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**TOLL FREE HELP LINE:** The attention of members and students is drawn to the toll-free helpline available to them at ICAI Bhawan, Cuffe Parade during office hours from Monday to Friday 1800 22 8009 to solve their queries.

## CA Amendment Bill Passed by Both Houses of Parliament

The Chartered Accountants Amendment Bill has been passed by both the Lok Sabha as well as the Rajya Sabha, thus, paving the way for limited liability partnerships (LLPs) and multidisciplinary partnerships subject to notification of the relevant provisions, after the assent of the President of India and issue of guidelines for multidisciplinary partnerships by the Council. The Bill, moved by the Hon'ble Corporate Affairs Minister Dr. M. Veerappa Moily, will allow chartered accountants to have a choice to form a business model of LLPs to offer their services. This legislation will expectedly help them achieve a leadership position in the services sector. ICAI members' practice through LLPs and Partnership firm and their entry to MDPs has been allowed. LLPs can also be called firms within the meaning of the CA Act, 1949 and the CA Regulations, 1988.

## Introduction of The Companies Bill, 2011

The Companies Bill, 2011 was introduced in the Lok Sabha on 14th December, 2011. As we all know, the Bill is a completely new one, very much different from the one on which we had earlier made our presentation before the Standing Committee. Many new Sections and provisions which are very important from professional perspective have been added on which neither the profession nor any other interested groups/stakeholders have had any opportunity to express views. Since the passage of the Bill has been deferred in the current session of Parliament, ICAI requests all the members to provide their suggestions on the provisions introduced so that ICAI can make revised presentation once again.

## 2nd Conclave of Members in Entrepreneurship & Public Services

Encouraged by the success of first conclave, ICAI is organising the Conclave of ICAI Members in Entrepreneurship & Public Services again in Mumbai in January 2012 with an objective to encourage the participation of our members in entrepreneurship and public services in the ICAI's activities and to provide them an interactive platform, aiming at enhancing the efficacy of our activities by factoring our members' perspective and vision. ICAI sincerely appreciates CA members in entrepreneurship or public services, as they have not only established themselves in their career, but, in process, have positioned the brand CA on a higher pedestal.

**General Amnesty Scheme for Members:** The Executive Committee of the ICAI Council has at its recent meeting considered the question of putting a General Amnesty Scheme in place for members whose names had been removed on account of non-payment of membership fee with a view to facilitating such members restore their names with retrospective effect. The Committee recommended to the Council that the members whose name stood removed in the past due to non-payment of membership fee be given an opportunity, by way of a General Amnesty Scheme, to restore their name, irrespective of the period of such removal, retrospectively on payment of applicable membership fees for the year during which the name was removed and for the current year, i.e. 2011-12 – the year in which the restoration of name is applied for together with fee(s) of the intervening year(s), if any, along with Form 'g' and the additional (restoration) fee of ₹ 1,200. The Committee further recommended that the above General Amnesty Scheme be kept in force (and inclusive of) 31st March, 2012.

**Clarification regarding number of tax audit assignments under Section 44AB:** The ICAI Council, at its 311th meeting held recently, has clarified that audit prescribed under any statute which requires the audit report in the form as prescribed under Section 44AB of the Income-tax Act, 1961 shall not be considered for the purpose of reckoning the specified number of tax audit assignments if the turnover of the auditee is below the turnover limit specified in Section 44AB of the Income-tax Act, 1961. For instance, audit under Section 44AD, under DVAT, 2004 (for turnover between ₹ 40 lakh and ₹ 60 lakh), etc., will not be considered for inclusion in the current limit of 45 audits. The said clarification has also been hosted on the ICAI website.

**Software for Billing and Accounting, and Payroll Management:** In order to empower CA professionals further, ICAI will soon be arranging the Billing and Accounting software, i.e. software for accounting and billing on cash-basis, which will be a complete package to manage all accounting and billing requirements of a CA Firm on cash system of accounting and provide facilities to generate bills, receipts, vouchers, etc. ICAI will also be arranging the Payroll software, i.e. software for payroll management for professionals named 'Payroll' Software. The software is a complete package to manage all small

business firms' PF, ESI, PT and TDS aspects of the same. This software will be available to all ICAI practitioners and CA firms free-of-cost for two financial years.

**XBRL Software and Certificate Course:** ICAI will soon be arranging XBRL software for CA members towards cloud service for the MCA mandate XBRL filing, i.e. a solution for converting financial information of a company in XBRL format as per the MCA mandate. The software will be available to all CA firms free-of-cost for two financial years. Further, in order to provide requisite technical knowledge to ICAI members to learn this new form of business language, the XBRL India has decided to launch a Certificate Course on XBRL. The XBRL India board has constituted a committee for working out the layout, content and other modalities in this regard.

