, i.e. crediting the account of a party to whom monies are payable or debiting the account of a party from whom monies are receivable in the books of accounts, is clearly outside the ambit of s. 269SS because passing such entries does not involve acceptance of any loan or deposit of money

5. **Aravali Polymers LLP vs. JCIT (ITAT Kolkata) 2014**

   S. 47(xiiib)/ 47A(4): Giving of interest-free loans to partners of the LLP does not contravene Proviso (c), though it contravenes Proviso (f), to s. 47(xiiib). Capital gains have to be computed on the book value of assets transferred & not on market value.

6. **Sumit Devendra Rajani vs. ACIT (Gujarat High Court)**

   Upon issue of Form 16A TDS certificate, TDS credit has to be given to the payee even if there is Form 26AS mismatch or deductor is at fault for non-deposit of TDS with Govt. U/s 204, the liability to deduct TDS is on the employer / payer. U/s 205, when tax is deductible at source, the assessee shall not be called upon to pay tax himself to the extent to which tax has been deducted from that income. This means that the assessee / deductee is entitled to credit of such amount of TDS. Even if the deductor, after deducting the TDS, does not deposit the sum with the department, the department has to recover the said amount from the deductor and cannot deny credit to the deductee (Om Prakas Gattani 242 ITR 638 (Gau) & Yashpal Sahni 293 ITR 539 (Bom) followed)

Write Up On Service Tax :
Compiled by CA. Sameer Agrawal

Sale or Deemed Sale of Goods: Assessee was providing services of repair of transformers. The Department argued that value of consumables like transformer oil and component parts was includible in value of services and liable to Service Tax. The Tribunal observed that:

(a) in invoices issued by assessee, value of goods used, such as transformer oil and service charges were shown separately and

(b) in respect of supply of consumables, sales tax/VAT was paid;

and accordingly, held that service tax would be chargeable only on service/labour component and value of goods used for repair would not be includible in value of service. It was held by the court that in view of judgment in CC & CE v. Balaji Tirupati Enterprises [2014] 43 taxmann.com 39/44 GST 163 (All.), said goods shall not enter into value of services. Hence, demand was found to be invalid **(Commissioner of Central Excise v/s Mahendra Engineering Ltd. [2014] 49 taxmann.com 379 (Allahabad))**

Notice and Demand : Assessee received GTA services under reverse charge but neither paid Service Tax nor filed returns. On Supreme Court holding that recipients could not be made liable to Service Tax and no recovery could be made from them, a series of retrospective amendments were made in years 2000, 2003 and lastly, in 2004 empowering issuance of notice. The Assessee challenged the validity of the notice. It was held that in view of the judgment in CCE v. CESTAT [2014] 44 GST 182/43 taxmann.com 13 (Mad.):

(a) Revenue has necessary jurisdiction under section 73, particularly with reference to limitation prescribed there under,

(b) show-cause notice issued on assessee is valid;

(c) interest was leviable and prayer for cancelling same was rejected; however,

(d) penalty imposed on assessee was deleted

(Commissioner of Central Excise v/s Customs, Excise & Service Tax Appellate Tribunal [2014] 50 taxmann.com 74 (Madras))

Penalty: Assessee received Provident Fund payments/ reimbursements from its clients relating to manpower supplied by it to those clients. The Assessee did not include the said payments in value of the services for payment of service tax. The Assessee paid service tax along with interest even prior to adjudication. The Tribunal held that said charges were includible in value. In appeal, the assessee did not press appeal on merits. It was held that since the issue of taxability has not been contested in appeal before High Court, same was not gone into.

Penalty: Section 80, read with sections 73, 76, 77 and 78, of the Finance Act, 1994 Department issued notice demanding service tax. The Assessee paid service tax prior to adjudication. The Department levied penalties under Sections 77 and 78. The Assessee argued that it had bona fide belief about non-taxability and there was mass unawareness about taxability, as noted by department itself and as evident from 200 notices issued by department to various services provider. It was held that the Assessee's conduct in paying service tax even prior to adjudication was a relevant factor. Since there was mass unawareness, as even noted by department itself, there was no intention to evade service tax on part of assessee. Hence, penalty could not be levied.

