

CHAPTER II

NON-LEVY/NON-PAYMENT OF SERVICE TAX

Service tax is levied on specified services. The rate of tax has been fixed at five per cent upto 13 May 2003, eight per cent from 14 May 2003, 10 per cent from 10 September 2004, 12 per cent from 18 April 2006 and 10 per cent from 24 February 2009.

A few illustrative cases of non-levy/non-payment of service tax of Rs. 328.22 crore are mentioned in the following paragraphs. These observations were communicated to the Ministry through 103 draft audit paragraphs. The Ministry/department has accepted (till January 2010) the observations included in 88 draft audit paragraphs with a revenue implication of Rs. 284.53 crore of which Rs. 116.99 crore has been recovered. In another draft audit paragraph though the reply of the Ministry/department has not been received, the assessee has accepted the observation and paid tax of Rs. 0.18 crore. Thus, total tax of Rs. 117.17 crore has been recovered.

2.1 Tax not paid by registered service providers

2.1.1 Air transport service

Transport of passengers embarking in India for international journey by air service was brought within the ambit of service tax from 1 May 2006.

Section 65(105)(zzzo) of the Finance Act, 1994 defines the taxable service as any service provided to any passenger by an aircraft operator in relation to scheduled or non-scheduled air transport of such passenger embarking in India for international journey, in any class other than economy class. Explanation 2 of the said section clarifies that in an aircraft meant for non-scheduled air transport of passengers, no class of travel will be treated as economy class. The phrase 'non-scheduled air transport' has not been defined in the said Act. However, rule 3 of the Aircraft Rules, 1937 defines 'scheduled air transport' to mean "an air transport service undertaken between the same two or more places and operated according to a published time table or with flights so regular or frequent that they constitute a recognisable systematic series, each flight being open to use by members of the public".

M/s National Aviation Company of India Ltd. (erstwhile Air India) in Mumbai service tax commissionerate, undertook non-scheduled (charter) flights as HAJ flights and recovered Rs. 499.03 crore for the period 2006-07 up to September 2007. These flights were not open to general public and were not operated according to a published time table. Audit observed that the said flights were non-scheduled flights and hence the assessee was liable to pay service tax on such services.

On the matter being pointed out (November 2007), the Ministry admitted the audit observation and stated (November 2009) that two show cause notices demanding service tax of Rs. 189.18 crore had been issued and the assessee had paid Rs. 95.89 crore in September 2009.

2.1.2 Public relation management service

Public relations management service came into the service tax net with effect from 1 May 2006. Section 65(86c) of the Finance Act, 1994 stipulates that public relations management service includes, strategic counseling based on industry, media and perception research, corporate image management, media relation, media training, press release, press conference, financial public relations, brand support, brand launch, retail support and promotions, events and communications and crisis communication.

M/s Social Media India, in Hyderabad IV commissionerate, rendered services to Information and Public Relations Department (IPRD) of the Government of Andhra Pradesh, in connection with publicising among rural masses various welfare/developmental programmes and schemes etc., undertaken by the Government of Andhra Pradesh. The assessee collected service charges of Rs. 39.76 crore during the year 2008-09 but service tax of Rs. 4.14 crore leviable under the 'public relations management service' was not paid. The service tax was recoverable with interest and penalty.

On the matter being pointed out (May 2009), the department stated (July 2009) that the action for recovery has been initiated. Further update of the case is awaited (January 2010).

The reply of the Ministry has not been received (January 2010).

2.1.3 Franchise and intellectual property right services

The franchise service came into service tax net from 1 July 2003 and intellectual property right service from 10 September 2004. Under section 65(47), 'franchise' means an agreement by which franchiser is granted representational right to sell or manufacture goods or to provide service or undertake any process identified with the franchiser, whether or not a trade mark, service mark, trade name or logo or any such symbol. This also covers the agreement by which the franchiser provides concepts of business operation to the franchisee, including know-how, method or operation, managerial expertise, marketing technique or training and standards of quality control etc. Section 65(55a) covers intellectual property right to intangible property, namely, trade design, patents or any other similar intangible property, under any law for the time being in force. It includes transferring or permitting the use or enjoyment of any intellectual property right.

2.1.3.1 M/s ACE Calderys Ltd., in Bhopal commissionerate, engaged in providing franchise operations, with some other units like Franchise Operation Mahakosal Ceramics, Franchise Operation Katni Tile Works, Franchise Operation Mahakaushal Potteries etc., placed orders for the manufacturing of items of refractory articles and its direct supply to the buyers at the agreed rate. The assessee collected the payments of goods at higher rate from the buyers and paid amounts at lower rates to the supplier of goods. The assessee retained the differential amount of Rs. 30.04 crore during the years 2006-07 to 2008-09 on which service tax of Rs. 3.66 crore was leviable, which was, however, not paid.

The matter was reported between February and August 2009, replies of the department/Ministry are awaited (January 2010).