## Tribute to Past President CA. Rahul Roy

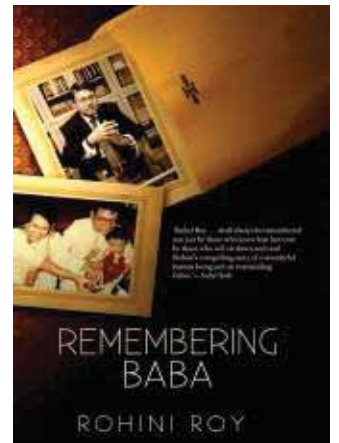
'REMEMBERING BABA' is a sixteen year old Rohini Roy's first book published by Penguin Publishers. She wrote the book when she was fourteen. It is an extraordinary story about an extraordinary man in her life, her father, Rahul Roy. As the youngest President of the Institute of Chartered Accountants of India Rahul was a very renowned person in the world of finance, but this book explores more than just the professional dimension of his personality. It draws a picture in the minds of the readers, of Rahul as a father, as a husband and as a role model.

As an attempted tribute to her father, her Best Friend Rohini's 'Remembering Baba' takes the reader on an emotional journey, exploring various sides of life, love and what used to be the city of Calcutta. 'Remembering Baba' is a book about a man who changed lives without letting hardships in life change him. This is a story of a man who deserves to be remembered.

The foreword of the book is written by Mr. Nawshir Mirza another very renowned personality in the world of finance and Mr. Suhel Seth who is also a very well known person in the world of advertising who used to be Rahul's fellow debater also.

A Chartered Accountant by profession, Rahul held several eminent positions in various committees internationally, as well as in India, the notable ones being the Ethics Committee of International Federation of Accountants, International Accounting Standards Committee, Company Law Advisory Committee, India, Accounting Standards Board, ICAI, RBI's Technical assistance group and also the Bhagwati Committee of SEBI.

The book is published hardbound and is priced at ₹ 250/-



## Congratulation

CA. Vivek Garud, Dramatist, for Releasing eleven books of dramas at 11.11.11 a.m. at Nashik on 11/11/11.

## Personal Column

Experienced CA in (Income Tax) CIT Appeals and Tribunal Appeals offers services in drafting, preparing and filing appeals on professional basis. Contact after 3.00 PM, Mobile:9869214472/ 28074989 Email - mjsca4@yahoo.co.in

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## DIRECT TAX

(Contributed by CA. Haresh P. Kenia & CA. Deepak Lala)

### Revised instruction for filing Form 49A and Form 49AA {203 TAXMANN 40 (ST.)}

Recently, CBDT has notified new forms for making PAN application. The Form 49A is prescribed for individuals who are citizen of India, HUF and others entities which are registered or formed in India. The Form 49AA is prescribed for Individuals who are not Citizen of India and other entities formed or registered outside India.

The revised instruction for filling up Form 49A and Form 49AA has been issued by the CBDT and are available.

### MEMORANDUM

### Suggestions for prescribing a proforma for obtaining information relating to Transfer Pricing and in other cases {203 TAXMANN 1 (ST.)}

The CBDT issued the office memorandum (F. No. 504/31/2010-FTD-1) dated 21/11/2011 giving suggestions for proforma for obtaining information relating to Transfer Pricing and Other Cases.

Presently, the information on tax matters sought by the field officers of the Income Tax Department from countries with which India has Double Tax Avoidance Agreement (DTAA) or Tax Information Exchange Agreement (TIEA) under the relevant 'Exchange Information' article of DTAA / TIEA, are obtained in a prescribed checklist / proforma named "Exchange Information proforma / checklist". There is a separate proforma prescribed by the UK tax authorities for obtaining banking information.

The CBDT considering the development at international forums including the Model Proforma for the exchange of information being developed by the OECD, it is proposed to change the existing proforma. Further, it is proposed to have separate proforma for obtaining any information relating to Transfer pricing and prescription of a separate proforma for the same.

In view of the above, the CBDT has requested for a comments and views for the following to the Foreign Tax and Tax division CBDT.

- for developing separate proforma (T.P.) for Transfer Pricing cases.
- for any improvement required to be made to the present Proforma prescribed for obtaining information from countries with which India has DTAA/TIEA.
- Any other suggestion relating to the above.

The CBDT has also prescribed the guidelines in this matter.

