

PREFACE

This report for the year ended March 2009 has been prepared for submission to the President of India under the Article 151 of the Constitution of India.

Audit of Revenue Receipts – Indirect Taxes of the Union Government is conducted under section 16 of the Comptroller and Auditor General of India (Duties, Powers and Conditions of Service) Act, 1971.

The report presents the results of audit of receipts of service tax.

The observations included in this report have been selected from the findings of the test check conducted during 2008-09, as well as those which came to notice in earlier years but were not included in the previous reports.

EXECUTIVE SUMMARY

This report contains 155 paragraphs with a revenue implication totalling Rs. 375.55 crore. The Ministry/department has accepted, till January 2010, the audit observations in 130 paragraphs involving revenue of Rs. 305.13 crore and reported recovery of Rs. 125.40 crore. In one draft audit paragraph though the reply of the Ministry/department has not been received, the assessee has accepted the audit observations and paid tax of Rs. 0.18 crore. In another case, though the department has not accepted the audit observation, yet the assessee has paid the tax of Rs. 1.91 crore. Accordingly, tax aggregating Rs. 127.49 crore has been recovered till January 2010, out of the Rs. 375.55 crore highlighted through this report. Significant findings of audit are summarised in the following paragraphs:-

Chapter I: Service tax receipts

- During the period 2004-05 to 2008-09 the actual collections of service tax were fairly close to the budget estimates except for 2005-06 when these were 31.73 per cent higher than the budget estimates.

{Paragraph 1.2}

Chapter II: Non-levy/non-payment of service tax

- Service tax totalling Rs. 328.22 crore was not levied or was not paid by the registered service providers, recipient of services and unregistered service providers.

{Paragraphs 2.1 to 2.4}

Chapter III: Exemptions

- Exemption from service tax totalling Rs. 24.93 crore was availed of in violation of notifications or Board's instructions or without a notification being in place.

{Paragraphs 3.1 to 3.6}

Chapter IV: Valuation of taxable services

- Instances of undervaluation of services due to incorrect deduction of charges from assessable value, non-inclusion of TDS in the gross value and adoption of lower value, were noticed. Service tax paid short in these cases amounted to Rs. 8.16 crore.

{Paragraphs 4.1 to 4.4}

Chapter V: Non-levy/short levy of interest and penalty

- **Interest and penalty of Rs. 1.86 crore was not/short levied in cases of delayed payment of service tax, incorrect availing of cenvat credit, etc.**

{Paragraphs 5.1 to 5.5}

Chapter VI: Miscellaneous topics of interest

- **Cases of incorrect self assessment of tax, incorrect suo-moto adjustment of service tax, suppression of value of services, service tax collected but not paid to the Government, non-monitoring of returns etc., were noticed in audit. Service tax implication in these cases was Rs. 12.38 crore.**

{Paragraphs 6.1 to 6.6}

CHAPTER I SERVICE TAX RECEIPTS

1.1 Tax administration

Service tax was introduced from 1 July 1994 through the Finance Act, 1994. Administration of service tax has been vested with the central excise department under the Ministry of Finance (the Ministry). The Central Board of Excise and Customs (the Board) has set up a separate apex authority headed by the Director General Service Tax (DGST) at Mumbai for the administration of service tax. Commissioners of central excise/service tax have been authorised to collect service tax within their jurisdiction.

1.2 Trend of receipts

Revenue projected through annual budget and actual receipts from service tax during the years 2004-05 to 2008-09 is exhibited in the following table and graph:-

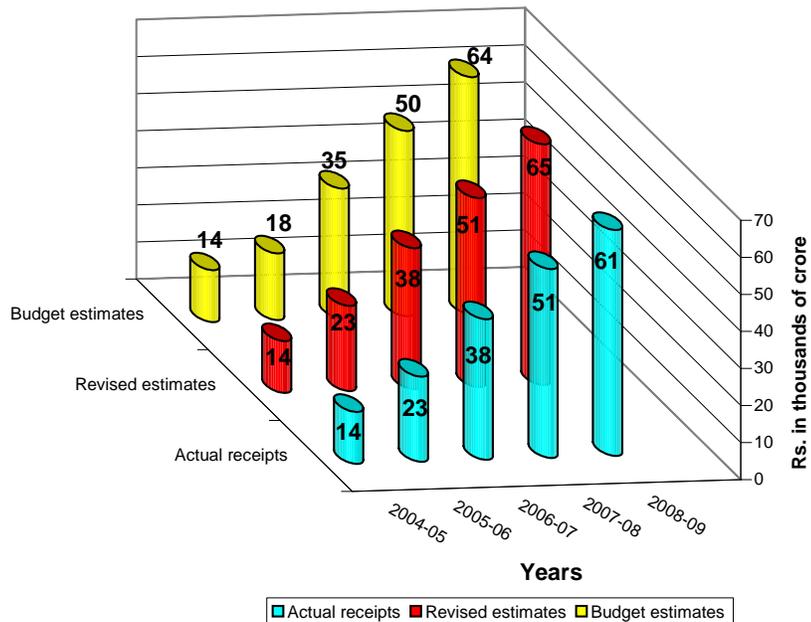
Table no. 1

(Amounts in crore of rupees)

| Year | No. of services subjected to service tax | Budget estimates | Revised budget estimates | Actual receipts* | Difference between actual receipts and budget estimates | Percentage variation |
|---------|--|------------------|--------------------------|------------------|---|----------------------|
| 2004-05 | 71 | 14,150 | 14,150 | 14,199 | 49 | 0.35 |
| 2005-06 | 81 | 17,500 | 23,000 | 23,055 | 5,555 | 31.73 |
| 2006-07 | 97 | 34,500 | 38,169 | 37,598 | 3,098 | 8.98 |
| 2007-08 | 104 | 50,200 | 50,603 | 51,301 | 1,101 | 2.19 |
| 2008-09 | 108 | 64,460 | 65,000 | 60,940 | (-) 3,520 | (-) 5.46 |

* Figures as per the Finance Accounts

Graph 1: Service Tax Receipts - Budget, Revised and Actual



During the period 2004-05 to 2008-09 the actual collections of service tax were fairly close to the budget estimates except for 2005-06 when these were 31.73 per cent higher than the budget estimates.

