CASE LAWS ON SERVICE TAX FROM FEBRUARY-08 TO JULY-09

ADVERTISING AGENCY:

The appellants were an advertising agency who provided advertising services to their clients and charged a fixed fee for its services. Their services consisted of booking slots in print and electronic media for the advertiser. The media billed the appellants @15% discount. If Rs. 100/- was the tariff rate the media charged them Rs. 85/- plus 10.2% service tax. The appellants in turn charged the same Rs. 85/- + 10.2% service tax to the advertisers, recovered the amount from them and paid it over to the media who paid the service tax of 10.2% on Rs. 85/- to the Exchequer. The appellants paid service tax on the fixed fee it received from their clients. Further, the appellants also received cash discounts (discount for prompt payment) and target incentives (incentive for achieving a certain level of business) from the media. The department sought to tax - (i) the discount of 15%; (ii) cash discount ; and (iii) target incentives under the category "Advertising agency" services. Dismissing the department's contentions the Tribunal relying upon Euro RSCG Advertising Ltd. vs. CCE (2007) 7 STR 277 (Tri.-Bang.) held -

i) For an advertising agency it is the advertiser who is its 'client'. Its client is not the media. It is only the amounts that are received from its clients which is taxable under the category of "Advertising agency" services and any amount received from media will not be liable for service tax.

ii) The discounts given by media is not an amount "received" by the advertising agency. It is only a "discount". Further, the media is not the client of the advertising agency. Hence the discount is not taxable.

iii) Both cash discounts and target incentives are not connected to the service rendered to the clients (advertisers) nor are they billed to the clients (advertisers). Hence these incomes earned by appellants are not liable for service tax under the category of "Advertising agency services". [Kerala Publicity Bureau vs. CCE (2008) 9 STR 101 (Tri-Bang)]

CLEARING AND FORWARDING AGENTS:

No service tax is payable on reimbursement of expenses such as accountant's salary, godown keeper's salary, steno's salary, office maintenance, computer programmer salary, computer installation, etc. incurred by a clearing and forwarding agent. [JayaLaxmi Enterprises vs. CCE (2008) 9 STR 19 (Tri. - Bang.)]

Booking of orders done by the broker on behalf of the appellant is not liable for service tax under Clearing and Forwarding Agent's services. [Harinagar Sugar Mills Ltd. vs. CCE (2008) 9 STR 128 (Tri. - Kol)]

SCIENTIFIC OR TECHNICAL CONSULTANCY SERVICES:

Transfer (sale) of technology with all its rights is not a provision of service and accordingly not liable under Scientific or Technical Consultancy Services. [Matrix Laboratories Ltd. vs. CCE (2008) 9 STR 15 (Tri. - Bang.)]

VALUATION:

Where a dealer of motor vehicles offered 3 free services on the sales made by him to his customers, the services provided by him are not liable for service tax in absence of any consideration. [Indus Motor Company vs. CCE (2008) 9 STR 18 (Tri. - Bang.)]

Cost of material consumed while rendering photography service are not includible in the value of taxable service vide Notification No. 12/2003-ST dated 20-6-2003. [CCE vs. Express Color Lab (2008) 9 STR 126 (Tri. - Bang.)]

DEMAND – LIMITATION:

Where the departmental authorities were not clear as to the nature of activities rendered by the assessee and had taken different views at different points of time the extended period of limitation cannot be invoked. [Nexcus Computers (P) Ltd. vs. CCE (2008) 9 STR 34 Chennai)]

INTEREST:

Where the assessee, a recipient of service from a foreign company which did not have an office in India, was liable for payment of service tax as a recipient of service under Rule 6 of the Service Tax Rules, 1994 as it stood during the material time [prior to 16-8-2002] since it was held by the High Court that the agreement with the foreign company authorised the service receiver to meet the service tax liability, the Supreme Court held that the assessee was also liable to pay interest if there was a delay in payment of service tax by the recipient. [Kerala State Electricity Board vs. CCE (2008) 9 STR 3 (SC)]

PENALTY:

Duty paid before the issuance of show cause notice is a sufficient ground to show that there has been no intention to evade payment of duty and accordingly penalty u/s. 11AC1 was set aside. [CCE vs. S. B. Packaging Ltd. (2008) 9 STR 124 (P & H)]

CENVAT:

Where the assessee, a manufacturer of computers, did not utilise the balance of Cenvat Credit but had to pay excise duty in cash on the instructions of the Department, the Tribunal allowed the cash refund of unutilised credit when his final product became exempted. [Microstar Computers vs. CCE (2008) 9 STR 22 (Tri. - Ahmd.)]

Credit taken on the basis of the photocopy of the invoices is inadmissible. [CCE vs. Vandana Energy & Steel Pvt. Ltd. (2008) 9 STR 31 (Tri. - Del.)]

The assessee is entitled to avail full credit on inputs procured from manufacturers, even though the manufacturer of inputs paid duty @24% instead of 16% and no dispute was initiated by the revenue at the supplier manufacturer's end. [CCE vs. Purity Flexpack Ltd. (2008) 9 STR 125 (Guj.)]

Where the assessee is only receiving taxable services and not providing any output service, service tax paid on the Goods Transport Agency Service received shall be deemed to be output service and accordingly credit of service tax paid on any input service and / or credit of duty paid on any input or capital goods could be validly availed against tax paid / payable on this output service. [Soundararaja Mills Ltd. 'E' Mills vs. CCE (2008) 9 STR 183 (Tri. - Chennai)]

1. Corresponding to S. 78 of the Finance Act, 1994, law governing service tax.

BUSINESS AUXILIARY SERVICES / BUSINESS SUPPORT SERVICES:

Services provided by the appellants to banks for verifying the correctness, fairness and authenticity of information furnished by the borrowers is not a service in relation to promotion or marketing of a service provided by the bank but a service rendered in relation to evaluation of prospective customers liable under 'Business Support Services' and not under 'Business Auxiliary Services'. [S. R. Kalyanakrishnan vs. CCE (2008) 9 STR 255 (Tri. – Bang.)]

CLEARING AND FORWARDING AGENTS:

Services provided by an auctioneer for sale of cardamom by auction is not liable for service tax under the category of "Clearing and Forwarding Agent's" services even though it involves the receiving and storing of goods by the auctioneer. [CCE vs. Cardamom Mkg. Corporation (2008) 9 STR 247 (Tri. – Bang.)]

CONSULTING ENGINEERING SERVICES:

- ❖ The appellant in the course of manufacture of transformers also carried out work in relation to design, drawing, engineering, training, supervision of erection, commissioning, trouble shooting etc. and raised separate invoices for the same. The Tribunal held that the appellants are liable for service tax since there is a clear demarcation of charges for various services rendered and the ratio that a works contract cannot be vivisected to charge service tax as held in M/s. Daelim Industrial Co. Ltd. vs. CCE (2006) 3 STR 124 did not apply to the present case. [Transformers & Electricals Kerala Ltd. vs. CCE (2008) 9 STR 285 (Tri. – Bang.)].
- ❖ Where the contract was one for design, manufacture, supply, erection, testing and commissioning of complete electro-mechanical equipment on turn-key basis and the terms and conditions of payment were as per the progress of work the Tribunal (3rd member) held that the services were not liable under Consulting Engineering Services since a composite contract cannot be vivisected. [Jyoti Limited vs. CCE (2008) 9 STR 373 (Tri. – Ahmd.)].

N.B.: *In this case the learned member (Judicial) had also come to the same conclusion on two other grounds:*

i) That the appellants were engaged in the manufacture of the goods and cannot be said to be covered by expression "professionally qualified engineers", or "engineering firm" engaged in providing or rendering any advice, consultancy or technical assistance.
ii) The jobs were not in the nature of advice, consultancy or technical assistance but was one of manufacture and sale of equipment and not engineering consultancy.

PORT SERVICES :

- ❖ Railway siding charges received by the appellants, a port trust, from the Railways for allowing them to utilise their railway marshalling yard for construction and maintenance of railway sidings are not services in relation to vessels or goods and accordingly not liable for service tax under Port Services. [New Mangalore Port Trust vs. CCE (2008) 9 STR 235 (Tri. – Bang.)].

The appellants, a minor port, provided various port services and registered for service tax with effect from 1.7.2003. It raised separate bills for wharfage, storage, etc. The department contended that the storage charges are liable for service tax under the category of "Storage and Warehousing Services" w.e.f. 16.8.02. Dismissing the contention of the department the Tribunal held that storage charges was not liable for service tax under "storage and warehousing services" but under "port services" since:

i) Storage & Warehousing is not a separate service but were an essential, integral and core part of the port service and were performed for the better enjoyment of the port service;

ii) Port services were subsequently introduced w.e.f. 1.7.03 without making a change in the definition of Storage and Warehousing service thus indicating that the two services were distinct and separate services.

[Gujarat Chemical Port Terminal Company Ltd. v. CCE (2008) 9 STR 386 (Tri. – Ahmd.)].

TECHNICAL TESTING AND ANALYSIS:

Where the appellant, a blood collection centre, drew / collected samples of blood and forwarded the sample after certain processing (e.g. serum separation) to test laboratories who do the testing, relying upon CCE vs. Dr. Lal Path Lab P. Ltd. (2007) 8 STR 337 (P&H), the High Court held that the said service was in the nature of "technical testing and analysis" but being in relation to human beings was specifically excluded from that category and were not liable under the category of 'business auxiliary services'. [CCE vs. Patient Service Centre (2008) 9 STR 229 (P&H)]

VALUATION:

Where the appellant, a dealer of motor cars, provided free after sales service to the customers to whom cars were sold by them without being reimbursed by the manufacturer for the cost of free service, the Tribunal held that the dominant intention of the appellant was to sell the cars and not to provide free service, which was merely incidental and intended to promote the sale of cars and hence the entire amount including the dealers' margin was rightly charged to sales tax and no service tax can be levied on the amount representing dealers' margin or any part of it.
[ASL Motors Pvt. Ltd. vs. CCE&ST (2008) 9 STR 356 (Tri. – Kol.)]

DEMAND:

When all the relevant facts against the appellant were in the knowledge of the authorities at the time of the issuance of the first SCN, then the same/similar facts could not be taken as suppression of facts on the part of the assessee while issuing subsequent SCN for making the demand for the extended period. [Nizam Sugar Factory vs. CCE (2008) 9 STR 314 (SC)]

REFUND:

The appellants collected certain amounts from the customers from April, 2000 to January, 2005 and paid service tax under the category of Real Estate Agent's services, filed returns and accepted assessments for the said period. However, when the services of Management, Maintenance and Repair of immovable property was notified w.e.f. 16.6.2005, the assessee claimed refund for the said period arguing that the tax paid was not "tax" but "money simplicitor" and must be refunded unaffected by the provisions of Section 11B. The authorities refunded the amount paid for the period March, 2004 – January, 2005 (which was within 1 year limitation period provided u/s. 11B) but rejected the refund claim for the previous period. On appeal, the Tribunal, on facts, dismissed the appeal of the assessee and held that the amount paid was "tax" and not "money simplicitor" especially considering that the assessee had paid tax, filed returns and also accepted the refund for 2004-05 for which he submitted a CA certificate that the tax was not collected from the customers. Accordingly, the provisions of S. 11B were held to be applicable and the amount for the period April 2000 – March 2004 was held time barred.
[Campus Service (India) Pvt. Ltd. vs. CCE (2008) 9 STR 259 (Tri. – Chennai)].

CENVAT CREDIT:

Goods Transport Agency service received for clearance of product from factory is deemed "output service" as per the Explanation to section 2(p) of the Cenvat Credit Rules (as it stood at the relevant time) and accordingly Cenvat credit can be validly utilised for discharging service tax on such goods transport agency services. [CCE vs. Nahar Exports Ltd. (2008) 9 STR 252 (Tri. – Del); CCE vs. Flowserve Microfinish Pumps Pvt. Ltd. (2008) 9 STR 278 (Tri. – Del.)]

SERVICE TAX – VAT:

The appellant an advertising agency while providing advertising services also created original concept, designed advertising material, brochures, annual report etc. and raised an invoice on the customers giving break up of service element and material. The appellant paid sales tax on value of materials and service tax on design and work charges. The sales tax department took a view that sales tax is payable on the entire amount charged from the customer including the amount of design and concept charges since the same went into the creation of the product which was ultimately sold. The Supreme Court held that the contract was a composite contract [as distinguished from an indivisible contract] for services and sale and accordingly sales tax would not be payable on the value of entire contract but only on the material component. [Imagic Creative Pvt. Ltd. vs. CCT (2008) 9 STR 337 (SC)]

ADDENDUM TO THE BUDGET PUBLICATION 2008-09 – CA A. R. KRISHNAN

As new services are introduced and existing services are expanded, for some it is good news since they will be able to avail cenvat credit and for others it is an add on cost. But for us (CA's) it is always good news with more work. This sentiment I express in my

“Ode to The Finance Bill” as under–

Every year the Finance Bill, Is a regular Drill,

Supposed to be a Pill, For all economic ills,

The suspense of the Bill, Brings an aura of Thrill,

Once introduced, this Bill, Give us some Fill, Some Chill,

To some, it brings Goodwill, To some, life goes downhill,

For us these Bills, Ensure that our Skills,

Are always going Uphill, It brings us a lot of Goodwill,

Thus, we wait, Till the next Bill !

APRIL 2008

Sovereign activity not subject to service tax:

Sovereign activities of inspection and certification of electrical installations done by Electrical Inspectorate, Government of Karnataka, a State Government Department, in terms of the Electricity Act is not subject to service tax being a statutory function. [Electrical Inspectorate, Government of Karnataka v. CST (2008) 9 SR 494 (Tri-bang.)].

Sub-Contracting of services:

Where the appellants, engaged in the business of providing photography services, were sub-contracted work by various other photo studios, the Tribunal basing its decision on various circulars and also on the principle that Revenue cannot demand service tax on the same service more than once held that the sub-contractor is not liable to pay service tax if the tax liability has been discharged by the main contractor. Further, it was also held that the onus of verifying whether the payment of service tax was made by the main contractor lies on the department and not on the assessee. [Foto Flash vs. CST (2008) 9 STR 462 (Tri- Bang); See also Evergreen Suppliers vs. CCE (2008) 9 STR 467 (Tri-Bang).]

Cargo Handling Services:

Where as per the terms of contract the contractors were to make arrangement for the transportation of goods which incidentally included loading and unloading of goods it was held that the activity of loading and unloading would not be liable as cargo handling services. [Dalveer Singh vs. CCE (2008) 9 STR 491 (Tri-Del)].

Supply of labours who are under the supervision and control of the service recipient would not be considered as cargo handling services. [CCE vs. Pawan Associates (2008) 9 STR 458(Tri-Bang)]

Mechanical transfer of coal from coal face to tippers and subsequent transportation of coal within the mining area would not constitute as cargo handling services since :

i) the dominant activity undertaken was movement of coal within the mining area, and loading and unloading was incidental;

ii) 'Cargo' in common parlance means something which is carried as freight in a ship, plane, rail or truck while in the present case the coal was merely moved within the mining area. [Sainik Mining & Allied Services Ltd. vs. CCEC & S (2008) 9 STR 531 (Tri-Kolkata)]

On facts the Tribunal held that the respondent's activity comprising of excavation, transportation and filling of iron ores to the crusher plant are primarily in the nature of mining activities and not 'cargo' handling services since:-

a) "Cargo" is commercially known to be something which is carried as freight in a ship, air plane, rail or truck for freight while in the present case what is carried cannot commercially be called 'cargo'; and

b) The incidental activities of loading and unloading cannot give the contracted activities (mining of ores) the character of cargo handling services. [CCE & C vs. B.K.Thakkar (2008) 9 STR 542 (Tri-Kolkata).]

Consulting engineering services:

Where the appellants manufactured gas/air separation plants for various chemical industries on a turnkey basis and in order to supply the plant they undertook detail designing, drawing and engineering, etc. the Tribunal relying on Daelim industrial Co. Ltd. vs. CCE (2003) 155 ELT 457 (Tri- Del) held that the designs and drawings carried out are essentially for the manufacture of plant and hence these services are not directly rendered to the clients but to themselves in order to carry out the works contract and accordingly not liable for service tax under consulting engineering services. Further the Tribunal also held that since works contract came into the service tax not only in 2007 it was was not liable for service tax under the category of consulting engineering services prior to that. [Air Liquid Engg. India Pvt.Ltd. vs. CCE (2008) 9 STR 486 (Tri-Bang)].

Pre-design drawing done by an electrical contractor for the purpose of erection of a transformer is not liable for service tax under the category of consulting engineering services since the services are provided by an electrical contractor and not a qualified engineer and moreover no engineering consultancy is provided. Further, the services of erection is also liable only from 10.9.2004 and erection done prior to 10.9.2004 (on 17.1.2004) is not liable for service under "commissioning and installation". Lastly, electrical wiring, and installation of bulbs, etc. are liable under the category of "erection commissioning and installation" only after the enactment of the Finance Act, 2005 which enlarged the definition of taxable service and not prior to that. [Power Best Electricals Ltd. vs. CCE (2008) 9 STR 497 (Tri Bang)]

Goods Transport Agency Services Cenvat credit and abatement
In this case the Tribunal clarified a number of issues with regard to goods transport agencies and held as follows :

a) service tax paid on goods transport agency ("GTA") services by the consignor or the consignee liable to pay the freight in terms of section 68(2) does not make them a service provider
b) in respect of GTA services availed for inward transportation of inputs or capital goods for which service tax is paid by the assessee as consignees (since they paid the freight to the GTA), they continue to be service recipients and therefore, such services are input services for them entitled for credit. Further, in respect of such consignments, the assessees as consignees would still be entitled to credit even if the service tax is paid by the consignors as payer of freight.
c) the service tax paid on GTA services for outgoing consignments of finished goods by consignors (since they paid the freight to the GTA) shall not be eligible as credit to them.
d) while paying service tax on GTA services availed in connection with removal of finished goods from factory, the person liable to pay service tax is entitled to utilize, for payment of service tax on such GTA service, the credit of tax paid on the GTA service availed by them in connection with receipt of inputs in their factory [M/s. India Cements Ltd. v. CCE (2007) 7 STR 569 (T) relied. See also Pallipalayam Spinners P. Ltd. v. CCE (2008) 9 STR 544 (Tri-Che.)]
e) notwithstanding taking of credit of service tax paid under GTA services in respect of incoming consignments, the respondents are eligible to avail the benefit of notification No. 32/2004-ST, dated 3-12-2004 (75% abatement). [See also CCE v. Sunhill Ceramics P. Ltd. (2008) 9 STR 530 (Tri-Ahmd.)].

LEASED CIRCUIT SERVICES:

The Interconnection Usage charges collected by each telecom authority for the calls terminating to the subscribers under them emanating from other telecom authorities cannot be treated for use of "leased circuit" and accordingly not liable for service tax under the category of leased circuit services. [BSNL v. CST (2008) 9 STR 499 (Tri-Bang.)]

WORKS CONTRACT:

i) Where the appellants were engaged in supply, installation and commissioning of ATMs for banks on a turnkey basis, the Tribunal held on facts that the activity of appellants were not liable for service tax under the category of "commissioning and installation agency services" since :-

ii) the services are in the nature of an indivisible works contract which were exigible to service tax only w.e.f. 1.6.2007 and prior to that date such indivisible contracts could not be vivisected for the purpose of levy of service tax on the service component alone;

iii) the services are in the nature of an indivisible works contract which were exigible to service tax only w.e.f. 1.6.2007 and prior to that date such indivisible contracts could not be vivisected for the purpose of levy of service tax on the service component alone;

iv) in any case, such contracts are not liable for service tax under Commissioning and installation services since ATM services became taxable only from 1.5.06 and not prior to that date. In other words, in the ever-widening sphere of service tax, addition of an item to the list of taxable services is just an addition, and not a subtraction from a pre-existing entry.

v) the fact that the services of "Commissioning and installation" of 'equipments' was entitled to 67% abatement and ATMs were 'equipments' does not ipso facto mean that supply, commissioning and installation of ATMs on a turnkey basis is exigible to service tax since charging provisions are to be found in the statute itself and where there is none it cannot be supplemented by notifications. Notifications can have no operation as long a service does not find place in the list of taxable services.

Valuation:

Where the appellants who were engaged to market the personal loan products of the banks besides raising invoices for "service charges" also received the reimbursement of the salaries paid to the personnel deputed and also infrastructural expenses such as rent, telephone charges, electricity etc. the Tribunal held that the reimbursements received cannot be said to be amounts "charged" by the service provider and hence is not includible in the taxable value for the purpose of payment of service tax. [Malabar Management Services P. Ltd. vs. CST (2008) 9 STR 483 (Tri-Che.); See also Keralam Enterprises vs. CCE (2008) 9 STR 503 (Tri-Bang.) in the context of reimbursement for a clearing and forwarding agent]

LIMITATION:

Where service tax is not paid as a result of confusion prevailing in the field as regards the liability of service tax it was held that the benefit of doubt is to be extended to the assessee and the extended period of limitation is not invokable. [Dalveer Singh vs. CCE (2008) 9 STR 491 (Tri-Del)].

REFUND:

Recovery of demands by adjustment against refunds due to the assessee u/s. 11 of Central Excise Act is not permissible if the demands are not final but pending appeal before higher judicial fora. Hence it was held that the assessee was entitled to the interest in the refunds so adjusted. [Voltas Ltd. vs. CCE (2008) 9 STR 591 (Tri-Bang)].

APPEALS :

a) The miscellaneous application signed by a person having a vakalatnama is not valid. It has to be signed by the appellant. [SBEC Sugar Ltd. Vs. CCE (2008) 9 STR 573 (Tri-Del)]

b) Appeal to Commissioner (Appeals) – additional grounds can be added by filing an addendum before the hearing [CCE vs. Tata SSL Ltd. (2008) 9 STR 579 (Tri-Mumbai)].

CENVAT :

- Where the appellant's factory for manufacture of cements was located at remote places without any facilities for accommodation and stay of their employees, and the appellants had constructed residential colonies for its employees so that their employees are available to them on the spot in order to maintain continuity of manufacture it was held that management, maintenance or repair services used by the appellants in the residential colonies are "input services" being relatable to business of the assessee and service tax paid on such maintenance and repair services is entitled to input credit. [Manikgarh Cement vs. CCE&C (2008) 9 STR 554 (Tri-Mumbai)].

Where the appellants had reversed the credit availed on inputs on a mere letter of superintendent of central excise when there was no show-cause notice and an adjudication to that effect they cannot suo-motu re-credit the amount of input credit without the permission of the Assistant Commissioner. [Oudh Sugar Mills Ltd. vs. CCE (2008) 9 STR 577 (Tri-Del)].

May 2008

ADVERTISING AGENCY SERVICES:

Where the appellants were only undertaking the activities of painting on the walls and the shutters as per the photograph of the advertisement provided to them by the advertiser the Tribunal held that the services rendered cannot be in the nature of advertising agency services since it was a mere painting job by the appellants and the services of designing, conceptualizing, visualizing etc normally provided by advertising agencies were not rendered. [Dhanshree Publicity vs. CCE (2008) 10 STR 209 (Tri-Del.)]

BANKING AND OTHER FINANCIAL SERVICES:

Where the hirer earmarks a portion of the cost of vehicle and the balance amount being is financed by the appellants and the vehicle is registered in the name of hirer then the transaction would be covered under "Hire purchase finance" services and accordingly not liable for service tax. On the other hand where the ownership of vehicle lies with the financier then the same would fall under the "hire purchase" services and accordingly be liable to service tax. [Kausalva Finance Ltd. vs. CCE&S (2008) 10 STR 150 (Tri-Bang)]

BUSINESS AUXILIARY SERVICE:

- The activities of verifying the credentials of applicants and processing their applications for grant of loans or for issuance of credit cards would be liable for service tax under the category of Business Auxiliary service and not under Franchise Service. [CCE vs. Oritrade Pvt. Ltd. (2008) 10 STR 215 (Tri-Kolkata)]
- Where the appellants who were engaged in providing the services of registrar and share transfer agent, they were held not to be falling under the category of Business Auxiliary services for the period prior to 1.5.06 when share transfer agent was brought within the service tax net since prior to 1.05.06 it was not covered under any other category of services. [Karvy Consultants Ltd. vs. CCE (2008) 10 STR 166 (Tri-Bang.)]

CARGO HANDLING SERVICE:

Where the appellants were engaged in mere supply of manpower and their activities were ancillary in the entire activity of packing, loading and unloading of cement bags from machines without having any control over the loading machines it was held that the services would not fall under the category of cargo handling services but under the Manpower Recruitment Agency service. [C. Krishnakumar vs. CCE&S (2008) 10 STR 162 (Tri-Bang.)]

CLEARING AND FORWARDING SERVICE:

On facts it was held that the activity of mere procurement of orders without attaching any liability on the appellant in respect of the goods would not get covered under the service of Clearing and Forwarding Agent service. [Patwari Forgings Pvt. Ltd. vs. CCE (2008) 10 STR 52 (Tri-Kolkata)]

COMMERCIAL TRAINING OR COACHING SERVICE:

Where the appellants were conducting diploma or post graduation course in management but were a non-profit organisation under the Companies Act and a Public Charitable trust under the Income tax Act, 1962 and there were also restrictions on distribution of profits or dividends to their members, the Tribunal held that no service tax would be leviable under the category of commercial training or coaching service since the appellants were not providing "commercial" training with a sole object of making profit. [Great Lakes Institute of management Ltd. vs. CST (2008) 10 STR 202(Tri-Chennai)]

Consulting Engineering Service :

- Where the contract was for operating and maintaining a power plant it was held by the Tribunal that they were not rendering any service in the nature of consulting engineering service to any person,the engineering service if any was for themselves [Rolls Royce (2006) 3 STR 292 referred], and further, that the contract cannot be vivisected to levy service tax on a portion of the contract. [GVK Power & Infrastructure Ltd. vs. CCE (2008) 10 STR 146 (Tri-Bang.)]
- Construction of commercial and residential buildings on a turnkey basis was held to be services falling under the category of works contract services liable from 1-6-07 and not under the category of consulting engineering service. Further the stray payments made by the appellants under the category of consulting engineers service would not make the service taxable under that category. [Malar Constructions vs. CCE (2008) 10 STR 156 (Tri-Chennai): See also BHEL v. CCE (2008) 10 STR 218 (Tri-Kol.)]