### Special provision for payment of tax by certain Limited Liability Partnership (203 TAXMANN 20 {ST.})

The CBDT vide notification No. 60/2011 dated 01/12/2011 gives the Income Tax (Ninth Amendment) Rules, 2011. It came into force from 01/04/2012. It inserted Rule 40BA. The Rule 40BA prescribed the "Form 29C" being the report of an accountant which is required to be furnished by the assessee under section 115JC(3) of the Income Tax Act.

## MAHARASHTRA VAT

(Contributed by CA. C. B. Thakar)

### MVAT ACT, 2002 NOTIFICATION

The Commissioner of Sales Tax has issued Notification u/s. 10(6) dated 4.11.2011 whereby the powers under section 66 are delegated to officer on special duty (survey).

The Commissioner of Sales Tax has issued one more Notification u/s. 10(5) dated 2.12.2011 whereby earlier notification dated 6.10.2007 is amended to change the reference to the designation of Joint Commissioner of Sales Tax.

### MVAT RULES, 2005

The Government has issued notification dated 5.12.2011 where by Rules 17 & 18 of the MVAT Rules, 2005 are amended. A provision is being made to call for information in Annexure Forms J1 & J2 etc. from dealers who are not covered by VAT Audit provision.

## CORPORATE LAWS

(Contributed by CA. Jayesh Thakur)

### INCREASE IN FII DEBT LIMIT IN GOVERNMENT & CORPORATE DEBT CATEGORY [www.rbi.gov.in]

The RBI has issued Circular No. CIR/IMD/FIIC/20/2011 dtd. 18.11.2011 increasing the current limit of FII investment in government securities by US \$ 5 billion thereby raising the cap to US \$ 15 billion. The incremental limit of US \$ 5 billion can be invested in securities without any residual maturity criterion. Also increased is the current limit of FII investment in corporate bonds by US \$ 5 billion thereby raising the cap to US \$ 20 billion. The incremental limit of US \$ 5 billion can be invested in listed corporate bonds. More details about the

allocation of increased limit to government debt and to corporate debt as also allocation of Government debt long-term category for the unutilized part is also provided in the circular.

### AMENDMENT TO TAKEOVER REGULATIONS OF 2011 [www.sebi.gov.in]

The SEBI has issued Circular No. SEBI/CFD/DCR/SAST/3/2011/11/22 dtd. 22.11.2011 amending the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 wherein the format for submitting Draft Letter of Offer to SEBI under Regulation 16(1) of the Regulations was specified. In that format, certain additional instructions have been now inserted and one should follow the new format for the purpose. Merchant bankers are advised to follow the updated format while submitting the draft letter of offer to SEBI.

### FOREIGN INVESTMENT IN INFRASTRUCTURE DEBT FUNDS [www.rbi.gov.in]

The RBI has issued Circular No. A.P. (DIR Series) No. 49 dtd. 22.11.2011 whereby it has stated that a SEBI registered foreign institutional investor (FII) and a non-resident Indian (NRI) may invest in securities other than shares or convertible debentures, subject to such terms and conditions mentioned therein and limits as prescribed for the same by the RBI and the SEBI from time to time. The circular now provides and allows investment on repatriation basis by eligible non-resident investors in (i) rupee and foreign currency denominated bonds issued by the infrastructure debt funds (IDFs) set up as an Indian company and registered as Non-Banking Financial Companies (NBFCs) with the RBI, and, in (ii) rupee denominated units issued by IDFs set up as SEBI registered domestic Mutual Funds (MFs), in accordance with the terms and conditions stipulated by the SEBI and the RBI from time to time. This circular provides more details on (a) who can be eligible non-resident investors, (b) the eligible instruments/securities for non-resident investment in IDFs, (c) the original/initial maturity of all securities at the time of first investment by a non-resident investor shall be five years, (d) the lock-in period for all non-resident investment in the securities to be a period of three years though all non-resident investors can trade amongst themselves within this lock-in period of three years, (e) that the foreign currency denominated bonds issued by IDFs would have to comply with all the terms and conditions (including all-in-cost) under the extant FEMA guidelines/regulations for External Commercial Borrowing (ECB), other than reporting requirements, (f) the quantitative limits for non-resident investment in IDFs, and (g) other conditions like end use and foreign exchange hedging.

### EXTENSION OF DATE OF FILING FINANCIAL STATEMENTS IN XBRL MODE [www.mca.gov.in]

The MCA has issued General Circular No. 69/2011 dtd. 30.11.2011 clarifying that the last date for filing financial statements in XBRL mode without any additional fee due to delay by those phase-I class of companies (excluding exempted class) whose balance sheet date for FY 2010-11 was on or after 31.03.2011, has been extended up to 31.12.2011 or within 60 days of their due date of filing, whichever is later.