2.1.3.2 M/s Laffans Petrochemicals Ltd., Panoli (the licensor) in Surat II commissionerate, entered into a technology licence agreement on 1 April 2005 with M/s Rossari Biotech India Pvt. Ltd. (the licensee), for supply of know-how to manufacture textile spin finishes and its variants. As per the agreement (i) the licensor had the right to verify the production and sales figures on monthly basis, (ii) the service receiver had to pay royalty at 10 per cent of the basic value of finished items till such time the unit continued to produce the product and (iii) the licensee at its discretion might transfer or assign the rights and obligations, in whole or in part with the prior written consent of the licensor. The licensor received royalty of Rs. 1.41 crore for the services rendered between 2005-06 and 2006-07 but did not pay service tax of Rs. 15.76 lakh leviable thereon.

On the matter being pointed out (between July 2006 and May 2007), the department stated (between February 2007 and February 2008) that the technical know-how was a permanent transfer of intellectual property rights and did not attract service tax. It further stated (October 2008) that the licensee has not transferred the technology to other person.

The reply of the department is not tenable for the reason that as per the conditions at (i) to (iii) above, the ownership/rights of the licensee on the property was/were not absolute and rested with the licensor only. Accordingly, service tax was recoverable under section 65(55b)(b) of the Finance Act, 1994.

The reply of the Ministry has not been received (January 2010).

2.1.4 Renting of immovable property service

Renting of immovable property service is taxable with effect from 1 June 2007. Under section 65(90a) of the Finance Act, 1994 renting of immovable property includes renting, letting, leasing, licencing or other similar arrangements of immovable property for use in the course or furtherance of business or commerce.

2.1.4.1 M/s Kandla Port Trust, Kandla, in Rajkot commissionerate and M/s Gujarat Maritime Board, Porbandar, in Bhavnagar commissionerate, received Rs. 6.44 crore between June 2007 and March 2008 for renting of immovable property for business/commercial purposes but did not pay service tax of Rs. 79.57 lakh leviable thereon.

On the matter being pointed out (between August and September 2008), the Ministry admitted the audit observation and stated (January 2010) that the show cause notice for Rs. 8.74 lakh had been issued to M/s Gujarat Maritime Board and another show cause notice for Rs. 70.79 lakh to M/s Kandla Port Trust was being issued.

2.1.4.2 Four assessees, in Faridabad and Gurgaon commissionerates, rented out industrial shed and commercial buildings to Railway Board and other parties for business or commercial use and received rent amounting to Rs. 2.79 crore during the period between June 2007 and August 2008. Though this service fell within the ambit of renting of immovable property, applicable service tax of Rs. 34.47 lakh was neither paid by the assessee nor was it demanded by the department, which was recoverable with interest of Rs. 3.78 lakh.

On the matter being pointed out (between September 2008 and January 2009), three assessee deposited service tax of Rs. 17.81 lakh (including interest of Rs. 1.75 lakh) between September 2008 and January 2009.

The replies of the department/Ministry have not been received (January 2010).

2.1.5 Port service

Section 65(82) of the Finance Act, 1994 defines port service to mean any service rendered by a port or other port or any person authorised by such port or other port, in any manner, in relation to a vessel or goods.

M/s Kolkata Port Trust, in Kolkata service tax commissionerate, rendered services to port users in connection with the storage of goods off loaded from vessels and collected licence fee for such services. However, service tax of Rs. 2.61 crore under port service was not paid for the period from April 2004 to March 2007.

On the matter being pointed out (April 2008), the department accepted (December 2008) the audit contention and issued a show cause notice in March 2009.

The reply of the Ministry has not been received (January 2010).

2.1.6 Rent-a-cab service

Rent-a-cab operator service became taxable from 1 April 2000. Any motor vehicle constituted or adapted to carry more than 12 passengers excluding driver for hire or reward comes under the definition of cab. The Board has also clarified on 2 August 2007 that service tax is liable to be paid on renting of buses under 'rent-a-cab service'.

M/s Andhra Pradesh Road Transport Corporation Ltd. (APSRTC), in Hyderabad II commissionerate, engaged in providing rent-a-cab service to various state/central public sector undertakings, private companies/offices for transporting employees from specified destinations to their work places and vice versa, had earned gross receipts of Rs. 27 crore in consideration of the services rendered to various organisations during the period from June 2007 to February 2009. However, service tax of Rs. 1.33 crore leviable thereon was not paid by the assessee.

On the matter being pointed out (between August and October 2008), the department accepted (June 2009) the audit observation in respect of the service provided to two clients involving tax of Rs. 24.36 lakh. The reply in respect of similar service rendered to other clients is awaited (January 2010).

The reply of the Ministry has not been received (January 2010).

2.1.7 Banking and other financial services

Section 65(12) of the Finance Act, 1994 envisages that banking and other financial services include services in relation to financial leasing, equipment leasing and hire purchase. The Board clarified (9 July 2001) that service tax in case of hire purchase would be leviable on processing fee/documentation charges, interest charges received in equated monthly installments and not on the principal amounts.

APTPC, in Hyderabad II commissionerate, engaged in providing clearing and forwarding agency, custom house agency, cargo handling service, storage and warehousing service and banking and financial services etc., rendered hire purchase services of consumer durable goods and vehicles to State Government employees, during the years 2003-04 and 2004-05. The assessee received Rs. 7.89 crore towards discount, commission, documentation and interest charges during the period 2003-04 and 2004-05 in relation to hire purchase services rendered by them but the applicable service tax of Rs. 70.37 lakh under 'banking and other financial service' was not paid.

