LATEST IN JUDICIARY FOR NOV 2012 – SERVICE TAX

S. NO.	QUESTION AIISED BEFORE THE COURT	DECISION	NAME OF THE CASE
		PRELIMINARY LEGAL PROVISIONS	
1.	**Whether the value of SIM cards sold by the mobile phone companies to their subscribers has to be included in value of taxable service under 'telecommunication service' or it is taxable as sale of goods under the Sales Tax Act?**	**Decision of the case:** The High Court, while examining the functioning of a SIM card, admitted that SIM card is a computer chip having its own SIM number on which telephone number can be activated. SIM card is a device through which customer gets connection from the mobile tower. Unless the SIM card is activated, service provider cannot give service connection to the customer because signals are transmitted and conveyed through towers and through SIM card communication signals reach the customer's mobile instrument. Hence, it can be inferred that it is an integral part required to provide mobile service to the customer. Further, SIM card has no intrinsic value or purpose other than use in mobile phone for receiving mobile telephone service from the service provider. Thus, the Court accepted the view that **SIM cards were not goods sold or intended to be sold to the customer, but supplied as part of service**. Consequently, it held that **the value of SIM card** supplied **by the assessee would form part of the value taxable service on which service tax was payable by the assessee**. ***Note:*** *Supreme Court, in case of Idea Mobile Communications Ltd. v. CCE 2011 (23) S.T.R. 433, has affirmed the aforesaid decision.*	***CCE v. Idea Mobile Communications Ltd. 2010 (19) STR 18 (Ker.)***

GAMUT AND COVERAGE OF TAXABLE SERVICES			
2.	**Whether a concern not having profit motive can be regarded as a security agency under section 65(94) of the Finance Act, 1994?**	**Facts of the case:** The assessee was a statutory corporation under the provisions of the Punjab Ex-Servicemen Corporation Act, 1978 (PESCO Act). Its activities were of deploying Ex-servicemen by way of providing security agency service. After the security agency service became taxable, the appellant applied for registration under the Act and was issued the registration certificate. However, inspite of registration, the appellant neither paid service tax nor filed return. The Revenue issued notice to the assessee requiring it to file the return contending that even if the appellant did not have profit motive and was not 'commercial concern', it was liable to pay service tax. **Decision of the case**: Considering the charging provision under section 68 and definition of value of taxable service under section 67, the High Court observed that there was no requirement that the service provider should provide service for profit motive. The Court further noted that use of the word business in the definition of security agency is not enough to hold that service provider must have profit motive. The word business does not necessarily imply requirement of profit motive. The expression is used in a taxing statute in the sense of occupation or profession which occupies time, attention and labour normally with the object of making of profit as against support or pleasure. Hence, the assessee was held liable to service tax in the given case. *Note: As per section 65(94) of the Finance Act, 1994:-* *"Security agency" means any person engaged in the* ***business*** *of rendering services relating to the security of any property, whether movable or immovable, or of any person, in any manner and includes the services of investigation, detection or verification, of any* © The Institute of Chartered Accountants of India **104** *Fact or activity, whether of a personal nature or otherwise, including the services of providing security personnel.*	**Security agency services** ***Punjab Ex-Servicemen Corporation v. UOI 2012 (25) S.T.R. 122 (P & H)***
3.	**In case where rooms have been rented out by Municipality, can it pass the burden of service tax to the service receivers i.e. tenants?**	**Facts of the case:** The petitioners entered into agreements with the respondent-Municipality and had taken rooms on rent from it. They were called upon to pay service tax. The primary contentions of the petitioners were as follows:- (a) Under the agreement, there was no provision for payment of service tax. Therefore, the	**Renting of immovable property services**

