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THE NEWSLETTER

Service Tax To Be Levied On Government Services

Previously, services provided by the Government or Local Authorities were exempted from service tax as they formed a part of the Negative List. But now due to the amendment by the Finance Act, 2015 which was made effective from 1st April, 2016 by Notification No. 6/2016 dated 18.02.2016, service tax will be levied on the services which are provided by the Government or Local Authorities to a business entity whose turnover in the preceding financial year was more than 10 lakhs. The liability to pay service tax will be on the recipient of such government services.

This amendment is not applicable on those government services which are specifically covered in the Negative List. Also, the services provided by Government or Local Authorities by way of issuance of passport, visa, driving licence, birth certificate or death certificate and assignment of right to use natural resources to an individual farmer for the purpose of agriculture are exempted from levy of service tax. Further, those services for which the gross amount charged by the Government or the Local Authorities, does not exceed Rs. 5000/- (Rs. Five thousand only) are also exempt from levy of service tax.

No TDS Is Deductible On Tips Received By Hotel Employees

The Hon'ble Supreme Court in ***ITC Limited Gurgaon Vs. Commissioner of I.T (TDS) Delhi [April 26, 2016]*** set aside the judgment of High Court of Delhi in toto and held that 'tips' received by Hotel employees does not amount to 'salary' from their employer and hence the employer need not deduct the tax at source under Section 192 of the Income Tax Act (hereinafter referred to as the "**Act**"), though the same would be chargeable in the hands of the employees as "income from other sources". The Hon'ble Court while interpreting Section 15(b) of the Act stated that for income to be chargeable under head "Salary" there must exist a contract of employment between employer and the employee, But in the present case, it is clear that the amount

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of tip paid by the employer to the employees has no reference to the contract of employment at all. Tips are received by the employer in a fiduciary capacity as trustee for payments that are received from customers which they disburse to their employees for service rendered to the customer. Therefore, there is no reference to the contract of employment when these amounts are paid by the employer to the employee. Further while interpreting Section 192 of the Act, the Hon'ble Court stated that under sub-section (1) of Section 192, "any person responsible" for paying any income chargeable under the head "salaries" is alone brought into the dragnet of deduction of tax at source. The person responsible for paying an employee an amount which is to be regarded as the employee's income is only the employer. In the instant caseit is clear that the person who is responsible for paying the employee the tip is not the employer at all, but a third person – namely, the customer and therefore, Section 192 of the Act would not get attracted at all on the facts of the present case. Thus, the Hon'ble Supreme Court held that, "*Tips received by the waiter does not form part of the Salary and hence would not amount to Tax deductible at Source under Section 192*."

Real Estate Act, 2016 Become Effective From 1st May, 2016

The Ministry of Housing and Urban Poverty Alleviation ("**Ministry**") *vide* Notification F. No. O- 17034/18/2009-H dated 27th April, 2016 notified that the Real Estate (Regulation and Development) Act, 2016 ("**Act**") becomes effective from 1st May, 2016. The Act comes into effect with the aim of protecting the interests of consumers and promoting the growth of real estate sector. However, the Ministry notified only 60 sections currently out of the total 92 sections of the Act. The Central and respective State Governments require to formulate the rules under the section 84 of the Act by 31st October, 2016. Further, the appropriate government which is defined under the Act, pursuant to Section 20 and 43 of the Act, require to formulate the Real Estate Regulatory Authority and the Real Estate Appellate Tribunals for exercising the powers and functions given in the Act and to adjudicate the matters in the Act.

Distributorship Termination Clause Does Not Amount To Abuse Of Dominance

The Competition Commission of India ("**CCI**") in the matter of **Tamil Nadu Consumer Products Distributors Association v. Britannia Industries Ltd. (Case No. 106 of 2015)** dated March 29, 2016, held that the information filed by the informant (distributor) against the respondent (Britannia Industries Ltd.) for imposition of conditions in distributorship

agreement for termination of distributorship does not leads to violation of Section 4 of the Competition Act, 2002 (“**Act**”). Further, CCI held that although the respondent is engaged in the manufacture of food-products, bakery and dairy products through India, the biscuits market constitute a relevant product market for respondent. CCI concluded that the biscuits industry in India has presence of other organized and unorganized players having comparable size and resources, due to which the respondent does not possess sufficient market power to act independently of the competitive forces.