On the matter being pointed out (July 2008), the Ministry admitted the audit observation and stated (November 2009) that the demand for Rs. 85.93 lakh was confirmed in February 2009 but the assessee had preferred an appeal with CESTAT.

2.1.8 Business auxiliary service

Service tax on business auxiliary service is leviable from 1 July 2003. Section 65(105)(zzb) of the Finance Act, 1994 defines the business auxiliary service as "any customer care service provided on behalf of the client." Further "commission agent" means any person who acts on behalf of another person and causes sale or purchase of goods or provision or receipt of services for a consideration and includes any person who, while acting on behalf of another person, deals with services or documents of title to such goods or services or undertakes any activities relating to sale or purchase of goods or services.

2.1.8.1 M/s Raj Ratan Castings Pvt. Ltd., in Kanpur commissionerate, engaged in the manufacture of M.S. ingots also provided mutual fund transaction services. The assessee received commission of Rs. 3.13 crore on mutual fund transactions conducted during the year 2006-07 and 2007-08. However, service tax of Rs. 38.45 lakh leviable under business auxiliary service was not paid which was recoverable with interest of Rs. 7.54 lakh. Besides, penalty of Rs. 38.45 lakh was also leviable under section 78 of the Finance Act, 1994.

On the matter being pointed out (August 2008), the department stated (March 2009) that the party is being persuaded to deposit the service tax. Further update of the case has not been received (January 2010).

The reply of the Ministry has not been received (January 2010).

2.1.8.2 M/s Union Enterprises Pvt. Ltd., in Jamshedpur commissionerate, engaged in the manufacture of M.S. ingot also provided business auxiliary service and received Rs. 4.22 crore on account of commission and discount, during the period April 2004 to March 2006 from its clients. Neither did the assessee pay the applicable service tax of Rs. 43.03 lakh nor did it submit the ST-3 return to the department. The service tax of Rs. 43.03 lakh was recoverable with interest and penalty.

On the matter being pointed out (August 2008), the department stated (May 2009) that a show cause notice demanding Rs. 68.03 lakh has been issued (April 2009). Further developments in the case have not been received (January 2010).

The reply of the Ministry has not been received (January 2010).

2.1.9 Consulting engineers' service

Section 65(31) of the Finance Act, 1994 defines "consulting engineer" as any professionally qualified engineer or any body corporate or any other firm which, either directly or indirectly, renders any advice, consultancy or technical assistance in any manner to a client in one or more disciplines of engineering.

M/s Himachal Pradesh State Industrial Development Corporation Ltd., Shimla, in Chandigarh commissionerate, received consultancy fee/supervision charges of Rs. 3.75 crore during the years 2001-02 to 2005-06 for construction work done under the supervision of its engineers but did not pay service tax of Rs. 27.39 lakh. The applicable service tax was recoverable with interest.

On the matter being pointed out (April 2007), the department stated (August 2008) that a show cause notice for Rs. 53.64 lakh for the years from 2002-03 to 2006-07 was issued (October 2007) but the demand for Rs. 24.33 lakh only could be confirmed, as demand for the balance amount of Rs. 29.31 lakh had become barred by limitation of time and was not recoverable. Further developments in the case are awaited (January 2010).

The reply of the Ministry has not been received (January 2010).

2.1.10 Mailing list compilation service

According to clause (63a) of section 65 of the Finance Act, 1994 "mailing list compilation and mailing" service means any service in relation to compiling and providing list of name, address and any other information from any source or sending document information, goods or any other material in a packet, by whatever name called, by addressing, stuffing, sealing, metering or mailing for or on behalf of the client.

The Indian Institute of Management, Kozhikode in Calicut commissionerate, conducted Common Admission Test (CAT) for admission to Indian Institutes of Management (IIM) by the CAT Group, which was an informal group of all IIMs. The IIM, Kozhikode also made available the CAT score to non-IIMs, on payment of a prescribed fee. The fee collected by the IIM, Kozhikode attracted service tax under mailing list compilation and mailing. However, service tax of Rs. 17.97 lakh during the period from June 2005 to March 2006 was not paid.

On the matter being pointed out (August 2006), the Ministry admitted the audit observation and stated (October 2009) that show cause notice for Rs. 63.79 lakh for the period from 16 June 2005 to 31 March 2008 has been issued.

2.2 Tax not paid by recipient of services

Rule 2 (1) (d) (iv) of the Service Tax Rules, 1994, stipulates that in respect of taxable service provided by a person, who is a non-resident or is from outside India and does not have an office in India, the person receiving the taxable service in India is liable to pay service tax.

2.2.1 Intellectual property right services

Intellectual property right services involves transfer of right to intangible property viz., trade marks, designs, patents or any other similar intangible property under any law for the time being in force, and were brought under the levy of service tax net from 10 September 2004. The term 'intangible property' for this purpose includes the right to use technical know-how belonging to another person.