### ANNUAL SYSTEM AUDIT [www.sebi.gov.in]

The SEBI has issued Circular No. CIR/MRD/DMS/13/2011 dtd. 29.11.2011 stating and recalling that keeping in view that the rapid technological developments in the securities markets does not overshadow the risks that these innovations pose to the efficiency and integrity of markets, it had earlier mandated that exchanges shall conduct an annual system audit by a reputed independent auditor and that a similar framework was also prescribed for depositories. Now, based on discussions with the stock exchanges and the depositories, and recommendations of the Technical Advisory Committee (TAC), the present system audit framework has been reviewed encompassing the system audit process, auditor selection norms, terms of reference (TOR) and audit report guidelines. Now, the annual system audit would be conducted as per the System Audit Framework enclosed to this circular. The systems audit reports and compliance status should be placed before the governing board of the stock exchanges / depositories and the system audit report along with comments of stock exchanges / depositories should be communicated to SEBI. Further, along with the audit report, the stock exchanges / depositories are advised to submit a declaration from the MD / CEO certifying the security and integrity of their IT Systems. In case the exchanges / depositories have commenced their annual system audit, they may follow the existing annual system audit framework and the exchanges / depositories who are yet to commence annual system audit would carry out their annual system audit as per the framework given in this circular.

### INTRODUCTION OF NEW CATEGORY OF NBFC-MFIs [www.rbi.gov.in]

The RBI has issued Notification No. DNBS.CC.PD.No. 250/03.10.01/2011-12 dtd. 02.12.2011 whereby based on recommendations of the YH Malegam Committee which was constituted to study issues and concerns in the Micro Finance

Institutions (MFI) sector and hence a new category of NBFCs are created 'Non Banking Financial Company-Micro Finance Institutions' (NBFC-MFIs). Consequently there would be seven categories of NBFCs and which are, (i) Asset Finance Company (AFC), (ii) Investment Company (IC), (iii) Loan Company (LC), (iv) Infrastructure Finance Company (IFC), (v) Core Investment Company (CIC), (vi) Infrastructure Debt Fund – Non-Banking Financial Company (IDF-NBFC), and, (vii) Non-Banking Financial Company - Micro Finance Institution (NBFC-MFI). One can refer to this Notification which contains the regulatory framework for NBFC-MFIs, and to this notification, the amending notifications amending the Non-Banking Financial (Non-Deposit Accepting or Holding) Companies Prudential Norms (Reserve Bank) Directions, 2007 and amending the Non-Banking Financial Companies Auditor's Report (Reserve Bank) Directions, 2008 are enclosed.

## **SEBI (KYC (KNOW YOUR CLIENT) REGISTRATION AGENCY) REGULATIONS, 2011** [[www.sebi.gov.in](http://www.sebi.gov.in)]

The SEBI has issued Notification No. LAD-NRO/GN/2011-12/29/36772 dtd. 02.12.2011 notifying the above Regulations which has a mechanism for centralization of the KYC records in the securities market. Under the regulations it is provided that an intermediary shall perform the initial KYC of its clients and upload the details on the system of the KRA. When the client approaches another intermediary, the intermediary can verify and download the client's details from the system of the KRA. As a result, once the client has done KYC Registration Agency (KYC) with a SEBI registered intermediary, he need not undergo the same process again with another intermediary. One may refer to the above citation for further details and the regulations.

## **NOTIFICATION OF COST ACCOUNTING RECORDS RULES** [[www.mca.gov.in](http://www.mca.gov.in)]

The MCA has issued six Notifications Nos. G.S.R. 869(E) to 874(E) all dtd. 07.12.2011 notifying the (a) Cost Accounting Records (Electricity Industry) Rules, 2011, (b) Cost Accounting Records (Fertilizer Industry) Rules, 2011, (c) Cost Accounting Records (Sugar Industry) Rules, 2011, (d) Cost Accounting Records (Petroleum Industry) Rules, 2011, (e) Cost Accounting Records (Telecommunication Industry) Rules, 2011, and, (f) Cost Accounting Records (Pharmaceutical Industry) Rules, 2011.

## **GUIDELINES ON OUTSOURCING OF ACTIVITIES BY INTERMEDIARIES** [[www.sebi.gov.in](http://www.sebi.gov.in)]

The SEBI has issued Circular No. CIR/MIRSD/24/2011 dtd. 15.12.2011 where SEBI has noted that under SEBI Regulations for various intermediaries, it is required that they shall render at all times high standards of service and exercise due diligence and ensure proper care in their operations. It is observed by SEBI that often the intermediaries resort to outsourcing with a view to reduce costs, and at times, for strategic reasons. SEBI has considered the definition of 'outsourcing' as the use of one or more than one third party – either within or outside the group by a registered intermediary to perform the activities associated with services which the intermediary offers. SEBI has provided by this circular the principles for outsourcing, the nature activities that shall not be outsourced, other obligations like reporting to financial intelligence unit (FIU) and need for self assessment of existing outsourcing arrangements. SEBI has provided in the Annexure to the circular the principles for outsourcing for intermediaries.