		demand for payment of service tax was illegal. Further, service tax was payable by the Municipality and there was no authority with which the Municipality could pass it on to the petitioners. (b) Since they were small tenants, the Municipality must be treated as units of the State within the meaning of Article 289 of the Constitution of India and, therefore, levy of service tax on the property or on the income of the Municipality was unsustainable. The Revenue contended that service tax was an indirect tax. Though primarily the person liable to pay the tax was Municipality, there was nothing in the law which prevented passing of the liability to the tenants. **Decision of the case:** The High Court rejected the contentions of the assessee and opined as under:- (a) As regards the contention that there was no mention of the service tax liability in the contract, the Court held that this is a statutory right of the service provider/Municipality by virtue of the provisions under law to pass it on to the tenants. It is another matter that they may decide not to pass it on fully or partly. It is not open to the petitioners to challenge the validity of the demand for service tax, in view of the fact that service tax is an indirect tax and the law provides that it can be passed on to the beneficiary. Hence, the service tax can be passed on by the service provider i.e. Municipality. (b) The word "State" in Article 289 does not embrace within its scope the Municipalities. Hence, when service tax is levied on the Municipality there is no violation of Article 289. Moreover, Municipality has not raised the contention that there was a violation of Article 289. Hence, it was held that Municipality can pass on the burden of service tax to the tenants.	***Kishore K.S. v. Cherthala Municipality 2011 (24) S.T.R. 538 (Ker.)***
4.	**Can marriage be regarded as a social function for the purpose of levying service tax under pandal or shamiana contractor services?**	**Facts of the case:** The assessee pleaded that erection of pandal/ shamiana for Hindu marriage is fundamentally a sacrosanct and sacred religious function and can never be treated as a social function to invite service tax. Thus, Explanation to section 65(77a)* is unconstitutional and hence should be quashed. **Decision of the case:** The High Court noted that apparently, Hindu marriage is not treated or regarded a social function per se. Only when a "pandal or shamiana" is used for marriage, it earns the status of "social function" because the service component is involved. Since the statute itself postulates that marriage is to be regarded as a social function, full effect has to be given to the same. Besides, the pre-requisite is the use of "pandal or shamiana". Hence, the High Court elucidated that when a "pandal or shamiana"	**Pandal or shamiana services** ***All India Tent Dealers Welfare Organization v. UOI 2011 (24) S.T.R. 385 (Del.)***

		is used for marriage, it would be regarded as "social function" and would be liable to service tax. **Note: Explanation to section 65(77a) was inserted by the Finance Act, 2007. Section 65(77a) reads as under:-* *"Pandal or shamiana" means a place specially prepared or arranged for organising an official, social or business function.* *Explanation: For the purposes of this clause, "social function" includes marriage.*	
5.	**Can a commission agent also acting as a consignment agent be covered under the definition of 'clearing and forwarding agent'?**	**Decision of the case:** The assessee contended that activity carried on by him came within purview of 'commission agent' and not under the 'clearing and forwarding agent'. The Court elucidated that assessee in question had not restricted its activities to business of commission agency, but had also carried on business as consignment agent. **Since the consignment agent had been brought under statutory definition of 'clearing and forwarding agent' by inclusive clause, the High Court held that the assessee falls under the definition of 'clearing and forwarding agent'** after considering the following points:- · Agreement itself termed the assessee as a consignment agent. · Price was mutually decided by the principal and the agent (assessee). Had the assessee been merely a commission agent, price determination would not have been within his domain. · Since assessee had been given the authority and power to appoint dealers, stockists and distributors, it implied that it was not merely a commission agent. · Mere procurement of purchase orders was not involved, but stored goods were also cleared and forwarded to stockists and dealers by the assessee.	***CCE v. Mahaveer Generics 2010 (17) S.T.R. 225 (Kar.)***
6.	**Whether the levy of service tax on hire purchase and leasing transactions falling under section 65(12) of the Finance Act, 1994 is constitutionally valid?**	**Decision of the case:** **The High Court, in the impugned judgment, had upheld the constitutional validity of service tax levy on hire purchase and lease services** after noting that service charge @ 1% was admitted as collected and service tax was levied on service and not on sale or purchase of goods. The High Court rejected the plea that levy of service tax on hire purchase/leasing transaction is violative of Articles 14 and 19(1) (g) of the Constitution after observing that a taxing statute was not *per se*, a restriction of the freedom under Article 19(1) (g) and policy of a tax, in its effectuation, might, bring in some hardship in some individual cases but that was inevitable.	**Section 65(12) of the Finance Act, 1994** ***Madras Hire Purchase Association v. UOI 2009 (16) S.T.R. 3 (Mad.)***