(H.M. Singh & Co. v/s Commissioner of Central Excise, Customs and Service Tax [2014] 49 taxmann.com 417 (Allahabad))

Experience Corner
Past Chairman Share Their Expereince

First of all, I would like to thank Nagpur Branch of ICAI for giving me an opportunity to introspect and analyze the issues relating to charging fees in our office. I am confident that all the problems as mentioned below can be resolved if every practicing member introspect his practice and answers the questions mentioned below without considering any opinion or suggestion given by others. If we can properly define answers to these questions for our office every practicing chartered accountant would be flourishing without favor or fear.

CA. Sudhir Surana

1. **Your Opinion as to what ails our Fraternity vis-a-vis the fees charged by CA's for their work?**

Ans : **A. Statutory Audit** : The trouble in charging fees vis a vis work done is mainly due to the fact that auditee donot see instant & direct visible benefits from our work, like in case of project finance or Income Tax Scrutiny cases. The same is considered as legal obligation than a necessity.

B. Consulting : Similar quality of work by a local CA firm vis big 4 commands a stark difference in fees branding.

2. **Should the fees be charged as per the cost involved in delivering the services or the value generated for the client?**

Ans : Yes, the fees charged should be based on the input required to execute the job. However the same will not always be true, especially in case of attest function where our qualification is result of hard work and efforts of many years to gain the qualification & expertise whose value cannot be directly estimated & associate with input / cost. In any case fees recommended by Institute should be taken into consideration as base of minimum fees to be charged, unless situation otherwise warrants. However in any case undercutting of fees cannot be warranted.

It should be a mix of cost involvement as well as value to the client cost as an internal matter but we have to charge on the basis of value to the client. For example time taken by a general physician and a surgeon may be same but the value of service rendered to the patient various and so does their fees. CA should value their work and its utility and charge fees subject to mandatory minimum & mutual agreement with client. Attitude of Client towards Statutory audit, Comparison with Big 4, lack of understanding of the value of services, restrictions of Institute on advertising thereby affecting creation of brand of the firm. Understanding by CA absence of mandatory minimum fees to be charged.

3. **How the Valuation / Costing of our work should be done? What factors should be taken into account?**

Ans : As stated above, one of the base of determining the fees would be cost involved, where the different tags of cost may be fixed for articled clerk, paid staff; qualified / semi qualified & off course value / cost of own time. One thing is for sure that, for the articled clerk the cost should be considered at normal commercial level, like that of paid staff. Apart from this direct cost, the administrative cost of admin staff, computer room cost, stationary cost etc. should be added / considered, as it vary from client to client for similar or different work. Value of services rendered must also be considered.

4. **How the value of our Service offering should be communicated to the client? How should he be convinced to pay not only as per time involved but also considering the value of advice & risks involved?**

Ans : In general, in our work there should not be any correlation between risk and reward. We are not supposed to execute the work at risk for the sake of hafty return. Our work is governed by Rules & Regulation and Code of Conduct & Ethics and we are supposed to carry out our task after due verification of records & document and the applicable law.

However considering the time, efforts and expertise involved, the value of our services should be brought to the notice of our client to justify the fees charged. Many a times, the client sees the final outcome, which may represent the small part of our efforts. But we should be able to showcase the hardwork and untiring efforts taken to deliver the final output and the vast experience & expertise we developed over the years.

5. **Should some part of Audit Fees or any other work be taken in Advance?**

Ans : It varies from client to client and the standing of the client and also the past experience. However, in general, I do not see such practice nor I feel the necessity. I always feel that you can command better fees after good delivery of work. However in case of Special , Long Term Assignments the schedule for payment of fees may be given to ensure that Cash Flow is continued.