VALUATION:

- Where as per the terms of agreement the appellants were in receipt of reimbursement of various expenses (viz. rent, loading -unloading charges, Freight, Courier, stationery etc.) from their principal besides the amount of service charges, the Tribunal held that service tax cannot be levied on the reimbursements since the same is not received for rendering services. [Apco Agencies vs. CCE (2008) 10 STR 169 (Tri-Bang.); See also S & K Enterprises vs. CCE (Appeals) (2008 10 STR 171 (Tri-Bang.)]
- Deduction of the value of materials/ consumables used in rendering the services of photography is allowable vide notification no. 12/2003-ST dated 20-06-03. (CCE vs. Crystal Colour Lab (2008) 10 STR 26 (Tri-Bang.); See also Digi Studio vs. CCE (2008) 10 STR 31 (Tri-Bang.)] No requirement of mentioning value of materials in invoice [Jyoti Art Studio vs. CCE (2008) 10 STR 158 (Tri. - Bang)]
- Service tax is not leviable for the free service rendered by the authorised agency in respect of the cars sold by them. [AVG Motors Ltd. vs. CCE 2008 (10) STR 20 (Tri. - Bang.)].

DEMAND :

- Where the appellants had filed the memorandum and articles with the department at the time of registration specifying the activities carried out by company it was held that there was no suppression of facts and the extended period of limitation was cannot be invoked. [Karvy Consultants Ltd. vs. CCE (2008) 10 STR 166 (Tri-Bang.)]
- Demand of excise duty on receipts which are subject matter of another show cause notice allegedly due to rendering of services as Consulting Engineer in another proceedings is not sustainable. [Unitherm Engineers Ltd. vs. CCE (2008) 10 STR 15 (Tri. - Bang)]

REFUND :

- Where the appellants had wrongly paid the service tax under the category of consulting engineer services but were liable to pay service tax from 1-7-03 under the category of erection commissioning and installation, the Tribunal upheld the refund claim of assessee. [Caryaire Equipments India P. Ltd. vs. CCE (2008) 10 STR 121 (Tri-Del.)]
- Where the order of the Tribunal granting refund to the appellants was pending adjudication before the Supreme Court and show cause notice was issued to nullify the order and to withhold the amount of refund the Tribunal observed that in the absence of any interim order by Supreme Court the department was bound to implement the orders of the Tribunal. [CCE vs. Diamond Cement (2008) 10 STR 183 (Tri-Del.)]
- Where on the facts the amount of service tax paid by the assessee could not be recovered from the customers and a claim for refund of the amount paid in excess was made it was held that the principal of unjust enrichment would not be apply to such refund since it is just money which the assessee is entitled as the same was paid by assessee in excess. [CST vs. Standard Chartered Bank (2008) 10 STR 6 (Kar)]

PENALTY :

- Where the department tried to challenge the powers of the adjudicating authority to reduce the penalties imposed by the original authority it was held that penal provisions confer an inbuilt discretion on the authorities to reduce the penalty. Moreover, section 80 of the Finance Act '94 also empowers the authorities to waive the imposition of penalties under sections 75, 76, 77 and 78 of the Act. [CCE vs. Nesamony Tours & Auto Consultant Travels (2008) 10 STR 42 (Tri-Chennai)].
- Where the appellants had collected the service tax without obtaining the registration and also did not remit the tax so collected to the Exchequer the Tribunal held that tax so collected alongwith penalties and interest was payable even if the service tax was not payable on the transaction. [Febin Advertisers vs. CCE (2008) 10 STR 50(Tri-Bang)]
- Where the assessee was not familiar with the formalities related to the new levy of service tax and the Commissioner (Appeals) considering their case leniently quashed the penalties levied, it was held that section 80 of the Finance Act empower the proper officer to condone the levy of penalty if there was a reasonable cause for the failure. [CCE vs. Military Ex-Servicemen Services (2008) 10 STR 135 (Tri-Chennai)]
- Where there was a dispute as regard the nature of service and interpretation of the scope of the service it was held that levy of penalty could be waived under s. 80 of the Finance Act. [National Mining Co. Ltd vs. CCE (2008) 10 STR 136 (Tri-Kolkata)]
- With respect to quantum of penalty for delay in payment of taxes u/s. 76 the adjudicating authorities can, in exercise of the discretion u/s. 80, impose a penalty lesser than that prescribed u/s. 76. [CCE v. Mukul S. Patil (2008) 10 STR 115 (Bom.); See also CCE v. Vinay Bele & Associates (2008) 9 STR 350 (Bom.) and M.R. Bhagat & Associates v. CCE (2008) 10STR130(Tri-Mum.)].

EXPORT OF SERVICES:

Where the appellants being a courier agency had rendered international courier services during the period 15.03.2005 to 16.06.2005 it was held by the Tribunal that as part of services were performed within India and the rest outside India, the courier services would be considered as exported and hence no service tax is payable even if the consideration for the services was not received in foreign exchange. The requirement that the services must be delivered and used outside India and the amount of consideration must be received in convertible foreign exchange would not apply for period prior to 16.06.2005. [Professional Couriers vs. CST (2008) 10 STR 125 (Tri-Chennai)]

CENVAT CREDIT :

- Service tax on Goods Transport Agency services payable as a recipient of services can be paid by utilisation of Cenvat credit. [Bhushan Power & Steel Ltd. vs. CCE (2008) 10 STR 18 (Tri-Kolkata); Also See CCE vs. Flowserve Microfinish Valves Pvt. Ltd. (2008) 10 STR 21; Nagammai Cotton Mills (P) Ltd. vs. CCE (2008) 10 STR 77 (Tri-Chennai) (Tri-Bang)] (These cases pertain to period prior to 19.4.2006)
- Where the decision of the Tribunal, ordering refund of unutilized Cenvat credit to the assessee who had surrendered its registration due to the closure of the company was challenged, the High Court held that claim for refund cannot be rejected relying on r. 5 of Cenvat Credit Rules, 2002 when the assesee company has been closed and the assesee has opted out of the Modvat scheme. [Union of India vs. Slovak India Trading Co. Pvt. Ltd. (2008) 10 STR 101 (Kar.)]
- Where the capital goods were installed in the factory premises and were in a position to be used at any time, Cenvat credit on the capital goods cannot be denied for the mere reason that the said capital goods could not be made functional. [CCE vs. Seat Metal Components India (P.)Ltd. (2008) 10 STR 108 (Tri-Bang)]
- In this case the appellants were manufacturing yarn both cotton and polyester and were utilizing the Cenvat credit without fragmenting the amount of credit between the products. On appeal the Tribunal held that Cenvat credit is indefeasible account and henceallocation of credit on the basis of raw material or product is not permitted. [Vardhman Spg. & Gen Mills Unit -I vs. CCE (2008) 10 STR 109(Tri-Del)]
- Where the appellant had availed cenvat credit on Goods Transport Agency services for inward transportation of inputs but thereafter retuned some of the inputs received by it, since they were substandard, the Tribunal held that the credit of service tax and education cess availed on the Goods Transport Agency services utilised for inward transportation need not be reversed proportionately when some of the inputs were subsequently returned. [Chitrakoot Steel & Power Pvt. Ltd. vs. CCE (2008) 10 STR 118 (Tri-Chennai)].
- A certificate from the service provider that the services have been rendered to the service recipient can be accepted as a valid document for availing Cenvat credit where the bills did not specify the name and the address of the service recipient. [CCE vs. Diamond Cements (2008) 10STR160(Tri-Del.)]

RECTIFICATION OF MISTAKE:

An order of the Tribunal concluded contrary to a decision of a superior court (High Court or Supreme Court) rendered "subsequent" to the order of the Tribunal would be amenable to rectification as involving an error apparent from records even though the Tribunal had decided the order "prior to" the judgement of the superior court since the subsequent decision does not "enact" the law but "declares" the law as it always was [Hindustan Lever Ltd. vs. CCE (2008) 10 STR 91 (Tri. -IB)].

SERVICE OF ORDER/DECISION /SUMMON/ NOTICE:

Pursuant to s. 37C of the Central Excise Act, 1944 an order / decision / summon/ notice, etc. maybe served on an assessee - (i) by physical delivery ; or (ii) by registered post; or (iii) on failure of the first two modes by affixing it on the assessee's premises; or (iv) on failure of all the aforesaid modes by affixing the copy of order on the notice board of the concerned officer. With regard to mode (ii) the Tribunal held "dispatch of adjudication order by speed post/registered post would not amount to a valid service in the absence of proof of actual delivery of speed post". The Tribunal also held that there cannot be a service by registered post and simultaneously affixing the order on the notice board and the affixing of the order has to be considered after failure of the first two modes. [Margra Industries Ltd. vs. CC (2008) 10 STR 81 (Tri-LB)]

June 2008

SOVEREIGN ACTIVITY NOT A SERVICE:

The activity of preparing electoral identity cards for The Election Commission of India is a sovereign duty under the Constitution of India and accordingly not a "service" liable for Service Tax. [CCCE v. C. S. Software Enterprises Ltd. (2008) 10 STR 367 (Tri. – Bang.) relying on CCE vs. Ankit Consultancy Ltd. (2007) 6 STR 101 (Tri. – Del.) and CCCE vs. CMC Ltd. (2007) 7 STR 702 (Tri. – Bang.)]

SITUS OF TAXATION:

Business Auxiliary services provided abroad prior to 18.4.06 not liable for service tax. [Prabhat Tyagi vs. CCE(Appeals) (2008) 10 STR 240 (Tri-Bang)]

RATE OF TAX APPLICABLE AS ON DATE OF RENDERING SERVICES:

The rate of tax applicable is the rate prevailing on the date of rendering of services and not the rate prevailing on the date of billing. [Reliance Industries Ltd. vs. CCE (2008) 10 STR 243 (Tri-Ahmd.)]

ADVERTISING AGENCY:

The appellants, an advertising agency, provided services of booking slots in print and electronic media for various advertisers for a commission. The media billed the appellants Rs. 100/- less @ 15% discount i.e. Rs. 85/- plus 10.2% service tax and the appellants in turn charged the same Rs. 85/- + 10.2% service tax to the advertisers, recovered the amount from them and paid it over to the media who paid the service tax of 10.2% on Rs. 85/- to the Exchequer. The appellants paid service tax on the commission it received from the advertisers. The department sought to levy tax on the discount of 15% received from the media. The Tribunal disagreed and held that the discounts given by media is not an amount "received" by the advertising agency. It is only a "discount". Further, the media is not the client of the advertising agency. Hence the discount is not taxable. [Mccann Erickson (India) Pvt. Ltd. v. CST (2008) 10 STR 365 (Tri. – Del.) relying on the decision in Euro RSCG Advertising Ltd. v. CCE (2007) 7 STR 277 (Tri.-Bang.)]

CLEARING AND FORWARDING AGENTS:

Commission received on account of del credre agency not liable for service tax under the category of clearing and forwarding services. [CCE vs. United Plastomers (2008) 10 STR 229 (P&H)]

INTEREST:

Where on the facts the payment of service tax was stayed by the High Court it was held that no interest was payable by the assessee for the period stayed by the High Court. [CCE vs. R.K.Swamy B.B.D.O. (2008) 10 STR 252 (Tri-Mumbai)]

IMPORT OF SERVICES :

- Where on the facts the appellants were in receipt of patented intellectual property services from abroad before the same were brought under the service tax net and the department had demanded service tax from both the appellants and the Foreign Service provider the Tribunal held that service tax can be demanded only from the person who is liable to discharge the same. Since the appellants were neither agents of, nor did they represent, the Foreign Service provider service tax cannot be demanded from them. [Sundaram Textiles Ltd. vs. CCE (2008) 10 STR 260 (Tri-Chennai)]
- The High Court confirmed the order of the Tribunal holding that the effective date of reverse charge under rule 2(1)(d)(iv) of the Service Tax Rules, 1994 (i.e. in respect of services provided by non-residents or persons from outside India not having an office in India) is 1.1.05. [UoI vs. Aditya Cement (2008) 10 STR 228 (Raj.)]

REFUND :

- The assesses were issued SCN dated 28.06.02 demanding tax on Goods Transport operator services availed by them. The assesee informed the Asst. CCE on 15.7.02 that they were not liable in view of the "exemption for SSIs" vide Notification no. 43/97 dated 5.11.97. Following the retrospective amendment to the above notification on 14.05.03 to exclude a "person registered for sales tax and whose turnover exceeded Rs. 50 lakhs in the preceding financial year" from the exemption, the Dy. CCE on 5.11.03 asked the assesses to pay up, which the assessees duly did on 12.11.03. The Asst. CCE dropped the SCN proceedings and granted refund in terms of "exemption for SSIs". The assesee claimed refund on 18.08.06. The CCE sought to revise the order of Asst. CCE rejecting the claim as time barred. On appeal, the Tribunal held that the amount paid on 12.11.03 at the instance of Dy. CCE's letter dated 5.11.03 must be considered as paid under protest since they had already claimed "exemption for SSIs" in the SCN proceedings and hence the time bar would not apply. In any event, the amounts collected by the revenue were not to be considered as "tax" since the same were collected without any authority of law. [Wardex Pharmaceuticals Pvt. Ltd. vs. CCE (2008) 10 STR 245 (Tri-Chennai)]
- Payment of tax into a jurisdiction (Jaipur - II) other than the jurisdiction of the adjudicating authority (Jaipur – I) is no ground for denying the refund when the assesee was otherwise entitled to the same. [Devasthan Vibhag v. CCE (2008) 10 STR 415 (Tri. – Del.)].

SHOW CAUSE NOTICE:

Where the SCN issued to the appellants does not give the basis of the calculation of demand nor specifically invoked the extended period of limitation in the SCN, it was held that the proceeding flowing from such a defective SCN was neither legal nor proper. [TIL Ltd. CST (2008) 10 STR 405 (Tri. – Kolkata)].

CENVAT CREDIT:

Allowing the credit of service tax paid on outdoor catering for providing canteen facilities to employees in factory premises the Tribunal held as follows:

i) The meaning assigned to "input service" is divided in two parts. The first part giving the specific meaning and the second part gives the inclusive meaning of the same. In the second part, an inclusive meaning is given to "input service", which otherwise would not have been covered in the main first part.

ii) The expression "such as" contained in the phrase "activities 'relating to' the business such as accounting, auditing, financing," means that the stipulated activities that follow the said expression in the definition are only illustrations and not limitations.

iii) The expression "relating to" occurring in the above phrase is to be given a wide construction.

iv) Canteen facility although not specifically stated in the list of activities in the definition of "input service" is an "activity relating to the business" of the appellants.

v) Canteen facility is beneficial for the workers as they are served food at concessional rates and it is they who are engaged in the business of the appellants which is nothing but manufacture of goods. Hence the manufacturer can be said to be using the canteen facility indirectly for manufacture of goods.

vi) The following facts fortify that canteen expenditure is an 'activity relating to business'. (a) maintenance of a canteen is a statutory requirement u/s. 46 of the Factories Act, 1948; (b) the appellants have paid fringe benefit tax [which is a tax on business expenditure] on canteen related expenses under the Income Tax Act; (c) credit of service tax paid on repairs and maintenance of residential colonies provided to employees is allowed. [Manikgarh Cement

v. CCE (2008) 9 STR 554 (T)]; (d) credit on mobile phones are allowed [CBEC Circular No. 97 dated 23.8.2007]; (e) expenditure on restoration of buildings and residential quarters as well as expenditure on maintenance of transit quarters for accommodating outstation employees have been held to be business expenditure under the Income-tax Act, 1961.

[Victor Gaskets India Ltd. v. CCE (2008) 10 STR 369 (Tri. – Mumbai)].

July 2008

ADVERTISING AGENCY SERVICES:

Amounts received by the assessee, an advertising agency (for the year 2000-01), from other advertising agencies as a sub-contractor was held not liable for service tax so long as the main ad-agency had already discharged service tax. [Synergy Audio Visual Workshop P. Ltd. vs. CST (2008) 10 STR 578 (Tri. – Bang.)].Where the appellants did not design, visualise or conceptualise any advertisement to be displayed/exhibited on the banners, traffic sign board, traffic barricade or hoarding which they erected, they cannot be said to have made or prepared any advertisement so as fall within the scope of advertising agency service. [Market Chase Advertising vs. CCE (2008) 10 STR 598 (Tri. – Chennai)]

BANKING AND OTHER FINANCIAL SERVICES:

The Supreme Court has affirmed the decision of Tribunal upholding that only "hire purchase" and not "hire purchase finance" is covered under the category of "Banking or other financial services". In this case the appellants entered into an agreement whereby its customer identifies the vehicle that he wishes to purchase from the manufacturer/dealer thereof, makes a part payment to the seller of the vehicle, applies to the appellants for financing the balance, and once the financing is sanctioned, the customer enters into an agreement with the appellants and provides as security, right of repossession of the vehicle to the appellants in the event of his (customer's) default in payment of instalments to the appellants. The customer becomes the owner of the vehicle - the title to the vehicle vests with him who is a purchaser and it is in his name that the vehicle stands registered and insured and the appellants are the nominees. The Tribunal held that such an agreement is a 'hire purchase finance agreement' which is different from 'hire purchase agreement' where the title to the goods remains with the finance company which bails the goods to the hirer in return for periodical payments and the title to the goods is transferred to the customer/hirer only if he exercises the option to purchase the same on full payment to the finance company. Having noted the distinction the Tribunal observed that only "hire purchase" and not "hire purchase finance" is covered under the category of "Banking or other financial services". [CCE vs. Bajaj Auto Finance Ltd. (2008) 10 STR 433 (SC)].

CARGO HANDLING SERVICE:

Where the assessee had undertaken a series of activities from mining to the delivery of limestone to designated places, the Tribunal rejected the Department's contention that the amount attributable to loading charges should be treated as liable under cargo handling services since

1. the activity of loading is incidental to mining and transportation; and

2. the same is rendered to the assessee himself in completing the entire work assigned to it by the contract

[CCE vs. Giriraj Brothers (2008) 10 STR 549 (Tri. – Del.); CCE vs. Laxmi Trading Co. (2008) 10 STR 620 (Tri. – Del.)].

CLEARING AND FORWARDING AGENT:

Where on facts the appellants were involved in selling goods on behalf or their principal for a commission the Tribunal held that the said activity would not come within the purview of Clearing and forwarding services as they were not involved in handling of the goods on behalf of their principal. [Style Cell vs. CCE(A) (2008) 10 STR 456 (Tri-Bang.)]

CONSULTING ENGINEERING SERVICES:

Where on facts the appellants who were designing and manufacturing fire fighting equipments, inter alia also undertook erection and installation the said equipments, the Tribunal held that the said services would not be covered under Consulting Engineering services. [CCE vs. Agnice Fire Protection (P) Ltd. (2008) 10 STR 447 (Tri-Chennai)]

Royalty paid for transfer of technical know-how was held to be in the nature of intellectual property rights services and not be liable tax under the category of consulting engineering services. [Nypro Forbes Products Ltd. vs. CST (2008) 10 STR 595 (Tri-Chennai)]

ERECTION, COMMISSIONING AND INSTALLATION:

Electrical work like laying of pipe for crossing of wires, fixing junction boxes etc., digging earth pits for laying cables etc. would be covered under the category of Erection commissioning and installation only w.e.f. 16.6.2005 since it is only w.e.f. 16.6.2005 that installation of electrical devices including wiring or fittings, therefore, was included in the definition of erection, commissioning or installation. Hence services rendered prior to the said period were not liable. [Rajeeve Electrical Works vs. CCE (2008) 10 STR 494 (Tri-Del.)].

Installation and commissioning of fire safety and protection systems would be liable for service tax only w.e.f 16.6.2005 and not prior to that date since fire proofing service has been specifically included under the category of 'Erection, Commissioning or Installation Services' only w.e.f. 16.6.2005. The Tribunal also held that post 16.6.2005, the assessee is entitled to avail benefit of Notification no. 12/2003-ST and deduct the cost of goods sold during the course of providing the service and also avail input credit on input services. [Firepro Systems Private Ltd. vs. CST (2008) 10 STR 606 (Tri. – Bang.)].

VALUATION:

Where service tax has not been charged and collected separately by the service provider the amounts collected towards the provision of services should be considered as inclusive of service tax. [CCE vs. Advantage Media Consultant (2008) 10 STR 449 (Tri-Kolkata)]
Out of Pocket expenses reimbursable on actual basis are not includable in the value for the purpose of service tax. [Aurobindo Pharma Ltd. vs CCEC (2008) 10 STR 611 (Tri. – Bang.); Al-Baith Steel (P) Ltd. vs. CCE (2008) 10 STR 554 (Tri. – Bang.)].

DEMAND:

On facts the Tribunal held that where the ground of limitation was not raised in the show cause notice by the lower authorities, they cannot reject the refund claim filed by the appellants on the grounds of time-bar. [Britannia Industries Ltd. vs. CCE (2008) 10 STR 528 (Tri-Kolkata)]

Service tax cannot be confirmed on the basis of amounts shown as receivables in the Income Tax Returns and Balance Sheet. [Synergy Audio Visual Workshop P. Ltd. vs. CST (2008) 10 STR 578 (Tri. – Bang.)].

The demands confirmed on services which are not invoked in the show cause notice, is beyond the scope of the show cause notice and hence unsustainable. [Aurobindo Pharma Ltd. vs CCEC (2008) 10 STR 611 (Tri. – Bang.)].

Where the show cause notice and the order of the adjudicating authority and lower appellate authority only related to the interest and penalty without confirming the service tax demand against the appellants, the Tribunal held that the notice/order is not legally sustainable and the impugned order was set aside. [Total Security Systems vs. CCE&C (2008) 10 STR 624 (Tri. – Mumbai).

PAYMENT OF SERVICE TAX:

Where the appellants paid service tax for the month of December, 2004 on behalf of four other service providers and on coming to know that those service providers have themselves separately paid the tax amount, the Tribunal allowed the adjustment of the excess tax so paid while paying the tax amount for the month of February, 2005 under rule 6(3) of the Service Tax Rules, 1994. [Narnolia Securities Pvt. Ltd. vs. CST (2008) 10 STR 619 (Tri. – Kolkatta)].

PENALTY:

Where the Commissioner while exercising his revisionary powers had not disputed the facts and circumstances of case as narrated by the adjudicating authority who dropped the penalties exercising his discretion u/s. 80 the Tribunal held that the penalties could not be re-imposed in the revision order. [L.N.Gupta vs. CCE (2008) 10 STR 462 (Tri-Del.)]

REFUND:

Where the CCE(A) insisted upon a CA certificate for verifying unjust enrichment and relying upon the CA certificate [which had examined the books of accounts of the assessee] granted refund to the assessee, the Tribunal held that the action of the CCE(A) cannot be faulted. [CCE vs. Pauls Engineering Industries Pvt. Ltd. (2008) 10 STR 561 (Tri. – Mumbai)].

EXPORT OF SERVICES – REFUND:

On facts the Tribunal upheld the appellants contention that the delay in filing the declaration for claiming rebate on export of services under notification no. 12/2005 dated 19.4.2005 was due to lack of awareness of the new provisions and accordingly the delay was rightly condoned. [CST vs. Keane Worldzen India Pvt. Ltd. (2008) 10 STR 471 (Tri-Del.)]

APPEALS:

Advocate-on-record has the authority to engage a counsel for representing the client before any forum without the requirement of client executing a separate vakalatnama in favour of the counsel. [Kevin Infotech Pvt. Ltd. vs. UOI (2008) 10 STR 514 (Cal.)]

CENVAT CREDIT:

Where the assessee availed Cenvat credit in respect of services availed at premises not mentioned in the Registration Certificate [but which were subsequently endorsed in the Registration Certificate], the Tribunal held that the credit is not deniable. However, the Tribunal denied credit where the invoices were not in the name of the appellant but another legal entity. [Raaj Khosla & Co. vs. CCE (2008) 10 STR 600 (Tri. – Del.)].

Credit on the 17 specified services as enumerated under Rule 6(5) of the Cenvat Credit Rules would be fully allowed to be taken and utilised and not restricted to 20% of the tax payable as mentioned in the erstwhile Rule 6(3)(c) of the Credit Rules. [CCE vs. V. M. Salgaonkar & Bros. Pvt. Ltd. (2008) 10 STR 609 (Tri. – Mumbai)].

August 2008

Import of Services:

Prior to 19.4.2006 i.e. before introduction of section 66A the services rendered outside India would not be liable for service tax in absence of a charging section (section 66A) [CCE v. Bhandari Hosiery Exports Ltd. (2008) 11 STR 151 (Tri. - Del.) see also CCE vs. Jindal Steel & Power Ltd. (2008) 11 STR 14 (Tri. - Del)]

Export of Services:

The appellant was an agent of a foreign company - GMC. It sourced contracts from the India Railways to GMC for a commission. The commission was denominated in USD but payable by GMC in INR through the Indian Railways. Thus, from the amount of USD payable to GMC by Indian Railways, the Railways deducted the USD equivalent of the commission payable to the appellant and remitted the net amount of USD to GMC and paid the commission in INR to the appellant. The department denied the export exemption on the basis that the commission was received in INR. The Tribunal allowed the exemption holding that the appellant was paid an amount in INR equivalent to the USD commission and correspondingly equivalent USD was not released to the

Indian Railways for remittance to GMC. Hence, the requirements of earning in convertible foreign exchange was held to be satisfied interpreting the condition in accordance with its object and purpose. [National Engg. Industries Ltd. v. CCE (2008) 11 STR 156 (Tri. - Del.)].

Where the appellants were engaged in booking orders in India for their foreign principals and received commission for such services in convertible foreign exchange the Tribunal held that such services were in the nature of business auxiliary services provided from India and used outside India and hence would qualify as export of service under rule 3(2) of the Export of Service Rules, 2005. [Blue Star Ltd. vs. CCE (2008) 11 STR 23 (Tri-Bang.)].

Valuation:

Where the appellants provided commercial or industrial construction services and claimed abatement (67%) under notification no. 1/2006 dated 1.3.2006, the High Court held that for the purposes of computing the abatement, the term "gross amount" charged in the Explanation to the said notification shall not include the value of free material supplied by the clients of the appellants. [ERA Infra Engineering Ltd. vs. U.O.I (2008) 11 STR 3 (Del.)].