1.3 Outstanding demands

The number of cases and amount involved in demands for service tax outstanding* for adjudication/recovery as on 31 March 2009 are mentioned in the following table:-

Table no. 2

(Amounts in crore of rupees)

| Pending decision with | As on 31 March 2008 | | | | As on 31 March 2009 | | | |
|--|----------------------|----------------------|----------------------|----------------------|----------------------|----------------------|----------------------|----------------------|
| | Number of cases | | Amount | | Number of cases | | Amount | |
| | More than five years | Less than five years | More than five years | Less than five years | More than five years | Less than five years | More than five years | Less than five years |
| Adjudicating officers | 196 | 76,620 | 0.42 | 4,092.80 | 10,891 | 46,572 | 46.80 | 11,575.80 |
| Appellate Commissioners | 53 | 1,937 | 1.59 | 301.40 | 37 | 2,588 | 27.56 | 1,132.93 |
| Board | 0 | 6 | 0.00 | 0.04 | 0 | 3 | 0.00 | 1.97 |
| Government | 0 | 1 | 0.00 | 0.71 | 4 | 6 | 5.73 | 2.42 |
| Tribunals | 22 | 1,419 | 4.24 | 1,423.05 | 60 | 5,294 | 28.78 | 2,639.92 |
| High Courts | 8 | 155 | 1.37 | 66.56 | 24 | 173 | 7.56 | 110.18 |
| Supreme Court | 0 | 13 | 0.00 | 4.01 | 0 | 121 | 0.00 | 7.20 |
| Pending for coercive recovery measures | 5,056 | 14,414 | 11.17 | 456.66 | 4,117 | 18,396 | 9.95 | 6,836.11 |
| Total | 5,335 | 94,565 | 18.79 | 6,345.23 | 15,133 | 73,153 | 126.38 | 22,306.53 |

* Figures furnished by the Ministry

A total of 88,286 cases involving tax of Rs. 22,432.91 crore were pending as on 31 March 2009 with different authorities, of which 65 per cent in terms of number were with the adjudicating officers of the department. Pendency for recovery of demands had increased from 19,470 cases in 2007-08 to 22,513 cases in 2008-09 i.e. an increase of 15.63 per cent.

1.4 Fraud/presumptive fraud cases

The position of fraud/presumptive fraud cases* alongwith the action taken by the department against defaulting assesseees during the period 2006-07 to 2008-09 is depicted in the following table:-

Table no. 3

(Amounts in crore of rupees)

| Year | Cases detected | | Demand of duty raised | Penalty imposed | | Duty collected | Penalty collected | |
|--------------|----------------|-----------------|-----------------------|-----------------|---------------|----------------|-------------------|-------------|
| | Number | Amount | | Number | Amount | | Number | Amount |
| 2006-07 | 2,466 | 591.50 | 287.29 | 413 | 56.24 | 235.65 | 90 | 2.77 |
| 2007-08 | 1,716 | 787.18 | 574.54 | 171 | 179.04 | 331.74 | 34 | 2.74 |
| 2008-09 | 2,330 | 3,770.64 | 2,236.07 | 156 | 170.20 | 429.26 | 20 | 0.48 |
| Total | 6,512 | 5,149.32 | 3,097.90 | 740 | 405.48 | 996.65 | 144 | 5.99 |

* Figures furnished by the Ministry

The above data indicates that while a total of 6,512 cases of fraud/presumptive fraud were detected during the years 2006-09 by the department involving tax of Rs. 5,149.32 crore, it raised demand of Rs. 3,097.90 crore only and recovered Rs. 996.65 crore (32.17 per cent). Similarly, out of the penalty of

Rs. 405.48 crore that was imposed, the department could recover only Rs. 5.99 crore (1.48 per cent).

1.5 Results of audit

This report contains 155 paragraphs featured individually or grouped together with a revenue implication of Rs. 375.55 crore. Of these, 73 paragraphs involving revenue of Rs. 358.24 crore have been reported individually and the remaining have been grouped under the heading "Other cases" appearing in each chapter. The Ministry/department has accepted (till January 2010) audit observations in 130 paragraphs involving Rs. 305.13 crore against which it has recovered Rs. 125.40 crore. In another audit paragraph, though the reply of the Ministry/department has not been received, the assessee has accepted the audit observations and paid the tax of Rs. 0.18 crore. In another case, though the department has not accepted the audit observation, yet the assessee has paid the tax of Rs. 1.91 crore. Therefore, the Ministry/department has effected a total recovery of Rs. 127.49 crore up to January 2010 including Rs. 124.11 crore where full recovery has been made at the instance of audit.

1.6 Impact of audit reports

1.6.1 Revenue impact

During the last five years (including the current years' report), audit through its audit reports had pointed out short levy and other deficiencies with revenue implication of Rs. 1,084.33 crore in 569 audit paragraphs. Of these, the Government had accepted audit observations in 456 audit paragraphs involving Rs. 508.91 crore and had since recovered Rs. 190.98 crore. The details are shown in the following table:-

Table no. 4

(Amounts in crore of rupees)

| Year of Audit Report | Paragraphs included | | Paragraphs accepted | | | | | | Recoveries effected | | | | | |
|----------------------|---------------------|-----------------|---------------------|---------------|---------------|--------------|------------|---------------|---------------------|---------------|---------------|-------------|------------|---------------|
| | | | Pre printing | | Post printing | | Total | | Pre printing | | Post printing | | Total | |
| | | | No. | Amount | No. | Amount | No. | Amount | No. | Amount | No. | Amount | No. | Amount |
| 2004-05 | 48 | 86.57 | 42 | 35.59 | Nil | Nil | 42 | 35.59 | 8 | 5.41 | 14 | 3.00 | 22 | 8.41 |
| 2005-06 | 83 | 266.47 | 38 | 28.40 | 2 | 0.39 | 40 | 28.79 | 20 | 7.38 | 5 | 1.06 | 25 | 8.44 |
| 2006-07 | 125 | 79.02 | 117 | 65.49 | 1 | 1.74 | 118 | 67.23 | 60 | 18.19 | 34 | 5.23 | 94 | 23.42 |
| 2007-08 | 158 | 276.72 | 112 | 47.43 | 14 | 24.74 | 126 | 72.17 | 57 | 23.22 | Nil | Nil | 57 | 23.22 |
| 2008-09 | 155 | 375.55 | 130 | 305.13 | Nil | Nil | 130 | 305.13 | 90 | 127.49 | Nil | Nil | 90 | 127.49 |
| Grand Total | 569 | 1,084.33 | 439 | 482.04 | 17 | 26.87 | 456 | 508.91 | 235 | 181.69 | 53 | 9.29 | 288 | 190.98 |

1.6.2 Amendment to Act/Rules

The Government had amended Act/Rules addressing the concerns raised by audit through audit reports. An important change carried out during the year 2008-09 is shown in the following table:-

Table no. 5

| Reference of audit report (AR) paragraph | Related issue raised in audit | Amendment to Act/Rules etc. |
|--|--|---|
| Paragraph 18.1 of AR no.7 of 2007 | Exemption from 75 per cent of amount of taxable service on goods transport agency services | Services like clearing and forwarding agent services, manpower recruitment services, cargo handling services, |

| Reference of audit report (AR) paragraph | Related issue raised in audit | Amendment to Act/Rules etc. |
|--|---|--|
| | was available provided credit of duty paid on inputs or capital goods used for providing such taxable service is not taken. Exemption was availed in violation of the said condition. | warehousing services, business auxiliary services, packaging services, etc., provided to the goods transport agency have been exempted from service tax by notification No.1/2009-ST dated 5 January 2009 having retrospective effect from 1 January 2005. |

1.7 Follow-up on audit reports

Public Accounts Committee, in their Ninth Report (Eleventh Lok Sabha) desired that remedial/corrective action taken notes (ATNs) on all paragraphs of the Reports of the Comptroller and Auditor General, duly vetted by audit, be submitted to them within a period of four months from the date of the laying of the audit report in Parliament.