## **AMENDMENT TO SEBI (DEBENTURE TRUSTEES) REGULATIONS, 1993** [[www.sebi.gov.in](http://www.sebi.gov.in)]

The SEBI has issued Notification No. LAD-NRO/GN/2011-12/30/37715 dated 14.12.2011 amending the Securities and Exchange Board of India (Debenture Trustees) Regulations, 1993 in relation to capital adequacy requirement (CAR) providing for the CAR to be not be less than the net worth of Rs. two crore for the debenture trustees such that a debenture trustee, who was granted a certificate of initial or permanent registration, as the case may be, under the regulations prior to the commencement of this amendment under this notification, it shall raise its net worth to the said minimum within a period of two years from the commencement of this amendment.

## **ALLOTMENT OF DIRECTOR'S IDENTIFICATION NUMBER (DIN) – TIMELINE EXTENDED** [[www.mca.gov.in](http://www.mca.gov.in)]

The MCA has issued General Circular No. 70/2011 dated 15.12.2011 extending the timeline up to 29.02.2012 for filing form DIN-4 by DIN holders for furnishing IT PAN and to update IT PAN details.

## **COMPANY LAW SETTLEMENT SCHEME, 2011 – TIMELINE EXTENDED** [[www.mca.gov.in](http://www.mca.gov.in)]

The MCA has issued General Circular No. 71/2011 dated 15.12.2011 extending the timeline up to 15.01.2012 for the filing of documents under the Company Law Settlement Scheme, 2011. The MCA has also clarified that this Scheme will not be extended beyond 15.01.2012 and that all the terms and conditions of the

previous General Circulars No. 59/2011 dated 05.08.2011 and No. 60/2011 dated 10.08.2011 will remain the same.

## **AMENDMENT TO PREFERENTIAL ALLOTMENT BY UNLISTED PUBLIC COMPANIES REGULATIONS** [[www.mca.gov.in](http://www.mca.gov.in)]

The MCA has issued Notification No. F. 2/21/2011-CL-V dtd. 14.12.2011 amending the Unlisted Public Companies (Preferential Allotment) Rules, 2003 substituting the definition of "preferential allotment" which would now mean allotment of shares or any other instrument convertible into shares including hybrid instruments convertible into shares on preferential basis made pursuant to the provisions of sub-section (1A) of section 81 of the Companies Act, 1956. This would be subject to the fact of the name, father's name, address and occupation of persons to whom such allotment is proposed to be made shall be mentioned in the resolution passed by the members under that sub-section as also that the persons to whom such offer is proposed, shall not be more than forty-nine as per the first proviso to section 67(3) of the Companies Act, 1956. The requirement of special resolution is amended whereby now no issue of shares or any other instruments convertible into shares including hybrids convertible into shares on a preferential basis can be made by a company unless authorised by its articles of association and unless a special resolution passed by the member in a general meeting authorising the Board of Directors to make such issue and that the special resolution shall be acted upon within a period of twelve months. A new rule is introduced relating to invitation and allotment of securities whereby no fresh offer or invitation shall be made unless the allotment with respect to any offer or invitation made earlier have been completed in terms of section 60B(9) of the Companies Act, 1956.

## **REVIEW OF REGULATORY COMPLIANCE, PERIODIC REPORTING AND CONTENTS OF TRUST DEED** [[www.sebi.gov.in](http://www.sebi.gov.in)]

The SEBI has issued Circular No. CIR/MIRSD/25/2011 dtd. 19.12.2011 providing a revised format of reporting for the above purpose and in order to strengthen the monitoring mechanism through periodic reporting. The revised format as given in the Annexure to the circular includes the status of regulatory compliance and investor grievances redressal. The board of directors of Debenture Trustees (DT) shall, henceforth, review the report and record its observations on (i) the deficiencies and non-compliances, and (ii) corrective measures initiated to avoid such instances in future. The circular also speaks about what was observed during inspections that certain clauses are included in the trust deed that limit or extinguish the obligations of DTs in relation to any rights or interests of investors or are in conflict with the provisions of the Regulations. It is clarified that such clauses in the existing or new trust deeds shall not be applicable and shall stand null and void.

