Recent amendments to Service Tax and Income Tax — *arising out of Union Budget 2009 proposals*

Many BAI members executing road works were facing problems of levy of Service Tax on repair, renovation and widening of roads. BAI Nashik Centre vigorously pursued the matter with Service Tax Commissioner, Nashik, which ultimately resulted in issuance of below-given circular.

Circular No. 110/4/2009-ST.
F. No. 345/17/2008-TRU
Government of India, Ministry of Finance
Department of Revenue, Tax Research Unit

New Delhi, the 23rd February, 2009.

Subject : **Reference from Commissioner Nashik seeking clarification in respect of levy of service tax on Repair/ renovation/ widening of roads — Regarding.**

Representations have been received by the Board pointing out divergent practices being followed by field formations with regard to levy of service tax on maintenance and repair of roads.

2. Commercial or industrial construction service [section 65(105) (zzq)] specifically excludes construction or repairs of roads. However, management, maintenance or repair provided under a contract or an agreement in relation to properties, whether immovable or not, is leviable to service tax under section 65(105) (zzg) of the Finance Act, 1994. There is no specific exemption under this service for maintenance or repair of roads etc. Reading the definitions of these two taxable services in tandem leads to the conclusion that while construction of road is not a taxable service, management, maintenance or repair of roads are in the nature of taxable services, attracting service tax.

3. The next issue requiring resolution is the types of activities that can be called as 'construction of road' as against the activities which should fall under the category of maintenance or repair of roads. In this regard the technical literature on the subject indicates that the activities can be categorised as follows :

(A) **Maintenance or repair activities :**

I. Resurfacing

II. Renovation

III. Strengthening

IV. Relaying

V. Filling of potholes

(B) **Construction activities :**

I. Laying of a new road

II. Widening of narrow road to broader road (such as conversion of a two lane road to a four lane road)

III. Changing road surface (gravelled road to metalled road/metalled road to blacktopped/ blacktopped to concrete etc.)

4. The cases may be decided/revenue should be protected based on the above classification. Suitable Trade and Public notices may be issued for information of the trade and field formations.

5. Receipt of this Circular may please be acknowledged.

6. Hindi version will follow.

Yours faithfully,
Sd/-
(Unmesh Sharad Wagh)
Under Secretary (TRU)

The circular though gave partial relief, but created more confusion in defining certain methodologies used in construction and maintenance of roads. BAI and NHBF were pursuing the matter with Department of Revenue, Union Ministry of Finance. Ultimately, Hon'ble Union Finance Minster, while replying to the debate on Union Finance (No. 2) Bill, 2009 in Lok Sabha on 27th July 2009. said :

"Madam Speaker, I have studied and analysed the various suggestions made in the representations which we have received. I intend to remain focussed on our immediate priority of providing stimulus to generate economic activity in the present environment of economic slowdown. Accordingly, I propose to make certain changes to the Finance (No. 2) Bill, 2009 to achieve these objectives.

Roads serve as a lifeline in the country. Therefore, the Government has accorded the highest priority in developing and maintaining roads across the country. This is adequately reflected in our expenditure allocation. On the tax front, construction or laying of the new road is excluded from the service tax. However, repairs and maintenance of the roads are chargeable to service tax. Several requests have been received to exempt the repairs and maintenance of roads from the service tax. Therefore, I propose to remove this anomaly by also exempting repairs and maintenance of roads from the service tax with immediate effect."

Accordingly, the notification below was issued.

[To be published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (ii)]

Government of India
Ministry of Finance
(Department of Revenue)

New Delhi, the 27th July, 2009.

Notification No. 24/2009-Service Tax

G.S.R. (E) — In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the Finance Act), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable service, referred to in sub-clause (zzg) of clause (105) of section 65 of the Finance Act,1994, provided to any person by any other person in relation to management, maintenance or repair of roads, from the whole of the service tax leviable thereon under section 66 of the said Finance Act.

[F.No.B-1/1/2009-TRU]

(Prashant Kumar)
Under Secretary to the Government of India

Hon'ble Union Finance Minster, in his reply to the debate on Union Finance (No. 2) Bill, 2009 in Lok Sabha on 27th July 2009, also stated the following :

"Section 80-IA(4), sub-clause (iii) of the Income Tax Act provides for tax holiday in respect of the profits derived by an undertaking from development, operation or maintenance of an industrial park, if the development is completed on or before 31st March, 2009. Representations have been received seeking extension of this scheme. With a view to providing stimulus to infrastructure sector to generate incomes in the wake of economic slowdown, I propose to extend the sunset clause for the industrial park scheme by a further period of two years, that is, up to 31st March, 2011."

"Madam Speaker, housing, particularly lower and middle income housing, deserves to be supported. In order to stimulate this segment of house-owners, I propose to provide support to borrowers by way of interest subvention of one per cent on all housing loans up to Rs. 10 lakh to individuals provided the cost of the house does not exceed Rs. 20 lakh. The interest subsidy will be routed through the scheduled commercial banks and the housing finance companies registered with the National Housing Bank. This interest subsidy will be available for a period of one year. I propose to provide Rs. 1,000 crore towards this end."

"I also propose to provide further stimulus to the housing sector by providing some tax relief. Accordingly, I propose to amend Section 80-IB(10) of the Income Tax Act so as to allow the tax holiday in respect of profits derived from projects approved between 1st April, 2007 and 31st March, 2008, if such projects are completed on or before 31st March, 2012."

The above Income Tax amendments, will be now incorporated in the Income Tax Act.