Where the consideration for services was collected before the imposition of the levy in respect of services rendered after its imposition, the consideration collected can be considered to be cum-tax and computation and payment of tax on that basis is in order [CCE vs. Daswani Classess (2008) 11 STR 189 (Tri. - Del.)]

Business Auxiliary Services:

Sale of SIM cards and recharge coupons (purchased from BSNL) by the assessee to its customers is transaction of purchase and sale of 'goods' and sales tax is attracted. The activity does not amount to marketing and distribution of products and would not be liable for service tax under the category of business auxiliary services. [R. B. Agencies vs. CCE (2008) 11 STR 124 (Tri. - Bang.)].

Cargo Handling Services:

Where the appellants were actually engaged in supplying labour for handling the semi-finished or semi-processed material inside the factory premises, the Tribunal held that such activities would not constitute as a cargo handling services. [S.N.Uppar & Co. vs. CCE (2008) 11 STR 34 (Tri-Bang)]

Clearing and Forwarding Agent:

Mere purchasing and selling of goods for the principal by an agent on payment of a commission would not amount to Clearing and forwarding services. [S. B. Enterprise v. CCE (2008) 11 STR 158 (Tri. – Bang.)]

Consulting Engineering Services:

Transfer of technology and technical assistance provided by a foreign company to an Indian company would not be liable for service tax under the category of consulting engineer services. [CCE vs. MICO Ltd. (2008) 11 STR 28 (Tri-Bang.)]

Where on facts the appellants were simultaneously engaged in preparing engineering designs required for executing the project and in carrying out the construction work involved therein the Tribunal held that it was a turn-key contract which could not be vivisected and service tax cannot be levied on service portion i.e. consulting engineering services. [Hindustan Construction Co. Ltd. vs. CCE (2008) 11 STR 121 (Tri-Chennai)]

Repair and Maintenance Services:

Where only repair work was undertaken by the appellants without a maintenance contract, maintenance and repair being distinct (maintenance is prevention from failure, repair is restoration after failure), such repair services were not liable to service tax prior to 16.6.05. [CCE vs. Bhiwadi Cylinders Pvt. Ltd. (2008) 11 STR 37 (Tri. - Del.)].

Share Transfer Agent Service:

Share Transfer Agent's services which were specifically brought to service tax w.e.f. 1.5.2006, cannot be taxed prior to that date. [Cameo Corporation Services Ltd. v. Commissioner of Service Tax (2008) 11 STR 161 (Tri. - Chennai)]

Refund:

Rule 5 of the Cenvat Credit Rules alongwith Notification no. 5/2006 dated 14.3.2006 provides for refund of credit on input services used for exports. This rule has been held to apply even in cases where the claim for refunds are filed on or after 14.03.06 but the exports in respect of which were made prior to that date. [Caliber Point Business Solutions Ltd. vs. CCE (2008) 11 STR 15 (Tri. - Mum.)].

Where the appellants have not challenged the order of assessment passed by the Superintendent, no refund claim is maintainable after the order has become final notwithstanding that the Superintendent had no jurisdiction to pass the assessment order. [Malwa Cotton Spinning Mills Ltd. vs. CEGAT (2008) 11 STR 82 (P&H)].

Where locational exemptions to units located at Jammu was granted by a Notification by allowing refund of "duty of excise or additional duty of excise" paid by such units, it was held that the exemption also extended to "education cess" since cess is also excise duty as per section 93 of the Finance Act, 2004. [Sun Pharmaceutical Industries vs. CCE (2008) 11 STR 93 (Tri. - Del.) relying on T.T.K.-LIG Ltd. vs. Commissioner (2006) 193 ELT (169) (Tribunal - LB)].

Cenvat:

Where the respondent had voluntarily reversed the amount of credit at the instance of the department the Tribunal held that the Original reversal is a kind of deposit of disputed amount which needs to be confirmed by a formal order. As no further actions were initiated against the reversed amount the appellant was eligible to re-credit the amount of cenvat or refund. [CCE vs. Intricast Pvt. Ltd. (2008) 11 STR 107 (Tri-Mumbai)].

Cenvat credit in respect of basic excise duty can be utilised for payment of education cess under rule 3(7) of the Cenvat Credit Rules, 2004. [Sun Pharmaceutical Industries vs. CCE (2008) 11 STR 93 (Tri. - Del.)]

Where the assessee took full credit based on the supplier's invoice but subsequently received discounts from the supplier which effectively reduced the invoice price, the Tribunal held that, the assessee was not required to reverse proportionate credit on receipt of discounts unless the supplier had obtained a refund of duty from the Government. [Kedia Electricals Ltd. vs. CCE (2008) 11 STR 197 (Tri. - Bang.)].

Where providing canteen services was a statutory requirement for the appellant's business, the Tribunal held such a service availed by the appellant to be an input service and accordingly allowed credit. [Indian Card Clothing Co. Ltd. v. CCE (2008) 11 STR 175 (Tri. - Mum)]

Credit of service tax paid on mobile phones was held allowable where mobile phones were used in "activities relating to business". [Grasim Industries vs. CCE 11 STR 168 (Tr. - Del.)]

Penalty:

On facts, the Hon'ble High Court held:

a) The Tribunal cannot entertain an appeal on merits where the appeal has been rejected by the lower adjudicating authorities on account of non-compliance with the requirement of pre-deposit; and
b) Penalty imposable u/s. 76 of the Finance Act, 1994, in absence of reasonable cause, cannot be reduced below the minimum amount prescribed in that section. It can, however, be

completely dispensed with (not reduced below prescribed minimum) if reasonable cause is shown by the assessee. [UoI vs. Aakar Advertising (2008) 11 STR 5 (Raj.)]

Where the appellants had not collected service tax from their clients since they had doubts regarding their liability to service tax but paid service tax before the issuance of show cause notice, and where the original authority itself had not imposed penalty u/s. 78, the Tribunal held that penalties u/s. 76 and 77 cannot be imposed. However, interest was payable on the delayed payment. [Nithyananda Electronics vs. CCE(Appeals) (2008) 11 STR 18 (Tri-Bang.)]

The appellants, an air travel agent, had not collected and paid the service tax in respect of certain bookings. However, on being pointed out they paid a major portion of the service tax liability before the issuance of show cause notice and the balance before the issuance of order-in-original. On facts the Tribunal held that there was a reasonable cause under Section 80 for not levying penalty under section 78. However, the appellants were liable to pay interest on delayed payments. [Akbar Travels of India (P) Ltd. vs. CCCE (2008) 11 STR 42 (Tri-Bang.)]

Where the appellants had got themselves registered and paid service tax alongwith interest before the issuance of show cause notice and recorded its receipts in its books, the Tribunal held that there was no suppression of value and hence penalty u/s. 78 was not imposable. However, penalty u/s. 76 and 77 for delay in payment and filing of the return is sustainable. [R. R. Construction Company vs. CCE (2008) 11 STR 53 (Tri-Del.)]

Penalty under sections 76, 77 and 78 can be waived on the 'reasonable cause' in case of newly introduced service where there is a nitty-gritty with regard to method and manner of computation of service tax and such fact has been intimated to the department by appellant. [Magnum International v. Comm. Cust., & Cent., Excise (2008) 11 STR 176 (Tri. - Del.)]

Where the assessee, a commercial coaching and training centre, though registered but failed to pay and file returns fees received for providing commercial training or coaching services were recorded in the records. Tribunal held that there was no suppression of facts with intent to evade payment of tax and hence, no penalty imposable u/s. 78. However, on facts, the tribunal reduced the penalty u/s. 76 [CCE vs. Target Institution of Competition (2008) 11 STR 152 (Tri. - Del.)]

On facts, where there were no findings to indicate contumacious conduct on the part of the appellants to evade payment of service tax or not following statutory formalities and where the amount of tax alongwith interest was paid before the issuance of show cause notice the Tribunal held that appellants were eligible to relief in the form of waiver of penalty u/s. 80 of the Finance Act, 1994. [R.Sukumar vs. CCE (2008) 11 STR 118 (Tri-Chennai)]

Where the service tax was paid before the issuance of show cause notice and the assessee also had a bona fide doubt as to the taxability of their activity, the Tribunal held that penalty u/s. 78 is not imposable since-

a) u/s. 73(3) show cause notice itself was not required to be issued; and
b) there was 'reasonable cause' u/s. 80 for not imposing penalty.

[Bhoruka Aluminium Ltd. v. CCE (2008) 11 STR 163 (Tri. - Bang.)]

Revision:

Where the original authority had correctly appreciated the facts and exercised his discretion u/s. 80 to drop penalties u/s. 76 & 77, the Commissioner in exercise of his revisional jurisdiction cannot sustain the penalties by fettering with the discretion of the original authority [Price Water House Coopers Dev. Associates Ltd. vs. CST (2008) 11 STR 43 (Tri-Bang)]

September 2008

IMPORT OF SERVICES:

The question before the larger bench was whether the recipient of taxable services is liable to pay service tax in respect of services provided by a person resident outside India not having any office in India under Rule 2(1)(d)(iv) of the Service Tax Rules, 1994 w.e.f. 16.8.2002 or only from 1.1.2005 since notification no. 36/2004 dated 31.12.2004 'notifying' taxable services for the purposes for purposes of section 68(2) was to take effect from 1.1.2005 ? Section 68(2) provided that the Central Government could fasten tax liability on a person other than the service provider provided –

i) the taxable service is "notified" by the Central Government in the official Gazette; and

ii) the person liable to pay and the manner of payment is "prescribed".

The department contended that the notification no. 12/2002 dated 1.8.2002 which inserted rule 2(1)(d)(iv) in the Service Tax Rules, 1994 satisfied both the above conditions and hence the recipient was liable from 16.8.2002. The Tribunal dismissed the contention of the department and held that the section specified the manner in which the government was to carry out its function i.e. to 'notify' the services and 'prescribe' the person liable to pay service tax. The Notification no. 12/2002 dated 1.8.02 inserting Rule 2(1)(d)(iv) which was issued u/s. 94 simply enlarged the definition of 'person liable to pay service tax' by including the recipient of foreign service providers within it but did not notify taxable services for the purposes of section 68(2). That was done only by Notification no. 36/2004 dated 31.12.04 which 'notified' the 'taxable services' "for the purpose of" section 68(2). Accordingly, the Tribunal held that recipient of services in such cases would be liable for service tax only w.e.f 1.1.2005 and not from 16.8.2002. [Hindustan Zinc Ltd. vs. CCE (2008) 11 STR 338 (Tri-LB)]

BUSINESS AUXILIARY SERVICES:

On facts, the Tribunal held that the activities of the appellants like selection of the right supplier or manufacturer, maintaining control over the quality of bags, providing current market trends/ feedback, keeping track of raw material cost, cost of production, co-ordinating between suppliers, material department and the plants would fall under the category of 'Business auxiliary service' and not under 'management consultancy services'. [CCE vs. Arvind Narayan Prasad Nopany (2008) 11 STR 353 (Tri-Ahmd.)]

CONSTRUCTION OF RESIDENTIAL COMPLEX SERVICE:

i) Where the petitioners were engaged in development and sale of residential flats to various purchasers who booked such flats on payment of an advance under an agreement for sale which was executed and registered during the course of construction and the title to which passed after the completion of the construction the High Court held –

ii) "service" is an act of doing something useful, rendering assistance or help. Service does not involve supply of goods; "service" rather connotes transformation of use/user of goods as a result of voluntary intervention of "service provider" and is an intangible commodity in the form of human effort. To have "service", there must be a "service provider" rendering services to some other person(s), who shall be recipient of such "service".

iii) Under the Finance Act, 1994, "service tax" is levied on "taxable service" only and not on "service provider". A "service provider" is only a means for deposit of the "service tax" to the credit of the Central Government. Although the term "service receiver" has not been defined in the Finance Act, 1994, the "service receiver" is a person, who receives or avails the services provided by a "service provider".

iv) The petitioners were not engaged in rendering any services of construction of residential complex to the prospective purchasers but were merely undertaking the construction activities for its own self and any advance, made by a prospective buyer, or deposit received by the petitioner-company, is against consideration of sale of the flat/building to such prospective buyer and not for the purpose of obtaining any "service" from the petitioner-company. Accordingly amounts received from prospective purchasers were not liable for service tax. [Magus Construction Pvt. Ltd. vs. UOI (2008) 11 STR 225 (Gau.)]

PORT SERVICES:

Where the appellants were undertaking certain activities like chipping, painting and repairs of vessels / Ships within its own premises and within the port premises under an authorisation from the Port authorities the Tribunal held that the said services were not liable under the category of 'Port services'. [Mazgaon Dock Ltd. vs. CST (2008) 11 STR 271 (Tri-Mumbai)]

REFUND:

The assessees, engaged in providing telephone services, inadvertently paid service tax on the MRP mentioned on the recharge vouchers instead of the discounted price [i.e. on the net monies received] and on certain vouchers distributed free. The vouchers were distributed by their agents. The assessees filed refund claims which were rejected by the lower authorities on the time bar, eligibility and unjust enrichment. However, the Tribunal allowed the refund observing as follows:

i) As regards time-bar the department had returned back the refund claim for insufficiency of documents and thereafter re-submitted by the assessees. The department contended that the date of re-submission is relevant and the refund claim was time barred. The Tribunal held that even if a refund claim is incomplete or is not substantiated by documentary evidence it cannot be retuned back by the adjudicating authorities. It is incumbent upon the authorities to make an order on such refund claim. Hence the re-submitted refund claim is in continuation of the original refund application and thus not hit by limitation.

ii) As regards the eligibility for refund the department had contested that the invoices were issued by the assessee's agent and hence the assessee would not be eligible. The Tribunal disagreed and held that the agent issued invoices "on behalf of" the assessees, collected the monies and paid to the assessees. Further, the Tribunal held that the assessee is the service provider and having paid service tax on the entire MRP they are eligible for the refund of service tax on the amounts not realised by them.

iii) As regards unjust enrichment, though the issue was raised in the show cause notice and replied by the assessee the lower authorities did not record any adverse finding in the Order-in-Original nor was it challenged before the CCE(A) who relied upon the Chartered Accountant's Certificate and the invoices and found that doctrine of unjust enrichment did not arise. The Tribunal concurred with CCE(A)'s findings though it observed that the said question cannot be raised before it. [CST vs. Reliance Communication Ltd. (2008) 11 STR 258 (Tri-Mumbai)]

The assesee DTIPL provided services to DT, USA for preparation and filing of US Federal, State and local tax returns, and property tax returns, as well as for computing advance Tax estimates, wage card processing and transfer pricing planning and execution which involved data entry, data processing, and such other incidental and support services. They paid service on the said services under the category of "Business Auxiliary Services". Further they also claimed input credit on – (i) Equipment hiring charges; (ii) Professional Consultation Service; (iii) Recruitment Services; (iv) Security Services; (v) Telephone Services; (v) Transport Services; (vi) Training Services; (vii) Facility Operation Service; (viii) Courier Services; (ix) Cafeteria Services; (x) Other input services like advertisement service. They claimed refund of input credit on the basis that their services were exported. The Department denied refund on the ground that –

i) The services were in the nature of information technology service not liable under business auxiliary services and accordingly input credit cannot be taken;

ii) Notwithstanding (a) above, the input services were not used for providing input services;

iii) The input credit pertained to services exported prior to 14.3.2006

Tribunal dismissed the Revenue's contention and held as follows –

a) The services are not information technology services since the use of computer or computer programme for their services is only secondary and the primary activity that of is business-related services. Hence their services would be liable as "Business Auxiliary Services".

b) The services on which credit has been claimed are necessary for providing output services and fall within the definition of input services u/r. 2(l) of Cenvat Credit Rules, 2004 which has defined the scope of an input service quite widely.

c) Rule 5 of the Cenvat Credit Rules alongwith Notification no. 5/2006 dated 14.3.2006 provides for refund of credit on input services used for exports. This rule would apply even in cases where the claim for refunds are filed on or after 14.03.06 but the exports in respect of which were made prior to that date.

[CCE vs. Deloitte Tax Services India Pvt. Ltd. (2008) 11 STR 266 (Tri. – Bang.)].

CENVAT:

Where the appellants entered into two agreements with a contractor - one for supply of components and parts and the other for erection at the appellant's site, the Tribunal held that credit of duty paid on parts and components which were used in setting up of the plant at the appellant's site was fully admissible and the department's contention that the components and parts were inputs of the contractor who supplied and assembled them at the manufacturer's site since it is he who used it to manufacture the plant is incorrect. [Rajarambapu Patil SSK Ltd. v. CCE (2008) 11 STR 437 (Tri-Mumbai)]

Where the appellants transferred their factory from one place to another, the input credit can be allowed to be transferred to the new place without actual physical transfer of the inputs. [CCE vs. Smithkline Beecham Consumer Healthcare Ltd. (2008) 11 STR 446 (Tri-Chennai)]

PENALTY:

Where penalties u/s. 76, 77 and 78 for delay in payment, non-registration and suppression of facts respectively were imposed on the appellants the Tribunal held as follows :

i) Penalty u/s. 76 is imposable notwithstanding that the assessee has paid interest. However, since the assessee did not pay service tax on the bona fide belief that it is liable to pay only on receipt of the amount from its customers penalty u/s. 76 was reduced from Rs. 6.54 lakhs to 1 lakh.

ii) Since no penalties were prescribed for non-registration, penalty under section 77 was rightly levied.

iii) Non-submission of the returns was a result of non-registration and cannot be considered as "suppression of facts" warranting imposition of penalty under section 78.

APPEAL :

Additional grounds before the Tribunal can be raised if these grounds are issues of law necessitated in view of the amendments to the Finance Act, 1994. [Aryan Energy (P) Ltd. vs. CCE (2008) 11 STR 407 (Tri-Bang.)]

Amounts pre-deposited at the time of pendency of appeal before the Tribunal is required to be refunded to the appellants on success notwithstanding that department had filed a reference before the High Court, in absence of stay by the High Court. [Morargee Goculdas Spg. & Wvg. Mills Co. Ltd. vs. CCE (2008) 11 STR 444 (Tri-Mumbai)]

DEPARTMENTAL CLARIFICATION:

A beneficial circular has to be applied retrospectively whereas an oppressive circular has to be applied only prospectively [Suchitra Components Ltd. vs. CCE (2008) 11 STR 430 (SC)].

OCTOBER 2008

Clearing and Forwarding Agents:

Services provided by an auctioneer for sale of cardamom by auction is not liable for service tax under the category of "Clearing and Forwarding Agent's" services even though it involves the receiving and storing of goods by the auctioneer. [CCE vs. Cardamom Mktg. Company (P) Ltd. (2008) 11 STR 522 (Tri. – Bang.)].

Telephone service:

Interconnection Usage Charges collected by a telecom authority from other telecom authorities for terminating calls emanating from the subscribers of the latter to the subscribers under them is not liable under "telephone services" since the other telecom authority is not a "subscriber" to whom a telephone connection is given. [Bharat Sanchar Nigam Ltd. v. CCE (2008) 11 STR 460 (Tri-Del)]

Note: The above decision pertains to the law as it stood prior to 1-6-2007.

Penalty:

The Tribunal held that u/s. 73(3) no penalty proceedings can be initiated in case where the appellants under bona fide belief had failed to discharge their service tax liability in time but on being pointed out by the department they discharged the same along with interest before the issuance of show cause notice. [Tidewater Shipping Pvt. Ltd. vs. CST (2008) 11 STR 475 (Tri-Bang.)]

Where the appellants rendered security agency services and had levied service tax on all their services except services rendered to the Official Liquidator, High Court but on being pointed out by the department, they paid the service tax alongwith interest, the Tribunal condoned the imposition of penalties u/ss. 76 and 78 on the ground that since other similar assessees were also not levying service tax on the said services the appellant's plea of bona fide belief cannot be ignored. [S. Doctor Security Services Pvt. Ltd. vs. CST (2008) 11 STR 477 (Tri-Ahmd.); See also Sri Venkateswara Cable Network vs. CCE(A) (2008) 11 STR 512 (Tri-Bang.)]

Refunds:

The assessee was granted refund pursuant to the Tribunal's order. The assessee subsequently also asked for interest u/s. 11BB of the Central Excise Act. However, the department instead of paying the interest issued another SCN seeking to recover the refund already granted on the ground that the Revenue appealed against the Tribunal's order to the High Court. The assessee made a Miscellaneous Application to the Tribunal which held that, in absence of stay against the order of the Tribunal, refusing to pay the interest u/s. 11BB is illegal and issue of SCN for recovering refund already granted amounts to contempt of the Tribunal. [Toyota Kirloskar Motor Ltd. vs. CCE (2008) 11 STR 551 (Tri-Bang.)]

Amounts paid by mistake cannot be termed as duty. Accordingly the limitation u/s. 11B would not apply for seeking refund of such amounts. [CCE vs. Motorola India Pvt. Ltd. (2008) 11 STR 555 (Kar)]

In this case the Tribunal held:

a) Where the assessee paid service tax on amounts not received from the customers, it is not necessary for the CCE(A) to examine each and every entry to overrule the plea of unjust enrichment. Further, the question of unjust enrichment would not arise in such a case [7 STR 449 (Tri-Mum.); 3 STR 751 (Tri-Bang.); 10 STR 6 (Kar) relied on];
b) Boards instruction No. 137/50/2007 CX 4 dated 16-3-2007 clarifying that in the event of centralized registration obtained by the assessee, the rebate refund claim shall be dealt with the Service tax Commissionerate having jurisdiction over the centralized registration of the assessee is not applicable to refunds pertaining to the period prior to 16-3-2007.

[*CCE v. Standard Chartered Bank* (2008) 88 RLT 440 (Tri-Bang.)]

Appeal:

Where a compendious order was passed by lower authorities disposing of two SCNs there was no need to file as many number of appeals as the SCNs before the higher authority – a single appeal would be in order. [Escorts vs. CCE (2008) 11 STR 532 (Tri-Del.)] Where the respondents had failed to avail the opportunity of agitating before the Tribunal by filing a cross objection, they were not allowed to raise new grounds at a later stage. [CCE vs. Delta Elastometal Compound Pvt. Ltd. (2008) 11 STR 534 (Tri-Mumbai)].

November 2008

Situs of taxation — Mutuality:

Where the appellants, a member of a Committee formed for cementing the relationship between Germany and India, had conducted an event at the behest of the committee and received certain amounts for it the Tribunal held that in absence of client-service provider relationship no event management services were rendered by them to the Committee. The Tribunal also held that the extended period of limitation could not be invoked. [Phase 1 Events & Entertainment Pvt. Ltd. vs. CST (2008) 12 STR 174 (Tri-Bang.)]

Automated teller machine operations, maintenance or management services
Cash replenishment services in an ATM is liable for service tax only from 1-5-2006 under 'Automated teller machine operations, maintenance or management services' and not under 'Business Auxiliary services'. [NCR Corporation Pvt. Ltd. vs. CST (2008) 12 STR 68 (Tri-Bang.)]

Business Auxiliary Services – MIS report generation is Information Technology

Services – Exempt:

Services of generating various MIS reports in pre-defined formats using input supplied by the client fall within the realm of 'computerised data processing' and accordingly would not be liable to service tax under the category of 'Business Auxiliary services' since 'Information Technology services' is specifically excluded. [Dataware Computers vs. CCE (2008) 12 STR 121 (Tri – Bang.)]

Cargo Handling services:

Where the appellants neither collected cargo from the consignor's premises nor delivered the same at the consignee's premises but merely undertook transportation of cargo by air from air cargo station at source location to air cargo station at destination location the Tribunal observed that the services of loading and unloading of goods rendered by the appellants is an integral part of the transportation services. Further relying on decision in Asian Paints India Ltd. vs. CCE (1988) 35 ELT 3 (SC) the Tribunal held that:

i) the appellants are admittedly not understood in the common parlance as a cargo handling agency, inasmuch as they are admittedly airline company;

ii) the contract entered into between the appellant and their customer is not for rendering cargo handling services but is for transportation of appellant's cargo by air.

Accordingly, the same cannot be subjected to tax under the category of 'Cargo Handling services'. [Jet Airways (India) Ltd. vs. CST (2008) 11 STR 645 (Tri-Ahmd.)] Where the appellants were contractors merely engaged in shifting of raw material, waste materials, finished products etc from one place to another place within the plant, relying on Sainik Mining and Allied Services Ltd. vs. CCE (2008) 9 STR 531 (Tri-Kol.) the Tribunal held that the said activities would not be liable to service tax under the category of Cargo Handling services. [Modi Construction Co. vs. CCE (2008) 12 STR 34 (Tri-Kolkata)]

Clearing and Forwarding Agents:

In this case the Tribunal observed that:

i) the appellants were rendering the services of storing and transportation of oil through pipeline to ONGC;

ii) the relation between them and ONGC was on principal-to-principal basis;

iii) the appellants were not doing the work of clearing and forwarding and thereafter held that the said activities would not fall under the category of Clearing and Forwarding Agents services. [Cairn Energy (I) Pvt. Ltd. vs. CCCE (2008) 11 STR 632 (Tri-Bang.); See also Oil India Ltd. vs. CCE (2008) 12 STR 115 (Tri- Kolkata) where thereto the Tribunal held that since transportation of crude oil through pipeline has been brought to tax specifically w.e.f. 16-6-2005 the same cannot be subjected to tax prior to that date under the category of 'Clearing and Forwarding Agency services' and 'Business Auxiliary services']

Consulting Engineering services:

Payment of technical fees to foreign collaborators for transfer of technical know-how for upgrading the manufacturing activities would not be liable for service tax under the category of Consulting Engineering services. [Spic Pharmaceuticals Division vs. CCE (2008) 12 STR 226 (Tri-Chennai)]

Management Consultancy services:

Activities like making purchase orders, calling tenders, issuing appointment orders, maintaining leave records and books of account etc., undertaken by the assessee for its sister concern are not covered under the definition of Management Consultancy Services. [CST vs. Goetze (India) Limited (2008) 11 STR 629 (Tri-Del.)]