6. **How to discourage the client from Bargaining of the quoted fees?**

Ans : Your quote for fees should always be reasonable based on the complexity of work and cost & time involved. If your homework is proper you should be able to justify the fees you are seeking and barring some minor corrections, there should be any instance of admitting bargaining. I am of the firm belief that your homework is correct than there will not be any scope / instance of bargaining, as at your level of firm / service the cost & reward will be almost same to your other counter parts too. Guideline of Institute for charging of fees may also be shared with the Client.

7. **How can we bring in the system of charging for Consultations?**

Ans : This is one area where we are not able to showcase our strengths, especially in non-metro cities. We are taken for granted and in fact we also permit that against one single

audit / assignment the client can consult us on any issue relating to his trade, finance, tax or audit matter or even his petty personal matter. Here, I can narrate one instance where one of the renowned tax consultants has issued a bill to one of the Birlas for discussing / seeking an opinion on a tax issue during the informal inflight discussion. However, we are not able to charge the fees for many of our expert advice which may be of great value to the client. We need to be more careful & professional that whenever any client is seeking any extra advice he should be informed that it will be separately charged. This will enhance our value and our time & advice will be more respected. The client will also be more alert & prepared as to what to ask.

Personal relationships with client also hampers the ability to charge for consultations. Professional relationships / approach to client by the entire firm / partners wiii help in creating professional image and facilitate charging of fair fees.

Experience Corner
Past Chairman Share Their Expereince

CA. Rajesh Khanzode

Ans1: According to me lack of understanding of the client regarding value of services and responsibilities of the CAs under various statutes, competition being faced by new CAs and fear of losing of work are mainly the factors for the present state of affairs. I think we should hold very frank discussions with the client before accepting any assignment about the scope of work, value of services and our legal responsibility involved in the work and our professional fees for the work.

Ans 2: Cost involved in delivering services is the traditional and basic criteria for charging fees for any services. But this cannot be sole criteria for charging fees. In my opinion fees should be based on both, cost of services rendered and value generated for client. But there are problems in quantifying value generated from client's perspective. It all depends on convincing clients on the value being generated by the services rendered or to be rendered.

Ans 3: The most important factor for costing of our work is cost of expert knowledge, efforts taken and skilled resources. The other factors are cost of infrastructure, cost of various softwares required, manpower training and the cost of outside support services.

Ans 4: As said earlier holding discussions with clients before accepting any assignment and impressing upon the client the efforts required to be taken, risk, responsibility and cost involved in the execution of work and value to be generated by services is most important aspect. Fees should be communicated based on the discussions with the clients after convincing him on foregoing aspect.

Ans 5 : In my opinion fees for the attest function should not be taken in advance. Clients should be billed after completion of assignment and the fees should be collected forthwith. For other work depending upon nature of assignment, time and cost involved in the execution of assignment fees may be taken in advance as per the arrangement with each client on case to case basis.

Ans 6 : The bargaining happens only if client is not convinced about the efforts required to be taken, risk, responsibility and cost involved in the execution of work and value to be generated by services. As mentioned earlier, if client is convinced on these aspect situation of bargaining may not arise. Further all the members should imbibe the discipline about charging the minimum scale of fees recommended by the ICAI and efforts are also required to make the clients aware about scale of fees and about revision in these fees from time to time.

Ans 7 : Firstly, consultations on phone and other medium of communications i.e. mails and other personal meetings should be discouraged totally. Secondly, members should subtly make aware the clients that by taking consultations you are not only seeking my knowledge and expertise but also precious time which is limiting factor. The system of billing can be put in place by allowing the clients to your office only by appointments and billing as soon as possible after giving the consultations.

Looking Behind A Case Law

Compiled by V S Datey

Case law as important source of law

Under Article 141 of Constitution, law declared by Supreme Court is binding on all lower courts.