Review of outstanding action taken notes on paragraphs relating to service tax contained in earlier audit reports on indirect taxes indicated that the Ministry had not submitted remedial action taken notes on 50 paragraphs relating to Report No. CA 20 of 2009-10. Summarised position of outstanding action taken notes is depicted in the following table:-

Table no. 6

| No. of ATNs pending | Related audit paragraph and audit report | Name of the Ministry |
|---------------------|--|----------------------|
| 50 | 10.1.1, 10.1.2, 10.1.3, 10.1.4, 10.1.5, 10.1.7, 10.1.8, 10.2 (DAP nos. 1, 38, 50, 56, 68, 89, 101, 128, 134, 156, 177, 194, 218, 225, 303, 339, 353, 361, 367), 10.3, 10.4.1, 10.4.2, 10.5.1, 10.5.2, 10.6.1 (DAP nos. 15, 157, 241, 343), 10.7 (DAP nos. 24, 121, 195, 253, 282), 10.8, 10.9, 10.10 (DAP nos. 23, 94, 187), 10.11, 10.12 (DAP nos. 44, 69, 83, 131, 158, 159, 173, 192, 193, 196, 198, 203, 344, 349), 11.1.1, 11.1.2.1, 11.1.2.2, 11.1.3.1, 11.1.5.1, 11.1.6, 11.1.7.2, 11.1.8, 11.1.9, 11.2.1 (DAP no. 357 part), 11.2.1.1, 11.2.2.1, 11.2.2.2, 11.2.2.4, 11.2.2.5, 11.2.2.6, 11.2.3, 11.2.4, 11.2.5, 11.3 (DAP nos. 10, 11, 12, 13, 71, 74, 78, 81, 86, 90, 97, 100, 115, 125, 135, 144, 148, 152, 153, 164, 165, 166, 174, 178, 199, 229, 246, 248, 250, 273, 340, 348, 357 part, 359), 12.1.1, 12.1.2, 12.1.3 (DAP nos. 312, 329, 154), 12.2, 12.3, 12.4, 12.5, 12.6, 12.7 (DAP nos. 40, 48, 52, 358) of CA 20 of 2009-10. | Ministry of Finance |

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.

CHAPTER III EXEMPTIONS

Under section 93 of the Finance Act, 1994, the Government is empowered to exempt services attracting service tax from the whole or any part of the tax leviable thereon, either generally or subject to conditions, as may be specified in the notifications granting these exemptions. A few illustrative cases of incorrect availing of exemptions involving short levy of service tax of Rs. 24.93 crore are mentioned in the following paragraphs. These observations were communicated to the Ministry through 10 draft audit paragraphs. The Ministry/department has accepted (till January 2010) the audit observations in four draft audit paragraphs with tax implication of Rs. 2.27 crore of which Rs. 1.11 crore has been recovered. In another draft paragraph, though the department has not accepted the audit observation, the assessee has paid the tax of Rs. 1.91 crore.

3.1 Exemption availed of violating the prescribed conditions

3.1.1 By a notification dated 1 March 2006 as amended on 23 May 2006, construction services as well as erection, commissioning or installation services under a contract involving supply of machinery, equipment or structures, are exempt from the levy of service tax to the extent of 67 per cent of the value of taxable service subject to the conditions that (i) cenvat credit on inputs, input services and capital goods is not availed of; (ii) the benefit of exemption of the cost of material under notification dated 20 June 2003 is not availed of and (iii) the gross amount charged from customers in respect of erection contracts involving structures, includes the value of structures, parts or any other material sold during the course of providing such service.

3.1.1.1 M/s Tata Projects Ltd., in Hyderabad II commissionerate, entered into two types of contracts with M/s Power Grid Corporation of India Ltd., M/s BHEL, M/s GAIL and several State Power Generation Corporations. In the first set of contracts involving erection of transmission line towers in civil foundations, the assessee supplied towers, tower extensions, bolts and nuts/accessories against separate supply orders and paid service tax on 33 per cent value of the contracts representing labour charges and cost of construction material like cement, sand etc., used in foundations of erection work. In the second set of contracts, involving supply of material as well as execution of projects on turn key basis, the assessee billed the customers for the total amount including the cost of equipment as well as labour charges and availed abatement of 67 per cent under the aforesaid notification. The exemption availed of, in both the cases was not correct as the assessee had availed of cenvat credit of service tax on several input services. Moreover, in the first set of contracts, the assessee also derived the benefit of exclusion of the cost of the material viz., towers and tower parts for the purpose of service tax by bifurcating the contracts into supply contracts and erection works and reckoning only the latter for payment of tax. During the period from March 2006 to March 2007, the assessee availed of abatement on a turnover of Rs. 107.67 crore (being 67 per cent of the contract value of Rs. 160.70 crore

on erection works and turn key projects) on which exemption of service tax of Rs. 13.14 crore availed of was incorrect.

On the matter being pointed out (December 2007), the department admitted the audit observation on the erection contracts and intimated (September 2008) recovery of service tax of Rs 45.84 lakh and interest of Rs. 12.41 lakh.

In the case of turn key construction contracts, the department stated (September 2008/March 2009) that the assessee had utilised credit only on certain common input services in its head office but not on any service which was project specific and the assessee had reversed pro-rata credit of Rs. 2.34 lakh alongwith interest of Rs 0.46 lakh attributable to such input services utilised in turnkey projects valued at Rs. 167.81 crore. It further stated that since the assessee had already foregone the input service credit, the abatement availed of on turn key projects was in accordance with the provisions of the exemption notification and also in line with the Supreme Court's decision in the case of M/s Chandrapur Magnet Wires (P) Ltd {1996 (81) ELT 3 (SC)}.

The reply of the department is not tenable as the reversal of pro-rata credit in lieu of the payment of service tax on 100 per cent value of contracts is not covered by the cenvat credit rules or the relevant notification. Further, the Supreme Court's decision quoted by the department is not relevant since non-availing of input service credit itself is a requisite condition for availing of exemption in the present case whereas Supreme Court decision was in the context of availing of modvat credit on fully exempted goods covered by an unconditional exemption.