Port Services:

Based on the decision in Homa Engineering Works vs. CCE (2007) 7 STR 546 (Tribunal) and Velji P. and Sons (Agencies) Pvt. Ltd. vs. CCE (2007) 8 STR 236 (Tribunal) the Tribunal held that rent charged for hiring out barges, floating cranes and tugging facilities would not be liable for service tax under the category of 'Port services'. [Vikram Ispat vs. CCE (2008) 11 STR 639 (Tri-Mumbai)]

Stock Broker services:

In a case where assessee was registered as a stock broker with SEBI but working as a sub-broker the Tribunal held that the assessee was providing taxable services as a stock broker and is covered by the definition of stock broker. Accordingly service tax recovered from the customers is liable to be deposited u/s. 11D of the Central Excise Act, 1944. [U.S. Bengali vs. CCE&C (2008) 12 STR 71 (Tri-Ahmd.)]

Storage and Warehousing services:

Where the appellants, who were engaged in manufacturing of sugar, were required by Government of India to maintain a specific quantity of free sale sugar for a specified period to comply with the provisions of Sugar Development Fund Act, 1982 for which they were compensated by way of reimbursement of expenses towards interest, storage and insurance, the Tribunal held that they would not be treated as providing of 'Storage and Warehousekeeping services' to Government and accordingly would not be subjected to service tax on the said reimbursement received from the Government. [Nawanshahr Co-op. Sugar Mills vs. CCE (2008) 12 STR 176 (Tri-Del.)]

Telephone services:

The Interconnection Usage charges collected from another telecom authority is not towards telephone services provided to a subscriber accordingly not liable for service tax under the category of Telephone Services. [Bharat Sanchar Nigam Ltd. vs. CCE (2008) 12 STR 171 (Tri-Bang.)]

Export of services:

In case of international courier agency services the services were partly performed in India and partly outside India and hence they would still qualify as export of services under Rule 3 of Export of Service Rules, 2005. [U.B. Xpress (South) Pvt. Ltd. vs. CCE&ST (2008) 12 STR 152 (Tri-Chennai)]

Demand –Limitation — Extended period:

Where the department had earlier issued a show cause notice for an issue, the department being aware of the appellant's activities, cannot invoke the extended period for issuing a second show cause notice. [Cairn Energy (I) Pvt. Ltd. vs. CCCE (2008) 11 STR 632 (Tri-Bang.)]

Where the assessee had suo motu assessed and paid the tax and reflected their income in the balance sheet and income tax returns for the impugned period the Tribunal held that the extended period of limitation cannot be invoked. [Om Sai Professional Detective & Sec. Ser. P. Ltd. vs. CCE (2008) 12 STR 79 (Tri-Bang.)]

Interest:

In absence of any tax liability, no interest could be levied even if the assessee had wrongly paid service tax on the taxable value of services. [CCE vs. Sundaram Textiles Ltd. (2008) 11 STR 608 (Tri-Chennai)]

Penalty:

Where the appellants bonafide believed that the canteen services provided in a space provided by the service recipient at the factory premises would not come under the category of 'Outdoor Catering service' during the initial period of levy, the Tribunal held that there was a reasonable cause for failure to pay tax, and accordingly set aside penalty. [Sharvin vs. CCE (2008) 11 STR 630 (Tri-Del.)]

Where the appellants had paid service tax along with interest before the issuance of show cause notice and also pleaded ignorance about the provisions of the service tax law the Tribunal on facts deleted the penalty u/s. 76 of the Finance Act. [Maharashtra State Co-op. Mktg. Fed. Ltd. vs. CCE (2008) 12 STR 57 (Tri-Mumbai)]

The Tribunal has no power to reduce the quantum of penalty under section 76 below the mandatory minimum as held by Rajasthan High Court in case of Union of India & Anr vs. Aakar Advertising – (2008) 11 STR 5 (Raj.). [CCE vs. Bhakya Beauty Parlour (2008) 12 STR 44 (Tri-Chennai)]

Where service tax was not paid on a bonafide impression but was paid partly before the issuance of show cause notice and partly before passing of the adjudication order, imposition of heavy penalty is not warranted. However, interest u/s. 75 is payable for delayed payment of tax. [Lawson Travel & Tour (I) Pvt. Ltd. vs. CCE(A) (2008) 12 STR 119 (Tri-Bang.)]

Where the quantum of penalty imposed by the original authorities was reduced by the CCE(A) below the statutory minimum penalty prescribed the Tribunal observed that since there was an element of confusion for categorising the activities of the appellant on account of interpretation there was a reasonable cause for leniency in levy of penalty and accordingly the order of CCE (A) was sustainable. [CCE vs. T. Stanes & Co. Ltd. (2008) 12 STR 236 (Tri-Chennai)]

Refund:

Where the assessee erroneously paid service tax on pilotage services rendered in minor ports, under the category of Management Consultancy services instead of 'Minor port' services which came into effect from 1-7-2003 and claimed refund of tax for the period 1-10-1999 to 30-9-2002 on 9.10.2003 the Tribunal rejected the refund claim as barred by limitation after observing that payment on account of misconstruction, misapplication or wrong interpretation of the provisions of law would not change the character of the amounts from tax to deposit, and accordingly the refund claim being filed beyond the statutorily prescribed period (of 1 year) would be barred by limitation. [Karnik Maritime Pvt. Ltd. vs. CCE (2008) 12 STR 145 (Tri-Mumbai)]

Appeal:

Where the appeal was dismissed on account of non-compliance of pre-deposit and its restoration on compliance was refused by the CCE(A) the Hon'ble High Court held that it was not permissible to refuse the restoration of appeal on compliance of the pre-deposit requirement. [Scan Consultancy vs. UOI (2008) 12 STR 108 (Guj.)]

The Tribunal need not decide all the grounds raised in the memo of appeal if the authorised person has appeared and argued only some of grounds therein. [CCE vs. Kothari Products (2008) 12 STR 5 (All.)]

An appeal filed even after the statutory period for which delay can be condoned by the CCE(A) is barred by limitation and cannot be saved even by section 5 of the Limitation Act, 1963, since:

i) the provisions of Limitation Act, 1963 apply only to courts or the forums that has trappings of the court;

ii) under the provisions of Central Excise Act, CCE(A) is only an executive authority performing quasi-judicial functions but he cannot be considered as a court or a forum having trappings of the court;

iii) the application of Limitation Act must be held to be expressly excluded by virtue of the specific provisions in section 35 of Central Excise Act which have provided a maximum period for which delay can be condoned.

CENVAT:

Where the appellants were engaged in manufacture of goods the Tribunal held that they were not entitled to treat the goods transport agency services obtained by them as an output service and utilise the balance in Cenvat credit account for payment of service tax on goods transport agency services taking recourse to the erstwhile Explanation to section 2(p) of the Cenvat Credit Rules, 2004. [Alstom Projects India Ltd. vs. CCE (2008) 12 STR 23 (Tri-Chennai)]

Service tax payable on the goods transport agency services by a service recipient can be paid by way of debit to Cenvat credit account since GTA is deemed to be an output service. [Mahindra Ugine Steel Co. Ltd. vs. CCE (2008) 12 STR 159 (Tri-Mumbai.)]

Cenvat Credit of service tax paid on 'Goods Transport services' used to dispatch finished goods, is not allowable since it is only "outward transportation up to the place of removal" that is allowable as per the definition of "Input Services" [CCE vs. Sound Castings Pvt. Ltd. (2008) 12 STR 25 (Tri-Mumbai)]

The High Court in this case agreed with the decision of the Tribunal that no interest is leviable where there has been only a reversal of amount of Cenvat credit availed but the credit was not utilised by the assessee. [CCE vs. Gupta Steel (2008) 12 STR 101 (Guj.)]

Once the service tax has been paid by the supplier of services credit cannot be denied to the receiver by contending that service tax was not required to be paid by the supplier on the said service. [Maersk India Pvt. Ltd. vs. CCE (2008) 12 STR 150 (Tri-Mumbai)]

Cenvat credit on inputs cannot be denied merely on the ground of non-mentioning of registration number in the invoice where the receipt and consumption of goods and discharge of duty liability thereon is not in dispute. [Agarwal Industries vs. CCE (2008) 12 STR 223 (Tri-Del.)]

December 2008

Departmental clarifications:

Circulars and clarifications issued by the board are binding on the authorities under the respective statute but are not binding upon the courts.

When the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the Court to direct that Circular should be given effect to and not the view expressed in a decision of this court or the High Court.

Circulars issued by the board which run contrary to the statutory provisions have no existence in law.

The revenue can lodge an appeal taking a ground contrary to a circular if it runs counter to the decision of a court. [*CCE vs. Ratan Melting & Wire Industries* (2008) 12 STR 416 (SC)]

Business Auxiliary Service:

Sale of SIM cards by the assessee to its customers is transaction of purchase and sale of 'goods' and sales tax is attracted. The activity does not amount to marketing and distribution of products and would not be liable for service tax under the category of business auxiliary services. [*Vallamattam Communication vs. CCE*(2008) 12 STR 267 (Tri. - Bang.)]

Where the assesses was engaged in the activity of applying epoxy coating of reinforced steel bars supplied by his customers, it was held that the activity would be in the nature of "production" of goods on behalf of his clients and accordingly liable for service tax under the category of business auxiliary service since:

i. The activity amounted to "production" though not 'manufacture' so as to merit exclusion u/s. 65(19);
ii. The production was done 'on behalf of of the assessee's customers (like L&T, HCC) since the assessee's customers utilised its services for performing their contracts with State Road Development Corporation.

However, the Tribunal remanded the matter for re-quantification of the demand for (i) allowing credit of duty paid on materials and tax paid on input services; (ii) excluding services provided prior to 10-9-2004; (iii) and giving benefit of 'cum service tax value" computation in terms of Expln. 2 to s. 67. *[PSL Corrosion Control Services Ltd. vs. CCE & C* (2008) 12 STR 504 (Tri. - Ahmd.)]

Banking and Other Financial Services :

In respect of hire purchase contracts, the taxable event occurs upon entering into the contract. Therefore, the rate of service tax will be the rate prevailing on the date on which the contract is entered into. It is not a case where there is a continuous service during the term of the contract when the instalments are paid. The payment of instalments is only the obligation of the hirer. Hence contracts entered into prior to 14-5-2003 would be exigible to service tax @5% notwithstanding the contract continued post 14-5-2003 when the rate became 8%. [*L.F.C. Hire Purchase Company Ltd. vs. CCE & C* (2008) 12 STR 320 (Tri.-Bang.)]

Commercial Training or Coaching Services :

Notification No. 7/2003 dated 1-7-2003 exempted - (i) vocational training institute (ii) computer training institute and (iii) recreational training institute from the category of commercial coaching and training from 1 -7-2003 - 30-6-2004. Thereafter, Notification No. 24/2004 dated 10-9-2004 exempted only "vocational training institute" and "recreational training institute" and this notification was amended on 16-6-2005 to provide that computer training institutes are excluded from the purview of vocational training institutes. However, in the interim period between 10-9-

2004 to 15-6-2005 the Tribunal held that computer training institutes would qualify as vocational training institutes since such training imparts skill to the trainee to undertake self-employment or seek employment after such training and accordingly would be exempt. [*Doon Institute of Information Tech. Ltd. vs. CCE* (2008) 12 STR 459(Tri-Del.)]

Consulting Engineering Services:

Repair of furnace is not liable for service tax under Consulting Engineering services. [*Schott Glass (I) Pvt. Ltd. vs. CCE* (2008) 12 STR 484 (Tri-Ahmd.)]

Erection, Commissioning or Installation :

Laying of long distance pipelines is not liable for services tax under the category of "Erection, Commissioning and Installation" service:

i) "The service does not involve - "erection" which means to put up civic structures nor "installation" which implies setting up machinery ready for use; nor even "commissioning" which involves operationalising the machinery;
ii) Long distance pipelines are not 'plants' when plants in popular usage means a cluster of building or a building in which machinery are involved usually for manufacture of goods;
iii) Section 65(39)(ii)(b) which reads 'installation of "plumbing, drain laying, or other installation of transport fluids" would cover only such facility provided in a building as it appears in the company of air-conditioning system, lifts, electronic devices including wiring etc. which are installed in a building and not activity of laying long-distance pipelines. [*Indian Hume Pipe Co. Ltd. vs. CCE*(2008) 12 STR 363 (Tri. - Chennai)]

Tour Operator services :

Services like arranging guide services, monument visit services, porter services, food services, general assistance services etc. provided by the assessee to Principal Tour operators who offered package tours to tourists are liable for service tax even before 10-9-2004 since they are services "in relation to" to a tour. However, amounts paid as advances by the principal tour operators to be paid to tour escorts and inter-branch billing would not be liable. [*Touraids (I) Travel Services vs. CCE* (2008) 12 STR 452 (Tri-Del.)]

Limitation :

Where the appellants were large tax payers of Central Excise duty and service tax and also relied upon several decisions in the context of income tax that the impugned expenditure on which Cenvat Credit was taken were used for the purpose of business the appellant's plea of bonafide belief is valid. Further the SCN also did not explicitly bring out the intention to evade payment of duty or suppression of fact. Hence the extended period of limitation cannot be invoked [*Toyota Kirloskar Motor P. Ltd. vs. CCE*(LT.U.) (2008) 12 STR 498).

Penalty:

Where the appellant was under bonafide belief that the activities undertaken by them were not liable for service tax and also paid the service tax within one month from the receipt of the order-in-original, the Tribunal waived the penalty u/ss. 76 and 77 and reduced the penalty u/s. 78 [*BPL Mobiles vs. CCE* (2008) 12STR274(Tri-Bang.)]

When the assessee did not pay tax initially on a bona fide in interpretation of statutory provisions of law, but paid the tax subsequently before the issuance of the show cause notice imposition of penalty u/ss. 76,77 & 78 is not warranted. [*Jagdeep Singh Saluja vs. CCE*(2008) 12 STR 309 (Tri. - Del.)]

Proceedings to be concluded on voluntary payment of service tax, interest and 25% of penalty. [*AK & /Advertising Pvt. Ltd. vs. CCE* (2008) 12 STR 315 (Tri. -Bang.)]

When there was litigation between the appellant and department whether the activity carried out by the appellant is manufacture or not, the Tribunal held that the department was aware of the nature of activity carried out by the appellant and it cannot be said that there was any suppression, misstatement or intent to evade service tax and hence penalty u/ss. 76, 77 & 78 is not leviable. [*PSL Corrosion Control Services Ltd. vs. CCE & C* (2008) 12 STR 504 (Tri. -Ahmd.)]

Cenvat Credit:

Under the Cenvat Credit Rules, 2004, credit of service tax paid on Telephone services availed by the assessee in respect of Mobile phones provided to its employees cannot be disallowed on the ground that phones are not installed in the factory premises [*CCE vs. Excel Corp Care Ltd.* (2008) 12 STR 436 (Guj.)]

The larger Bench of the Tribunal held that outdoor catering services availed by a manufacturer to provide the canteen facilities within the factory premises is an "input service" since:

i) expenditure on running a canteen forms part of the cost of production irrespective of whether the cost of food is borne by worker or factory;
ii) It is mandatory on part of the factories u/s. 46 of the Factories Act, 1948 to provide such a facility and hence is an activity relating to the business.

[*CCE vs. GTC Industries Ltd.* (2008) 12 STR 468 (Tri-LB)]

Expenditure to entertain the employees for social functions such as Kannada Rajyostava Function and inauguration of police station is not "activity relating to business **such as accounting, auditing, financing, etc**." since it is not in the nature of services which are illustrated (marked bold). Hence, no Cenvat credit would be allowed on such expenditure. [*Toyota Kirloskar Motor P. Ltd. vs. CCE* (2008) 12 STR 498 (Tri-Bang.)]

Appeal:

Where on facts only a letter was received from the department clarifying the assessee's right to avail Cenvat credit, but there was no 'adjudication' the Tribunal held that no appeal is maintainable. Further, the Tribunal also held that an assessee who desires to file an appeal would be required to pay a minimum fee of Rs. 10001- as required by s.86(6) of the Finance Act, 1994 even if there is no demand of tax, interest and penalty. [*E-Biz. Com Pvt. Ltd. vs. CCE* (2008) 12 STR 438 (Tri-Del.)]

Rectification of Mistakes:

When the finding given in Tribunal order is after due consideration of all the issues raised, it is not open to the revenue to reargue the matter or call upon the Tribunal to review the basis of decision on the ground of non-citing of an existing judgment and failure to make enquiries. Hence the application for rectification of mistakes not tenable. [*CCE vs. Victor Gaskets India Ltd.* (2008) 12STR341 (Tri.-Mumbai)]

JANUARY 2009

Architect services:

The definition of Architect services under the Act is wide enough to cover a commercial concern engaged in rendering services in the field of architecture. [Unintech Ltd. vs CST (2008) 12 STR 752 (Tri. – Del.)]

Banking and Other Financial services:

Where the appellant gave an extrusion machine on a lease of 35 months extendable to another period of 2 years for a monthly 'user charge' without an option to transfer the asset at the end of the term, the Tribunal, relying upon the ICAI Accounting Standard 17 defining 'Financial lease', held that the lease was for a short period without any relation to the economic life of the asset and the risks and rewards incidental to ownership was not transferred to the lessee. Accordingly, the lease was not a 'financial lease' liable for service tax under the category of 'Banking and Other Financial Services'.[CCE vs. G.E. India, Industries (P) Ltd. (2008) 12 STR 609 (Tri-Ahmd.)]

Business Auxiliary services:

Weighment of goods which are subsequently sold cannot be said to be sale, promotion or marketing of goods belonging to the client or an activity incidental or auxiliary to promotion or marketing or sale of goods and hence not liable under business auxiliary services. [CCE vs. Deepak Computers (2008) 12 STR 569 (Tri- Del.); See also CCE vs. Bankhe Bihari Computers (2008) 12 STR 724 (Tri-Del.)]

'Mutual fund units" are 'goods' within the meaning of section 2(7) of the Sale of Goods Act, 1930. Thus, distribution of units of mutual fund schemes for a commission is liable for service tax under the category of Business Auxiliary services, more particularly u/s. 65(19)(i) 'promotion or marketing or sale of goods belonging to the client' and not under clause (ii) and clause (iv) as propounded by Circular No. 66/15/03 –S.T. dated 5.11.2003. However, the said services are exempt under notification no. 13/2003 which exempts service tax on sale and purchase of "goods" by commission agent. [CST vs. P.N. Vijay Financial Services Pvt. Ltd. (2008) 12 STR 628 (Tri.-Del.)]

Note: The above exemption would be applicable only up to 8.7.2004
.

Cargo Handling Services:

Where the appellant provides the services of breaking / crushing limestone boulders to convert it into jelly and transport the same to the client's premises for further processing the Tribunal held that such services would not be liable under the category of "Cargo handling services" since loading and unloading are only incidental activity. [N. Rajashekar & Co. vs. CCE (2008) 12 STR 760 (Tri. – Bang.)]

Clearing and forwarding agent services:

Where on facts, it was found that a corporation established by the state government to regulate the trade of liquor purchased liquor from various manufacturers / suppliers and sold it on retail it was held that the appellants were engaged in purchase and sale of liquor and cannot be considered as a C & F agent although they were described as a procurement agent in the agreement with the manufacturer/supplier and their income from sale of liquor was described by them as commission in the balance sheet. [Chhattisgarh State Beverages Corpn. vs. CCE (2008) 12 STR 607 (Tri-Del.)]

Construction of complex services:

Construction and transfer of individual residential units would not be liable for service tax under the category of "Construction of residential complex services" since the service is not for construction of a residential complex comprising of more than 12 residential units. [Macro Marvel Projects Ltd. vs. CST (2008) 12 STR 603 (Tri-Chennai)]

Consulting Engineer service:

On facts the Tribunal held that supervisory and field engineering services rendered would be liable for service tax under the category of Consulting Engineer services [Prodorite Anticorrosive Ltd. vs. CCE (2008) 12 STR 618 (Tri-Chennai)]

Royalty paid for supply of technical know-how cannot be subject to service tax under the category of Consulting Engineering services. [CCE vs. Arai Seisakusho Co. Ltd. (2008) 12 STR 709 (Tri-Chennai)]

Services of supervising installation and commissioning equipments constituting an 'oxygen plant' would not be liable for service tax under the category of Consulting Engineering services but only under commissioning and installation services which is taxable w.e.f. 1.7.2003 [Southern Iron & Steel Co. vs. CCE (2008) 12 STR 725 (Tri-Chennai)].

Leased Circuit Services:

Interconnection Usage Charges collected by one telecom authority from another telecom authority is not liable for service tax prior to 1.6.2007. [Bharti Airtel Ltd. vs. CST (2008) 12 STR 565 (Tri-Ahmd.)]

Online information and database access or retrieval services vs. Commercial training and coaching services:

Providing online computer courses through the medium of internet is in the nature of "commercial training and coaching services" and not "online information and database access or retrieval services" since, the essential character of the services involves providing education through the medium of internet i.e. providing online lessons on computer hardware and software, online interaction with the faculty, students and experts, online test, etc. and not merely providing online access to data or information. However, computer training institutes being exempt vide notification no. 9/2003 dated 20.6.2003 the appellants were not liable for service tax. [Dewsoft Overseas Pvt. Ltd. vs. CST (2008) 12 STR 730 (Tri. – Del.)]

Port Service:

Where only a portion of the land and water front is licensed by the port to the assessee for providing ship repair services, the relationship between the port and the assessee is only that of licensor and licensee and the assessee is not rendering services as authorised person of port, the Tribunal relying on Homa Engg. vs. CCE (2007) 7 STR 546 (T.) held that the said activities of ship repair services would not be covered under the category of port services. [Western India Shipyard Ltd. vs. CCE (2008) 12 STR 550 (Tri-Mumbai)];

Note: Disagreed in Western Agencies Pvt. Ltd. s. CCE (2008) 12 STR 739 (Tri-Chennai) and matter referred to Larger bench
.
Where the appellants holding licences as a stevedoring agent were providing cargo handling services but such services were not rendered on behalf of the port authorities - the Tribunal held that the appellant's services are Cargo handling services and not port services [H.K. Dave Ltd. vs. CCE (2008) 12 STR 561 (Tri-Ahmd.)].

Burden of proof:

The appellants provided computer courses through various franchisees for a fee paid by the franchisees. During the relevant period i.e.; 1.7.2008 to 6.10.03, four conditions were required to be satisfied to fall under "franchise service" one of which was that the franchisee must be under an obligation not to engage in selling or providing similar goods or services identified with the franchisor. The Tribunal held that the onus of proving fulfilment of the said condition is on the Revenue, and since Revenue had failed to lead evidence to prove the satisfaction of this condition the Revenue cannot make the appellants liable for service tax under the category of Franchise services. [Dewsoft Overseas Pvt. Ltd. vs. CST (2008) 12 STR 730 (Tri. – Del.)]

Valuation:

Unless the invoice mentions that invoice amount is inclusive of service tax it cannot be treated as cum-service tax price. [Shakti Motors vs. CCE (2008) 12 STR 710 (Tri. – Ahmd)]

Liability of service recipient to pay service tax:

The Tribunal held that though comprehensive provisions for taxing import of services by all possible modes came w.e.f. 18.4.06 when Section 66A was introduced in the Finance Act, 1994 and simultaneously Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 were notified vide Notification No. 11/2006-S.T. dated 18.4.06, but, so far as the taxable services provided in India by a foreigner or non-resident, not having any office or business establishment in India to a person in India are concerned, these services were taxable even prior to 18.4.06 under section 66 read with Section 65(105) of the Finance Act, 1994 and by virtue of Rule 2(1)(d)(iv) of the Service Tax Rules, 1994 read with Notification 36/04-S.T. dated 31.12.2004 issued under Section 68(2) of the Finance Act, 1994, the recipient in India, was liable to pay service tax w.e.f 1.1.05. [Unitech Ltd. v CST (2008) 12 STR 752 (Tri. – Del.);]

Prior to 1.1.2005, in respect of taxable services provided by a non-resident or a person from outside India who does not have an office in India to a person based in India, the recipient of the service is not liable to pay service tax notwithstanding that the recipient has agreed to bear the tax liability **since the tax liability is a creature of the statute and governed by statutory provisions and cannot be determined or apportioned by an agreement between two private parties.** [JCB India Ltd. vs. CST (2008) 12 STR 714 (Tri. – Del.)]

Demand – Limitation:

Where the correspondence with the department revealed that the department was aware about the non-payment of service tax on certain advance fees received by the appellants, the Tribunal held that the larger period of limitation was not invokable. [PT Education & Training Services Ltd. vs. CCE (2008) 12 STR 582 (Tri-Ahmd.)]

Demand – Recoverable only from notice of Show cause notice:

Where non-resident companies provided certain services to an Indian company which the department alleged would be liable for service tax under the category of consulting engineering services and issued SCNs on the non-resident companies, but made a demand on the Indian company since the non-resident companies did not pay the service tax nor responded to the SCNs, the Tribunal struck the demand and held that it is not open to the department to recover service tax from a person in pursuance of an SCN addressed to another person. [Southern Iron & Steel Co. vs. CCE (2008) 12 STR 725 (Tri-Chennai)].

Refund:

Passing an assessment order is contemplated only when a notice u/s.73 is issued. Otherwise, there is no provision for assessment. Thus, where the assessee deposited excess services tax and claimed refund (which was rejected by the lower authorities for certain reasons), the rejection of the refund claim by the Tribunal on the ground that the assessee had not challenged the assessment by filing a statutory appeal is not sustainable since no order capable of being appealed against had ever been passed. [Central Office Mewar Palace Org. vs. Union of India (2008) 12 STR 545 (Raj.)]
The appellants claimed refund on the ground that service tax was not recovered from the client at the time of receipt of the value of services. It produced evidence in the form of CA certificate, invoices and books of account where the amount of service tax was shown as receivable. The department contended that service tax might have been recovered after the issue of CA certificate. The Tribunal allowed the refund claim and held that as the tax was not paid or recovered at the time of payment of value of services the Revenue's contention is in the realm of assumption and presumption. [CCE vs. Gujarat Chemical Port Terminal Co. Ltd. (2008) 12 STR 564 (Tri-Ahmd.)]