CCI also noted that special rates/discounts provided to other retailers to purchase material from the respondent directly on the basis of sale volumes, cannot be considered as anti-competitive in terms of Section 4 of the Act.

No Penalty For Non-Deduction Of Tax Based On CA Certificate

The ITAT Mumbai Bench ‘A’, in **Smt. Aishwarya Rai Bachchan vs. Additional Commissioner of Income-tax, Range – 2 Mumbai ([2016] 68 taxmann.com 324 (Mumbai –Trib.))** held that certificate obtained from chartered accountant stating that remittance was exempt from withholding tax at source would amount to reasonable cause for not deducting tax at source from the payment made to non-resident and hence, no penalty can be imposed on the assessee under Section 271C of the Income Tax Act, 1961 (“**Act**”). Facts of the case were, the assessee made payment of US$ 77,500 to a non-resident for development of website and other allied works without deducting TDS under Section 195 of the Act on the basis of certificate obtained from assessee’s chartered accountant. Assessing officer treated assessee as assessee in default under Section 201(1) of the Act for non-deduction of TDS by observing that website maintenance fell within the meaning of 'fees for technical services' as provided under Section 9(1)(vii) read with Explanation-2 of the Act. Assessee accepted her liability before the tribunal to deduct the TDS. On the basis of order, Assessing Officer initiated penalty proceedings u/s 271C of the Act. The question that arose in the tribunal was that, whether imposition of penalty u/s 271C of the Act is automatic and mandatory. It was held that imposition of penalty under section 271C is subject to the condition imposed under section 273B. A reading of section 273B of the Act suggests that where the assessee proves that the failure to deduct tax was for a reasonable cause, no penalty can be

imposed and therefore, from the conjoint reading of section 271C and 273B, it is clearly evident that imposition of penalty under Section 271C is neither automatic nor mandatory. Now, whether certificate from a chartered accountant would constitute as reasonable cause, it was held that, "*when the C.A. issued a certificate opining that there is no requirement for deduction of tax at source, assessee under a bonafide belief that withholding of tax is not required, did not deduct tax at source on the remittances made. In our view, the explanation submitted by the assessee is a valid explanation and cannot be brushed aside with some general observations. Therefore, in our considered opinion, failure on the part of the assessee to deduct tax at source was due to a reasonable cause. Accordingly, we delete the penalty imposed under section 271C is deleted*."

If Partnership Firm Has Been Penalized, No Separate Penalty Can Be Levied On Its Partners & Dummy Units

The Ahmedabad Bench of CESTAT in the case of **Sharp Engineers v. Commissioner of Central Excise, Ahmedabad-I**, recently held that if partnership firm has been penalized, no separate penalty can be levied on its partners & dummy units. The facts of the case were that the Department raised demand on assessee, a partnership firm, by treating two proprietorship firms as dummy of assessee and clubbing total turnover. Department also levied penalty on assessee's partner and proprietors of dummy firms. Assessee-firm paid duty, interest and 25 per cent penalty prior to issuance of notice, but, challenged penalty on partner and proprietors of dummy firms. It was held that since assessee had made payment prior to issuance of notice to avoid legal proceedings, levy of separate penalty on partner was unjustified; further, once partnership firm has been penalized, separate penalty is not imposable upon partner, as partner is not a separate legal entity. Secondly, penalty cannot be imposed on dummy units; therefore, revenue cannot impose penalty indirectly on proprietor of dummy units.

A Company Not Paying Its Debts: Can It Be Wound Up?