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

3.1.1.2 M/s Larsen & Toubro Ltd., (ECC Division), Chennai, in Chennai service tax commissionerate, engaged in providing erection, commissioning or installation service, availed of abatement of Rs. 15.74 crore being 67 per cent of the gross amount of Rs. 23.49 crore charged for the construction of port facility at Karaikal in the month of March 2006 under the aforesaid notification dated 1 March 2006. Audit observed that the assessee had availed of cenvat credit of Rs. 26.47 lakh during March 2006. The benefit of exemption was, therefore, not admissible. Service tax of Rs. 1.61 crore on the abated amount was required to be collected along with interest.

On the matter being pointed out (April 2009), the department stated (July 2009) that the assessee had utilised accumulated credit on input services for payment received after 1 March 2006 for the services rendered prior to March 2006 and had stopped taking cenvat credit from 1 March 2006.

The reply of the department is not tenable as the relevant service tax return indicated that the assessee had no accumulated credit at the end of February 2006 and that the credit of Rs. 26.47 lakh was taken afresh during March 2006 and utilised in the same month.

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

3.1.2 A notification dated 20 June 2003 provides for exemption from service tax on the value of goods and material sold by the service provider to the recipient of the maintenance and repair services (MRS), subject to the condition that no credit of duty paid on such goods and material sold has been

taken under the provisions of the cenvat credit rules or where such credit has been taken by the service provider on goods and material, the service provider has to pay the amount equal to such credit availed of, before the sale of such goods and material.

M/s Hewlett Packard India Sales Pvt., Ltd., and M/s Sun Micro Systems India Pvt., Ltd., in Bangalore commissionerate of service tax, engaged in providing maintenance and repair services, availed credit of countervailing duty paid on the inputs/spares received for MRS covered under annual maintenance contract during the period from 2004-05 to 2006-07. The assessees sold the goods and material to the service recipients on separate invoices without charging service tax. The assessees also claimed exemption under the aforesaid notification without paying an amount equal to the cenvat credit availed of, before the sale of those goods and material. Availing of exemption of service tax of Rs. 3.30 crore was accordingly not correct.

On this being pointed out (December 2007/December 2008), M/s Hewlett Packard India Sales Pvt. Ltd. paid the entire amount of Rs. 1.91 crore (December 2007). However, the department stated (December 2007) that the above assessee would be benefited as cenvat credit availed of was 16 per cent of the value of input whereas service tax paid on the value of input was 12 per cent. The reply in the second case has not been received (January 2010).

The reply of the department is not tenable as the assessee had taken double benefit by availing of cenvat credit as well as exemption of service tax simultaneously while the benefit of exemption was available only on reversal of cenvat credit before the sale of such goods/material, which was not done by the assessee.

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

3.2 Benefit availed on non-specified services

3.2.1 A notification dated 30 June 1994 exempts the service tax leviable on departmentally run public telephones for local calls and guaranteed public telephone operating only for local calls. The term local calls has been defined in rule 2(X) of the Indian Telephone Rules which means a call from a subscriber's line to another line on any exchange within the same exchange system.

M/s Bharti Airtel Ltd. in Bhopal commissionerate, issued coin collection boxes (CCBs) to the various subscribers in the shape of local PCO connections in urban area after executing agreement/receipt of security deposit. The assessee collected call charges of Rs. 33.05 crore from the said subscribers through bills for the period April 2005 to March 2006 but service tax of Rs. 3.37 crore leviable thereon was not paid claiming exemption under the aforesaid notification dated 30 June 1994. Since CCBs were installed with STD facility, these were not exempt from service tax under the category of "guaranteed public telephone operating only for local calls" covered under the notification. The exemption availed was incorrect and tax of Rs. 3.37 crore was recoverable with interest.

On this being pointed out (June 2007), the department stated (January 2008) that the assessee had provided CCBs to subscribers for local calls only.

The reply of the department is not tenable as it could not produce evidence to support its contention despite persistent follow up by audit. The department, however, intimated (June 2008) that a show cause notice was being issued.

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

3.2.2 A notification dated 20 June 2003 exempts the business auxiliary service provided by a commission agent who causes sale or purchase of goods on behalf of another person for a consideration which is based on the quantum of such sale or purchase, from payment of service tax.

M/s Hindustan Unilever Ltd., in Chennai service tax commissionerate, engaged in providing business auxiliary service, beautician and GTA services etc., rendered services for the sale and distribution of edible oil and fat of M/s Bunge Agribusiness India Pvt. Ltd., through its own distribution network for which it was entitled to a commission at 2.5 per cent of the net proceeds of sale. M/s Bunge consigned the products to M/s Hindustan Unilever Ltd. i.e. the assessee on consignment transfer basis to various depots designated by the assessee and after distribution of the products, the sale proceeds collected by the assessee excluding commission was passed on to M/s Bunge's account. Since the assessee not only booked sales order for M/s Bunge but also received, stored and distributed the goods, the service provided by the assessee fell under 'clearing and forwarding agent's service'. The assessee did not pay service tax up to 8 July 2004 by availing of exemption under the aforesaid notification and started paying service tax under BAS from 9 July 2004. The exemption of Rs. 34.01 lakh availed of, for the period from April 2003 to June 2004 was not correct as the said notification exempted services of commission agent and not services of consignment agent.

On the matter being pointed out (May and December 2008), the department reported (October 2008 and January 2009) that show cause notice for Rs. 34.01 lakh was issued (October 2008) in accordance with the findings of the internal audit group which visited the unit during July 2008. It was further reported that the audit observation stated to have been sent on 29 May 2008 had also not been received by them.

The reply of the department is not tenable as the observation had already been discussed and a copy thereof handed over to the jurisdictional assistant commissioner during discussion on 28 May 2008 for further action by the department whereas the internal audit visited the unit only in July 2008 and the show cause notice was issued in October 2008. Thus, the departmental action to examine and safeguard revenue was subsequent to the audit finding.

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

3.3 Exemption availed of, in violation of the Board's instructions

By a notification dated 3 December 2004, 75 percent value of the taxable service provided by a goods transport agency (GTA) to a customer is exempt from the levy of service tax subject to the condition that credit of the duty paid on inputs or capital goods used for providing such taxable service is not taken

and exemption under notification dated 20 June 2003 is not availed of, by the goods transport agency.

The Board issued instructions (27 July 2005) that the abatement is permissible only if the GTA issued consignment note declaring that neither has the credit been taken on inputs or capital goods used for provision of service nor has the benefit of notification dated 20 June 2003 taken. Rule 4B of the Service Tax Rules, 1994 stipulates the issue of consignment note by the goods transport agency to the customers. The Board again examined the issue in consultation with the Ministry of Law and issued (12 March 2007) an order under section 37B reiterating that the earlier instructions of 27 July 2005 must be followed.