Where the appellant paid tax on certain activities but claimed refund on the ground that tax was not payable, the Tribunal held that since the contract value was inclusive of taxes, the presumption would be that the tax in question has been collected from the client unless proved otherwise by specific evidence. Since the appellants only produced a CA certificate stating that the invoices did not indicate the service tax payments made by them the Tribunal denied the refund on the ground of unjust enrichment. [Multi Mantech International Pvt. Ltd. vs. CST (2008) 12 STR 717 (Tri. – Ahmd)]
.
Cenvat Credit:

Where the goods exported have been sold on FOB/CIF basis the Tribunal held that the load port would be the "place of removal" and accordingly, credit of service tax paid on CHA services availed for facilitating clearance of goods from the place of removal (i.e. load port) would be admissible. [CCE vs. Adani Pharmachem P. Ltd. (2008) 12 STR 593 (Tri-Ahmd)]Service tax paid on goods transport agency services availed for transportation of goods from the factory to the consignment agent's premises is entitled to CENVAT credit since consignment agent's premises is also defined as a place of removal and the property in the goods never passes to a consignment agent. [CCE vs. Rajhans Metals P. Ltd. (2008) 12 STR 597 (Tri-Ahmd.)]Rent-a-cab services availed for transportation of employees to factory premises is an "input service" since –

i) it may be considered as being used indirectly in relation to manufacture of goods;

or

ii) as part of business activity for promoting the business since any facility given to the employees will result in greater efficiency and promotion of business.

Accordingly, service tax paid on rent-a-cab scheme services would be entitled to CENVAT credit. [CCE. v. Cable Corporation of India Ltd. (2008) 12 STR 598 (Tri. – Mumbai)].

Where the assessee availed CENVAT credit in respect of services availed at premises not mentioned in the Registration Certificate [but which were subsequently endorsed in the Registration Certificate], the Tribunal held that the credit is not deniable. [Raaj Khosla & Co. Pvt. Ltd. vs. CST (2008) 12 STR 627 (Tri. – Del.)]

Where the appellant is liable to pay service tax on Goods Transport Agency services as payer of freight, such goods transport agency services shall be deemed to be "output service" as per the Explanation to section 2(p) and accordingly credit of service tax paid on any input service and/or credit of duty paid on any input or capital goods can be validly utilised for discharging service tax on such goods transport agency services. [Scan Synthetics Ltd. vs. CCE (2008) 12 STR 766 (Tri. – Del.)

Service tax paid on cell phone bills of Individuals (presumably employees) would be allowable subject to verification that phones are being used for attending calls of the appellant's customers. [Wiptech Peripherals Pvt. Ltd. vs. CCE (2008) 12 STR 716 (Tri-Ahmd.)]

Penalties:

Where the appellants registered themselves on 10.9.2003 and paid service tax for the period 1.4.01 to 31.7.02 but did not pay it for the subsequent period in the matter of Revenue's appeal against the order of Commissioner of Central Excise (Appeals) dropping the penalty u/s, 76, 77 and 78 the Tribunal ordered for payment of penalty limiting to 25% of Service tax amount u/s. 78. [CCE vs. V.S. Patil (2008) 12 STR 567 (Tri-Bang.)]

Where the appellants had paid entire amount of service tax before issuance of show cause notice but had only withheld the payment of interest for want of quantification the Tribunal held that there was a reasonable cause u/s. 80 for non levy of penalty u/s.76. [Lawson Travel & Tours (I) Pvt. Ltd. vs. CST (2008) 12 STR 572 (Tri-Chennai)]

Where the appellants, bonafide believed that only services provided by cable operators who were receiving signals directly from the satellite, and not from multi system operator, were liable under cable operator service, the Tribunal held that there was a reasonable cause for waiver of penalty u/s. 80. [Krishna Satellite Cable Network vs. CCE (2008) 12 STR 605 (Tri-Del.)]

Though the plea of bona fide belief was not specifically raised before the lower authorities the fact that the appellant had been resisting the demand of service tax on the premise that his activity is not liable for service tax led the Tribunal to believe that the appellants were entertaining bona fide belief of not being liable to pay service tax. Accordingly the penalties u/s. 76, 77 and 78 were waived on the reasonable cause ground. [Prodorite Anticorosive Ltd. v. CCE (2008) 12 STR 618 (Tri-Chennai]

Penalty u/s.76, 77 and 78 of the Act can be waived u/s.80 where the appellants committed the transgressions owing to a bona fide ignorance of statutory provisions. [CCE vs. Busy Bee (2008) 12 STR 613 (Tri.-Chennai)]

Where there was confusion as regards leviability of service tax on certain receipts and the appellants also paid the service tax during the investigation proceedings no penalty u/s. 76, 77 or 78 is imposable. [Shakti Motors vs. CCE (2008) 12 STR 710 (Tri. – Ahmd)]Where issue related to the interpretation of the law penalty cannot be imposed [Wiptech Peripherals Pvt. Ltd. vs. CCE (2008) 12 STR 716 (Tri. – Ahmd.)]

When the original authority waived the penalty exercising the discretion vested in him u/s. 80 the Tribunal held that such order cannot be revised by the Commissioner following the Karnataka High Court judgement in CCE vs. Sunitha Shetty (2006) 3 STR 404 (Kar.). [Solomon Foundry v. CCE (2008) 12 STR 750 (Tri-Chennai); Handiman Services Ltd vs. CST (2008) 12 STR 765 (Tri. – Bang.)].

FEBRUARY 2009

Authorised service station services:

'Free services' rendered by automobile dealers in respect of vehicles sold are not liable for service tax since -

i) the value for such services have already been included in the price of the vehicle paid by the customer and has been subjected to payment of excise duty and sales tax.
ii) no payment is received for the services from the customers.
iii) there is no evidence that the vehicle manufacturers have specifically reimbursed any amount towards the said services.

[Hindustan Auto House (P) Ltd. vs. CCE (2009) 13 STR 190 (Tri-Del.)]

Business Auxiliary Services:

Weighment of goods which are subsequently sold cannot be said to be a service in relation to sale, promotion or marketing of goods belonging to the client or an activity incidental or auxiliary to promotion or marketing or sale of goods and hence not liable under business auxiliary services. [CCE vs. Northern Computer (2009) 13 STR 34 (Tri-Del.)]

The appellants in the present case were engaged in the activities of beneficiation of coal i.e. a process whereby the coal extracted from the mines is crushed into pieces and thereafter washed to remove its impurities and ash content so as to make it fit for sale. The Revenue raised a demand on the ground that the said activity would liable for service tax under business auxiliary services as "production or processing of goods for or on behalf of the client". On appeal, the Tribunal referring to a number of enactments and cases with regard to mining of coal, held that beneficiation of coal is an integral part of 'mining' and liable under the category of 'mining services' which came into effect only from 01.06.2007 and not under 'business auxiliary services' [Aryan Energy (P) Ltd. vs. CCCE (2009) 13 STR 42 (Tri-Bang)]

Sale of SIM cards (purchased from BSNL) by the assessee to its customers is transaction of purchase and sale of 'goods' and sales tax is attracted. The activity does not amount to marketing and distribution of products and would not be liable for service tax under the category of business auxiliary services. Further BSNL had already paid service tax. [R. Venkataramanan vs. CCE (2009) 13 STR 187 (Tri - Chenai)]

Cargo Handling Services / Port Services:

Services of cargo handling (i.e. loading, unloading, etc.) within the port premises by a person who has been issued a stevedoring licence u/s. 42(3) of the Major Port Trust Act, 1963 read with rule 60 of the New Mangalore Port Rules, 1976 and section 3(i) of the Department of Surface Transport, Ministry of Transport, Government of India, Notification dated 16.12.1985, falls within the category of "Cargo Handling Services" and not "port services". Further, since the assessee was handling only "export cargo" he would not be liable for service tax even under cargo handling services and accordingly be entitled to refund of tax paid. [CCE vs. Konkan Marine Agencies (2009) 13 STR 7 (Kar)].

Where the assessees were engaged in operating pay loaders to load the coal into railway wagons, the Tribunal after examining the contracts held that the activity of the appellants was not merely "hiring" of payloaders but that of loading the cargo into the railway wagons and the payloaders were merely an aid to perform the activity. Hence, the assessee's activity would be liable for service tax under the category of cargo handling services. [Gajanand Agarwal vs. CCE (2009) 13 STR 138 (Tri-Kolkata)]

Clearing and forwarding Agent services:

Where the appellants were engaged in activities of storing, selling and invoicing of the goods on behalf of their principal, on facts, the Tribunal held that services rendered by them were in the nature of consignment agent services and were liable to service tax under the category of clearing and forwarding agent services. [CCE vs. Singhania Chemicals Agency (2009) 13 STR 160 (Tri-Del.)]

Event management services:

Where the appellants had obtained commercial rights in tournaments of PGAI in exchange for some consideration to be paid to PGAI and undertaking the obligation of finalizing with sponsors and golf clubs to organize certain minimum number of tournaments the Tribunal held, on facts, that the appellants, by organizing the golf tournaments, the commercial rights of which can be exploited by the appellants, have provided the event management service to themselves and not to the association or to the sponsors and no service tax is payable on the amount received from the sponsoring companies under the category of event management services.
[Tiger Sports Marketing Pvt. Ltd. vs. CST (2009) 13 STR 59 (Tri-Del).]

Management Consultants services:

Rendering of services in areas like procurement or raw material, packing of finished goods, documentation, sharing of common facilities and expenses etc. will not amount to rendering of management consultant services. [Sara Services & Engineers Pvt. Ltd. vs CCE (2009) 13 STR 177 (Tri-Del.)]

Rent-a-cab operator service:

Where the appellants had rented out two of its vehicles having seating capacity of less than 6 and 6-12 passengers for hire, the Tribunal held that the activity of the appellants would be covered under "rent-a-cab services" since all vehicles with the relevant seating capacity used for transportation of passengers would fall within the definition of 'cab', 'motor cab' and 'maxi cab' for the purpose of service tax notwithstanding that other requirements of Motor Vehicles Act with respect to the vehicles have not been complied to consider it as motor cab or maxi cab.

[Neeraj Construction vs. CCE (2009) 13 STR 145 (Tri-Del)]

Stock Broker services:

Services provided by a sub-broker to a stock broker viz., of getting prospective investors for sale or purchase of securities is liable for service tax post 10.9.04 under the category of "stock broker services". [Unique Investment Centre vs. CCE (2009) 13 STR 158 (Tri-Del.) Decision in Vijay Shantha v. CCE (2007) 7 STR 518 (Tri-Del.) held per incurium]

Tour Operator service:

Where the appellants were granted "tourist permits" by the transport authorities under the Motor Vehicles Act, 1988, it was held that they would be covered under the definition of tour operator and hence would be liable for service tax notwithstanding that the vehicles were utilised as "stage carriages" and not as contract carriages". [Mangalwardhini Travels vs. CCE (2009) 13 STR 51 (Tri-Del)]

Valuation:

It is only 'gross amount charged for services' that is liable for service tax. Reimbursement of expenses incurred by the service provider on behalf of the service receiver (which but for the payment by service provider would have been payable by the service receiver) cannot be considered as amounts received for rendering of services and hence would not be included in the gross amount charged for services rendered and accordingly not liable for service tax. It is not necessary that there must be a specific provision in the Act for each service regarding deduction of reimbursements. [Rolex Logistics Pvt. Ltd. vs. CST (2009) 13 STR 147 (Tri-Bang.)]

Limitation:

Where an order was issued u/s. 11C dated 4.4.2007 of the Central Excise Act under which the Government acknowledged that there was a general practice of not levying service tax in respect of vehicles used as stage carriages and accordingly granted exemption for the period 1.4.2000 to 4.2.2004, it was held that a show cause notice dated 13.6.2005 invoking longer period of limitation to demand tax for the period 1.4.2001 to 31.3.2004 is time barred. [Mangalwardhini Travels vs. CCE (2009) 13 STR 51 (Tri-Del)]

Where the SCN is based on the information disclosed in balance sheet and other documents maintained by the appellants and the appellants have been regularly paying tax and filing returns the Tribunal held that there is no suppression of facts with an intent to evade tax and hence larger period of limitation cannot be invoked. [Rolex Logistics Pvt. Ltd. vs. CST (2009) 13 STR 147 (Tri-Bang.)]

Penalty:

Where there were factors which created confusion in the minds of assessee with regard to payment of service tax and the assessee had paid service tax alongwith interest before the issuance of show cause notice there Tribunal held that there was a reasonable cause u/s.80 for non levy of penalties u/s. 76, 77 & 78. [Vinayak Travels vs. CST (2009) 13 STR 31 (Tri-Bang.); See also CCE vs. Shantha Satellite Vision (2009) 13 STR 76 (Tri-Bang.)]

In absence of malafide intention for delay in payment of tax, penalties u/s.76, 77, 78 and 79 must be waived under section 80 on the ground of "reasonable cause" instead of merely reducing the penalties.[M.R. Coatings Pvt. Ltd. vs. CCE (2009) 13 STR 79 (Tri-Ahmd.)]

On a question as to whether the benefit of immunity from penalty under the Extraordinary Tax Payer Friendly Scheme communicated vide D.O. Letter dated 20.9.2004 would be available to the assessees who have registered themselves prior to the communication of Scheme, The Hon'ble High Court observed:

i) the amnesty scheme is an administrative instruction issued for the benefit of both the service providers and the Revenue and is not an instruction envisaged under section 37B of the Central Excise Act. Thus it would not be considered as having a statutory force.
ii) The scheme is issued with an intention to provide immunity to defaulters who chose to deposit arrears of tax and interest before the cut off date and hence immunity should not be denied to persons who have already got themselves registered prior to the communication of the Scheme.

[UOI vs. Amit Kumar Maheshwari (2009) 13 STR 119 (Raj.)]

Where the appellant was operating in a small town on a small scale, penalties u/s.76 & 77 was waived u/s.80 on the 'reasonable cause' ground [Neeraj Construction vs. CCE (2009) 13 STR 145 (Tri-Del)]

Where there is no intent to evade tax and prevalence of confusion as to taxability at the infancy stage of implementation of the law the Tribunal waived the levy of penalties u/s. 76, 77 & 78. [Gajanand Agarwal vs. CCE (2009) 13 STR 138 (Tri-Kolkata)]

Penalty can be waived where there was no malafide intention since -

a) the issue in dispute involved bonafide interpretation of provisions of law; and
b) Credit was availed in statutory records under due intimation to the jurisdictional authorities.

[Mundra Port & Special Economic Zone Ltd. vs. CCE (2009) 13 STR 178 (Tri-Ahmd.)]

Refund Rebate:

Refund arising due to the order of the Tribunal is refundable even if SLP has been filed by the department and the matter is pending before the Supreme Court. [Jai Bhagwati Impex Pvt. Ltd. vs. UoI (2009) 13 STR 24 (Bom.)]

Where the revenue contended that since goods exported out of country were exempted from payment of duty and therefore, the amount paid by the respondent manufacturer cannot be treated as "duty" paid and he is not entitld to rebate on account of duty paid on goods removed from factory / authorised warehouse for export out of India, the High Court held that -

i) if no duty was leviable and the assessee was not required to pay the duty but still he has paid the duty the Government cannot retain the same on any ground and must refund the amount received from the assessee as on their own showing. It has not received the amount by way of duty which could be appropriated by them nor to which Section 11B applies.
ii) If on the other hand, the assessee is entitled to remove such goods on payment of duty in ordinary course he is entitled to claim rebate thereon because the goods were exported out of country on payment of excise duty.

In either case the refund is admissible. [CCE vs. Suncity Alloys Pvt. Ltd. (2009) 13 STR 86 (Raj.)]

Where the assessees, air travel agents, paid service tax on cancelled tickets but subsequently refunded the amount of tax and value of its customers, it was held that the fact that the incidence of tax has not been passed on to any other person stood established. [CCE vs. Sharma Travel (2009) 13 STR 150 (Tri.-Del.)]

Appeal:

Where additional evidence was not adduced before the Tribunal by filing an application in writing to that effect under r. 23 of CESTAT (Procedures), Rules, 1982 it was held by the High Court that the order of the Tribunal rejecting the additional evidence and upholding the order of lower authorities was correct. [Kay Iron Works Pvt. Ltd. vs. CCE (2009) 13 STR 87 (Bom.)]

Appeals and Remand:

In the first round of proceedings, the deputy Commissioner raised a demand and imposed penalties on the assessee. The CCE(A) confirmed the demand but reduced the penalties to Rs. 20,000/-. The assessee appealed to the Tribunal for cum-tax computation of demand which the Tribunal agreed and remanded the matter to "decide the matter afresh including the imposition of penalty and interest …." On remand, the Assistant CCE sustained the demand but increased the penalty which the CCE (A) modified to some extent. On appeal, the Tribunal held that where the reduction in the quantum of penalty to Rs. 20,000/- by the CCE(A) in the first round of proceedings was not challenged by the revenue authorities the quantum of penalty was final as against them. The remand was meant for the assessee to seek a waiver of penalty and it was not open to the lower authorities to pass a more disadvantageous or onerous order so far as quantum of penalty was concerned. [Bhagwati Security Services vs. CCE (2009) 13 STR 152 (Tri-Del.)]

Cenvat Credit:

Custom house agent's services availed for clearance of goods exported does not have any nexus with the manufacturing and clearance of the final products from the factory and hence tax paid on custom house agent services is not eligible for cenvat credit. [Nirma Ltd. vs. CCE (2009) 13 STR 64 (Tri-Ahmd.)]

Credit of service tax paid on manpower supply services used for operation and maintenance of power plant set up by manufacturers for generating electricity (not excisable) to produce excisable goods is admissible. [Sanghi Industries Ltd. vs. CCE (2009) 13 STR 167 (Tri-Ahmd.)]

The appellants generated power in their power plants situated 200 kms away from their factory and supplied the same to Gujarat Electricity Board in consideration whereof they were permitted to withdraw electricity for their factory from the power grid on payment of fixed wheeling charge. On the question whether credit of service tax paid on maintenance and repair services consumed in their power plants would be admissible the Tribunal observed that the transaction of delivering power to the grid and sale of power from the grid are two distinct transactions and there was no direct nexus between the services received within the power plant and goods manufactured within the factory by the appellants and hence credit was not admissible. [Ellora Times Ltd. vs. CCE (2009) 13 STR 168 (Tri-Ahmd.)]

Credit of service tax availed on the basis of TR-6 challans cannot be denied since no document was prescribed for taking credit during the relevant point of time especially when the payment of service tax has not been denied. [Centaur Phamaceuticals P. Ltd. vs. CCE. (2009) 13 STR 171 (Tri. - Mumbai)]

In this case the Tribunal held as follows:

i) Cement and steel used in construction of a jetty of a port does not fall within the definition of term 'inputs' as defined under Rule 2(k) of the Cenvat Credit Rules, 2004 since it cannot be said that they are "used for providing" port services and accordingly credit of duty paid on cement and steel is inadmissible.
ii) Mobile phone services, Custom house agent's services, Surveyor's services and rent-a-cab services availed for hiring cars for port officers are "used for providing output services" and credit of service tax paid on these services is admissible.
iii) Credit of service tax paid on club house fees meant for recreation of workers being not directly connected with rendering of port services would be inadmissible.
iv) Credit of duty paid on air-conditioners being capital goods falling with the definition of term capital goods is fully admissible.

[Mundra Port & Special Economic Zone Ltd. vs. CCE (2009) 13 STR 178 (Tri-Ahmd.)]

Export of services:

Where the appellants booked orders in India for the sale of the goods manufactured by its subsidiary situated in Singapore for a commission, the Tribunal held that:

i) it cannot be said that the booking of orders indicate services being rendered in India;
ii) since the orders were booked for a Singapore company the services were considered to be delivered only to the Singapore company;
iii) when the recipient of the service is Singapore Company, it cannot be said that services is delivered in India and the benefit of services is derived only by the recipient company;
iv) because of the booking of orders, the Singapore Company gets business therefore the services are also utilized abroad

Accordingly, the services of the appellant would be considered as export of services and not liable for service tax. [ABS India Ltd. vs. CST (2009) 13 STR 65 (Tri-Bang.)]

March 2009

Authorised Service Station:

'Free services' rendered by automobile dealers in respect of vehicles sold are not liable for service tax since –

i) the value for such services have already been included in the price of the vehicle paid by the customer and has been subjected to payment of excise duty and sales tax

ii) no payment is received for the services from the customers

iii) there is no evidence that the vehicle manufacturers have specifically reimbursed any amount towards the said services

[K.P.Authomobiles Pvt. Ltd vs. CCE (2009) 13 STR 389 (Tri-Del)]

Banking and other financial services:

The very nature of business and transaction under the Chits as per the provisions of the Chit Funds Act stands on its own as a class. It does not have any parlance or similarity to that of normal transactions as one understood in law or commercially. Hence in absence of specific definition of 'cash management' or 'asset management' in the statute governing service tax Circular No. 96/7/2007-ST dated 23.8.2007 clarifying Chit funds business to be within ambit of service tax as being in the nature of cash management is incorrect and liable to be set aside. *[A.P. Federation of Chit Funds vs. UOI (2009) 13 STR 350 (A.P.)]*

Business Auxiliary Services:

Sale of various telecom services (purchased from BSNL) by the assessee to its customers is transaction of purchase and sale of 'goods' and sales tax is attracted. The activity does not amount to marketing and distribution of products and would not be liable for service tax under the category of business auxiliary services. Further BSNL had already paid service tax. *[Chetan Traders vs. CCE (2009) 13 STR 419 (Tri-Del.)]*

Goods Transport Agency Services:

Where the service tax on GTA services was paid by the transporters, the Tribunal held that tax in respect of the same services cannot be demanded again from the service recipient. *[Navyug Alloys Pvt. Ltd. vs. CCE (2009) 13 STR 421 (Tri-Ahmd.)]*

Mandap Keeper services:

Where the appellants, a hotel which let out its halls for functions as well as conferences / meetings but registered itself only under mandap keeper services and not under convention services, the Tribunal held that the assessee is required to register under both as mandap keeper services and convention services and should classify the service each time either as convention or mandap keeper depending upon whether the hall is let out for organizing official, social or business function, or for formal meetings / conferences and discharge service tax appropriately. *[Welcome Hotel vs. CCE (2009) 13 STR 375 (Tri-Ahmd.)]*

"Breakfast" and "High Tea" (which in social context is used in replacement of dinner) would be considered as 'substantial and satisfying meal' within the meaning of Notification no. 21/97-S.T. dated 26.6.1997 and an assessee providing them whether on fixed menu basis or unlimited basis along with mandap keeper services would be entitled to abatement under the said notification. In order to claim exemption each and every invoice disclosing as to whether the supplied item was only tea or coffee or the same was inclusive of how many number of snacks etc. so as to fulfill the meaning of 'substantial and satisfying meal' is not required to be gone through. It would be sufficient if the mandap keeper has provided catering services and has disclosed the same as 'inclusive of catering charges' in the invoices raised by him. *[Welcome Hotel vs. CCE (2009) 13 STR 375 (Tri-Ahmd.)]*

Import of Services:

Prior to 1.1.2005, in respect of taxable services provided by a non-resident or a person from outside India who does not have an office in India to a person based in India, the recipient of the service is not liable to pay service tax notwithstanding that the recipient has agreed to bear the tax liability since the tax liability is a creature of the statute and governed by statutory provisions and cannot be determined or apportioned by an agreement between two private parties. *[CCE vs. Nicholas Piramal India Ltd. (2009) 13 STR 383 (Tri. – Del.)]*

Valuation:

Income-tax deducted at source under the provisions of Income tax Act would form part of the gross amount charged for the purpose of charging service tax. *[CCE vs. Louis Berger International Inc. (2009) 13 STR 381 (Tri-Del.)]*

Limitation:

Where the appellants, bonafide believed that they were not required to pay service tax both as mandap keeper and convention services since two interpretations were possible the Tribunal held that larger period of limitation cannot be invoked *[Welcome Hotel vs. CCE (2009) 13 STR 375 (Tri-Ahmd.)]*

Where the cenvat credit alleged to have been wrongly availed had been reflected by them in statutory records placed before the revenue authorities and the issue involved a bona fide interpretation of the provisions of law the Tribunal held that larger period of limitation cannot be invoked. *[Sagar Springs P. Ltd. vs. CCE (2009) 13 STR 400 (Tri-Ahmd.)]*

Penalty:

In this case the Tribunal held as follows:

i) No penalty would be imposable u/s. 75A (for failure to register) in respect of period prior to 16.7.2001;

ii) Where the appellants had bonafide doubts with regard to the classification of services and the original authority in de novo proceedings directed by the Tribunal had also reduced substantial amount of demand, no penalty u/s. 76 was imposable;

iii) Further there being no suppression of facts and in absence of the permission from the CCE to levy penalty, no penalty u/s. 78 was leviable.

Appeal:

Appeals filed before the High Court u/s. 35G of the Central Excise Act, 1944 beyond the prescribed period of limitation in terms of section 35G(2)(a) [180 days from the date of receipt of the order] would be barred by time and the High Court would have no jurisdiction to condone the delay and entertain the appeal after the said period of limitation. Further, the language of the provisions [especially section 35G(9) – opening words] seen in conjunction with the legislative intent and the objects of expeditious disposal sought to be achieved would exclude the application of section 5 of the Limitation Act, 1963 (which provides for condonation of delay on sufficient reasons) by necessary implication. *[CCE vs. Shruti Colorants Ltd. (2009) 13 STR358 (Bom)]*.

CENVAT Credit:

Where credit is taken on common inputs / input services used in the manufacture of dutiable and exempted products without maintenance of separate accounts as per rule 6(2), but the assessee has reversed the credit on inputs / input services pertaining the exempt products, either prior to or after the issuance of show cause notice, the assesee would not be liable to pay 10% of the value of exempted products under rule 6(3)(b) of the Cenvat Credit Rules, 2004. *[Mount Mettur Pharmaceuticals Ltd. v. CCE (2009) 13 STR 414 (Tri- Chennai)]*.

APRIL 2009

Advertising Agency services:

The Hon'ble High Court held that –

i) Advertising material need not always be a product of creative work like conceptualisation, visualisation, designing etc. by an advertising agency and the definition of "advertisement" u/s. 65(2) is wide enough to include material in the form of vinyl stickers, hoardings, boards, banners, boxes, covers, balloons, film-slides etc. with manufacturers name or logo or product name or trade name, with or without design work.

ii) All commercial concerns engaged in any of the activities connected with advertisement, which includes making, preparation, displaying or exhibition of advertisement, answer the description of "advertising agency" u/s. 65(3). It is not necessary to carry out all the activities in the definition viz., making, preparation, displaying or exhibition.