Supreme Court under Article 141, is not mere interpreter of the law but much beyond that. The Court, as a wing of State, is by itself a source of law. The law is what the court says it is - Nand Kishore v. State of Punjab - (1995) 6 SCC 614.

Article 227 of Constitution of India confers powers on High Court of superintendence over all courts and tribunals in the territory in which the High Court has jurisdiction. Thus, Courts and tribunals in a State are subordinate to the High Court of that State and decisions of the High Court are binding on them.

In view of aforesaid Constitutional provisions, Case law, which is also termed as 'judge made law' i.e. decision of Supreme Court and High Courts , is surely a very important source of law. Technically, decisions of High Court are binding within the State where High Court has jurisdiction. In other States, the decision of High Court has only persuasive value. However, since Central Government has to implement any law all over India, it cannot afford to ignore decision of any High Court.

However, case law has its own limitations.

Law means any law, ordinance, order, bye-law, rule or regulation passed or made by competent legislature [see Article 366(10) which defines 'existing law']. Thus, the word 'law' is quite wide.

Though the definition is wide, the definition does not talk of 'case law' and rightly so, as really, 'case law' is not a 'law'. In the scheme of Constitution of India, Parliament enacts law, Court interprets the law and Executive implements the law.

Court cannot make a law. If an interpretation of statutory provision made by Supreme Court or High Court is not what Parliament intended, Parliament can always amend the law, even with retrospective effect (of course such amendment cannot go beyond the Constitutional provisions). By 'Retrospective amendment', Parliament, in effect, says that the interpretation done by Supreme Court is not what it had intended when it passed the law, hence it is making its intentions clear by suitable amendment.

Similarly, CBDT & CBEC cannot make a law-they implement the law. Hence, circular issued by CBDT or CBE&C, which are not administrative in nature, have no force of law. The view expressed in circular of CBDT or CBE&C about any statutory provision is only their understanding of the legal provision. Court, Tribunal, or Assessee are not bound by the view expressed in the circular (except where it is only of administrative nature).

How any Court decision is binding?

Some well settled principles of binding nature of any case are summarised below.

- Each and every word in decision of Court is not binding. Only 'law declared' in any judgment is binding.
- Judgments of courts are not to be construed as statutes. They interpret the statutes: their words are not to be interpreted as statutes.
- Each judgment is based on its own context and background. It is neither desirable nor permissible to pick out a word or sentence from the judgment, divorced from the context of the question under consideration, and treat it as a 'law' declared by the Court.
- A case is an authority only for what it decides and not what logically follows from it.
- Every judgment must be read as applicable to the particular facts proved, or assumed to be proved.
- A decision of Court cannot be treated as Euclid's formula and read and understood mechanically.
- Decision Sub Silentio is not binding. A decision of Court is said to be 'sub silentio' when a particular point of law involved is not perceived by Court or it is not present in its mind.
- Per incuriam means 'through inadvertence or want of care' e.g. A judgment or ruling given when a statutory provision or a previous binding decisions are not brought to the notice of Court/Tribunal is a judgment 'per incuriam'. Such judgment is not binding.

Often these principles are lost sight of and decisions of Courts are mechanically applied.

If we see some cases, wecan clearly see how has this lead to unintended results.

Cost of production and Assessable Value - Fiat Case

As per section 4 of Central Excise Act (as effective from 1-7-2010), transaction value is the basis of assessable value for purpose of payment of excise duty, if price is the sole consideration.

Thus, cost of production is really irrelevant for purpose of excise valuation.

However, lot of confusion has been created in view of the decision of Supreme Court in case of Fiat India The Fiat case was mainly in relation to old section 4 of Central Excise Act, as existing upto 1-7-2000, where 'normal

wholesale price' was the basis of assessable value.

However, part of the period covered in the case also covers period after 1-7-2000 i.e., covered under new section 4.