M/s Kross Manufacturers (I) Pvt. Ltd. in Jamshedpur commissionerate, engaged in the manufacture of various excisable goods, availed of the services of GTA and paid service tax after availing of exemption of seventy five per cent on the gross taxable freight charges paid to GTA during the period April 2006 to March 2008. The declaration as required under the Board's instructions was not obtained in any of the consignment notes issued by the GTA. Exemption of service tax amounting to Rs. 20.26 lakh availed of, by the assessee was, therefore, incorrect.

On the matter being pointed out (September 2008), the department stated (May 2009) that show cause notice for Rs. 20.26 lakh for the period April 2006 to March 2008 had been issued.

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

3.4 Exemption availed of without exemption notification in vogue

Service in relation to maintenance or repair of computers or computer system was exempt from payment of service tax vide a notification dated 21 August 2003. However, the aforesaid notification was rescinded by another notification issued on 9 July 2004. Accordingly, service tax on maintenance or repair of computers or computer system or computer software was leviable from 9 July 2004.

M/s Microsoft Corporation (India) Private Ltd., Gurgaon, in Delhi commissionerate of service tax, provided services under the category of business auxiliary services, manpower recruitment agency and maintenance and repair services. The assessee paid service tax on income on account of "service fees - product support services in relation to software" covered under maintenance or repair of software services from 7 October 2005. However, service tax was not paid on similar charges of Rs. 12.55 crore obtained during the period from 9 July 2004 to 6 October 2005 treating the service as exempt under the aforesaid notification. Since the notification providing exemption was rescinded from 9 July 2004, service tax of Rs. 1.28 crore was recoverable with interest and penalty.

On the matter being pointed out (January 2008), the department issued a show cause notice in April 2008 for the recovery of service tax of Rs. 1.28 crore.

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

3.5 Exemption on services provided to SEZ unit/developer

Under a notification dated 31 March 2004, all taxable services provided by a person to a developer of Special Economic Zone (SEZ) or a unit located in SEZ are exempt from levy of service tax if such services are consumed within SEZ, subject to fulfillment of certain specified conditions. The Ministry clarified on 28 June 2007 that since the exemption was intended to cover services meant for consumption in SEZ, taxable services provided and consumed within SEZ are only exempt from service tax and service provided outside SEZ do not qualify for exemption under the aforementioned notification.

M/s IVRCL Infrastructure and Projects Ltd. in Hyderabad II commissionerate, entered into an agreement with the Public Health Engineering Department (PHED), Jaipur for execution of work relating to the transmission of clear water from an industrial area (Sanganer) to the SEZ boundary on turnkey contract basis for a consideration of Rs. 9.77 crore. The assessee received the consideration of Rs. 8.46 crore during the period from December 2007 to March 2008 but did not discharge the service tax liability on the ground that they were eligible for exemption under the notification dated 31 March 2004. The services rendered by the assessee do not qualify for exemption as the services were provided to PHED but not to a unit of SEZ or developer of SEZ. Further, the execution of work was from industrial area to SEZ boundary and services were consumed outside SEZ. The exemption availed of, amounting to Rs. 1.05 crore was not correct.

On the matter being pointed out (May 2008), the Ministry accepted the audit observation and reported (January 2010) issue of show cause notice for Rs. 1.32 crore covering the period from December 2007 to September 2008.

3.6 Other cases

In two other cases of exemption involving tax of Rs. 64.04 lakh, the department has accepted the audit observations and reported (January 2010) recovery of Rs. 53.15 lakh.

CHAPTER IV VALUATION OF TAXABLE SERVICES

Service tax is levied on various taxable services on the basis of value charged by the service provider. Its valuation is governed by section 67 of the Finance Act, 1994 read with the rules under Service Tax (Determination of Value) Rules, 2006. A few illustrative cases of short levy of service tax of Rs. 8.16 crore are mentioned in the following paragraphs. These observations were communicated to the Ministry through seven draft audit paragraphs. The Ministry/department has accepted (till January 2010) the audit observations in six draft audit paragraphs with total revenue implication of Rs. 7.38 crore, of which Rs. 1.66 crore has been recovered.

4.1 Incorrect adoption of the value of service

Section 67 of the Finance Act, 1994, envisages that the value of taxable service in relation to commissioning or installation services, is the amount charged by the service provider for rendering such services. Further, notifications dated 21 August 2003 and 1 March 2006 provide that, in the cases of contracts involving provision of services along with supply of materials, the service provider may pay the service tax on 33 per cent of the gross contract amount.

M/s CMC Ltd., in Kolkata service tax commissionerate, engaged in providing software and hardware solutions, executed jobs of installation and commissioning alongwith supply of equipment under composite price contracts without having any price breakup for supply, installation and commissioning works. The assessee paid service tax at two per cent instead of 33 per cent of the gross contract value which was applicable for installation and commissioning work. Incorrect adoption of value resulted in short payment of service tax of Rs. 5.62 crore during the period from 2004-05 to 2007-08.

On this being pointed out (May 2008), the department accepted the audit observation and stated (May 2009) that a draft show cause cum demand notice was being issued.

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

4.2 Value of service adopted not based on sole consideration

Section 67(2) of the Finance Act, 1994, read with rule 3(a) of the Service Tax (Determination of Value) Rules, 2006, effective from 19 April 2004, stipulates that where provision of service is for a consideration not wholly or partly consisting of money, the value of such taxable service shall be equivalent to the gross amount charged by the service provider to provide similar service to any other person in the ordinary course of trade and the gross amount charged is the sole consideration.

M/s Kandla Port Trust (KPT), Vadinar, in Rajkot commissionerate, provided port services to M/s Essar Oil Ltd. (EOL), in connection with

installation/creation of various new ports, related facilities in the KPT water limits and also in land/road area of KPT at Off-shore Oil Terminal (OOT), Vadinar. M/s EOL paid Rs. 6.68 crore between February 2007 and March 2008 to KPT as wharfage and berthing charges at 51.43 per cent of the scale of rates (SORs) of KPT for the products brought by EOL at the Vadinar Terminal. The assessee also paid service tax of Rs. 82.38 lakh on this amount. Audit observed that payment of service tax of 51.43 per cent of scale of rates was not correct because the assessee and EOL had entered into an agreement by virtue of which KPT had extended its facilities to be used and developed by the EOL and the developed assets were to be repatriated to KPT free of cost on a future date. In consideration thereof, the charges leviable were reduced to 51.43 per cent of the actual scale of rates of KPT. In such cases, the service tax of Rs. 1.60 crore should have been paid on the full service charge of Rs. 12.98 crore which was chargeable by KPT in normal circumstances from any other assessee for providing similar services under rule 3 (a) of the aforesaid Rules. This resulted in short payment of service tax of Rs. 77.87 lakh.

The matter was pointed out to the department/Ministry in August 2008/October 2009; its replies have not been received (January 2010).

4.3 TDS not included in the value of service

Section 67 of the Finance Act, 1994 stipulates that the value of any taxable service should be the gross amount charged by the service provider. The Director General of service tax clarified that tax deducted at source (TDS) is includible in the gross amount charged.