7.	**Can a software be treated as goods and if so, whether its supply to a customer as per an "End User Licence Agreement" (EULA) would be treated as sale or service?**	**Decision of the case:** The High Court observed that the law as to whether the software is goods or not is no longer res integral as it has been settled by the Supreme Court ruling in *TCS case [2004 (178) ELT 22 (SC)]*. The High Court reiterated that **software is goods as per Article 366(12) of the Constitution**. A software programme may consist of various commands which enable the computer to perform a designated task. The copyright in that programme may remain with the originator of the programme. Goods could be tangible property or an intangible one. A software, whether customized or non-customised, would become goods provided it has the attributes thereof having regard to (a) utility (b) capable of being bought and sold (c) capable of transmitted, transferred, delivered, stored and possessed. On the issue as to whether the transaction would amount to sale or service, the High Court was of the view that it would depend upon the nature of individual transaction. The High Court stated that as a transaction could be exclusive sale or exclusive service or composite one i.e., where the element of sales and service both are involved; the nature of transaction becomes relevant for imposition of tax. The High Court explained that when a statute, particularly a taxing statute is considered with reference to the legislative competence, the nature of transaction and the dominant intention on such transaction would be relevant. In the instant case, the terms of EULA indicated the dominant intention of parties whereby the developer retained the copyright of each software, be it canned, packaged or customised, and only the right to use with copyright protection was transferred to the subscribers or the members. The High Court opined that in the transactions taking place between the members of ISODA with its customers, the software is not sold as such, but only the contents of the data stored in the software are sold which would only amount to service and not sale. Further, the High Court was of the view that such transactions could also not be treated as deemed sale under Article 366(29A)(d) of the Constitution of India as that requires a transfer of right to use any goods and in the instant case, the goods as such are not transferred. As regards constitutional validity of service tax levy on information technology software service, the High Court did not agree with the contention of the assessee that since software is goods, all transactions between the members of ISODA and their customers would amount to sales and be liable to sales tax/VAT and that State Government alone	**Section 65(105)(zzzze) of the Finance Act, 1994** ***InfoTech Software Dealers Association (ISODA) v. Union of India 2010 (20) STR 289 (Mad.)***

		would be competent to enact law therefore. The High Court observed that **though software is goods, the transaction may not amount to sale in all cases and it may vary depending upon the terms of EULA**. The High Court stated that the relevant test for this purpose would be whether section 65(105)(zzzze) of the Finance Act, 1994 can be brought under Entry 97 of List I of Schedule VII of Constitution as the Parliament has the legislative competence to make laws for service tax in terms of the said entry. Entry 97 is a residuary entry and relates to taxable service. The High Court referred to the case of *Tamil Nadu Kalyana Mandapam Association v. Union Of India 2006 (3) STR 260 (SC)* wherein it was held by the Apex Court that the Parliament is empowered to make law for service tax under said residuary powers in the absence of entry under List II. Thus, the High Court held that amended provisions to levy service tax on IT software service are not unconstitutional by virtue of the residuary power available to the Parliament under Entry 97.	
8.	**Whether service tax is chargeable on the buffer subsidy provided by the Government for storage of free sale sugar, under the category of `storage and warehousing services'?**	**Facts of the case:** The assessee was engaged in the manufacture of sugar. The Central Government directed him to maintain buffer stock of free sale sugar for the specified period. In order to compensate the assessee, the Government of India extended buffer Subsidy towards storage, interest and insurance charges for the said buffer stock of sugar. Revenue issued a show cause notice to the assessee raising the demand of service tax alleging that amount received by the assessee as buffer subsidy was for the services covered within the definition of `storage and warehousing services'. **Decision of the case:** The High Court noted that apparently, service tax could be levied only if service of `storage and warehousing' was provided. Nobody can provide service to himself. In the instant case, the assessee stored the goods owned by him. After the expiry of storage period, he was free to sell them to the buyers of its own choice. He had stored goods in compliance to directions of Government of India issued under the Sugar Development Fund Act, 1982. He had received subsidy not on account of services rendered to Government of India, but had received compensation on account of loss of interest, cost of insurance etc. incurred on account of maintenance of stock. Hence, the act of assessee could not be called as rendering of services. The High Court upheld the Tribunal's decision that just because the storage period of free sale sugar had to be extended at the behest of Government of India, neither the assessee becomes `storage and warehouse keeper' nor the Government of India becomes their 'client' in this regard. Therefore, the storage of specific quantity of free sale sugar could not be treated as providing `storage and warehousing' services to the Government of India.	**Section 65(105)(zza) of the Finance Act, 1994** ***CCE v. Nahar Industrial Enterprises Ltd. 2010 (19) STR 166 (P & H)***