In CCE v. Fiat India P Ltd. (2012) 25.taxmann.com 534 = 283 ELT 161 (SC), it has been held that if goods are sold below the cost of production, the price would not be 'normal price'. The price charged would not be 'sole consideration'. Intention to penetrate the market or meet the competition would be the additional consideration. In that case, excise duty will be payable on the basis of cost of production plus profit and not on basis of transaction value (selling price) - review petition filed by assessee dismissed by SC in November 2012 - (2012) 86 ELT A78.

Facts of the case - Assessee were manufacturers of Fiat UNO model cars. The components were imported in CKD/SKD condition, car was assembled and sold in India. The cost of production was Rs 3.98 lakh whereas assessable value based on sale price was Rs 1.85 lakh. Assessee contended that there was no flow back. They were forced to sell below cost of production due to increased cost of imported components. As the process of indigenization would increase, cost would come down.

The low price was to penetrate the market and to meet fierce competition in the market. Such 'loss making price' was continued for five years.

Department contended that the price at which the cars were sold is not 'normal price'.

Decision - (1) 'Loss making price' which continued for five years cannot be treated as 'normal price'. (2) There could be instances where manufacturer may sell below cost, like switching manufacturing activity or goods could not be sold in a reasonable time. These instances are only illustrative, not exhaustive. (3) When assessee was selling goods at a loss, price was not the sole consideration. 'Penetrating market' was the additional consideration (4) This principle would apply even under new section 4, if price is not the sole consideration. (5) Consideration means a reasonable equivalent or other valuable benefit passed on by promisor to promisee or by transferor to transferee. 'Sole consideration' means it should be sufficient and valuable having regard to the facts, circumstances and necessities of the case (6) Mere fact that correct interpretation of law may lead to hardship would not be a valid consideration for distorting the language of statutory provision.

My Comments - The decision has lead to lot of problems to assessees and litigation. My views and comments are as follows -

(a) The concept of 'normal cost' was not brought forward. 'Normal Selling price' is to be based on 'normal cost', i.e. on basis of normal rejection, normal plant utilisation, normal raw material costs etc. For example, if Tata Motors produce only 10,000

Nanos in initial years, the 'actual cost' considering all overheads and initial heavy rejection may even come to Rs. Five crores. This cannot be treated as 'normal cost'.

In case of Fiat, the input cost was abnormally high due to heavy cost of imported components on account of adverse foreign exchange rate. Cost of manufacture of those components, if manufactured in India, would have been much lower. Thus, in case of manufacturers who had entered the market earlier, their level of indigenization of components was high and hence cost of production was much lower compared to cost of production of Fiat.

Thus cost of Uno was not 'normal cost' due to adverse rate of foreign exchange. Since, the cost of the UNO car was not 'normal cost', that really could not be considered for calculating 'normal price'.

(b) For purpose of fixing price, two types of costs are considered - (i) Marginal cost (which excludes fixed overheads as in any case, these are going to be incurred whether or not you manufacture (ii) Total cost which includes normal overheads considering normal plant utilisation.

There can be instances where the selling price is above marginal cost but below total cost, as such sales also contribute to profit of the company.

This is particularly true where assessee has to offer full range of products where some of the items may be slow moving but still required to ensure presence in market. This is also true in case of subsidiary products or by-products where main profit comes from principal product only.

(c) Price is what market can bear and not something which is determined on the basis of cost of manufacturer. Further market can be expected to bear only normal price based on normal costs. Market cannot be expected to pay higher price simply because your 'actual costs' are higher.

(d) In case of Fiat, so far as issue relating to new section 4 is concerned, it was held that price was not the sole consideration. Intention to penetrate the market or meet the competition was the additional consideration. Thus, the transaction value can be rejected only if there was 'additional consideration'.

(e) Supreme Court itself has noted the situations where sale price may be lower than cost of production. It was observed 'There could be instances where manufacturer

may sale below cost, like switching manufacturing activity or goods could not be sold in a reasonable time. These instances are only illustrative, not exhaustive'.