M/s Saint Gobain Glass India Ltd. and M/s Mainetti (India) Pvt. Ltd., in Chennai service tax commissionerate, engaged in the manufacture of excisable goods availed of technical know-how from foreign service providers. The assessee paid royalty of Rs. 9.29 crore and Rs. 8.95 crore for the period from January 2005 to December 2005 and from May 2005 to December 2005 after deducting the TDS amount of Rs. 1.03 crore and Rs. 1.34 crore respectively. Service tax was paid on the value after excluding TDS. The exclusion of TDS resulted in short payment of service tax of Rs. 28.82 lakh which was recoverable with interest.

On the above being pointed out (between March and December 2008), the department admitted the audit observations (between July 2008 and February 2009) and reported recovery of tax of Rs. 12.64 lakh and interest of Rs. 5.21 lakh in June and July 2008 from M/s Saint Gobain Glass India Ltd. and issued show cause notice to the other assessee.

The Ministry accepted (November 2009) the audit observation in the case of M/s Mainetti (India) Pvt. Ltd. and intimated that a show cause notice for Rs. 16.50 lakh had been issued in September 2008.

4.4 Other cases

In three other cases of valuation of taxable services involving Rs. 1.48 crore, the Ministry/department has accepted the audit observations and reported recovery of the total amount.

CHAPTER V

NON-LEVY/SHORT LEVY OF INTEREST AND PENALTY

Where a person liable to pay service tax under section 68 of the Finance Act, 1994 or the Rules made thereunder fails to pay the tax or any part thereof within the prescribed time, he is liable to pay interest at 13 per cent per annum for the period of default under section 75 of the aforesaid Act. Further, the penalty for failure to pay tax is also leviable, in addition to tax and interest under section 76 of the Act. A few illustrative cases of non-levy of interest and penalty involving revenue of Rs. 1.86 crore are mentioned in the following paragraphs. These observations were communicated to the Ministry through nine draft audit paragraphs. The Ministry/department has accepted (till January 2010) the audit observations in eight draft audit paragraphs with a revenue implication of Rs. 1.48 crore, of which Rs. 56.53 lakh has been recovered.

5.1 Non-payment of interest

As per rule 6(1) of Service Tax Rules, 1994, service tax in respect of any service provided by a service provider during a month is to be paid to the credit of the Central Government by the 5th of the month immediately following the month in which payments are received except for the month of March where tax is to be paid by the 31st of March itself. Failure to pay service tax by the due date attracts interest at the rate of 13 per cent per annum. Besides, penalty of not less than Rs. 200 per day during which such failure continues or at the rate of two per cent of such tax per month, whichever is higher, is payable subject to a maximum limit of service tax due.

M/s Raasi Refractories Ltd. in Hyderabad III commissionerate and M/s NCS Industries Ltd., in Visakhapatnam II commissionerate, were registered service tax payers of goods transport agency and warehousing services respectively. The assessee, during the period 2005-06 and 2006-07, paid service tax with delays ranging from 18 to 568 days. In addition, M/s Raasi Refractories Ltd. has also not paid the service tax for the period from October 2006 to January 2008. The interest and penalty due on such belated payments/non-payment of service tax aggregates to Rs. 40.07 lakh.

On the matter being pointed out (March 2007 and February 2008), the department stated (January and March 2009) that the demand of Rs. 22.79 lakh covering the period from January 2005 to September 2006 had been confirmed and Rs. 2.21 lakh recovered in February 2009.

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

5.2 Non-recovery of interest

Scrutiny of the records of the superintendent of central excise, Duliajan range indicated that five security service providers since 1998 and one service provider since 2003 had been providing security service to M/s Oil India Ltd., Duliajan, but obtained service tax registration only in 2004 though 'security service agency service' came under service tax net on 16 October 1998. On

the demand of the central excise department, these assessee paid service tax amounting to Rs. 51.51 lakh in March 2007 relating to the period from 16 October 1998 to June 2003 and Rs. 105.25 lakh in August 2006 relating to the period from July 2003 to June 2006. However, interest of Rs. 38.47 lakh and penalty for delayed payment of service tax was not recovered.

On this being pointed out (May 2008), the department stated (May 2009) that action would be taken to recover the interest.

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

5.3 Short payment of interest

M/s Pratyusha Associates Shipping Private Ltd. in Visakhapatnam I commissionerate, engaged in providing commercial or industrial construction service and port services, paid service tax on port services for the period from May 2007 to February 2008 with delays ranging from 208 to 487 days. The interest liability for delayed payment of tax was Rs. 30.12 lakh against which the assessee paid Rs. 2.04 lakh only. Interest of Rs. 28.08 lakh short paid was recoverable from the assessee. It was also noticed that assessee paid service tax of Rs. 26.03 lakh on commercial or industrial construction service and goods transport agency services for February and March 2008 with delays of 182 to 208 days which attracted interest of Rs. 1.73 lakh. Thus, the total interest payable by the assessee worked out to Rs. 29.81 lakh.

On this being pointed out (November 2008), the Ministry accepted (January 2010) the audit observation and reported recovery (December 2008) of Rs. 1.73 lakh and intimated that show cause notice for recovery of interest of Rs. 40.37 lakh was being issued.

5.4 Non-levy of interest on incorrect cenvat credit

Rule 14 of the Cenvat Credit Rules, 2004 provides for levy of interest on the amount of cenvat credit taken or utilised wrongly by the manufacturer or the provider of the output service.

M/s APAR Industries Ltd. in Vapi commissionerate, availed of and utilised the cenvat credit of service tax of Rs. 1.54 crore on outward freight during the period from January 2005 to June 2007. The assessee reversed the service tax credit on 5th September 2007. However, applicable interest was not levied. This resulted in non-levy of interest of Rs. 25.12 lakh on cenvat credit wrongly availed.

On this being pointed out (September 2008), the department accepted the audit observation and intimated (December 2008) that a show cause notice was being issued.

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

5.5 Other cases

In six other cases of non-levy of interest amounting to Rs. 52.59 lakh, the Ministry/department has accepted all the audit observations and reported recovery of the total amount.

CHAPTER VI MISCELLANEOUS TOPICS OF INTEREST

A few interesting issues pertaining to the short payment of service tax due to incorrect self assessment, suppression of value of service etc., which are not included in the foregoing chapters, are mentioned in the following paragraphs. These issues have a total revenue implication of Rs. 12.38 crore and were communicated to the Ministry through 26 draft audit paragraphs. The Ministry/department has accepted (till January 2010) the audit observations in 24 draft audit paragraphs with total revenue implication of Rs. 9.47 crore, of which Rs. 5.07 crore has been recovered.