Accordingly the court held that the assessee who was engaged in production and sale of the above advertisement material was an "advertising agency" liable to pay "service tax" under advertising agency services. [CCE vs. Zodiac Advertisers (2009) 13 STR 593 (Ker.); See CST vs. Identity Communication Pvt. Ltd. (2009) 13 STR 614 (Tri-Ahmd.) – "Tableau" is not an advertisement]

Broadcasting Service:

Where the assessee undertook the activities of selection, production and scheduling of programmes for telecast and collected money from their sponsors / advertisers by sale of time slots for such telecast the Tribunal held that the activity of selling time slots for the telecast of programmes, obtaining sponsorships etc., is covered by the second part of the definition of "broadcasting" and by all these activities, they were providing a service to their clients in relation to "broadcasting" and such services was exigible to levy of service tax. [Vijay Television (P) Ltd. vs. CST (2009) 13 STR 296 (Tri. – Chennai)].

Business Auxiliary Services:

Where the appellants undertook activities like identifying customers, explaining them the utility of product and providing them with samples in consideration for a commission payable only when payment was received from the customers the Tribunal held that the appellant's services were in the nature of commission agent and not "promotion" and hence they were entitled to the benefit of notification no. 13/2003 (as it stood prior to 8.7.2004). [CCE vs. M. A. Menon & Co. vs. CCE&C (2009) 13 STR 653 (Tri-Ahmd.)]

Where the assessee, a dealer in motor vehicles, was promoting or marketing the services of the financial institution which provided loans to his customers, the Tribunal held that his services would be liable for service tax under the category of "Business auxiliary services". [Roshan Motors Ltd. vs. CCE (2009) 13 STR 667 (Tri-Del.)]

Consulting Engineer Services:

Where the appellant entered into a turnkey contract for construction of a LNG Terminal and had rendered design and engineering services for the purpose of the project, the Tribunal held that the contract cannot be vivisected and part of it be subjected to service tax as consulting engineering service [CCE vs. Ishikawajima-Harima Heavy Ind. Co. Ltd. (2009) 13 STR 650 (Tri-Ahmd.)]

Supervision charges for installation and commissioning of the plant would not be liable for service tax under the category of 'Consulting Engineering Service'. [Kirlburn Engg. Ltd. vs. CCE (2009) 13 STR 285 (Tri. – Ahmd.)]

Insurance Auxiliary Services:

The appellants, reinsurance brokers, arranged reinsurance for certain Indian insurance companies. The overseas reinsurance companies paid the Indian insurance companies a 'reinsurance commission' – 50% of which was paid to the appellants and 50% to the Indian insurance companies. The department sought to tax the appellant's remuneration under the category of "insurance auxiliary services" for the period from 16.7.2001 to 30.6.2005. On appeal based on the facts the Tribunal held that –

i) a contract of reinsurance is essentially a contract of insurance and the definition of term 'insurer' as defined in section 65(58) was wide enough to include the services of 'reinsurer'. The amendment made by the Finance Act, 2006 w.e.f. 1.5.06 to expressly include a "reinsurer" within the definition of "insurer" was a clarificatory amendment;

ii) the services of reinsurance brokers were provided to the Indian insurance company. Hence its services cannot be considered to be exported out of India;

iii) in absence of physical receipt of convertible foreign exchange the appellants could not claim exemption under notification no. 6/99 or 21/2003.

[Suprasesh G.I.S. & Brokers P. Ltd. vs. CST (2009) 13 STR 641 (Tri-Chennai)]

Site formation and clearance, excavation and earth moving and demolition Services:

Where the appellants under a contract with APMDCL were required not only to remove the overburden but to extract Barytes Ore the Tribunal held that the essential character of the activities of the appellants were in the nature of mining services and site formation (i.e. removal of overburden) was only incidental. Since mining services were liable to service tax only w.e.f. 1-6-2007 the demand for a period prior to 1-6-2007 is not payable. Further, the Tribunal also observed that the contract for mining being comprehensive in nature cannot be vivisected for the purpose of levying service tax on the portion of activity relating to site formation services.[M. Ramakrishna Reddy vs. CCE&C (2009) 13 STR 661 (Tri-Bang.)]

Tour Operator services:

Prior to 10-9-2004, where the vehicles which were used by the appellants for conveyance of its client's staff were not tourist vehicle as defined under Section 2(43) of the Motor Vehicles Act, read with Rule 128 of the Central Motor Vehicle Rules, the Tribunal held that appellants cannot be said to be a tour operator within the meaning of the term as defined under Finance Act, 1994. [CCE vs. Super Travels (2009) 13 STR 625 (Tri-Del.); See also CCE vs. Gayatri Enterprises (2009) 13 STR 630 (Tri-Del.)]

Appellants having contract carriage permit but not tourist permit (since vehicle was not a tourist vehicle) would not come within the definition "tour operator", which, during the period of dispute stood as "any person engaged in the business of operating tours in a tourist vehicle covered by a permit granted under the Motor Vehicles Act or the rules made thereunder". [Bhagwan Singh Gulati vs. CCE (2009) 13 STR 253 (Tri. – Del.)]

Rate of tax – Taxable event:

In a case where insurance premium was received in advance and policy was issued and thereafter the rate of service tax had increased the Tribunal held the enhanced rate of Service tax is not applicable to the policies, which were issued prior to the enhancement of the rate. [Bajaj Allianz General Insurance Co. Ltd. vs. CCE (2009) 13 STR 259 (Tri.- Mumbai)].

Import of services – Liability:

Recipient of taxable services from offshore service provider [i.e. overseas commission agents in this case] liable to pay service tax under Rule 2(1)(d)(d)(iv) of the Service tax Rules, only w.e.f. 1.1.2005. [Nahar Spinning Mills vs. CCE (2009) 13 STR 255 (Tri. – Del.)].

In respect of taxable services received outside India by a person who is resident in India from a person who is non resident or is from outside India would be liable for service tax only after enactment of Section 66A w.e.f. 18-4-2006. Prior to 18-4-2006, in respect of the said services the service recipient in India would not be liable for service tax. [Indian National Shipowners Association vs. UOI (2009) 13 STR 235 (Bom.)]

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Valuation:

Photography service is a works contract involving both the elements of sale and service and the value of sale portion cannot be included with the value of service and subjected to service tax. [Deluxe Color Lab (P) Ltd. vs. CCE (2009) 13 STR 605 (Tri-Del.); See Jain Bros. vs. CCE (2009) 13 STR 633 (Tri-Del.)]

Show cause notice:

Where refund application of CENVAT credit on inputs used for exports was rejected by the appellate authority without issuing a show cause notice on the ground that the CENVAT credit was not available in respect of service tax paid on the services provided by the foreign commission agents, the Tribunal held the appellate authority travelled beyond the proposal for considering refund claim and no opportunity was given to the appellant by way of proceedings to deny CENVAT credit. On this ground the refund was allowed. [Rawmin Mining and Indus. Ltd. v. CCE (2009) 13 STR 269 (Tri. – Ahmd.)].

Limitation – suppression of facts – burden of proof:

Where the revenue had alleged that the appellants (CHA) had not spent any amounts collected towards reimbursable expenses without verifying the service tax returns and the Cenvat credit returns which were filed regularly, the Tribunal observed that in absence of verification the benefit of doubt would be given to the appellants and that the burden to prove that the said expenses have not been incurred by the appellants lay on the department. Further, since the appellants had been regular in filing their service tax and CENVAT credit returns the Tribunal observed that there was no suppression of facts hence the larger period of limitation was not invokable. [Chandra Shipping & Trading Services vs. CCE&C (2009) 13 STR 655 (Tri-Bang)]

Where the department had issued an SCN to include erection, commissioning and installation charges in the assessable value for charging excise duty, a subsequent SCN on the assessee seeking to invoke the larger period of limitation for charging the said charges to service tax is not permissible since the department is deemed to be aware of the facts and there was no suppression of the facts.[Kirlburn Engg. Ltd. vs. CCE (2009) 13 STR 285 (Tri- Ahmd.)]

Where the order for invoking the extended period of limitation was not a speaking one, the Tribunal held that the extended period is not invokable and directed the CCE to quantify the demand for the normal period.[Vijay Television (P) Ltd. vs. CST (2009) 13 STR 296 (Tri-Chennai)]

Penalty:

Where the appellants had wilfully defaulted in depositing the service tax collected within the due date with the government but had deposited the same before the issuance of show cause notice the Tribunal held that penalty was leviable inorder to prevent recurrence of such breach of law. Thus, penalty u/s. 76 was upheld but reduced from Rs. 100/- per day starting from the date of default till the date of payment of tax to Rs. 1 lakhs and penalty u/s. 78 was deleted. [Remac Marketing (P) Ltd. vs. CST (2009) 13 STR 658 (Tri-Kolkata)]

Where no penalty u/s. 78 was levied in the original show cause notice the Tribunal observed that the same cannot be levied by way of a revisionary order. [Punjab Small Inds. & Exports Corpn. Ltd. vs. CCE (2009) 13 STR 677 (Tri-Del.)]

Where the provisions of S. 73(1A) were in existence at the time of issuance of SCN, proceedings shall be deemed to be concluded on voluntary payment of service tax, interest and 25% of penalty u/s. 73(1A) even if the demand pertains to the period prior to the introduction of section 73(1A). [Aneja Property Dealer vs. CCE (2009) 13 STR 266 (Tri. – Del.)]

Penalty u/s. 76 was set aside where the assessee was under a bona fide belief that no service tax was payable by them and subsequently they paid the service tax alongwith interest before the issuance of SCN. [ABE Value Point Systems Pvt. Ltd. vs. CST (2009) 13 STR 288 (Tri. – Bang.)]

Setting side of penalties by the Tribunal on the ground that the matter was not free from doubt and during the relevant period there was a decision by the Tribunal in favour of assesses, the decision of the Tribunal cannot be held to be a mistake requiring any rectification by the Tribunal [Redson Pharmaceuticals Ltd. vs. CCE (2009) 13 STR 292 (Tri-Ahmd.)]

Summons:

An advocate had filed an argument note on behalf of his clients in certain proceedings under the Customs Act. Based on the argument note a SCN was issued to a third party. The third party sought cross-examination of the advocate. Quashing the summon for cross-examination, the court held that an advocate appearing in a case cannot be forced to give evidence in respect of his actions as an advocate on behalf of a client. What he has done is only to present his arguments before the adjudicating Authority under the Customs Act. In respect of the same he cannot be summoned for cross examination under section 108 of the Customs Act. [Mohammed Zahir vs. Add. CC (2009) 13 STR 322 (Ker.)]

Cenvat credit – Refund:

The place of removal in case where the goods are exported on FOB basis would be the port and accordingly, credit of service tax paid on C & F agent services for facilitating clearance of goods from the place of removal (i.e. port) would be admissible. [Rawmin Mining and Indus. Ltd. vs. CCE (2009) 13 STR 269 (Tri. – Ahmd.)]

CENVAT Credit:

Service tax paid on medical and personal accident insurance policies of employees and catering services would be entitled to input credit since these costs are included in the cost of final product in terms of CAS-4. Further, in view of the broad definition of input services, CENVAT credit on the services of landscaping the surrounding of the factory premises was held to be admissible especially in the present day conditions where much importance is given to keeping the environment in a proper manner. [Millipore India Ltd. vs. CCE (2009) 13 STR 616 (Tri-Bang.)]

Prior to 16.6.2005 credit in respect of service tax paid on Goods Transport Agency services can be availed on the basis of TR-6 challans even if no document was prescribed for taking credit especially when the service tax was paid and the assessee is otherwise entitled to credit. [Gaurav Krishna Ispat (I) Pvt. Ltd. vs. CCE (2009) 13 STR 629 (Tri-Del.); See also CCE v. Shree Sidhbali Steel Ltd. (2009) 13 STR 284 (Tri. – Del.)].

Where the services had been rendered by sub-contractor to the main contractor and the tax liability thereon had been discharged by the sub-contractor, credit of service tax was admissible in the hands of the main contractor and such credit cannot be denied on the ground that sub-contractors were not liable to pay service tax. [Koch-Glitsch India Ltd. vs. CCE&C (2009) 13 STR 636 (Tri-Ahmd.)]

Credit of service tax paid on mobile phones which are standing in the name of the company and are used by the employees in relation to work cannot be denied only on the ground that the same has been incidentally used for personal work. [CCE vs. Conzerv Systems (Pvt.) Ltd. (2009) 13 STR 638 (Tri-Bang.); See also CCE vs. Brakes India Ltd. (2009) 13 STR 684 (Tri-Chennai); CCE vs. Steelcast Ltd. (2009) 13 STR 696 (Tri-Ahmd); See also CCE vs. Stanzen Toyotetsu India (P) Ltd. (2009) 13 STR 289 (Tri.- Bang.)]

CENVAT credit of service tax paid on amounts paid to Airport Authority for allowing the appellants to park their aircraft, used for the business purposes, in the airport, is allowable in absence of evidence that the aircraft had not been used for business purposes. [Force Motors Ltd. vs. CCE (2009) 13 STR 692 (Tri-Mumbai)].

JULY 2009

CARGO HANDLING SERVICES:

On facts, where the appellants were engaged in unloading of coal from railway wagons and discharging the same to the conveyor belt through the track hopper the Tribunal held that the appellant's activities would be liable for service tax under the category of cargo handling services.[Singh Brothers vs. CCE (2009) 14 STR 552 (Tri-Del.)]

CLEARING AND FORWARDING AGENT:

In order for a service to be covered under the category of 'clearing and forwarding' services, the service provider must provide both clearing "and" forwarding services and not only clearing "or" forwarding. [CCE v. Kulcip Medicines (P) Ltd. (2009) 14 STR 608 (P&H) overruling Medpro Pharma Pvt. Ltd. v CCE (2006) 3 STR 355 (Tri. – LB)]

COMMERCIAL TRAINING OR COACHING CENTRE SERVICES:

Providing training to candidates, sponsored by various insurance companies to appear for examinations conducted by IRDA which are required to be cleared to work as an insurance agent would be considered as a vocational training entitled for exemption from service tax under Notification No. 9/2003 – S.T. [Pasha Educational Training Inst. vs. CCE (2009) 14 STR 481 (Tri-Bang.)]

CONSULTING ENGINEERING SERVICES:

Supply of drawings and designs as per the technical requirements ofthe client which would attract the provisions of the Customs Act, 1962 would amount to sale of goods and not rendering of consulting engineering services. [Solitz Corporation v. CST (2009) 14 STR 642 (Tri-Del.)]

MANAGEMENT CONSULTANCY SERVICES:

On facts, the Tribunal held that the appellants by providing on going technical services were engaged in rendering advice, consultancy or technical assistance in the working system of the manufacturing facility of their client and accordingly would be liable for service tax under the category of 'Management consultancy services'.[Shervani Indus.Syndicate vs. CCE (2009) 14 STR 486 (Tri-Del.)] The services of deputing personnel to sister concerns to engage in day to day activities is not liable under Management Consultancy services.[Daurala Organics v CCE (2009) 14 STR 620 (Tri. – Del.)]

IMPORT OF SERVICES:

The Larger Bench of the Tribunal affirmed its decision in Hindustan Zinc Ltd. vs. CCE (2008) 11 STR 338 (Tri-LB) and held that recipient of services imported would not be liable for service tax prior 1.1.2005.[Molex (India)Lltd vs. CCE(A). (2009) 14 STR 616 (Tri-LB.)]

VALUATION:

In case of photography services, the portion of value attributable to sale of photography materials would not be included for the purpose of levy of service tax. [CCE vs. Ajanta Color Labs. (2009) 14 STR 468 (Tri-Del.)] Handling charges recovered from customers for giving physical delivery of scrips and certificates (a system which prevailed prior to2001), not being in the nature of commission or brokerage is not includible in the value of taxable services which in terms of Section 67(a) is the aggregate of the commission or brokerage charged by a stock broker on the sale or purchase of securities from the investors and includes the commission or brokerage paid by the stock broker to any sub-broker. [Steel City Securities Ltd. vs. CCE (2009) 14 STR 479 (Tri –Bang.)]Note : This decision is as per the law prior to 16.7.2001 Commission received by mandap-keeper from decorators for providing them the client for the purpose of decoration would have to be excluded for the purpose of calculating service tax under the category of mandap keeper services. [Anand Associates vs. CST (2009)14 STR 504 (Tri-Ahmd.)]

LIMITATION:

Where the appellants had registered for service tax since September,2004 but bona fide believed that their activities would not be liable prior to 16.6.05 and they had also informed the department as far back as in 1998 about their activities the Tribunal held that since the department was made aware of the activities of the appellant in 1998, there was no suppression of facts and hence the larger period of limitation was notinvokable. [CST vs. P.J. Margo Pvt. Ltd. (2009) 14 STR 477 (Tri-Bang.)

Demand-Limitation:

Where no objections were raised by the department as regards valuation when the appellant firm filed returns regularly during its existence nor when they surrendered their registration certificate on dissolution of the firm, the Tribunal held that extended period of limitation cannot be invoked to confirm a demand prior to dissolution.[CCE & ST v. P.V. Narayana Reddy (2009) 14 STR 701 (Tri-Bang.)

PENALTY:

Where non-payment of service tax was on account of confusion with regard to the liability to pay service tax the Tribunal held that there was a reasonable cause as envisaged u/s. 80 for waiver of penalties. [Life Insurance Corporation of India vs. CCE (2009) 14 STR 495 (Tri-Del.)] Enhancement of penalty by way of revising the order of adjudicating authority during the pendency of appeal before CCE(A) is not sustainable. [Agarwal Color Lab vs. CCE (2009) 14 STR 547 (Tri-Del.)]

REFUND:

Refund of service tax paid under TR-6 challan cannot be denied merely on the ground that the same was not a prescribed document at the relevant point of time especially when the payment of service tax has not been denied; the objection of the revenue pertains more to the form rather than substance.[CCE vs. Nitin Spinners Ltd. (2009) 14 STR 527(Tri – Del.)]Where the assessee had self assessed and deposited excess services tax and claimed refund, the rejection of the refund claim by the revenue on the ground that the assessee had not challenged the assessment by filing a statutory appeal is not sustainable since no order capable of being appealed against had ever been passed. [CCE v. Noble Grain India Pvt. Ltd. (2009) 14 STR 617 (Tri. – Mumbai) following the decision of Rajasthan High Court in Central Office Mewar Palace Org. v. Union of India (2008) 12 STR 545 (Raj.)]

EXPORTS – REFUND:

The appellant provided services to clients based abroad. It got these clients through its agent in India. The consideration for its services was received first by its agent in foreign currency who after deducting its commission paid the balance to the appellant in INR. The Revenue denied refund of tax paid on inputs used for export of such services on the ground that the appellant had not received the consideration for services exported in convertible foreign exchange directly from service recipient. The Tribunal allowing the appeal of the appellant held –

i) The condition for receipt in foreign exchange was not applicable prior to 1.3.07 in respect of services falling under rule 3(3) [i.e. location of service recipient category] and the appellants claim was in respect of services exported prior to 1.3.07 and also in respect of services falling under rule 3(3) [i.e. location of service recipient category].

ii) Even if there was condition for receiving the money in foreign exchange–

iii) The appellant would be satisfying such a condition also by liberal interpretation since it is the appellant who have rendered the services directly to the recipient situated abroad and not the agents and the payment has been received in foreign exchange though by their agents.

iv) The receipt of monies by an agent of the appellant in foreign exchange would be deemed to have been received by the appellant in foreign exchange for the purposes of export Rules.

SERVICE TAX

A] CLASSIFICATION OF SERVICE

Banking & Other Financial Service:

1. In this case, the appellant challenged levy of service tax on chit funds after deletion of exclusion to cash management. The Hon'ble High Court has held that as there is no specific statutory definition of 'cash management' or 'asset management, in the statute and wider interpretation to include or exclude transactions did not arise. There was no policy decision or statutory legislative Act to levy service tax on chit funds. CBEC Circular No. 97/7/2007-ST dated 23-8-2007 clarify that Service tax was leviable on chit funds was required to be set aside as statutory definition to cover chit funds is absent in statute.

A.P. Federation of Chit Funds vs. UOI 2009 (13) STR 350 (AP)

Broadcasting Service:

2. In this case, the appellant had prepared schedules and decided programmes to be telecasted and collected money for sale of time slots to advertisers and sponsors. The Tribunal held that, appellant was covered under 'broadcasting agency or organization'. Since the provision of slot sale agreement between appellant and broadcasting company was within the knowledge of the department, demand relating to extended period is required to be set aside.

Vijay Television (P) Ltd. vs. CST, Chennai 2009 (13) STR 296 (Tri-Chennai)

Business Auxiliary Service:

3. The assessee was managing dharmakanta and issuing weighment slips for weighing goods. The Tribunal held that assessee was not concerned with sale or marketing of goods and was also not provider of incidental or auxiliary service to any sale promotion or sale of goods, hence not covered under Business Auxiliary service.

CCE, Chandigarh vs. Deepak Computers 2008 (12) STR 569 (Tri-Del.)

4. The Tribunal in the case has held that the activity of sale and purchase of mutual fund units did not fall under clause (ii) and (iv) of section 65 (19) defining Business Auxiliary service as said clauses refer to 'services'. Mutual fund units being goods as per definition under section 65(50) r.w.s. 2(7) of Sale of Goods Act, 1930 and therefore entitled for exemption under Notification No. 13/2003-ST.

CST, Delhi vs. P. N. Vijay Financial Services Pvt. Ltd. 2008 (12) STR 628 (Tri-Del.)

C&F Agent Service:

5. The assessee in the agreement executed indicated that the assessee were not the owners of goods and not entitled to sell the goods on their own. Sale of goods took place at a price fixed by the principal and on behalf of principal. Goods also delivered to customer on behalf of principal. The Tribunal held that consignment agent is specifically included under C&F Agent service and therefore, had upheld the original order confirming demand of service tax.

CCE, Ludhiana vs. Singhania Chemical Agency, 2009 (13) STR 160 (Tri-Del.)

Cargo Handling Services:

6. The Tribunal in the case held that main purpose of contract was that of breaking and crushing of limestone boulders into jelly and loading and unloading boulders and jelly was only incidental to mining activity. The essential characteristics of work were not that of 'cargo handling service' but that of breaking and crushing of limestone and its transportation.

N. Rajashekar & Co. vs. CCE, Mysore 2008 (12) STR 760 (Tri-Bang.)

7. The Tribunal held that letting out pay loader was not primary object of contract but pay loader was used as aid to perform service of loading of cargo. It was further held that, taxable event arouse when service relating to or in relation to handling of cargo was provided by a cargo handling agency irrespective of mode of transport used for movement of such cargo. Since intention to evade tax was absent as confusion prevalent during the infancy stage for implementation of law, penalties was set aside.

Gajanand Agarwal vs. CCE, BBSR, 2009 (13) STR 138 (Tri-Kolkata)

Commercial Training & Coaching Centre Service:

8. The appellant, a non-profit society registered under the State Societies Registration Act imparts education and awards degrees/diplomas recognized by the law. Service tax was demanded under 'Commercial Training and Coaching Service'. It was held that the appellant were imparting higher education and conferred degrees recognised by law and had recognition from various State Governments and UGC and as such, these services provided by institutions registered under the Societies Registration Act for educational purposes were outside the purview of the definition of commercial coaching.

ICFAI vs. CC & CE, Hyderabad-II, (2008) 17 STT 501 (Bang.-CESTAT)

9. The Tribunal in the case observed that online computer courses had all the features of traditional computer classes with difference of medium only and held that the said activity could not be restricted to providing online access to data or information. The essential character of service provided was online training or coaching centre. CBEC circular had clarified that correspondence courses was covered under Commercial Training or Coaching Centre service and hence, impugned courses through internet were also covered under Commercial Training or Coaching Centre service. It was further held that Revenue had to prove liability on particular person, if they sought to impose service tax on such person.

Dewsoft Overseas Pvt. Ltd. vs. CST, New Delhi 2008 (12) STR 730 (Tri-Del.)

Consulting Engineering Services:

10. The Tribunal held that, supervision of installation and commissioning of plant or construction was not covered under Consulting Engineers service. It was further held that, department was aware of activity undertaken by appellant while issuing first SCN and the appellant being a registered unit with Central Excise Department and clearing goods on payment of excise duty, the extended period of limitation could not be invoked.

Kilburn Engg. Ltd. vs. CCE, Vadodara-II 2009 (13) STR 285 (Tri-Ahmd.)

Mining Services:

11. Tribunal in this case held that washing of coal (beneficiation) was an integral part of mining activity. This activity did not amount to production of coal because beneficiation was a process which enhances quality of coal. Washing of coal was liable to service tax w.e.f. 1-6-2007 under Mining Service.

Energy (P) Ltd. vs. CC&CE, Hyderabad-I 2009 (13) STR 42 (Tri-Bang.)

Port Services:

12. The appellant had undertaken ship repair in dry dock under agreement with Port. The Tribunal held that the issue was settled in Homa Engineering Case 2007 (7) STR 546 (T), wherein it was held that ship repair service was not covered under Port service and hence no demand was sustainable under Port service.

Western India Shipyard Ltd. vs. CCST, Goa 2008 (12) STR 550 (Tri-Mumbai)

13. According to the Tribunal, cargo handling services i.e., loading and unloading of cargo when performed within territorial limits of minor and major ports qualify to be 'port services'. Port service could be performed from premises only if authorised by major port or minor port authorities and therefore stevedoring operations performed from port premises were port services. However, considering the importance of the issue and disagreement made with the decision in the abovementioned cases, the matter was referred to the Larger Bench.

Western Agencies Pvt. Ltd. v. Commissioner of Service Tax, Chennai, 2008 (12) STR 739 (Tri-Chennai)

Residential Complex Service:

14. The Tribunal in the case held that in order to attract liability under Construction of Residential Complex service the residential complex should comprise more than 12 units to attract service tax liability. The legislative intention was not to levy service tax on construction of individual residential units but to tax construction of new residential complex or part thereof. It was further held that such activity was also not covered under Works Contract service.