In case of Fiat, loss making price continued for about five years. If it was for shorter period, then probably, transaction value would have been acceptable.

(f) Often goods are sold below total cost to survive in market. In many cases, prices are based on the principle of 'follow the leader'. It can be argued that 'To survive in market' cannot be said to be additional consideration during short period.

As per section 2(d) of Contract Act, when, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise.

If price is fixed to survive in the market or on basis of what can be marketed by promisee (the manufacturer), it cannot be said that it is at the desire of promisor (customer). The customer (promisor) had never expressed any such desire. The promisee is dong it on his own.

Conclusion - The decision of Supreme Court, which was mainly based on old section 4, cannot be mechanically applied to new section 4 of Central Excise Act. Under new section 4, transaction value can be rejected only if there is additional consideration. Fixing price on what market can bear cannot be said to be additional consideration, considering definition of 'consideration' under Contract Act. Supreme Court itself has noted that there can be instances where sales may be below cost. Further, 'cost' means cost calculated on basis of normal overheads, normal plant utilisation, normal material cost and normal rejection.

Service tax on Developing plots and selling the plots

In Narne Construction (P) Ltd. v. UOI (2013) 38 STT 502 = 30 taxmann.com 42 (SC), it has been held that activity of company involving offer of plots for sale to its customers/members with an assurance of development of infrastructure/amenities, layout approvals etc. amounts to 'service'.

Based on this decision, conclusions are being drawn that service tax is payable on activity of developing plots and selling them.

Actually, this decision is in respect of definition of 'consumer' and 'service' under Consumer Protection Act. Section 2(1)(o) of Consumer Protection Act states that 'Service' means service of any description, which is made available to potential users and includes, but not limited to, the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying a news or other information, but does not include rendering of any service free of charge or under a contract of personal service.

The definition in that Act is quite wide and quite different from definition of 'service' under service tax law. Decision under Consumer Protection Act cannot be applied to service tax law. Further, Consumer Protection Act is a benevolent legislation and hence calls for liberal interpretation. Service tax law is a taxing statute which requires strict interpretation.

In many cases, a developer purchases land, prepares layout, builds internal roads and other infrastructure and sells the plots. Issue is whether this would be 'service'.

Really, he is developing the land for himself. After development, he sells plots without charging separately for such development charges. This is an activity which constitutes merely, a transfer of title in immovable property, by way of sale, which has been excluded from definition of 'service' itself as per section 65B(44) of Finance Act, 1994. Hence, service tax should not apply.

Service tax on Reimbursement of Expenses

The service provider often claims reimbursement of certain expenses incurred by him (like travelling, boarding and lodging, etc.) while providing a taxable service. These are often termed as 'out of pocket' expenses.

Rule 5(1) of Service Tax Valuation Rule provides that where certain expenditure or costs are incurred by the service provider in the course of providing any taxable service, all such expenditure or costs shall be treated as consideration for the taxable services provided or to be provided and shall be included in the 'value' for purpose of charging of service tax on the said service.

This is a general rule, which makes it clear that, even when such expenditure or costs are recovered separately by service provider from service receiver, such expenditure, or costs must be included in the value of taxable service. Rule 5 gives some illustrations also.

Travelling, hotel and other expenses incurred for providing taxable service - Illustration 2.-In the course of providing a taxable service, a service provider incurs costs such as travelling expenses, postage, telephone, etc., and may indicate these items separately on the invoice issued to the recipient of service. In such a case, the service provider is not acting as an agent of the recipient of service but procures such inputs or input service on his own

account for providing the taxable service. Such expenses do not become reimbursable expenditure merely because they are indicated separately in the invoice issued by the service provider to the recipient of service.