6.1 Incorrect self assessment of tax

From 16 July 2001 onwards, the scheme of self assessment procedure was introduced under which a person liable to pay service tax can itself assess the service tax and deposit it, in the Government account. In addition, he is required to submit periodical returns, in the prescribed form, to the concerned superintendent of central excise. For the purpose of verification, the superintendent is empowered to call for any accounts, documents or other evidence from the assessee, as deemed necessary.

6.1.1 M/s Juhu Beach Resorts India Pvt. Ltd. in Mumbai service tax commissionerate, received management consultancy services from Marriott Worldwide Corporation and paid Rs. 35.26 crore for the period from April 2004 to December 2007 involving service tax liability of Rs. 4.02 crore. However, the assessee paid service tax of Rs. 2.04 crore only. Thus, there was a short payment of service tax of Rs. 1.98 crore which was recoverable with interest of Rs. 55.32 lakh.

On this being pointed out (April 2008), the department intimated (June 2009) that show cause notices for the recovery of Rs. 2.75 crore for the period April 2004 to December 2007 had been issued in March 2009. Out of the above amount, Rs. 21.04 lakh (including interest of Rs. 3.28 lakh) has been paid by the assessee in June 2008.

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

6.1.2 M/s Hindustan Unilever Ltd. in Chennai service tax commissionerate, engaged in providing business auxiliary service, beautician service etc., also received GTA service and paid freight charges for transport of goods under the heads primary freight, secondary freight, inter-depot freight and inter-branch freight etc. The assessee incurred freight charges of Rs. 146.50 crore during the years 2004-05, 2005-06 and 2006-07 on which service tax payable worked out to Rs. 416.28 lakh at the appropriate rates on 25 per cent freight charges. However, the assessee paid service tax of Rs. 361.41 lakh which resulted in short payment of service tax of Rs. 54.87 lakh which needed to be recovered along with appropriate interest.

On this being pointed out (April, May and December 2008), the Ministry accepted the audit observation and stated (January 2010) that a show cause notice demanding service tax of Rs. 3.52 crore¹ on full freight charges for the period from January 2005 to March 2008 had been issued to the assessee in August 2008 and was under adjudication.

6.1.3 M/s Ortel Communications Ltd., M/s Security and Intelligence Service (India) Ltd., M/s Eagle View Security Services Pvt. Ltd. and M/s Power Con Projects and Associates Ltd. in Bhubaneswar I commissionerate, paid Rs. 2.16 crore as against Rs. 2.49 crore payable towards service tax during the period between December 2004 and March 2006. This resulted in short payment of service tax amounting to Rs. 32.69 lakh which is recoverable with interest and penalty.

On this being pointed out (May 2006), the department stated (February 2009) that the tax of Rs. 33,502 and interest of Rs. 7,331 had been recovered from M/s Eagle View Security Services Pvt. Ltd. and show cause notices had been issued or were under issue to the other three assessees.

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

6.1.4 M/s Nokia India Pvt. Ltd. in Delhi service tax commissionerate, did not correctly assess service tax liability on the taxable service of installation, commissioning and implementation services provided during November 2006. This resulted in short payment of tax of Rs. 13.40 lakh which was recoverable with interest of Rs. 3.32 lakh and penalty of Rs. 6.22 lakh.

On this being pointed out (December 2007 and August 2008), the department stated (April 2009) that show cause notice demanding service tax of Rs. 35.08 crore² not paid on various services provided during the period from October 2003 to September 2006, and for recovery of cenvat credit of Rs. 26.20 lakh incorrectly utilised, during April 2006 to September 2006, had been issued to the assessee, besides levying applicable interest and penalty.

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

6.2 Incorrect suo-moto adjustment of service tax

Section 83 of the Finance Act, 1994 stipulates that the provisions of section 11B of the Central Excise Act, 1944 shall apply to service tax as well. Section 11B provides that any person claiming refund of excise duty may make an application within one year.

Sub-rule 3 of rule 6 of the Service Tax Rules, 1994 provides that where an assessee has paid to the credit of the Central Government service tax in respect

¹ The difference between the amount pointed out by audit (Rs. 54.87 lakh) and the demand raised by the department (Rs. 3.52 crore) is due to the difference in period as well as calculation. Audit has worked out the short payment on 25 per cent value of service charges whereas the department has raised demand on 100 per cent value alleging suppression of facts.

² The difference between the amount pointed out by audit (Rs. 13.40 lakh) and the demand raised by the department (Rs. 35.08 crore) is due to coverage of larger period and more services provided by the assessee in the show cause notice.

of a taxable service, which is not so provided by him either wholly or partially for any reason, the assessee may adjust the excess service tax so paid by him against his service tax liability for the subsequent period, if the assessee has refunded the value of taxable service and the service tax thereon to the person from whom it was received.

6.2.1 M/s Citibank N.A., Chennai, in Chennai service tax commissionerate, engaged in providing banking and financial services, business auxiliary services, etc., adjusted the excess service tax of Rs. 1.78 crore paid in April and May 2005 for the service tax liability during the months of June, July and August 2005. The suo-moto adjustment of excess tax by the assessee in the subsequent months was not in order and the assessee should have claimed refund of excess paid tax from the department within the stipulated period.

On this being pointed out (May 2008), the Ministry accepted the audit observation and stated (January 2010) that a show cause notice was being issued.

6.2.2 M/s Bharti Airtel Ltd. in Bhopal commissionerate, engaged in providing telephone service, paid service tax of Rs. 195.73 lakh for the month of March 2005 against the liability of Rs. 189.19 lakh. The amount of Rs. 6.54 lakh paid in excess by oversight was adjusted against service tax liability for the subsequent month of April 2005. This suo-moto adjustment of service tax against future liability was not allowable under the rules and for this the assessee was required to file a refund claim under the provisions of section 11B of the said Act. The wrong adjustment of the service tax was liable to be recovered alongwith interest.

On this being pointed out (March 2007), the department stated (June 2007) that the adjustment of excess service tax paid was permissible in view of various judicial pronouncements.

The reply of the department is not tenable as judicial pronouncements cited are not in the case of the assessee or by the jurisdictional court. Also, the reply is contradictory to the Ministry's clarification (13 October 1997) that there is no provision in the Finance Act, 1994 to adjust service tax already paid. Besides, the CESTAT in the case of Sudhir Paper Ltd. {2002 (148) ELT 275 (Tri-Bang.)} based on the judgement of the Supreme Court of India in the case of M/s Doaba Cooperative Sugar Mills {1988 (37) ELT 478 (SC)} has specifically emphasised that the revenue authorities are bound by the statute of law. The department further intimated (June 2008) that a show cause notice was being issued.

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

6.2.3 Rule 6(4A) of the Service Tax Rules, 1994 (with effect from 1 March 2007) provides that where an assessee has paid to the credit of the Central Government any amount in excess of the amount required to be paid towards service tax liability for a month or quarter, as the case may be, the assessee may adjust such excess amount paid by him against his service tax liability for the succeeding month or quarter, as the case may be. Sub-rule (4B) of the said

rule prescribes a monetary limit of rupees fifty thousand for adjustment for a relevant month or quarter, as the case may be.