## **AMENDMENT TO SCHEDULE XIV – RATES OF DEPRECIATION** [[www.mca.gov.in](http://www.mca.gov.in)]

The MCA has issued Notification No. F:2/6/2008/CL-V dtd. 14.12.2011 amending Schedule XIV under the heading "II PLANT AND MACHINERY", under item (ii) relating to special rates, in sub-item B.7, and replacing with the following entries:

Name of assets	Single Shift	
	W.D.V.	S.L.M.
1	2	3
"7. Mineral oil Concerns Field operations (above ground) Portable boilers, drilling tools, well-head tanks, etc. (NESD)	30 per cent	11.31 per cent
7A. Rigs (NESD)	10 per cent	3.34 per cent

## **PUBLIC ISSUE OF DEBT SECURITIES - PROHIBITION ON PAYMENT OF INCENTIVES** [[www.sebi.gov.in](http://www.sebi.gov.in)]

The SEBI has issued Circular No. CIR./IMD/DF/22/2011 dtd. 26.12.2011 stating that it was gathered from market participants that in public issues of debt securities, some brokers/distributors are passing on part of their brokerage/commission to the final investor(s) for subscription to such public issue of debt. As a result, while on one hand it is giving an unfair advantage/bargaining power to a certain set of investors and distributors, on the other hand it is adding to the cost of issuance for the company. In order to curb such practices, SEBI has now advised that in respect of public issues of debt securities, no person connected with the issue shall offer any incentive, whether direct or indirect, in any manner, whether in cash or kind or services or otherwise to any person for making an application for allotment of specified securities and that it shall not apply to fees or commission for services rendered in relation to the issue.

## **GREEN INITIATIVE IN CORPORATE GOVERNANCE** [[www.mca.gov.in](http://www.mca.gov.in)]

The MCA has issued General Circular No. 72/2011 dtd. 27.12.2011 referring to its earlier circular whereby in respect of shareholders meetings to be held during the financial year 2011-12, video conferencing facility for shareholders was

optional and that thereafter it would be mandatory for all listed companies. That circular also provided that in case of e-voting in general meetings, presently only National Security Depository Ltd. and Central Depository Services (India) Ltd. are authorized as agencies for providing and supervising electronic platforms for electronic voting subject to the condition that they obtain a certificate from Standardization Testing and Quality Certification (STQC) Directorate, Department of Information Technology, Ministry of Communication and IT, Government of India, New Delhi. The above circular also states that the MCA has noticed that the aforesaid mandatory requirement is in variance with the Companies Act, 1956 as also the relevant provisions proposed in the Companies Bill, 2011. On re-examination of the matter, it has accordingly been decided that the mandatory requirement for holding shareholders meetings through video conferencing shall continue to be optional for listed companies for the subsequent years too. It is also clarified that now for e-voting in general meetings, any agency providing electronic platform for e-voting is required to obtain certificate from Standardization Testing and Quality Certification (STQC) Directorate, Department of Information Technology, Ministry of Communication and IT, Government of India, New Delhi and that the MCA shall not authorize any agency for the purpose of providing video conferencing facilities by the corporate sector.

## GUIDELINES ON OUTSOURCING OF ACTIVITIES BY INTERMEDIARIES [www.sebi.gov.in]

The SEBI has issued Circular No. CIR/MIRSD/24/2011 dtd. 15.12.2011 and has noted that in terms of the SEBI Regulations for various intermediaries, it is expedient that intermediaries shall render at all times high standards of service and exercise due diligence and ensure proper care in their operations and that it has been observed that often intermediaries resort to outsourcing with a view to reduce costs, and at times, for strategic reasons. SEBI has now issued guidelines for the purpose based on its earlier concept paper on outsourcing of activities related to services offered by intermediaries. It has listed the activities that shall not be outsourced and clarified that the intermediaries desirous of outsourcing their activities shall not, however, outsource their core business activities and compliance functions. A few examples of core business activities may be execution of orders and monitoring of trading activities of clients in case of stock brokers; dematerialisation of securities in case of depository participants; investment related activities in case of Mutual Funds and Portfolio Managers. Regarding Know Your Client (KYC) requirements, the intermediaries shall comply with the provisions of SEBI {KYC (Know Your Client) Registration Agency} Regulations, 2011 and Guidelines issued thereunder from time to time. There are some other obligations like reporting to Financial Intelligence Unit (FIU) also necessary like the intermediaries shall be responsible for reporting of any suspicious transactions/reports to FIU or any other competent authority in respect of activities carried out by the third parties. Also, in relation to the need for self-assessment of existing outsourcing arrangements, it is clarified that in view of the changing business activities and complexities of various financial products, intermediaries shall conduct a self assessment of their existing outsourcing arrangements within a time bound plan, not later than six months from the date of issuance of this circular and bring them in line with the requirements of the guidelines/principles. One may refer to the above citation for further details and the principles for outsourcing for intermediaries available at the above citation in an Annexure.