Costs incurred in providing service and recovered from service receiver - Illustration 4.- Company X provides a taxable service of rent-a-cab by providing chauffeur-driven cars for overseas visitors. The chauffeur is given a lump sum amount to cover his food and overnight accommodation and any other incidental expenses such as parking fees by the Company X during the tour. At the end of the tour, the chauffeur returns the balance of the amount with a statement of his expenses and the relevant bills. Company X charges these amounts from the recipients of service. The cost incurred by the chauffeur and billed to the recipient of service constitutes part of gross amount charged for the provision of services by the company X.

Rule 5 held ultra vires section 67 - In International Consultants and Technocrats P Ltd. v. UOI (2012) 28 taxmann.com 213 = 38 STT 75 (Del HC DB), it was held that service tax is payable 'for such service'. The reimbursable expenses are not charges for 'such service' and hence are not includible in value. The rule 5(1) providing for inclusion of such expenses is ultra vires and section 67 and 66 of Finance Act, 1994.

In this case, the assessee was providing consultancy services. He was charging separately for travel and other expenses. It was held that these are not for 'such service' and are not includible.

Two types of Reimbursement expenses - Really, reimbursement of expenses are of two types. Some expenses are such that without incurring those expenses, the service cannot be provided. These really part of value of service e.g. market survey cannot be conducted without incurring travelling and hotel expenses, audit service cannot be provided without travelling to client's place and checking the records. An engineer cannot repair a machinery unless he travels and visits the place where the machinery is situated. A cargo handling agent cannot provide service without labour and hiring of vehicle. These are includible even if charged separately (even on actual basis).

Expenses which are not part of value of service - Often, a service provider incurs some expenditure on behalf of service receiver and then recovers the amount from him. Such expenditure is not part of service provided by him to service receiver, but is incurred by him as per business practice or convenience. Following illustrations may clarify the provisions -

- Customs duty, dock dues, demurrage, transport charges etc. paid by Customs Broker on behalf of client, as client cannot go to port and incur these expenses
- Advertisement charges paid by Advertising Agency to newspaper on behalf of clients. The agency collects advertisement charges from client and pays to newspaper. His value of service is only commission.
- Ticket charges paid by Travel Agent and recovered from his customer.

These are not part of service provided and hence are not includible. Rule 5(2) provides that the expenditure or costs that a service provider incurs, as a pure agent of the client, shall be excluded from the value if such service provider fulfills prescribed conditions.

The principle is also discernible from various exclusions as contained in rule 6(2).

Distinction between the two types not brought to notice of Court

- As the distinction between the two types of reimbursable expenses was not brought to notice of the Delhi High Court, the decision is open to further challenges.

Conclusion

Those who are conversant with inter-state sales by transfer of documents can go through the case of A & G Projects and Technologies v. State of Karnataka (2009) 2 SCC 326 = 18 STT 525 = 19 VST 239 (SC) and see what problems it has created to the trade.

There are many such decisions of Supreme Court and High Court, which have created serious problems to industries. Thus, 'case law' is two-sided weapon - it does help in interpreting a legal provision, but sometimes, unless the case is seen in its proper perspective, it can lead to unintended situations.

SERVICE TAX

Compiled by Unkown Author

General	Section 69: Registration	Section 68: Payments
Rate is **12.36%**	**9Lakh** is the limit for registration anytime	**Payment due date is** : For Co. : 5th/6th Of MONTH For others : 5th/6th of QUARTER March : 31st March
Charged on GROSS amount i.e Ignoring TDS/VAT/Other provisions.	Apply **within 30 days** of exceeding 9L	
	See books for Documents required	
No ST in current yr. if Taxable services in PY is 10L or Less.	Penalty of **₹10,000 or ₹200per day (Higher)** for non registration.	**W.e.f 1st Oct 14**, ST must paid only thorugh epayment mode.
ST should be charged **on the invoice which increases the 10L limit.**	**Section 70: Return**	**Int. on late payment (Sec.75):** Upto 6months : 18% 6-12months : 18% (1st six months) and then 24% (For the last six months). More than 12months : 18% (1st six months) and then 24% (For the last six months), then 30%.
ST + TDS example: Bill is 90,000 after deducting TDS of 10,000, then ST is on 100,000.	Date is **25th April** & **25th October**	
	Revision can be done by 90days	
TDS is charged on GROSS amount as well i.e 100,000 in above example.	**Penalty for Non-filing (Sec.77):** Upto 15 days: ₹500 15-30 days: ₹1000 Above 30 days: ₹100/day (max. 20,000)	