2.2.1.1 M/s Hero Honda Motors Ltd., in Faridabad commissionerate, M/s Escorts Ltd., M/s Napino Auto Electronics Ltd. and M/s Munjal Showa Ltd., in Gurgaon commissionerate, obtained services from foreign service providers and paid Rs. 414.64 crore as royalty, technical know-how fee etc., during the period between April 2004 and March 2008. However, service tax of Rs. 47.80 crore leviable under intellectual property right was not deposited, which was recoverable with interest and penalty.

On the matter being pointed out (between November 2006 and April 2008), the department intimated (between August 2007 and June 2009) the recovery of Rs. 25.42 lakh from M/s Escorts Ltd. and M/s Napino Auto Electronics Ltd. and issue of show cause notices demanding Rs. 17.63 crore to other two assesseees. It also intimated that show cause notices for the remaining amount were being issued.

The reply of the Ministry has not been received (January 2010).

2.2.1.2 M/s Ranbaxy Laboratories Ltd., Dewas, in Indore commissionerate, engaged in the manufacture of medicaments and other organic compounds, obtained technical know-how from foreign service providers and paid professional charges of Rs. 137.02 crore during the year 2007-08. However, service tax of Rs. 16.94 crore under management consultant service was not paid.

On the matter being pointed out (September 2009), the department stated (September 2009) that the issue would be examined. Further update on the case is awaited (January 2010).

The reply of the Ministry has not been received (January 2010).

2.2.1.3 M/s Air Liquide Engineering India Pvt. Ltd., in Hyderabad III commissionerate, availed of technology provided by M/s Air Liquide, France for manufacture of air and gas separation plants on a turnkey basis. The assessee made payments to the foreign company towards royalty for having acquired the requisite technology. The payments were worked out with reference to sales turnover of air and gas separation plants manufactured by them. The assessee made payments aggregating Rs. 5.52 crore towards rights acquired by them for use of technology during the period from 2004-05 to 2006-07 but did not pay the applicable service tax of Rs. 58.85 lakh.

On the matter being pointed out (February 2008), the department admitted the audit observation and reported (May 2009) that show cause notice covering the period from 2004-05 to 2007-08 has been issued.

The reply of the Ministry has not been received (January 2010).

2.2.1.4 M/s Rane NSK Steering Systems Ltd., in Chennai III commissionerate, engaged in the manufacture of steering column assembly, received technical assistance services from NSK Ltd., Japan. It paid royalty of Rs. 92.52 lakh for the years 2004-05 and 2005-06 but did not pay applicable service tax of Rs. 9.44 lakh.

On the matter being pointed out (May 2007), the department accepted the audit observation and reported (July 2009) the issue of a show cause notice for Rs. 11.33 lakh in April 2009.

The reply of the Ministry has not been received (January 2010).

2.2.2 Banking and other financial services

Banking and other financial services have been brought under the levy of service tax from 16 July 2001. This service also includes advising and other auxiliary financial services including investment and portfolio research and advice, advice on mergers and acquisition and advice on corporate restructuring and strategy.

2.2.2.1 M/s Air India Ltd., (now NACIL), in Mumbai service tax commissionerate, engaged the services of M/s ABN Amro, Singapore and foreign branches of ICICI Bank and SBI Bank for arranging loans such as PDP loan, EXIM loan, commercial loan etc., and paid fee of Rs. 28.52 crore during the period from December 2006 to January 2008. However, applicable service tax of Rs. 3.49 crore was neither paid by service providers nor was it paid by the recipient of services. This was recoverable with interest.

On the matter being pointed out (February 2008), the department stated (April 2009) that service tax of Rs. 9.94 crore had been recovered after the assessee was convinced about the service tax liability on such services and the amount included the amount pointed out by audit. However, the reply is silent on whether interest, as applicable, had also been recovered.

The Ministry has admitted the audit observation in principle (December 2009).

2.2.2.2 M/s Era Infra Engineering Ltd., in Delhi service tax commissionerate, raised capital of Rs. 326.03 crore during 2006-07 by issuing Foreign Currency Convertible Bonds (FCCB) and paid commission of Rs. 11.94 crore to a foreign merchant banker on the issue of the bonds. However, service tax of Rs. 1.46 crore leviable thereon was not paid which was recoverable with interest and penalty.

On the matter being pointed out (September 2008), the department stated (April 2009) that a show cause notice has been issued. Further update of the case has not been received (January 2010).

The reply of the Ministry has not been received (January 2010).

2.2.3 Business auxiliary service

Business auxiliary services have been brought under the service tax net with effect from 1 July 2003. Section 65(19) of the Finance Act, 1994 states that "business auxiliary service" means any commercial concern engaged in providing any service to any client for promotion of marketing or sale of goods, promotion or marketing of services, or any customer care service or

any incidental or auxiliary support service such as billing, collection or recovery of cheques etc.

2.2.3.1 M/s Bharti Airtel Ltd., in Kolkata service tax commissionerate, engaged in providing telecommunication services, appointed different overseas companies for providing international GSM and/or 3GSM roaming services on its behalf in different countries. The assessee paid Rs. 15.40 crore to foreign companies for receiving such services during April 2006 to March 2008 but service tax under the category of business auxiliary service was not paid. This resulted in non-payment of service tax of Rs. 1.89 crore which was recoverable with interest.

On the matter being pointed out (August 2008), the department accepted the audit observation and intimated (February 2009) that show cause notice was under issue. Further update on the case has not been received (January 2010).