By Manish Singh Lakhawat, Advocate

A company comes into existence by a legal process and when it desires to end its existence it must again go through the legal process of winding up of its affairs. Winding up of company is the process whereby its life is extinguished and its property administered for the benefit of its creditors and members. An administrator is appointed and he takes control of the company, collects its assets, pays its debts and finally distributes the surplus if any among the members in accordance with their rights. Thus winding up is the last stage in the life of a company.

The Companies Act, 1956 provides a mechanism for winding up of companies. There are three modes of winding up under the Act. A company may be wound up by an order of the Court that is called 'compulsory winding up' or 'winding up by the Court'. Winding up by the creditors or members without any intervention of the Court is called 'voluntary winding up'. In voluntary winding up, the

company and its creditors are left free to settle their affairs without going to the Court. In the case of voluntary winding up, the creditors or members may apply to the Court for directions or orders. Such a winding up is known as 'winding up subject to the supervision of the Court'.

When can a company be wound up by the Court?

A company can be wound up by the Court in following six situations as prescribed in Section 433 of the Companies Act, 1956-

a. If the company itself, has passed a special resolution (passed by three-fourth of the members present) in the general meeting to that effect;

b. Default in holding the statutory meeting or in delivering the statutory report [under Section 165 (1) & (5) of the Act] to the RoC;

c. The company fails to commence its business within one year from the date of it's incorporation, or suspends its business for a whole year;

d. The number of members is reduced below the statutory minimum number required;

e. If the company is unable to pay its debts, and

f. If the court is of the opinion that, the company be wound up (due to mismanagement, financial unsoundness, illegal operations, etc.)

When does a Company deem to be 'unable to pay its debts'?

Section 434(1) of the Companies Act, 1956 lists three circumstances where a company is deemed to be un able to pay its debts-

"A company shall be deemed to be unable to pay its debts-

(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding five hundred rupees then due, has served on the company, by causing it to be delivered at its registered office, by registered post or otherwise, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor;

(b) if execution or other process issued on a decree or order of any Court in favour of a creditor of the company is returned unsatisfied in whole or in part; or

(c) if it is proved to the satisfaction of the Court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the Court shall take into account the contingent and prospective liabilities of the company."

Inability to Pay Debts

Section 433(e) of the Companies Act, 1956 provides that in cases where the company is unable to pay its debts the court can order winding up. The expression 'unable to pay its debts' has to be taken in the commercial sense of being unable to meet current demands though the company may be otherwise solvent.

In spite of repeated demands if a company neglects to pay its debts, it will be considered as the inability of the company to pay its debts and an order of winding up can be passed by the court. By non-payment of the undisputed debt within the period of statutory demand, the company is deemed unable to pay its debts and where the company is unable to pay its debts, winding up ought generally to follow in public interest.

However, there is a line of judicial view that Section 433 cannot be used to coerce a company to make pay-

ments even though its liability is admitted. In ***I.T.C. Ltd. v. Fomento Resorts & Hotels Ltd***[24]***.,*** it was held that a winding up petition is not to be filed as a coercive means of recovery of debt. Similarly, in ***Agro Anlagewbau GmbH v. Orient Ceramics & Industries Ltd***., the Delhi High Court observed that the winding up jurisdiction is not to be use as an arm twisting device to compel a company to pay up a claim which it is unwilling to pay for legitimate reasons.

Conclusion

Winding up is the last thing that the court would do and not the first thing the court would do having regard to its impact and consequences, for winding up of a company would result, in (a) closing down of a unit which produces some goods or provides some service; (b) throwing out of employment numerous persons results in grave hardship to the members of the families of such employees; (c) loss of revenue to the state by way of collection that the state could hope to make on account of customs or excise duties, sales tax, income tax etc.; and (d) scarcity of goods and in diminishing of employment opportunities. The court would not be too keen or too anxious to wind up a company by an order of the court only on the ground that the company is unable to pay the debts. In fact, it would be a blow to do so, so long as there is any possibility of resurrecting the company.

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