Section 80-IA/Income-tax Act

[2009] 178 Taxman 397 (Bom.)

High Court of Bombay

Plastiblends India Ltd. *v.*
Addl. Commissioner of Income-tax, Range 8(2)

Dr. S. Radhakrishnan and V. C. Daga, JJ.

IT Appeal No. 1282 of 2007

December 19, 2008

Section 80-IA of the Income-tax Act, 1961 — Deductions — Profits and gains from infrastructure undertakings — Whether there was a conflict of view between two Division Benches of High Court, one in case of Grasim Industries Ltd. v. ACIT, [2000] 245 ITR 677/[2001] 115 Taxman 278 (Bom.) and other in Scoop Industries (P.) Ltd. v. ITO [2007] 289 ITR 195/161 Taxman 366 (Bom.) on issue as to whether for purpose of availing special deduction under Chapter VI-A, gross total income is required to be computed by deducting allowable depreciation even though assessee had disclaimed same for purpose of regular assessment and, therefore, matter was to be referred to Larger Bench of High Court to resolve conflict between aforesaid two decisions — Held, yes.

Facts :

For the relevant assessment year, the assessee filed its return of income claiming deductions under section 80-IA. In the said return, while computing the income under the head 'Profits and gains of business and profession', the assessee had not claimed any depreciation under section 32 in respect of the assets of its undertakings and, consequently, the income which qualified for deduction under section 80-IA was also worked out on the basis that depreciation had not been claimed as a deduction. The Assessing Officer, however, allowed deduction under section 80-IA by reducing the income of the eligible undertakings by the amount of depreciation. On appeal, the Commissioner (Appeals) held that under the scheme of the Act, the claim for depreciation cannot be allowed unless claimed by the assessee, and that an assessee has an option not to claim the depreciation. He, therefore, allowed the assessee's claim for deduction under section 80-IA, without reducing the eligible income by the amount of depreciation. On the revenue's appeal, the Tribunal held that the profits derived from the undertaking for the purpose of claiming a deduction under Chapter VI-A had to be arrived at after setting off the current year's depreciation as well as the unabsorbed depreciation and the unabsorbed development rebate irrespective of whether depreciation allowance had been claimed as a deduction under section 32 in arriving at the business income.

On appeal to the High Court, the revenue relied upon the judgment of another Division Bench of the jurisdictional High Court in *Scoop Industries (P.) Ltd. v. ITO*, [2007] 289 ITR 195/161 Taxman 366 (Bom.), wherein it was held that depreciation would have to be taken into account while computing a special deduction under Chapter VI-A. In rejoinder, the assessee contended that the judgment of the Division Bench in the case of Scoop Industries (P.) Ltd. (*supra*) needed reconsideration as there was conflict of views between two Division Benches of the Court, one in the case of *Grasim Industries Ltd. v. Asstt. CIT*, [2000] 245 ITR 677/[2001] 115 Taxman 278 (Bom.) and the other in Scoop Industries (P.) Ltd.'s case (*supra*).

S. 80IA of the Income-tax Act, 1961

[2009] 116 ITD 241 (Chennai)

Mohan Breweries & Distilleries Ltd. *v.*
ACIT (Chennai)

A.Y. : 2004-05. Dated : 31-10-2007

S. 80IA of the Income-tax Act, 1961 — Whether S. 80-IA(2) gives an option to assessee to claim relief u/s.80-IA for any 10 consecutive assessment years out of 15 years beginning from year in which undertaking or enterprise develops or begins to operate any infrastructure facility, etc., and it does not mandate that first year of 10 consecutive assessment years should be always first year of set-up of enterprise — Held, Yes — Whether provision of S. 80-IA(5), treating eligible undertaking as a separate sole source of income, is applicable only when assessee chooses to claim deduction u/s.80-IA and same cannot be applied to a year prior to year in which assessee opted to claim relief u/s.80-IA for first time — Held, Yes.

The assessee-company had started three power projects, two in the previous year, relevant to the A.Y. 1996-97 and one in the previous year, relevant to the assessment year 1999-2000. In respect of the profits of these power units, the assessee claimed deduction u/s.80-IA for the first time in the A.Y. 2004-05. The Assessing Officer held that while computing the gross total income of the eligible units, the notional brought forward loss incurred by those units in earlier years had to be taken into account first and after that, if any remaining profit was available then the deduction u/s.80-IA had to be given.

On appeal, the Commissioner (Appeals) upheld the order of the Assessing Officer. On second appeal, the ITAT held that :

(1) S. 80-IA gives an option to the assessee to claim relief under this section for any 10 consecutive assessment years out of 15 years beginning from the year in which the undertaking or enterprise develops or begins to operate any infrastructure facility, etc.

(2) S. 80-IA(2) does not mandate that first year of 10 consecutive assessment years should be always the first year of set-up of enterprise.

(3) The provision of S. 80-IA(5) is applicable only when the assessee chooses to claim deduction u/s.80-IA and if it has not chosen to claim the deduction u/s.80-IA, S. 80-IA(5) cannot be made applicable.

(4) In the instant case, there was a categorical finding by the Assessing Officer and the Commissioner (Appeals) that the first year claimed by the assessee was from the A.Y. 2004-05. Hence, the initial assessment year could not be the year in which the undertaking commenced its operations but it was the assessment year in which the assessee had chosen to claim deduction u/s.80-IA. Therefore, there was no question of setting-off notionally carried forward unabsorbed depreciation or loss of earlier years against the profits of the units and the assessee was entitled to claim deduction u/s.80-IA on the current assessment year's profit.