The reply of the Ministry has not been received (January 2010).

2.2.3.2 M/s Man Industries Pvt. Ltd., Pithampur, in Indore commissionerate, engaged in the manufacture of saw pipes, paid Rs. 10.65 crore during the year 2006-07 as commission to various foreign firms for procuring export orders. The assessee paid service tax on Rs. 2.62 crore only and service tax on the balance amount of Rs. 8.03 crore was not unpaid. This resulted in non-payment of service tax of Rs. 98.30 lakh which was recoverable with interest and penalty.

On this being pointed out (March 2008), the Ministry admitted the audit observation but stated (October 2009) that the matter had already been taken up by the Indore commissionerate with the Mumbai service tax commissionerate in November 2007 and a show cause notice demanding tax of Rs. 2.20 crore for the period from 10 September 2004 to 31 March 2008 had been issued in September 2009. The reply of the Ministry is not tenable since show cause notice was issued after audit pointed out the matter. Further, delay in issue of show cause notice provided financial accommodation to the assessee.

2.2.3.3 M/s Balasore Alloys Ltd., in Bhubaneswar I commissionerate, engaged in the manufacture of high carbon ferro chrome, paid Rs. 5.78 crore during January 2007 to March 2008 as sales commission to agents for procuring export sale orders. Though such service came under the ambit of business auxiliary service and attracted service tax of Rs. 71.40 lakh, yet it was not paid. Besides, interest and penalty were also leviable.

On this being pointed out (August 2008), the department stated (January 2009) that the assessee has not discharged the service tax liabilities of Rs. 2.09 crore for the period from 2004-05 to 2007-08 for which show cause notice was under issue. It further stated (February 2009) that the assessee had paid Rs. 43.69 lakh towards service tax and Rs. 6.36 lakh towards interest.

The reply of the Ministry has not been received (January 2010).

2.2.3.4 M/s Jaya Shree Textile and M/s PMC Rubber Chemical India Pvt. Ltd., in Kolkata service tax commissionerate, availed of the services of foreign service providers for promoting business and procurement of orders in foreign countries and paid commission to foreign companies during the period

between 9 July 2004 and 31 March 2006. Though service tax was leviable under business auxiliary service but service tax was not paid. This resulted in non-payment of service tax of Rs. 62.10 lakh which was recoverable with interest.

On the matter being pointed out (May 2006), the department accepted the audit observation and reported (March and May 2008) recovery of Rs. 55.27 lakh and issue of show cause notice demanding the remaining amount.

The reply of the Ministry has not been received (January 2010).

2.2.3.5 M/s Morarjee Textile Ltd., in Nagpur commissionerate, engaged in the manufacture of cotton and blended fabrics paid commission of Rs. 3.77 crore to commission agents for sale of the goods in foreign countries during the year 2007-08. However, service tax of Rs. 46.58 lakh leviable thereon was not paid which was recoverable with interest.

On the matter being pointed out (September 2008), the department intimated (January 2009) that the assessee had paid the amount from cenvat account for the year 2007-08 and thereafter credit had been taken for the same amount treating it as input service. The department further stated (March 2009) that the matter had already been raised by the internal audit in September/October 2007.

The reply of the department is not tenable as the issue raised by the internal audit was different and it pertained to a different period (2006-07). Further, payment of tax through cenvat account was erroneous since the assessee was liable to pay service tax on behalf of the foreign service provider and utilisation of cenvat credit for payment of tax on input services is not permissible under the Cenvat Credit Rules.

The reply of the Ministry has not been received (January 2010).

2.2.4 Management consultants service

M/s Subros Ltd., in Noida commissionerate, engaged in the manufacturing of auto air conditioning systems and its parts, obtained management consultancy services from M/s. Denso Corporation, Japan and paid Rs. 37.27 lakh during the year 2004-05 on account of service rendered by them for upgradation and development of working system, manufacturing and selling systems. Though these services were covered under 'management consultants service' and the assessee was liable to pay service tax of Rs. 3.80 lakh but the same was not paid. This was recoverable with interest of Rs. 1.67 lakh and penalty of Rs. 3.80 lakh.

On the matter being pointed out (July 2006), the department stated (September 2008) that demand of Rs. 70.13 lakh for the years 2003-04 and 2004-05 had been confirmed in September 2007 besides imposing penalty of Rs. 150 per day from April 2003 to the date of payment under section 76 and another penalty of Rs. 1.05 crore under section 78 of the Finance Act, 1994.

The reply of the Ministry has not been received (January 2010).

2.2.5 Goods transport agency services

Rule 2(1)(d)(v) of the Service Tax Rules, 1994 stipulates that the recipient of goods transport agency service is liable to pay service tax if the recipient of services is a factory, a company, a corporation, a co-operative society etc.

M/s Bengal Beverage Pvt. Ltd., in Kolkata commissionerate of service tax, engaged in the manufacture of aerated water, cleared its final product on payment of duty. The assessee engaged different goods transport agencies for delivery of its products to customers and paid freight charges for such transportation. However, the assessee did not discharge its liability of paying service tax on freight paid to the transporters. Based on the records made available to audit, such non-payment of service tax worked out as Rs. 4.90 lakh for the period from January 2005 to March 2006.