## SERVICE TAX (Contributed by CA. Rajiv Luthia)

### SYNOPSIS OF NOTIFICATIONS, CIRCULARS & LETTERS

Central Government vide Notification No.49/2011-ST, Notification No.50/2011-ST & Notification No. 51/2011-ST all dated 30th December, 2011 has deferred the levy of service tax on taxable services provided by Government Railways to any person in relation to transport of goods by rail (Section 65(105)(zzpp)) to 1st April, 2012.

Central Government Vide Notification No. 52/2011-ST dated 30th December, 2011 has superseded Notification No. 17/2009-ST dated 6th July, 2009 w.e.f. 3rd January, 2012. The exporter of goods has option either to apply for refund of Service Tax on the basis of schedule rates prescribed for descriptions of goods exported or to avail refund of Service Tax paid on "Specified Input Services" on the basis of submissions of documents. The conditions and procedure for availing refund of service tax is laid down in the said notification.

CBEC vide Order No. 2/2011-ST dated 16th December, 2011 has specified the documents required to be submitted along with ST-1 application under Rule

4(1) of The Service Tax Rules, 1994 :-

- (a) Copy of PAN Card
- (b) Proof of residence
- (c) Constitution of the applicant
- (d) Power of attorney in respect of authorised person

The said documents are required to be submitted with the service tax department within 15 days from the date of online filing of ST-1 & the time limit of 7 days for issuance of Service Tax registration certificate as prescribed in Rule 4(5) of The Service Tax Rules, 1994 will be applicable from the date of submission of the complete application including above documents.

CBEC vide Order No. 3/2011-ST dated 29th December, 2011 has extended the date of filing of half yearly service tax return for the period April to September, 2011 from 26th December, 2011 to 6th January, 2012.

Central Government vide Circular No.148/17/2011-ST dated 13th December, 2011 clarified on levy of service tax on distributors/sub-distributors of films & exhibitors of movie:

Type of Arrangement Movie exhibited on whose account Service Tax Implication

Principal-to-Principal Basis Movie being exhibited by Theatre Owner or Exhibitor on his account - i.e. the copyrights are temporarily transferred Service Tax under Copyright Service to be provided by Distributor or Sub-Distributor or Area Distributor or Producer etc, as the case may be Movie being exhibited on behalf of Distributor or Sub-Distributor or Area Distributor or Producer etc. - i.e. no copyrights are temporarily transferred Service Tax under Business Support Service / Renting of Immovable Property Service, as the case may be, to be provided by Theatre Owner or Exhibitor

Arrangement under unincorporated partnership/ joint/ collaboration basis Service provided by each of the person i.e. the 'new entity'/ Theatre Owner or Exhibitor / Distributor or Sub-Distributor or Area Distributor or Producer etc. as the case may be, is liable to Service Tax under applicable service head

It is further clarified that the arrangements mentioned in this Circular will apply mutatis mutandis to similar situations across all the services taxable under the Finance Act.

Vide Letter F.No. 137/21/2011-ST dated 15th July, 2011, Central Government had clarified that International Private Leased Circuit (IPLC) charges paid by BPOs/MNCs to services providers situated outside India are liable to service tax under the category of "Business Support Services (Section 65(105)(zzzq))" rather than "Telecommunication Services (Section 65(105)(zzzx))" and service tax is payable under Reverse Charge Mechanism U/s.66A read with Rule 2(1)(d) of the Service Tax Rules, 1994. Central Government vide Letter F.No.137/21/2011-ST dated 19th December, 2011 has now clarified that the view taken vide above said letter was erroneous on the grounds that

- the IPLC is specifically covered by the definition of the telecommunication service (Section 65(109a)(iv).
- As per the said section these services are taxable only when provided by a person who has been granted a licence under the first proviso to section 4(1) of the Indian Telegraph Act, 1985.
- It is only because the foreign telecom service provider cannot constitute a telegraph authority under an Indian law that they remain outside the taxability clause of the telecommunication service.