Macro Marvel Projects Ltd vs. CST, Chennai 2008 (12) STR 603 (Tri-Chennai)

15. In this case, the appellant engaged in construction of residential flats, entered into tripartite agreement indicating themselves as first party acting as actual developer of residential complex, second party being flat purchaser and third party being land owner. The Tribunal held that appellant had rendered construction of residential complex service. However, since service tax had been paid with interest before issue of SCN and there was doubt about liability and interpretation of provision, therefore, the Tribunal set aside the penalty.

Rohan Builders Ltd. vs. CST, Bangalore, 2009 (13) STR 56 (Tri-Bang.)

Tour Operators:

16. In this case, the appellant was having contract carriage permit and deployed vehicles with various manufacturers for carrying employees of factory. The Tribunal held that, in view of Madras High Court decision in Secretary Federation of Bus Operators Assn. of Tamil Nadu 2006 (2) STR 411 (Mad), appellant was not having tourist permit and hence not liable to service tax as provider of tour operator service.

Bhagwan Singh Gulati vs. CCE, Bhopal 2009 (13) STR 253 (Tri-Del.)

Stock Broker's Services:

17. In this case, the Tribunal held that decision in Vijay Sharma & Co. 2007 (7) STR 518 (Tribunal) holding levy only on main stock broker for the period prior to 10-9-2004 is per incurium and rendered overlooking the term 'in connection with'. The expression 'in connection with' expands the scope of service and includes any service in connection with sale and purchase of securities. Arranging prospective investor by registered sub-broker for sale or purchase of securities from stock broker was covered and liable to service tax even prior to 10-9-2004.

Unique Investment Centre vs. CCE, Chandigarh, 2009 (13) STR 158 (Tri-Del.)

Works Contract:

18. The Tribunal held that dominant nature test is not applicable for works contract falling under clause (b) of Article 366(29A) of Constitution of India. Turnkey contract could be treated differently, when works contract could be split into sale contract and service contract. Tribunal's decision in Daelim Industrial Co. Ltd. – 2006 (3) STR 124 (Tri) was not in accordance with Supreme Court ruling in BSNL case 2006 (2) STR 161 (SC) and prima facie not correctly decided. Also, turnkey works contract requires reconsideration and therefore referred to Larger Bench. Summary rejection means, Supreme Court declining to interfere with the impugned order. Reconsideration of impugned decision was not barred by summary dismissal or appeal.

CCE, Raipur vs. BSBK Pvt. Ltd. 2009 (13) STR 26 (Tri-Del.)

B] VALUATION:

19. The Tribunal in the case held that in terms of section 67(2) of Finance Act, 1994, if invoice specifically did not mention that gross amount charged includes Service tax, then it could not be treated as cum-service tax price. Cum-tax benefit was not extendable in absence of evidence to show that invoice was prepared in that manner.

Shakti Motors vs. CST, Ahmedabad 2008 (12) STR 710 (Tri-Ahmd.)

20. In this case Tribunal held that payment made on behalf of service recipient by service provider in the course of rendering service was reimbursement. The gross receipt for the service rendered means only for the services rendered. The amount of money received only for the services rendered and not for all the expenditure, which was to be incurred normally by the client was liable to tax. Therefore, it was not necessary that for each service, there should be a provision in the Finance Act, 1994 regarding deductions from the gross receipts as held out by the learned Commissioner (Appeals).

Rolex Logistics Pvt. Ltd. vs. CST, Bengaluru 2009 (13) STR 147 (Tri-Bang.)

C] CENVAT CREDIT:

21. The Tribunal held that, input service includes service rendered for outward transportation up to place of removal and Custom House Agent (CHA) services were required to facilitate clearance of final products from the place of removal i.e. load port. Thus, the Tribunal allowed the cenvat credit of service tax paid on CHA service used for export of goods outside India.

CCE, Rajkot vs. Adani Pharmachem P. Ltd. 2008 (12) STR 593 (Tri-Ahmd.)

22. In this case, the assessee availed cenvat credit of service tax paid on Goods Transport Agency services used for transportation of finished goods from factory to consignment agent's premises. The Tribunal held that consignment agent's premises was also defined as place of removal and property in goods never passed to consignment agent, therefore the order of Commissioner allowing cenvat credit of service tax paid on such service was upheld.

CCE, Rajkot vs. Rajhans Metals P. Ltd. 2008 (12) STR 597 (Tri-Ahmd.)

23. The Tribunal held that Input service as defined under rule 2(l) of CCR, 2004, includes a plethora of other services such as services used directly or indirectly in relation to manufacture and hence rent a cab service was to be considered as being used indirectly in relation to manufacture or as part of business activity for promoting business as any facility given to employees would result in greater efficiency and promotion of business.

CCE, Nasik vs. Cable Corporation of India Ltd. 2008 (12) STR 598 (Tri-Mumbai)

24. In this case cenvat credit was denied as address mentioned in the invoice was not registered with Revenue authorities. However, the registration certificate was amended subsequently to include the address mentioned in the invoice with retrospective effect. The Tribunal held that order denying cenvat credit was not sustainable.

Raaj Khosla & Co. Pvt. Ltd vs. CST, Delhi 2008 (12) STR 627 (Tri-Del.)

25. In this case, the assessee availed cenvat credit on the basis of TR-6 challan during 1-1-2005 to 16-6-2005, however department rejected credit on the ground that during said period TR-6 was not a valid document. The Tribunal held that, TR-6 challan being valid document, credit of service tax paid on GTA service is admissible.

CCE, Meerut-I vs. Shree Sidhbali Steels Ltd. 2009 (13) STR 284 (Tri-Del.)

26. In this case, assessee claimed cenvat credit of service tax paid on mobile phones. Assessee had given specific undertaking to use mobile phone for official purpose only as noted by the Commissioner. The Tribunal held that Commissioner's order granting benefit based on Board's Letter F. No. 149/6/2006-CX. 4, dated 19-7-2006 is legal and proper.

CCE, Bangalore-III vs. Stanzen Toyotetsu India (P) Ltd. 2009 (13) STR 289 (Tri-Bang.)

27. The assessee was in the manufacture of refined oil and vanaspati, used CENVAT credit on capital goods viz. acid oil plant used for refining and processing and credit of duty paid on computers, paints and welding electrodes. The Tribunal held that the refinery was part of the factory and the assessee could take credit of duty paid on capital goods and not on exempted or nil-rated goods. The impugned goods produced PFAD also, which was cleared on payment of duty. Acid oil was also cleared on payment of duty. Thus, machinery installed in refinery was not exclusively deployed in producing only non-dutiable products. Declarations as per the rules, records, invoices and returns relating to credit had been furnished to the Dept. indicating that PFAD was also acid oil which was cleared on payment of duty. Likewise, credit on duty on computers, electrodes were allowed. The order itself was set aside and appeal was allowed.

Ruchi Health Foods Ltd. vs. CCE, Chennai, 2009 (13) STR 330 (Tri.-Chennai)

28. The appellant availed cenvat credit of service tax paid on CHA and C&F agent services. The Tribunal held that, impugned issue is covered by decision in Excel Corp Care Ltd. 2007 (7) STR 451 (Tri) holding CHA service in respect of export not having nexus with manufacture and clearance from factory and services rendered in port is not covered by input service, therefore order denying credit upheld.

Nirma Ltd. vs. CCE, Bhavnagar, 2009 (13) STR 64 (Tri-Ahmd.)

29. The Tribunal held that, admissibility of credit on inputs/capital goods used for power plant set up by various manufacturers for generating electricity to manufacture excisable goods was well-settled and hence benefit of cenvat credit on services of supply of manpower and operation and maintenance of power plant was admissible.

Sanghi Industries Ltd. vs. CCE, Rajkot, 2009 (13) STR 167 (Tri-Ahmd.)

30. The appellant in this case received maintenance and repair services in wind energy plant producing electricity situated 200 kms. from factory. The electricity produced by the said plant was sent to electricity grid and assessee was permitted to draw power from grid for use in factory. The Tribunal held that transaction of delivery of power to electricity board and sale of power by electricity board were two independent transactions and there was no direct nexus between services received in power plant and items manufactured in factory. The power plant was also not a captive power plant. Hence, it was held that, cenvat credit of service tax paid on maintenance and repair services in wind energy plant was not admissible.

Ellora Times Ltd. vs. CCE, Rajkot 2009 (13) STR 168 (Tri-Ahmd.)

31. In this case, the Tribunal held that Cenvat credit of service tax paid on mobile phones, CHA service, surveyor's service, Rent a cab service was admissible as they were used for providing output service i.e. port and storage and warehousing service. Cenvat credit of service tax paid on club house fees was not admissible as the same was meant for recreation of workers and not used for providing output service. Cenvat credit of excise duty paid on Air Conditioner was admissible as capital goods. Cenvat credit of excise duty paid on cement and steel used for construction of jetty and storage tanks was not admissible as statutory definition of input restricts the credit only when inputs were used for providing output service. The definition of input used for manufacture and for providing output service was different and provided under different clauses. The cement and steel was input used for output service of construction of building and not inputs used for providing port services.

Mundra Port & SEZ Ltd. vs. CCE, Rajkot, 2009 (13) STR 178 (Tri-Ahmd.)

D] PENALTY

32. The Tribunal in the case observed that the assessee was not only aware, but also recovered service tax from customers. Amount collected as tax was not paid to the Department but pocketed by the assessee. Tax was paid with interest only on detection by Department. The Tribunal on facts and circumstances of the case held that, leniency shown by Appellate Authority in setting aside penalties was not sustainable and upheld order-in-original imposing penalty.

CST Mumbai vs. B. G. Talwalkar Physique Club 2008 (12) STR 616 (Tri-Mum)

33. The Commissioner (Appeals) reduced the penalty u/s. 76 against which the Revenue filed an appeal and contending that S. 76 was unambiguous and did not provide liberty to reduce penalty. Tribunal considering various decisions in which authorities used discretion to impose less penalty u/s. 80 of the Finance Act, 1994 rejected the Revenue's appeal and extension of S. 80 by the lower authority was upheld.

CCE – Rajkot vs. Shri BSGK Shashtry, 2009 TIOL 173 CESTAT-AHM

34. The appellant had made payment of service tax along with interest before issue of SCN. Thus the Tribunal held that there was no intention to evade duty, having bona fide belief and there were factors, which created confusion and after relying on decision in Majestic Mobikes Pvt. Ltd. 2008 (11) STR 609 (Tri), the Tribunal set aside the order passed by revisionary authority enhancing penalty.

Vinayaka Travels vs. CST, Bengaluru 2009 (13) STR 31 (Tri-Bang.)

E] OTHERS

APPEAL:

35. In this case appeal filed by the department was dismissed as non-maintainable as the required authorization filed by the department was not proper and legal. The department applied for restoration of appeal and filed required authorization. In view of the facts, the Tribunal held that subsequent authorization after dismissal of appeal had no value at all.

CCE, Belapur vs. Coromandel Fertilizers Ltd. 2008 (12) STR 781 (Tri-Mum.)

36. In this case Tribunal held that, since Reviewing authorities were not validly appointed by appropriate notification in Official Gazette to exercise powers of review, the appeal filed by revenue was not maintainable.

CCE & ST, BBSR-II vs. Mahanadi Coalfields Ltd. 2009 (13) STR 409 (Tri-Kolkata)

Burden of Proof:

37. The orders passed by the Tribunal and the High Court did not consider distinction between assessment orders under the Income-tax Act and Sales Tax Act inasmuch as the fact that income tax would be levied on the entire income, whereas sales tax could be levied only on the 'sale' and not the other income which did not result out of 'sale of goods'. The condition precedent to the passing of an order was assessment of sale. Professional service rendered did not constitute sale, which attracted service tax. Further, the Supreme Court ruled that in general law, the burden of proof lay with the State and 'reverse burden' must be construed having regard to the nature of the statute. In the Kerala General Sales Tax Law, however, S.12 places the burden on the assessee, provided a transaction of 'sales' has taken place and at least one party to it is a dealer. Appeal was allowed by way of a remand to the adjudicating authority for consideration of materials placed by the appellant.

Haleema Zubair v. State of Kerala, 2009 (13) STR 113 (SC)

Certificate of Registration:

38. The Supreme Court in the case held that Registration Certificate granted to an assessee by Assessing Officer mentioning fuel and lubricants as raw material is in the nature of an order. As diesel was specifically and intentionally included in definition of raw material by legislature, question whether it is directly or indirectly used in process of manufacture was irrelevant.

CTO, Udaipur vs. Rajasthan Taxchem Ltd. 2008 (12) STR 660 (SC)

Demand:

39. In this case, the appellant provided security services to PSU-client. The said PSU deposited service tax on behalf of appellant to the government treasury, which was accepted by the jurisdictional authorities. The department contended that liability of appellant could not be discharged by the client and sought to demand tax from appellant. The Tribunal held that demand was not sustainable as service tax has already been paid by PSU and interest for delayed payment of tax also been deposited by the appellant.

Invincible Security Services vs. CCE, Noida, 2009 (13) STR 185 (Tri-Del.)

40. In this case, department sought to demand tax on 5% amount allowed as discount/commission to distributors (appellant) on sale of SIM cards under Business Auxiliary service. The Tribunal observed that service tax had been paid on full value of SIM card by principal. Thus the entire consideration charged from customers had been subjected to service tax and the findings that appellant was promoting business of sale or service of principal was misconceived.

R. Venkataraman vs. CCE, Trichy; 2009 (13) STR 187 (Tri-Chennai.)

41. The department in this case demanded service tax by alleging that the appellant received warranty labour charges by including the same in the margin for dealer from manufacturer at the time of purchase of vehicle. The Tribunal observed that value of service already included in price of vehicle paid by customer and is included for payment of excise duty and sales tax. The appellant had not received any extra payment from customers. The certificate given by the manufacturer that they had not paid any actual reimbursement towards service charges was not contradicted by Revenue. Therefore, it was held that the demand and penalties are not sustainable.

Hindustan Auto House (P) Ltd. vs. CCE, Jaipur, 2009 (13) STR 187 (Tri-Chennai.)

Export of Services:

42. The appellant paid service tax on services in relation to marketing of products manufactured by subsidiary located abroad under Business Auxiliary service. The Tribunal held that booking of order in India is not indicative of rendering of services in India. Services were delivered only to company located abroad and same could not be considered as delivered in India when recipient was located abroad. The benefit of such service was derived by recipient and hence services were utilized out of India. Therefore, the impugned services having been exported, exemption under Export of Service Rules, 2005 was admissible.

ABS India Ltd. vs. CST, Bengaluru 2009 (13) STR 65 (Tri-Bang.)

Extra Ordinary Tax Payer Friendly Scheme:

43. The Court in this case held that the Extraordinary Taxpayer Friendly Scheme was purported to provide benefit to persons who earlier failed to register themselves with the Department. The scheme was intended to cast the net of Service Tax wider and wider and augment revenue. The scheme was applicable not only to those service providers who had registered themselves after the introduction of scheme i.e. after 20-9-2004, but also to those service providers who failed to register at the appropriate time as required by the Act prior to 20-9-2004. The benefit of scheme was available, only if the payment of service tax and interest was made by 30-10-2004 (extended up to 30-11-2004). If payment was not made by that date then benefit of scheme was not available.

UOI vs. Amit Kumar Maheshwari, 2009 (13) STR 119 (Raj.)

Import of Services:

44. Service tax was demanded under consulting engineer services for import of services. The appellant received service of consulting engineer from their holding company and the period under dispute was 6-8-2002 to 9-9-2004. The Larger Bench of the Tribunal's decision in the case of Hindustan Zinc Ltd. v. CCE, 2008 (11) STR 337 (Tri.-LB) was followed, finding the facts of the case similar and relief was provided for the period prior to 1-1-2005.

Nestle India Ltd. vs. Commissioner of Service Tax, New Delhi, [2008 (12) STR 570 (Tri.-Del.)]

Interest:

45. The Tribunal held that when refund was granted in respect of any amount illegally collected, without authority of law, department was liable to pay interest from the date of payment of duty to the date of actual payment of refund at the rate as defined under section 11BB of the CEA, 1944.

Binrajka Steel Tubes Ltd. vs. CCE, Hyderbad-III 2008 (12) STR 788 (Tri-Bang.)

Jurisdiction:

46. In this case, the Hon'ble Gujarat High Court held that as no notice was ever issued by appellate authority, condition precedent for assumption of jurisdiction and exercise of powers under section 35A(3) of CEA, 1944 had not been fulfilled. If the appellate authority had failed to comply with the requisite statutory provisions and show from the record satisfaction of the prerequisite condition for exercise of jurisdiction to enhance the assessment by making addition of any duty of excise, which had not been levied or paid etc. the appellate authority could not be permitted a second innings. The appellate order was thus set aside.

Patel Filters Ltd. vs. UOI 2009 (13) STR 245 (Guj.)

Limitation:

47. In the case it was held that, point of limitation goes to the root of the matter and being a question of law that could be agitated at any stage of pendency of appeal and therefore, Miscellaneous Application for raising above additional ground was allowed.

Damodhar Cement & Slag Limited vs. CCE, Bolpur, 2009 (13) STR 220 (Tri-Kolkata)

Notification:

48. The Tribunal in this case held that, benefit of Notification No. 12/2001-ST was available to high tea provided by the service provider. The expression "substantial and satisfying meals" was not defined in the Notification. High tea was a concept associated with early evening meal. It was further held that, each and every invoice was not required to be scrutinized to find out number of items supplied. Mandap keeper providing catering and invoice included charges for catering, was sufficient to determine exemption admissibility.

Welcome Hotel vs. CCE, Vadodara 2009 (13) STR 375 (Tri-Ahmd.)

Rate of Tax:

49. The Tribunal observed that, premium to be collected in advance and policy was to be issued as per Insurance Act, 1938. The date of receipt of insurance premium was the date of rendering service. It was held in Art Leasing Ltd. 2007 (8) STR 162 (Tribunal) that service tax was payable as per rate of tax prevalent on the date of contract was applicable and hence, enhancement of tax rate not applicable to policies issued prior to such enhancement.

Bajaj Allianz General Insurance Co. Ltd. vs. CCE, Pune 2009 (13) STR 259 (Tri-Mumbai)

Refund:

50. In this case, the department refused the refund claim of the appellant on the ground that assessment was not challenged. The Rajasthan High Court held that when no order capable of being appealed against, had ever been passed, it could not be said that the assessee could file appeal against the assessment order, and not having so filed appeal he could not lay the claim of refunds.

Central Office Mewar Palace Org. vs. UOI 2008 (12) STR 545 (Raj.)

51. The appellant in the case entered into a contract with service receiver inclusive of all taxes, duties, VAT etc. for providing services of survey and mapping. The appellant paid service tax under consulting engineer service but claimed refund of the same subsequently. The Tribunal held that, it was reasonable to presume that tax was taken into account for quoting contract price as price was inclusive of all taxes, duties etc. and therefore order of original authority crediting refund to consumer welfare fund was upheld.

Multi Mantech International Pvt. Ltd. vs. CST Ahmedabad 2008 (12) STR 717 (Tri-Ahmd.)

52. In this case, the Court held that mere pendency of SLP for admission could not be used as ground to deprive or postpone the benefits of order of Tribunal. It was further held that petitioner was commercial establishment and was deprived of its liquidity in trade, commerce and business and such deprivation was bound to cause substantial prejudice to it and therefore interest was payable for delayed refund under section 11BB of CEA, 1944.

Jai Bhagwati Impex Pvt. Ltd. vs. UOI, 2009 (13) STR 24 (Bom.)

53. The appellant claimed refund of service tax paid under Health Club and Fitness Centre Services on the ground that they were registered as society and services had been provided to their own members. The Tribunal held that, under any establishment providing taxable service covered. Appellant being club having health centre and hence, falling under the expression 'health club and fitness centre', service tax was correctly paid and refund was not admissible.

Century Club vs. CST, Bengaluru 2009 (13) STR 68 (Tri-Bang.)

54. The assessee paid service tax under the category of 'port service' for the period March 2004 to September 2004 and filed a refund claim of service tax and interest paid, stating that they were handling only export cargo which was outside the purview of service tax under 'cargo handling service' and that they had erroneously paid service tax under port services. After relevant findings, CESTAT held that the assessee was not rendering services on behalf of port, but on its own behalf to customers for loading of export cargo. Accordingly, the Revenue's appeal was dismissed in limine.

CCE, Mangalore v. M/s. Konkan Marine Agencies, [2008 TIOL 601 HC Kar. ST]

Reasoned Order:

55. The appellant was aggrieved by the order of ITAT as the order was passed after 4 months of hearing, dismissing the appeal without recording reasons, propositions of the law urged and case laws relied upon by them. The High Court relying inter alia on the case of Anil Rai v. State of Bihar, 2002 (3) BCR (SC) 360, the Court directed the president of the Appellant Tribunal to issue guidelines to all the Benches of Tribunal to decide matters heard within three months from the date of closing of judgment. The Appellate Tribunal directed to rehear the said appeal and give fresh order with sound reasons.

Shivsagar Veg. Restaurant v. Asstt. Commr. of Income-tax, Mumbai, 2009 (13) STR 11 (Bom.)

Revision:

56. The Tribunal held that the revisional authority did not have powers to revise a decision of competent authority, which had refrained from imposing penalty on the assessee u/s. 80 of the Act.

M/s. Solomon Foundry vs. CCE, Tiruchirapalli (2008 TIOL 1826 CESTAT-Mad.)

57. The Hon'ble High Court held that, issue of penalty was agitated before Commissioner (Appeals) and power of review or revision was not exercisable, when original order was being subject matter of appeal and such appeal was decided before revision. The doctrine of merger was applicable in this case.

UOI vs. Inani Carriers 2009 (13) STR 230 (Raj.)

Show Cause Notice:

58. The assessee in the case paid part of service tax before issue of SCN and part after issuance of SCN along with interest. Service tax paid was appropriated towards demand of tax in adjudication. The Tribunal affirmed the order of CIT(A) dropping SCN for review following CBEC Circular F. No. 137/176/06-CX-4, dated 3-10-2007 clarifying that once tax was paid voluntarily before SCN, proceedings deemed to be concluded. In appeal filed by the department against such order, the Tribunal affirmed Commissioner's Order.

CCE, Delhi vs. Brill Education (India) Private Limited 2008 (12) STR 759 (Tri-Del.)

59. In this case, it was observed that show cause notice was not issued for denial of cenvat credit and cenvat credit availment was not one of the grounds for rejecting refund. The Tribunal held that, the order in question was travelling beyond the scope of show cause notice. Further, the Tribunal decision in Rolex Rings Ltd. 2008 (230) ELT 569 (Tribunal) holding that cenvat credit on C&F Agent service was admissible, when place of removal was port in case of FOB exports was applicable and hence, refund of cenvat credit was admissible.

Rawmin Mining and Industries Ltd. vs. CCE, Bhavnagar-I 2009 (13) STR 269 (Tri-Ahmd.)

Stay:

60. The assessee, a co-operative society, provided treatment of effluents and managed waste generated by industrial units which were members of society. The High Court concluded that the petitioner-society had been established with the aid of Central & State Governments for treatment of industrial effluents and waste materials in public interest. The representation to the Central Government for exemption would be made within 2 weeks and would be placed by the Central Government within two months from that day. Interim stay for recovery was granted.

Green Environment Services Co-op. Society Ltd. vs. Union of India, 2009 (13) STR 250 (Guj.)

Others:

61. The Tribunal held that the issue relating to service tax on cell phones or landlines was no more res integra and stood settled by various Tribunal decisions. However, since the appellant was unable to establish that cell phones in the names of individuals were exclusively used in relation to output services, the matter was remanded to the original authority for verifying the said facts. The Tribunal also held that no penalty could be levied when the dispute related to interpretation of the provisions of law, while setting aside the penalty.

Wiptech Peripherals Pvt. Ltd. vs. CCE, Rajkot 2008 (12) STR 716 (Tri.-Ahmd.)

62. In the present case, the department demanded service tax on amount collected by the appellant from its own refinery towards cost of additives used in 'extra mile diesel'. The Tribunal held that, there was no case of Revenue that appellant rendered any service to anybody else, nor any service recipient was identified in impugned order hence, so-called service rendered to themselves could not be subjected to service tax.

Senior Terminal Manager IOC Ltd. vs. CCE, Tirunelveli 2009 (13) STR 287 (Tri-Chennai)

63. The Tribunal in this case held that departmental instructions conferring jurisdiction on departmental officers based on some monetary limits were only to supplement administrative functions and do not take away rights or cause any prejudice to parties or affect jurisdiction of statutory bodies.

CCE, Mumbai vs. Central Cable Pvt. Ltd. 2009 (13) STR 328 (Tri-Mumbai)

64. In this case, demand of tax was confirmed against the recipient of Goods Transport Agency service. The appellant contended that service tax had already been paid by the transporters. Revenue contended that appellant alone was liable for GTA service and payment of tax by transporters was not valid. The Tribunal held that once tax was paid, same amount could not be confirmed again in respect of same service.

Navyug Alloys Pvt. Ltd. vs. CCE&C, Vadodara-II 2009 (13) STR 421 (Tri-Ahmd.)

F] WAIVER OF DEPOSIT

Pre-Deposit

65. The appellant was in the business of collecting export goods from different Indian suppliers for a foreign party under an agreement with the latter. Such goods were consolidated into one cargo and exported for a consideration in Indian rupees. Thus, the appellant was undertaking the activity of handling of export cargo that was excluded from the ambit of cargo handling service. The Revenue contended to tax this activity as 'Business Auxiliary Service' as services were provided on behalf of client. Since the matter involved detailed examination for Revenue's claim, waiver of pre-deposit was granted.

APL Logistics India (Pvt.) Ltd. v. Commissioner of Service Tax, Chennai, 2008 (12) STR 588 (Tri-Chennai)

66. The Revenue denied the credit on the ground that the credit was availed on the strength of improper document. It stated that the invoices were in the name of Headquarter Bhopal, whereas credit was taken at Jabalpur on the strength of debit notes. However the appellant contented that invoices for capital goods received at Jabalpur were issued in the name of circle Headquarter i.e., Bhopal, and Jabalpur comes under the Bhopal circle. Further, there was no dispute as to payment of duty on those capital goods and they were used for providing output service. Finding merit in the contention, waiver of pre-deposit and penalties were granted.