Cenvat Credit	Point of Taxation Rules
ST with VAT cannot Set off.	***For Service Provider:*** **Invoice issued within 30 days: Invoice date** **Invoice not issued within 30 days: Date of completion of service.** **Advance received before invoice or Completion of service: Date of advance.**
ST credit can be used for ST/Excise payments as both under C.Govt. & vice-versa	
Credit **can be availed within 6 months** from the date of invoice/bill.	
Credit prior to the registration can be availed after Registration	***In case of Reverse Charge (w.e.f 01/10/2014):*** **In case of advance payment :Date of Advance.** **In case payment is made within 3months of invoice date : Date of payment** **Payment not made within 3 months of invoice date: The date immidietly following the 3 months.**
ST **can be paid from** the credits of Excise/ST/CVD/SAD	**Bill Issued before 1st Oct & payment after 1st Oct'14 :** **Payment made within 6 month :Date of payment** **Payment beyond 6 months: Service provider wale rules shall apply.**
Credits of Ecess/Shec cannot be used for ST but vica-versa can be done.	

Abatements Not. 26/2012		Reverse Charge (Notification 30/2012)			
Service	Taxed @	Main Services	Provisions	Provider	Receiver
G.T.A	3.09%	G.T.A	**Any Company/Partnership firm/Excise dealer** paying any freight **to Any Transport agency.** (If Indivual/Huf are paying freight then GTA is liable to charge ST, not Indivual,huf)	0%	3.09% (After Abatment)
Rail	3.708%				
Vessel	4.944%	Advocates	**Any Individual/Firm of advocates** providing services **to Any person in business/profession whose turnover in the PY is more than 10Lac.**	0%	12.36%
Air	4.944%				
Food supply	4.944%	Director to Company	**Any Individual Director** providing any Service to **Any Company**	0%	12.36%
Shamiana	8.652%	Supply of Manpower/ Security guard	**Any Individual/HUF/Firm** Providing this service to **Any Company**	3.09%	9.27%
Hotels	7.416%				
Renting of MotorVec	4.944%				
Contructn	3.090%	Renting of Motor Vechile	**Any Individual/HUF/Firm** providing rent a cab service **to Any Company**	0%	4.944% (After Abat)
Restaurants	4.944%	Import of Service	If Any Services are imported into India and provided to Any person in India (Eg. Processing charges paid to a Singapore bank for taking an ECB)	0%	12.36%
Tour opertr	3.09%				

Other Important points

1. The liability of SReceiver is not discharged even if the Stax is charge by the SProvider in his bill.
2. **Excess payment of ST** can be adjusted against ST laibility in the succeding Month/quarter by fulfiling juts on condition that such excess should not be on the account of interpretation of law/taxability/exemptions.[Rule 6(4B)]
3. **Where reciever is in the non-taxable territory**, then Service provider is liable to pay service tax and not receiver.
4. Under Notifiation 25/2012, **GTA can claim exemption of ₹1500** under the single contract.This exemption is also avaible in case of R.Charge.
5. **ST paid under Reverse charge can be taken as Credit** for the payment of ST as a provider or for the payment of excise duty. (Applicable only in case the Person paying ST under RC is also a service provider or manufacturer)

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Published by CA. Ashiwini Agrawal, Editor in Chief on behalf of the Institute of Chartered Accountants of India, Nagpur Branch & Printed by : BPS Marketing Inc., Nagpur