M/s CMA CGM East and South India Pvt. Ltd. in Chennai service tax commissionerate, engaged in providing business support service and steamer agent service paid excess service tax in the months of May, July and August 2007 which was adjusted in the subsequent months beyond the monetary limit mentioned above. This resulted in excessive suo-moto adjustment of Rs. 27.46 lakh (business support services of Rs. 19.11 lakh and steamer agency services of Rs. 8.35 lakh) during the year 2007-08.

On this being pointed out (August 2008), the Ministry accepted the audit observation and stated (January 2010) that a show cause notice for Rs. 27.46 lakh had been issued to the assessee.

6.3 Suppression of value of services

Section 78 of the Finance Act, 1994 provides for levy of penalty on non-payment of tax by suppression of facts.

6.3.1 M/s Haldia Steels Limited (unit-II) in Bolpur commissionerate, engaged in the manufacture of sponge iron, billets etc., cleared its final product on payment of duty. Scrutiny of records indicated that the assessee had paid Rs. 8.03 crore to transporters during 2007-08 for carrying of inputs but declared the same at Rs. 3.32 crore in ST 3 returns and discharged service tax liability on Rs. 3.32 crore only. This resulted in short payment of service tax of Rs. 58.22 lakh which was recoverable with interest of Rs. 2.52 lakh (upto July 2008) and penalty.

On the matter being pointed out (August 2008), the department reported (March 2009) recovery of Rs. 60.74 lakh on 30 December 2008 including interest of Rs. 2.52 lakh. Since the interest was paid upto July 2008, interest amounting to Rs. 3.15 lakh for the period from August 2008 to December 2008 was also recoverable.

The Ministry admitted the audit observation and stated (November 2009) that a show cause notice demanding interest of Rs. 10.02 lakh was being issued.

6.3.2 Scrutiny of records of M/s J.K. Avtar Pvt. Ltd., Unit II, Assam, in Shillong commissionerate, indicated that the assessee was required to pay service tax to the extent of Rs. 13.24 lakh (inclusive of arrears of service tax of rupees four lakh pertaining to the year 2005-06) for providing goods transport agency service (GTA) during the period from April 2007 to March 2008, but no amount was paid. The assessee also did not indicate the value of services provided in ST-3 returns for the period from April 2007 to March 2008. By suppressing the value of taxable service in the ST-3 return for the period mentioned above, the assessee evaded service tax of Rs. 9.24 lakh excluding the arrears of service tax of rupees four lakh pertaining to the year 2005-06. No action was taken by the department to recover service tax with applicable interest and penalty.

On this being pointed out (February 2009), the department admitted the audit observation and stated (June 2009) that the assessee was asked to pay Rs. 9.24 lakh alongwith interest, out of which Rs. 1.24 lakh had been recovered.

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

6.3.3 M/s Andhra Pradesh Trade Promotion Corporation (APTPC) in Hyderabad II commissionerate, engaged in providing services of hire purchase of consumer durable goods and vehicles to government employees, collected interest charges of Rs. 173.16 lakh during 2005-06 on which service tax of Rs. 17.66 lakh was payable. As against this, the assessee declared Rs. 29.13 lakh only towards interest charges in its half yearly returns on which service tax of Rs. 2.97 lakh was paid. Understatement of interest charges collected resulted in short payment of service tax by Rs. 14.69 lakh which was recoverable with interest and penalty.

On the matter being pointed out (July 2008), the department intimated (March 2009) that the demand of tax had been confirmed (February 2009).

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

6.4 Service tax collected but not paid to the Government

In terms of section 68 of the Finance Act, 1994 read with rule 6 of the Service Tax Rules, 1994, service tax is to be paid to the credit of the Central Government by the 5th day of the month following the month in which payments are received except during the month of March where tax is to be paid by the end of March itself.

M/s GEI Industrial Systems Pvt. Ltd., Bhopal, in Bhopal commissionerate, engaged in the manufacture of heat exchangers/industrial fans and parts thereof provided technical services and received rupees two crore from the clients. The assessee also charged service tax of Rs. 22.66 lakh through the invoices from its service receivers. Neither did the assessee deposit the service tax so recovered into the Government account nor was it demanded by the department. The service tax was recoverable with interest and penalty.

On this being pointed out (June 2009), the department intimated (June 2009) that the assessee has agreed to deposit the service tax. Further update in the case has not been received (January 2010).

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

6.5 Non-monitoring of returns

Section 70 of the Finance Act, 1994 read with rule 7(i) of Service Tax Rules, 1994 stipulates that every person liable to pay service tax shall assess the tax itself and shall furnish half yearly return in form ST-3 by 25th of the month following the half year. Failure to furnish return and pay service tax would entail levy of interest and penalty.

M/s Balaji Detective and Security Service (I) Pvt. Ltd., Indore, in Indore commissionerate engaged in providing security services, recovered service charges of Rs. 3.72 crore during February to April 2008 from different clients/customers. Service tax of Rs. 45.94 lakh was payable but the assessee paid only Rs. 6.62 lakh (i.e. Rs. 1.62 lakh on 31 March 2008 and Rs. 5 lakh on 18 July 2008). The tax short paid amounting to Rs. 39.32 lakh was recoverable with interest. In addition, interest was also recoverable on delayed payment of tax of rupees five lakh for the month of March 2008 paid on 18 July 2008. It was also noticed that the assessee had not submitted ST-3 returns since October 2007 onwards. The department did not monitor the submission of returns by the assessee for which penal action was also required to be taken.

On this being pointed out (August 2008), the Ministry admitted the audit observation and reported (November 2009) recovery of Rs. 62.86 lakh including interest. It further stated that the show cause notice for imposing penalty was under issue.

6.6 Other cases

In 241 other cases of short payment of service tax involving a revenue implication of Rs. 4.92 crore, the Ministry/department has accepted all the audit observations and reported recovery of Rs. 3.56 crore up to January 2010.

New Delhi
Dated :

(SUBIR MALLICK)
Principal Director (Indirect Taxes)

Countersigned

New Delhi
Dated :

(VINOD RAI)
Comptroller and Auditor General of India

Glossary of terms and abbreviations

| Abbreviated form | Expanded form |
|-------------------------|---|
| Board | Central Board of Excise and Customs |
| commissionerate | Commissionerate of central excise |
| CESTAT | Customs, Excise & Service Tax Appellate Tribunal |
| ELT | Excise Law Times |
| EOU | Export Oriented Unit |
| GTA | Goods transport agency |
| NT | Non Tariff |
| PLA | Personal ledger account |
| the Ministry | The Ministry of Finance |
| Ltd. | Limited |
| Pvt. | Private |