On the matter being pointed out (June 2006), the department accepted the audit observation and intimated (June 2007) that the demand for Rs. 1.21 crore for the period from 1 July 2003 to 31 March 2006 had been issued to the assessee for providing/receiving different services like business auxiliary service, storage and warehousing service and goods transport agency services.

The reply of the Ministry has not been received (January 2010).

2.2.6 Consulting engineers

Section 65(31) of the Finance Act, 1994, states that 'consulting engineer' means any professionally qualified engineer or any body corporate or any other firm who, either directly or indirectly, renders any advice, consultancy or technical assistance in any manner to a client in one or more disciplines of engineering.

2.2.6.1 M/s Bharat Petroleum Corporation Ltd., in Mumbai service tax commissionerate, obtained consulting engineers' services from various foreign service providers. The assessee made payment of Rs. 8.72 crore as technical fee and royalty to these foreign service providers in convertible foreign currency during the period from 2003-04 to 2004-05 for the services rendered. However, applicable service tax of Rs. 88.49 lakh was not paid.

On the matter being pointed out (September 2005), the department stated (January 2009) that two show cause notices for Rs. 3.89 crore for the period from April 2003 to September 2007 had been issued (August and October 2008). The assessee had paid Rs. 38.17 lakh on account of services received from M/s Chevron Lummus Global LLC for the year 2004-05 in June 2007.

The reply of the Ministry has not been received (January 2010).

2.2.6.2 M/s H.E.G. Ltd., Mandideep, in Bhopal commissionerate, engaged in the manufacture of graphite electrodes paid service charges of Rs. 3.53 crore to the consulting engineers abroad on account of services received during the period from March 2003 to December 2004. However, service tax of Rs. 32.77 lakh payable thereon was not paid by the assessee. This resulted in non-payment of service tax of Rs. 32.77 lakh which was recoverable with interest of Rs. 19.41 lakh and penalty of Rs. 15.75 lakh.

On the matter being pointed out (October 2007), the department stated (May 2008) that the service tax was not recoverable from the recipient of services as it was recoverable from the service provider only under the law. The Service Tax Rules had been amended from 1 January 2005 and tax was legally recoverable thereafter. However, a protective show cause notice had been issued in February 2008.

The reply of the department is not tenable because the person receiving taxable service in India was made liable to pay tax with effect from 16 August 2002 under rule 2(1)(d)(iv). The Supreme Court had also upheld, in December 2007, in the case of State Electricity Board {2008 (9) STR 3 (SC)} that the liability of tax payment and interest in case of delay, vested with the person receiving taxable service in India from 16 August 2002.

The reply of the Ministry has not been received (January 2010).

2.2.6.3 M/s Jaiswal Neco Ltd., Siltara, in Raipur commissionerate, engaged in the manufacture of pig iron, non-alloy carbon steel billet etc., paid Rs. 4.08 crore for the years 2005-06 and 2006-07 in foreign currency to foreign consultants for providing “technical know-how services”. However, service tax of Rs. 37.96 lakh on such services was not paid which was recoverable with interest.

On the matter being pointed out (May 2008), the department stated (May 2008) that it would be examined. Further update on the case has not been intimated (January 2010).

The reply of the Ministry has not been received (January 2010).

2.2.6.4 M/s Modi Mundi Pharma Ltd., in Meerut I commissionerate, engaged in the manufacture of pharmaceutical products paid Rs. 47.13 lakh and Rs. 2.91 crore during the year 2003-04 and 2004-05 respectively to M/s Mundi Pharma AG Switzerland on account of royalty and technical know-how. However, service tax of Rs. 33.46 lakh leviable thereon, under ‘consulting engineers’ services’ was not paid. This was recoverable with interest of Rs. 7.41 lakh.

On the matter being pointed out (June 2006), the department stated (December 2008) that a show cause notice demanding service tax, cess and interest had been issued (June 2007). Further update on the case has not been intimated (January 2010)

The reply of the Ministry has not been received (January 2010).

2.2.6.5 M/s ESAB India Ltd., in Chennai service tax commissionerate, engaged in the manufacture of electrodes received technical know-how from M/s ESAB, Sweden and paid Rs. 3.17 crore during the period from January 2005 to December 2006 in foreign currency. However, service tax of Rs. 32.28 lakh due thereon was not paid. This was recoverable with interest.

On the matter being pointed out (December 2007), the Ministry admitted the audit observation and stated (December 2009) that two show cause notices for Rs. 36.68 lakh had been issued in August 2009.

2.3 Non-registration and non-payment of tax

Rule 4 of the Service Tax Rules, 1994 stipulates that every person liable for paying the service tax shall make an application for registration within a period of 30 days from the date on which the service tax under the Finance Act is levied or from the date of commencement of business of providing taxable service if such business is commenced after introduction of the levy under the Finance Act.