M/s. BSNL vs. CCE, Bhopal (2008 TIOL 1938 CESTAT-Del.)

SERVICE TAX

1. CLASSIFICATION OF SERVICE

Business Auxiliary Service

1. It was held that office space, furniture etc. provided by the assessee to the Bank/Financial Institution to provide loans to assessee customers, who was engaged in sale and service of two wheelers, could be brought to tax within the ambit of Business Auxiliary Services.

CCE, Belgaum vs. Chadha Auto Agencies 2008 (11) STR 643 (Tri-Bang.)

2. It was held that generation of MIS report and development of software for such purpose was covered under Information Technology Software Service and thereby excluded from the scope of 'Business Auxiliary Service'.

Dataware Computers vs. CCEC & ST(A), Guntur 2008 (12) STR 121 (Tri-Bang.)

3. In this case, the appellant contended that since they were proprietary concern, they should not be treated as commercial concern for liability under Business Auxiliary Service. The Tribunal relied on the decision of R. S. Financial Services 2008 (9) STR 231 (Tribunal) wherein it was held that concern in context of business run by sole proprietor means business of such sole proprietary concern and activity undertaken was commercial activity, hence liable to service tax.

Anuradha Jain vs. CCE, Bhopal 2008 (12) STR 475 (Tri-Del)

4. It was held that the impugned activity of the appellant; i.e., epoxy coating on steel bars supplied by the customers, did not amount to manufacture in appellant's own case, hence the same is covered under Business Auxiliary Service.

PSL Corrosion Control Services Ltd. vs. CCEC, Daman 2008 (12) STR 504 (Tri-Ahmd.)

Banking & Other Financial Service

5. It was held that appraisers charges directly collected from borrowers were not liable to service tax under other financial services under Banking & Other Financial Services.

Pudukottai District Central Co-op. Bank Ltd. vs. CCE, Trichy 2008 (12) STR 376 (Tri-Chennai)

6. The notice gave extrusion machinery on lease under an agreement to a party, which the Revenue held as banking and financial service and served show cause notices. The Tribunal relied on the decision in the case of Thermax Ltd. vs. CCE Pune, 2007 (8) STR 487 (Tri. Mum), wherein it was held that the appellant was not a professional in leasing business, and the activity was confined to own products and considering 'interest on loan' not forming part of value of taxable service in view of Explanation 1 to S. 67 of the Finance Act, 1994, the demand was held unsustainable.

CCE Vadodara I vs. M/s. GE India Industries (P) Ltd., 2008 TIOL 1444 CESTAT-Ahm.

Cargo Handling Services

7. The appellant in this case was engaged in the business of transportation of cargo from one place to another. The department sought to tax them under Cargo Handling Service. The Tribunal held that appellant neither collected cargo from the consignors' premises nor delivered the same to the consignee of the cargo. Further, providing facilities of packing/unpacking, loading/unloading of goods to the customers for promotion of business, if covered under Cargo Handling Services, then the new services of transportation of goods by air or road will become redundant as transport of goods could not be envisaged without loading/unloading.

Jet Airways (India) Ltd. vs. CST, Ahmedabad 2008 (11) STR 645 (Tri-Ahmd.)

8. The assessee was engaged in providing services of shifting/transportation of raw materials, waste materials and finished products from one place to another inside the customer's plant. The Tribunal held that scope of activity carried out by the appellant inside plant does not call for taxation under the head 'Cargo Handling Services'.

Modi Constructions Co. vs. CCE, Ranchi 2008 (12) STR 8 (Tri-Kolkata)

Clearing and Forwarding

9. The appellant was a licence holder authorized by Spices Board to auction cardamom brought by various owners and received commission of 1% of total sales value for carrying out such activity. The Tribunal held that impugned activity was not liable to service tax under Clearing and Forwarding Agent service.

CCE, Kochi vs. Indian Cardamom Marketing Company (P) Ltd. 2008 (11) STR 522 (Tri-Bang.)

10. The appellant was engaged in storing the goods viz. crude oil received on behalf of ONGC and then through pipelines transferred it to the ONGC. The Tribunal held that relation between appellant and ONGC was of principal to principal basis and not of principal and agent. The appellant had not played any role in delivering the goods to consignee and hence, service provided by the appellant was not liable to service tax under Clearing and Forwarding Agent's Service. It was further held that, extended period was not invocable for issuing second show cause notice, once the first show cause notice was issued and the department was aware of the affairs of the assessee.

Cairn Energy (I) Pvt. Ltd. vs. CCCE, Visakhapatnam-II 2008 (11) STR 632 (Tri-Bang.)

Erection, Commissioning and Installation Service

11. The appellant had undertaken construction of pipeline for supply of water. The department sought to tax them under Erection, Commissioning or Installation Service. The Tribunal on the facts of the case held that erection was not involved in digging of earth and laying long distance pipeline. Pipeline was not covered under the expression 'plant'. Water supply project being infrastructure facility and civic amenity provided by State in public interest was not an activity of commerce or industry. Laying of pipeline was not covered under Erection, Commissioning or Installation Service.

Indian Hume Pipe Co. Ltd. vs. CCE, Trichy 2008 (12) STR 363 (Tri-Chennai)

Management Consultancy

12. It was held that services provided to licensees to develop suitable organization for identifying business opportunities, professional expertise, technological, industrial and engineering information in the areas including financial, taxation etc. to develop cadre of managers and suitable infrastructure for IPR protection were covered under Management Consultants Service.

RPG Enterprises Ltd. vs. CCE, Mumbai-IV 2008 (11) STR 488 (Tri-Mumbai)

13. The functions carried out by the assessee like inviting purchase orders, calling tenders, issuing appointment orders, maintaining leave records and maintaining books of account of sister concerns regarding which, payments had been received from sister concern was not liable to service tax under Management Consultancy Services.

CST, Faridabad vs. Goetz (India) Limited 2008 (11) STR 629 (Tri-Del.)

<u>Port Services</u>

14. The Tribunal held that income received as rent charges by assessee for hiring out the barges, floating cranes and tugging facilities would not be liable to service tax under Port Services.

Vikram Ispat vs. CCE, Raigad 2008 (11) STR 639 (Tri-Mumbai)

<u>Rent-a-Cab Operators Service</u>

15. The Tribunal observed that to rent was allowing use of something one owns in exchange for payment. On the facts of the case it had been held that, cab operator providing cab with driver for going from one place to another on per kilometre basis or on lump sum amounts based on distance was providing transport service, wherein control of vehicle remains with cab operator/driver and therefore such service was outside the purview of Rent-a-cab Operators Service.

R. S. Travels vs. CCE, Meerut 2008 (12) STR 27 (Tri-Del)

<u>Scientific & Technical Services</u>

16. The Tribunal held that, services in respect of projects pertaining to optimizing efficiency and output of industry or organization falls under the discipline of industrial engineering and such service was covered under Scientific and Technical Consultancy Service and not under Management Consultants Service.

National Productivity Council vs. CCE, Chandigarh 2008 (12) STR 491 (Tri-Del)

<u>Telecommunication Services</u>

17. The Tribunal held that Interconnectivity Usage Charges (IUC) was not liable to service tax during the period prior to amendment of statutory definition when 'telecommunication service' came into effect in 2007. It was further held that CBEC circular dated 12-3-2007 was applicable during the impugned period.

Bharat Sanchar Nigam Ltd. vs. CCE, Meerut 2008 (11) STR 460 (Tri-Del.)

<u>Tour Operators</u>

18. The appellant a tour operator provided supplementary services such as arranging guide, monument visits, food, general assistance etc., in relation to tours. The Tribunal held that taxable service in relation to tour operator was defined as "any service provided by tour operator in relation to a tour" and the expression "in relation to tour" was very wide and covers allied services even for the period prior to 10-9-2004.

Touraids (I) Travel Services vs. CCE, Kanpur 2008 (12) STR 452 (Tri-Del)

<u>Works Contract</u>

19. In K. Raheja Development Corporation vs. State of Karnataka 2006 (3) STR 337 (SC), it has been held that construction and sale of individual flats was in the nature of works contract and thus liable to sales tax. The Supreme Court observed that prima facie the proposition laid down by the Supreme Court in K. Raheja's case was difficult to accept. There would not be any difference between works contract and contract for sale of chattel if ratio of said decision was accepted. The contention of revenue that Development Agreement was not a works contract but Tripartite Agreement was works contract was prima facie fallacious. Therefore, it was decided to refer the judgment in K. Raheja to Larger Bench for reconsideration.

Larsen & Toubro Ltd. 2008 (12) STR 257 (SC)

2. VALUATION

20. The Tribunal held that service tax was not leviable on SIM card value as such cards were subjected to custom duty on import and recognized as goods by the department. Relying on decision in RPG Cellular Service Ltd., 2008 (10) STR 298 (Tri) it was held that, since the SIM cards were imported on payment of customs duty and sales tax was also paid on sale of SIM card, value of SIM card was not includible in taxable value for levying service tax.

Hutchison Max Telecom Pvt. Ltd. vs. CCE, Mumbai 2008 (12) STR 373 (Tri-Del.)

3. CENVAT CREDIT

21. The Tribunal held that, CENVAT credit could not be denied merely on the ground that invoices were not authenticated, if other particulars were available in the invoices and verified by the lower authorities.

GAIL (India) Ltd. vs. CCE, Indore (11) STR 538 (Tri-Del.)

22. In this case the Tribunal held that, merely because Tribunal's decision in other case granting credit of Service tax paid in respect of mobile phone services had been appealed against, credit is not deniable.

CCE, Bhavnagar vs. Saurashtra Chemicals Ltd. 2008 (12) STR 67 (Tri-Ahmd.)

23. In this case the Hon'ble Gujarat High Court held that interest was not to be levied on amount of credit directed to be reversed, when such credit was not availed by assessee but lying unutilized. No substantial question of law arises for consideration of High Court as there being no infirmity in order of Tribunal.

CCE vs. Gupta Steels 2008 (12) STR 101 (Guj.)

24. In this case, appellant availed CENVAT credit on certain invoice/duty paying documents, which were not containing Central Excise registration number of original manufacturer. The Tribunal after relying on Circular No. 441/7/99 dated 23-2-1999 and on decision in Kamakhya Steels Pvt. Ltd. 2000 (121) ELT 247 (T-LB), held that receipt and consumption of inputs in factory premises were not in dispute and discharge of duty liability was also not in dispute hence, Modvat credit not to be denied.

Agarwal Industries vs. CCE, Kanpur 2008 (12) STR 223 (Tri-Del.)

25. The Commissioner (Appeals) in this case held as under:

Expressions used in Rule 6 of CCR, 2004 were 'used in manufacture of exempted goods or exempted services'. Trading activity cannot be equitable with exempted goods or exempted services. Hence, reversal of credit to the extent used for trading goods, working out on the basis of ratio between manufacturing and trading turnover as sought by Revenue was not sustainable.

Since reversal was not warranted, imposition of penalty was also not sustainable.

In Re: Faber Heatkraft Industries Limited 2008 (12) STR 252 (Commr. Appl.)

26. In this case AAR inter alia held that, extended definition of input service includes services used for setting up buildings used to house factories and its offices. Provision of buildings for housing, schooling, recreation, etc. for workers was welfare measure had no nexus with manufacture, storage or sale; hence construction of quarters for workers was not an input service under rule 2(1) of CCR, 2004.

It is further held that, construction and other allied services used for setting up of a factory, have been specifically included, though the use of these services in the setting up of the factory precedes manufacture and the activity was concluded prior to commencement of the manufacturing process. Again, auditing of accounts relating to a final product had been considered to be an 'input service' though this service was used after the completion of manufacture of final product and could not have been used directly or indirectly in the manufacturing process. Both the services however had a nexus with and were related to final product. A perusal of other services in the inclusive part of this definition indicated that use of each of these services was linked to manufacture, storage, transport or sale of the final product.

In Re: VMT Spinning Co. Ltd. 2008 (12) STR 388 (AAR)

27. The appellant utilized Cenvat Credit for payment of service tax on goods transport agents service and business auxiliary services received from abroad, which were received subsequently. The revenue authorities objected to such adjustment. The Tribunal observed that there were contrary orders on the issue and therefore referred the matter to Large Bench.

Panchmahal Steel Ltd. vs. CCEC, Vadodara-II 2008 (12) STR 447 (Tri-Ahmd.)

28. The Larger Bench of Tribunal held that outdoor caterer providing catering service is input service relating to business and Cenvat Credit is admissible.

CCE, Mumbai-V vs. GTC Industries Ltd. 2008 (12) STR 468 (LB)

29. The Tribunal held that service tax paid on Pandal or Shamiana service and Photography service incurred in respect of holding Kannada Rajyostava function and inaugural function of police station was not entitled for Cenvat credit as the said expenses were not covered under 'activities relating to business' as they do not keep company with other terms used in the inclusive definition of input service. However, demand was set aside on the point of limitation.

Toyoto Kirloskar Motor P. Ltd. vs. CCE, (LTU), Bengaluru 2008 (12) STR 498 (Tri-Bang.)

30. The Tribunal found that there existed an agreement between the parties, which even the lower Appellate Authority had taken note of and irrespective of the same, it was ruled that once Service Tax has been paid by the supplier, the same cannot be questioned at the receiver's end and accordingly, credit could not be denied. Credit for the period prior to 10-9-2004 (the date on which the Cenvat Credit Rules were prescribed) also was held allowable as the ground was the same and in terms of existence of the Service Tax Credit Rules, 2002, credit could not be denied.

Maersk India Pvt. Ltd. vs. CCE Raigad, 2008 TIOL 1477 CESTAT-MUM

31. The appellant, after taking registration as recipient of consulting engineer's service paid Service Tax net of abatement for R & D cess on the sum paid by them to foreign parties. The foreign party however had transferred merely the technology. It was held that the date on which the registration for providing output service was sought was not relevant and that Service Tax paid as deemed output service provider was eligible for taking credit of. Further, Service Tax on transfer of technology under 'Consulting Engineering Service' was wrongly paid by the appellant at the instance of the department and therefore credit could not be denied. The Tribunal also stated that there was no time limit prescribed for utilization of credit and therefore Service Tax paid on deemed output service was available as credit.

Jindal Steel & Power Ltd. vs. CCE, Raipur, 2008 TIOL 1450 CESTAT-Del.

32. While exporting goods, the appellant utilised services of CHA and surveyors. The Revenue treated them as non-eligible being of post-manufacturing activity and post-clearance of goods. Considering the Board's Circular No. 91/8/2007 and the definition of 'input services' (which the Revenue had not considered), it was held that exporter remained owner of the goods until export took place and place of removal was port area. Further, the services were clearly related to business activity and therefore the Revenue's appeal was rejected.

CCE Rajkot vs. Rolex Rings (P) Ltd., (2008) 16 STT (Ahd.-CESTAT)

33. For Consulting Engineer's Services received from abroad, the assessee got registered this category and paid service tax from Cenvat account. Later they also registered as output service provider of consulting engineer's services. However, the services availed from foreign company related to transfer of technology. The assessee however, took credit for the service tax paid as receiver. The Tribunal observed that had the service tax been paid by actual service provider, the assessee would have been entitled to credit. Merely because tax was paid as receiver of service, its right as recipient could not be denied. Further, at the relevant time, in terms of Rule 2(p) of the Cenvat Credit Rules, service tax was paid as deemed output service provider. Also, there is no time limit prescribed for utilisation of credit. Therefore, the date on which output service registration was taken is not at all relevant. Utilisation of credit was permissible in view of the extended definition of 'output services'.

Jindal Steel & Power Ltd. vs. CCE Raipur, 2008 16 STT (N. D. – CESTAT)

34. The short issue involved in the appeal was whether input duty credit can be utilized for payment of Service Tax on GTA services for the period October 2005 to March 2006. Since by an earlier order the appellant was already given a decision in their favour (covered under MMS Steel Ltd. & Others vs. CCE Trichy, 2007 TIOL 1317 CESTAT-Mad.) and identical decision was also given in the case of RRD Tex Pvt Ltd vs. CCE Salem 2007 TIOL 891 CESTAT-Mad, the order of the lower authority was set aside after condoning the delay in filing the appeal.

M/s. Sri Sarvana Spg. Mills P. Ltd. vs. CCE Madurai, 2008 TIOL 1429 CESTAT-Mad.

4. PENALTY

35. The Adjudicating authority invoking provisions of section 80 imposed nominal penalties under sections 75A, 76, 77 and 78. Thereafter, Commissioner in revision enhanced penalties. The Tribunal held that no ground had been adduced and no evidence relied upon to come to conclusion different from one taken by original authority hence leniency shown by Adjudicating authority was reasonable and order of adjudicating authority to be restored.

Darmanian Enterprises vs. CCE, Jalandhar 2008 (11) STR 463 (Tri-Del.)

36. The Tribunal held that section 73(3) and CBEC circular provides that no penalty was imposable, if assessee paid tax due along with interest on his own and even on insistence of department. It was held that revisionary order enhancing penalty was not sustainable.

Tidewater Shipping Private Limited vs. CST, Bengaluru 2008 (11) STR 475 (Tri-Bang.)

37. The Tribunal held that once the opportunity of filing cross objection was not availed by assessee on appeal filed by department, then at a later stage, assessee was not allowed to raise fresh grounds; and since the duty had been paid before issuance of show cause notice, department's plea to enhance the penalty imposed was rejected.

CCE, Nashik vs. Delta Elastometal Compound Pvt. Ltd. 2008 (11) STR 534 (Tri-Mumbai)

38. The Tribunal in this case held that where there was genuine doubt and the Board issued clarification, no mala fide could be attributed. In such cases, waiver of penalty under section 80 was justified. In terms of the Explanation below 73(1), even in cases of suppression, if an assessee paid the service tax along with interest and penalty equal to 25% of service tax, the proceedings were closed. In such circumstances, there was no justification for imposing a penalty of Rs. 10 lakhs for short payment of Rs. 6,68,945.

Majestic Mobikes Pvt. Ltd. vs. CST, Bengaluru 2008 (11) STR 609 (Tri – Bang.)

39. The Tribunal observed that Government was adopting tax payer friendly approach and plea of bona fide to be taken into account. In such circumstances, the Tribunal set aside the penalty under sections 76 and 77.

BP Mobiles vs. CCE (A), Mangalore 2008 (12) STR 274 (Tri-Bang.)

40. In this case, appellant a proprietorship firm acting as agent in loading and unloading of cargo, paid tax belatedly on the belief that they were not liable to pay service tax. The Tribunal held that since the delay in making payment was due to statutory interpretation and in fact they have paid service tax before issue of SCN, penalty was not warranted.

Jagdeep Singh Saluja vs. CCE, Bhopal 2008 (12) STR 309 (Tri-Del.)

41. The Tribunal held that penalty was to be limited to 25% of service tax amount under section 78 of FA, 1994 in terms of CBEC Letter F. No. 137/67/2006-CX.4 dated 3-10-2007 and no penalty was to be imposed under any other sections. It was further held that, interest was payable even when the short paid amount was paid before issue of SCN.

AK & I Advertising Private Limited vs. CCE (Appeals-II), Bengaluru 2008 (12) STR 315

(Tri-Bang.)

42. The Tribunal in this case held that since the Amnesty scheme was extended up to 30-11-2004 and assessee applied for registration on 30-11-2004 and deposited the amount under dispute on the same day, penalty was not impossible.

CCE, Chandigarh vs. Amson Transformers 2008 (12) STR 340 (Tri-Del.)

5. OTHERS

Certificate of Registration

43. The petitioner engaged in the business of leasing operation and supervision work for supply of coal to power plants applied for registration under business auxiliary service. The Department did not reject the application. There was a provision for deemed registration if not granted within 7 days. After 22 months, the Department on its own registered the firm under clearing and forwarding service. The Court ruled that certificate granted could not remain in operation until the Commissioner, Service Tax, gives reasoned decision after hearing the petitioner and until then, the petitioner would continue to pay service tax under business auxiliary service. However, the Court stated that it had not made any observation on merits which the Commissioner, Service Tax, had to adjudicate.

Karamchand Thaper & Bros. (Coal Sales) Ltd. vs. UOI, 2008 (11) STR 459 (Cal.)

Circulars

44. The Supreme Court held that Circulars and instructions issued by CBEC are binding on authorities under respective statute. The Court had to declare what particular provision of statute says and the Executive Circular contrary to the statutory provisions had not existence in law. The assessee's contention that revenue authorities cannot take advantage of Supreme Court decision and file appeal taking position contrary to CBEC circular was not acceptable as that would indicate that the valuable right of challenge would be denied and there would be no scope for filing an appeal by revenue authorities.

CCE, Bolpur vs. Ratan Melting & Wire Industries 2008 (12) STR 416 (SC)

Refund

45. In this case the Tribunal held that interest was grantable if the Tribunal's order granting the refund had not be stayed by the High Court. It further held that issuing a show cause notice for recovery of refund already granted on the ground that order granting refund had been challenged in the High Court amounted to contempt of the Tribunal. Thus, department was directed to pay interest within a week.

Toyota Kirloskar Motors Ltd. vs. CCE, Aurangabad 2008 (11) STR 551 (Tri-Bang.)

46. The Tribunal held that letter issued by the department was decision and was appealable. The Commissioner (Appeals) was not correct in holding that letter rejecting refund was not an appealable order.

Indian Aluminium Co. Ltd. vs. CCE (Appeals), Kochi 2008 (12) STR 533 (Tri-Bang)

Show Cause Notice

47. In this case single appeal was filed against compendious order disposing of two show cause notices. The Tribunal held that single appeal filed against a compendious order could be held to be irregular only for reason that impugned order had dealt with more than one Show Cause Notices.

Escorts Ltd. vs. CCE, Faridabad 2008 (11) STR 532 (Tri-Del.)

48. In this case, appellants were neither made party in the show cause notice nor any corrigendum was issued subsequently to make them party in the SCN. The Commissioner, when adjudicated the case in second de novo proceedings, chose to cast duty liability on the appellant. The Tribunal held that, impugned order was beyond the scope of show cause notice, therefore not sustainable.

Gopal Repackers vs. CCE, Coimbatore 2008 (11) STR 534 (Tri-Mumbai)

49. In this case Supreme Court held that liability to file return on recipient of Goods Transport Operator was cast only under section 71A, which was introduced in Finance Act, 2003. It was further held that, Show Cause Notice to assessee under section 73 takes in only case of assessee who was liable to file return under section 70 and class of persons who come under section 71A not brought under net of section 73.

CCE, Vadodara-I vs. Gujarat Carbon & Industries 2008 (12) STR 3 (SC)

50. The Tribunal in this case held that section 11B(2) of CEA, 1944 did not require issuance of show cause notice for rejecting refund claim as a mandatory rule.

Omega Bright Steel Pvt. Ltd. vs. CCE, Faridabad 2008 (12) STR 102 (Tri-Del)

51. The appellant in this case voluntarily without protest deposited service tax in 2004 for the period September 2000 to March 2003. The SCN was issued to appropriate the amount deposited by the appellant. The department subsequently issued corrigendum alleging suppression of facts to invoke extended period of limitation. The Tribunal held that, proposal in corrigendum for invocation of extended time limit was ineffective as notice meant for appropriation of amount paid.

JSP Security vs. CCE, Jaipur-I 2008 (12) STR 290 (Tri-Del.)

Others

52. The payment of tax made by the appellant to the Government as recipient of service did not imply that it was paid on behalf of the contractor. The contractor being service provider was not liable to make payment of Service Tax. The Court considered the arbitration award as faulty, considering it as opposed to the scheme of Service Tax, which levies tax on services and not on service provider.

Rashtirya Ispat Nigam Ltd. vs. Dewanchand Ramsaran, 2008 (11) STR 453 (Bom.)

53. The Commissioner (Appeals) held that composition scheme could be opted prior to payment of service tax and the same was applicable for entire contract. Part of the service was already rendered and service tax was already paid thereon under construction service. Composition scheme under Works Contract service was not available to such ongoing contracts.

In Re: M. B. Chitale Constructions 2008 (11) STR 573 (Commr. Appl)

54. In this case, the Hon'ble Bombay High Court has held that section 35 of CEA, 1944 expressly provided a ceiling on powers of Commissioner (Appeals) even on production of proof of sufficient cause. In view of that, general provision of section 5 of Limitation Act, 1963 should be deemed to be excluded and not applicable. Appeal preferred beyond 30 days of expiry of statutory period of 60 days held to be time barred.

Navinon Ltd. vs. Union of India 2008 (12) STR 84 (Bom.)

55. In this case, the Tribunal held that in case of hire purchase contracts entered prior to the date of enhancement of rate of service tax, the applicable rate of tax would be the rate prevailing on the date on which the contract was entered into with the customer.

LFC Hire Purchase Company Ltd. vs. CCCE (Appeals), Kochi 2008 (12) STR 320 (Tri-Bang.)

6. WAIVER OF DEPOSIT

Pre-deposit

56. The Hon'ble Supreme Court in this case held that petition for stay should not be disposed of in routine manner unmindful of consequences flowing from order requiring deposit of full or part of demand. Where denial of interim relief may lead to public mischief, grave irreparable private injury or shake citizen's faith in the impartiality of public administration, interim relief can be given. It further held that for a hardship to be undue, it must be shown that the particular burden to be observed or performance of requirement is out of proportion to nature of requirement itself and benefit which applicant would derive from compliance with it. The word 'undue' adds something more than just hardship. It means excessive hardship or a hardship greater than circumstances warrant.

Benara Valves Ltd. vs. CCE, 2008 (12) STR 104(SC)

57. The appellants, registered under 'Management Consultancy Services' and 'Maintenance and Repair Services', filed their returns and paid Service Tax. The Tribunal observed that order of the Commissioner (Appeals) was non-speaking on various case laws relied upon by the appellant. Further, the facts of appellants' filing of return and checking and scrutinizing of records, etc., by the Department could not be prima facie considered 'suppression' in the light of various Supreme Court decisions cited by the appellants, waiver of pre-deposit was granted.

Rolex Logistics Pvt. Ltd. v. Commissioner, Service Tax, Bengaluru, 2008 (11) STR 394 (Tri-Bang)

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