9.	**Will the service provided by way of "advice, consultancy or technical assistance" in the case of turnkey contracts attract service tax and can these turnkey contracts be vivisected?**	The Larger Bench of the Tribunal noted that Article 366(29-A) (b) to the Constitution has allowed the vivisection of indivisible contracts in order to find out goods component and value thereof. Therefore, the remnant part of the contract may be attributable to the scope of service tax under the provisions of the Finance Act, 1994. It inferred that **turnkey contracts can be vivisected and discernible service elements involved therein can be segregated and classifiable as well as valued for levy of service tax under the Finance Act, 1994 provided such services are taxable services** as defined by that Act and depending on the facts and circumstance of each case, services by way of advice, consultancy or technical assistance in the case of turnkey contract shall attract service tax liability.	***CCE v. BSBK Pvt. Ltd. 2010 (18) S.T.R. 555 (Tri. – LB)***
10.	**In case where the respondent is authorized by the airport authority to collect entrance fee from visitors to airport, who is liable to pay service tax –respondent or Airport Authority?**	**Facts of the case:** The respondent entered into a licence agreement with Calicut Airport Authority Ltd. where under he got the right to collect entrance fee from visitors to the Airport. Since respondent was authorized to collect entrance fee which was for services provided to the customers in the Airport, the Department issued notice demanding service tax from the respondent. The Tribunal held that the Airport Authority only was rendering service and therefore, respondent could not be held liable for the same. The appellant contended that once licence was issued to the respondent, respondent stepped into the shoe of the service provider and he permitted the visitors to enjoy the service on collection of entrance fee. The respondent replied that licence fee paid by respondent to the Airport Authority constituted consideration for the services provided in the Airport and so much so, the Airport Authority was liable to pay service tax on the entire licence fee. **Decision of the case:** The High Court elucidated that **even though respondent was not providing the service in the Airport which was done by the Airport Authority, once the licence was given by the Airport Authority to the respondent to permit entry and allow enjoyment of the services provided there to the customers, respondent in fact became the service provider,** though he was only acting as an agent under the licence agreement with the Airport Authority. Therefore, the Court opined that respondent being the service provider was liable to pay the service tax and the Tribunal's finding to the contrary was untenable. Consequently, it reversed the findings of the Tribunal and allowed the Department's appeal.	**Section 65(105)(zzm) of the Finance Act, 1994** ***CCE v. P. C. Paulose 2010 (19) STR 487 (Ker.)***

SERVICE TAX PROCEDURES			
11.	**Can the option for composition scheme under works contract service be exercised after payment of service tax on a particular works contract?**	**Decision of the case:** The High Court held that on a true and fair construction of rule 3(3) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007, unambiguously, it was clear that where in respect of a works contract service tax had been paid, no option to pay service tax under the composition scheme could be exercised. The entitlement to avail the benefits of the composition scheme is only after an option is exercised under rule 3(3) of the said rules and this provision specifically enjoins a disqualification for exercise of such option where service tax has been paid in respect of a works contract. In other words, **where service tax has been paid in respect of a works contract, the eligibility to exercise an option to avail the benefits of the composition scheme is excluded**. The benefit of the composition scheme is available [subject to the exercise of option and the conditions of eligibility for exercise of such option as spelt out in rule 3(3)] only in relation to "works contract service", as defined in rule 2(c) [Rule 2(c) defines "works contract service" as meaning service provided in relation to execution of the works contract referred to in sub-clause (zzzza) of clause 105 of section 65 of the Act].	**Rule 3(3) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007** ***Nagarjuna Construction Company Ltd v. GOI 2010 (19) STR 321 (A.P.)***