2.3.1 Renting of immovable property service

Renting of immovable property services involving renting, letting, leasing, licensing for use in the course of furtherance of business or commerce are liable to service tax with effect from 1 June 2007. In terms of explanation 1 below section 65(105)(zzzz) of the Finance Act, 1994 'immovable property' includes (i) building and part of a building and the land appurtenant thereto, (ii) land incidental to the use of such building or part of a building, (iii) the common or shared areas and facilities relating thereto and (iv) in respect of buildings located in a complex or industrial estate, all common areas and facilities relating thereto, within such complex or estate.

Forty seven municipalities and twelve other assesseees including Municipal Corporations, Urban Development Authorities, South Central Railways, State Road Transport Corporation etc., in Hyderabad I, II, III, Guntur, Tirupathi, Visakhapatnam I and II commissionerates, rented/leased out its immovable properties like shops, godowns, sheds, show rooms, slaughter houses etc., in the course of its business during the period between June 2007 and May 2009. These assesseees rendered such services without getting registered and collected Rs. 129.76 crore during the said period but did not pay service tax of Rs. 15.76 crore which was recoverable with interest and penalty.

On the matter being pointed out (between June 2008 and July 2009), the department admitted the audit observations in twelve cases involving service tax of Rs. 82.20 lakh against which, show cause notices were issued in three cases demanding service tax of Rs. 80.95 lakh besides interest and penalty. In the remaining cases, reply of the department has not been received (January 2010).

The reply of the Ministry has not been received (January 2010).

2.3.2 Security agency services

Section 65(94) of the Finance Act, 1994 (as amended) defines 'security agency' to mean 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 fact or activity whether of a personal nature or otherwise, including the services of providing security personnel.

2.3.2.1 Central Industrial Security Force (CISF) units at Coimbatore and Kalpakkam, in Coimbatore and Chennai III commissionerates, provided security services to the Airport Authority of India, Coimbatore and Madras Atomic Power Station (MAPS), Kalpakkam and collected service charges totalling Rs. 34.90 crore between April 2006 and February 2009. The assessee did not register with the department and also did not pay service tax of Rs. 4.30 crore payable on the value of taxable service provided. The applicable service tax was recoverable with interest and penalty.

On the matter being pointed out (February 2008), the department admitted the audit observation (July 2009). Further update on the case has not been intimated (January 2010)

The reply of the Ministry has not been received (January 2010).

2.3.2.2 Similarly, CISF, in Cochin commissionerate, provided security services to M/s FACT Ltd., Udoygamandal. It recovered the cost periodically but no service tax was paid. The assessee was also not registered with the department. Therefore, the department was asked (August 2006) to ascertain the tax liability and recover tax, under intimation to audit.

On the matter being pointed out (August 2006), the department stated (March 2007) that there was no tax liability as services were rendered in discharge of the statutory functions under the Law. Audit again pointed out (April 2008) that the services provided by the assessee were not in the nature of statutory activity and charges collected were not in the nature of statutory fee. Service tax was, therefore, payable in terms of Board's clarification dated 18 December 2006 and 19 August 2008. Thereafter, the department reported (September 2008) that a show cause notice demanding Rs. 99.09 lakh had been issued to the assessee. The show cause notice was adjudicated confirming the demand in May 2009.

The Ministry admitted (December 2009) the audit observation and stated that two more show cause notices for Rs. 1.28 crore had been issued in June 2009 which were pending adjudication.

2.3.3 Tour operators' services

The Board clarified on 18 December 2006 that any service rendered by sovereign/public authorities (i.e. an agency constituted/set up by the Government) which is not in the nature of statutory activity and the same is undertaken for a consideration, then the total fee collected for such a service is chargeable to service tax.

Service tax on tour operators' service is leviable on sixty per cent of the gross amount charged subject to non-availing of credit of duty paid on inputs or capital goods.

M/s Bangalore Metropolitan Transport Corporation (BMTC), Bangalore, a Government of Karnataka public sector undertaking, in Bangalore service tax commissionerate, provided buses to private parties for travel within Karnataka and also neighbouring states on casual contract basis for a consideration, by obtaining special permit for each contract tour. The assessee earned Rs. 21.89 crore during the period from 2004-05 to 2006-07 for running buses on contract basis. The assessee paid motor vehicle tax of Rs. 1.21 crore on the income earned. As the activity of providing buses by BMTC to private parties on contract basis fell within the purview of tour operators' services and also outside the purview of its statutory function, i.e. running public transport within Bangalore city limits, the assessee was required to get itself registered and pay service tax of Rs. 1.30 crore.

On the matter being pointed out (March 2008), the department replied (April 2009) that show cause notice demanding Rs. 1.30 crore was being issued.

The reply of the Ministry has not been received (January 2010).

2.3.4 Manpower recruitment services

Section 65(68) of the Finance Act, 1994 as amended defines the 'manpower recruitment or supply agency' to mean any person engaged in providing any service, directly or indirectly, in any manner for the recruitment or supply of

manpower, temporarily or otherwise to any other person. Service tax is payable on the gross amount charged for the services rendered.

2.3.4.1 M/s Bharat Box Factory Ltd., in Ludhiana commissionerate, availed of the services of manpower recruitment agencies and paid Rs. 368.99 lakh to 11 contractors during the period 2007-08 for supply of labour. However, these contractors neither charged the service tax on its bills nor were these registered with the department. This resulted in non-payment of service tax of Rs. 45.60 lakh which was recoverable with interest and penalty.

On the matter being pointed out (June 2008), the department stated (March 2009) that show cause notices in nine cases demanding service tax of Rs. 42.97 lakh has been issued between December 2008 and February 2009. It further stated that in the remaining two cases suitable action to recover the Government revenue is also being taken.

The reply of the Ministry has not been received (January 2010).

2.3.4.2 Similarly five assesseees in Patna commissionerate and five assesseees in Mumbai service tax commissionerate, engaged in providing recruitment and supply services, collected service charges of Rs. 3.29 crore during the period from March 2004 to March 2008. Though the services fell under the category of 'manpower recruitment or supply agency services', neither did the service providers register themselves with the department nor was the applicable service tax of Rs. 48.92 lakh paid to the Government, which was recoverable with interest and penalty.

On the matter being pointed out (between July 2006 to July 2008), the department reported (between May 2008 and March 2009) that three service providers in Patna commissionerate have taken registration and the nine assesseees have deposited service tax of Rs. 46.37 lakh. It further reported that a show cause notice was being issued to an assessee in Patna commissionerate.

The Ministry admitted (November 2009) the audit observations in four cases. The replies in the remaining cases have not been received (January 2010).

2.3.5 Goods transport agency service

Service tax on transport of goods by road is levied with effect from 1 January 2005. As per rule 2(1)(d)(v) of Service Tax Rules, 1994, the person making payment towards freight would be liable to pay service tax on services of GTA in case the consignor or consignee of the goods transported is one in the organized sectors.

M/s Pepsico India Holdings Pvt. Ltd., Kanjikode, in Calicut commissionerate, engaged in the manufacture of aerated water, made payment towards carriage inwards on raw material, packing material, etc., and carriage outward on finished goods. The amount so paid was liable to service tax under goods transport agency services. However, neither was the applicable service tax paid nor did the assessee get itself registered with the department. The department was asked to recover the tax with interest and penalty.

On the matter being pointed out (October 2005), the department stated (May 2009) that the demand of Rs. 42.60 lakh had been confirmed (November 2007) and Rs. 6.32 lakh already paid had been appropriated. However, the

assessee has gone in appeal which was pending with the Commissioner (Appeals).

The Ministry has admitted the audit observation (December 2009).

2.3.6 Technical testing and analysis service

Technical testing and analysis service came into tax net from 1 July 2003. Section 65(106) of the Finance Act, 1994 defines 'technical testing and analysis' to mean any service in relation to physical, chemical, biological or any other scientific testing or analysis of goods or material or any immovable property and includes testing and analysis undertaken for the purpose of clinical testing of drugs and formulations.

Quality Testing Lab at Kochadai under Tamil Nadu Water Supply and Drainage (TWAD) Board, in Madurai commissionerate, engaged in the work of testing AC pipes, steel, cement, sand, hollow brick, etc., collected testing charges amounting to Rs. 2.64 crore from various clients during the period from January 2004 to August 2008. However, neither did the assessee register itself with the department nor was the applicable service tax of Rs. 31.65 lakh paid.

On the matter being pointed out (May 2009), the department confirmed the facts and intimated (July 2009) that action was being taken to realise the service tax.

The reply of the Ministry has not been received (January 2010).

2.3.7 Maintenance and repair service

"Maintenance or repair services" has been brought under service tax net with effect from 1 July 2003. Section 65(64) of the Finance Act, 1994 defines "maintenance or repair service" to mean, any service provided by (i) any person under a contract or an agreement; or (ii) a manufacturer or any person authorised by him in relation to, (a) maintenance or repair including reconditioning or restoration, or servicing of any goods or equipment, excluding a motor vehicle; or (b) maintenance or repair of immovable property.

M/s Endurance Technology Pvt. Ltd., in Aurangabad commissionerate, paid Rs. 42.82 lakh for the years 2005-06, 2006-07 and 2007-08 to M/s R.B. Engineering Works for the maintenance of furnaces. The above assessee was raising monthly bill to M/s Endurance Technology Pvt., Ltd. Audit noticed (February 2008) that the assessee was not registered with the service tax department and had also not charged the service tax. The non-payment of service tax for the said period worked out as Rs. 4.93 lakh which was recoverable with interest.

On the matter being pointed out (February 2008), the department intimated (November 2008) that the assessee was not providing any repairing or maintenance service to any firm and that the assessee had been registered with effect from 14 February 2008 under the category of 'manpower recruitment agency'. It also intimated recovery of Rs. 7.58 lakh and interest of Rs. 1.10 lakh during the period March to August 2008.

The reply of the department is not tenable as the agreement entered into by the assessee with another firm was for carrying out furnace operations and maintenance. Clause 2 of the agreement further states that the payment will be towards furnace maintenance charges. The bills issued by the assessee to M/s Endurance Technology clearly indicate that these were for furnace maintenance charges. The services provided by the assessee, accordingly, fell under the definition of 'maintenance or repairs service'.

The reply of the Ministry has not been received (January 2010).

2.4 Other cases

In 75 other cases of non-levy of service tax involving revenue of Rs. 10.76 crore, the Ministry/department has accepted all the audit observations and reported (till January 2010) recovery of Rs. 8.95 crore.