In nutshell, it is now clarified that the IPLC charges paid to service providers situated outside India are neither liable under the category of "Telecommunication Services (Section 65(105)(zzzx))" nor under the category of "Business Support Services (Section 65(105)(zzzq))"

## CENTRAL EXCISE (Contributed by CA. Jayesh Gogri)

### Non Tariff Notifications

**Exempts Central Excise duty on pile liners fabricated at the site of construction for use at the marine site retrospectively w.e.f. 1.4.2005 to 17.11.2011**

The benefit under this notification to exempt the goods falling under chapter '7305' during the period 1.4.2005 to 17.11.2011 shall be available only if the assessee reverses the input credit taken, if any, for the purpose of fabrication at the site of construction for use at the marine site.

(Notification No. 23/2011-CE (N.T.) dated 1st December, 2011)

**Extending of rebate of duty paid on export of excisable goods to Nepal**

With effect from 1st March, 2012 the rebate of whole of the duty paid on the export of excisable goods shall be available to any country except to Bhutan.

As a result of this Nepal has been brought at par with all other countries.

(Notification No. 24/2011–CE dated 5th December, 2011)

### The notification granting the rebate on goods exported to Nepal Rescinded

In view of the notification 24/2011 withdrawing the rebate granted under 19/2004 the Notification No. 20/2011 stands invalid and hence rescinded.

This notification shall be in force from 1st March, 2012.

(Notification No. 25/2011–CE dated 5th December, 2011)

### Extension of benefits and other mandatory conditions to Nepal

As Nepal has now been brought at par with all other countries the procedure and conditions for export of all excisable goods without the payment of duty shall be applicable for exports to Nepal also. Similarly, conditions for procurement of the goods without payment of duty for the purpose of USE in the manufacture of such goods will extend to Nepal.s

(Summary of Notification No. 26/2011, 27/2011 and 28/2011- CE, dated 5th December, 2011)

### Amends the Notification No. 45/2001 Central Excise

The conditions to be followed in order to export goods to Nepal and Bhutan under Bond shall now be mandatory for exports to Bhutan only.

Further, paragraph specifying the conditions to be followed for exports of capital goods to Nepal is no longer valid and hence has been omitted.

(Notification No. 29/2011 –CE dated 5th December, 2011)

## GUJARAT VAT (Contributed by CA. Kishor R. Gheewala)

### Amendments in Registration Provisions

Vide Notification Dt. 1st December, 2011, Gujarat Vat Rules have been amended to provide, Inter Alia, the following.

- a) Provisional Registration No. is to be issued within 3 days of application, if accompanied by specified documents and evidences.
- b) Fixing the Security amount to be ₹ 10,000/- each for GVAT & CST. The security amount is to be paid in treasury, instead of N.S.C. / K.V.P. etc.
- c) Permanent Registration Certificate is to be issued after post verification but in any case, within 30 days of the application.

Vide Public Circular No. GUJKA/VAT-5/2011-2012/ 126-107, Dt. 01/12/2011, amendments regarding provisional registration are explained in detail.

Vide Public Circular No. VAVEK/VVT-1/2011-2012/OTW 2711/1256, Dt.01/12/2011, amendments in provisions relating to Tatkal Registration are explained in detail

## FEMA (Contributed by CA. Manoj Shah, CA. Hinesh Doshi)

### Cabinet Decision on the FDI in Retail

#### Press Release dated November 25, 2011

Presently, FDI in Multi Brand Retail Trading (MBRT) is prohibited. FDI in the Single Brand Retail Trading (SBRT) sector, is permitted, up to 51%, under the Government/FIPB route, subject to the certain conditions.

#### Cabinet has made following decision in respect of FDI in retail:

To permit FDI in MBRT in all products, in a calibrated manner, subject to the following conditions:

- (i) FDI in MBRT may be permitted up to 51%, with Government approval;
- (ii) Fresh agricultural produce, including fruits, vegetables, flowers, grains, pulses, fresh poultry, fishery and meat products, may be unbranded.
- (iii) Minimum amount to be brought in, as FDI, by the foreign investor, would be US \$ 100 million.
- (iv) At least 50% of total FDI brought in shall be invested in 'backend infrastructure', where 'back-end infrastructure' will include capital expenditure on all activities, excluding that on front-end units and expenditure on land cost and rentals, if any.
- (v) At least 30% of the procurement of manufactured/processed products shall be sourced from 'small industries' which have a total investment in plant & machinery not exceeding US \$ 1.00 million.
- (vi) Self-certification by the company, to ensure compliance of the condition as above, which could be cross-checked as and when required. Accordingly, the investors to maintain accounts, duly certified by statutory auditors.

(vii) Retail sales locations may be set up only in cities with a population of more than 10 lakhs as per 2011 Census. Only 53 cities qualify for FDI in multi-brand retail. For the rest of the country, current policy regime will apply. In the current regime, 100% FDI is allowed upto wholesale cash and carry point from which franchise/small retailers are able to source quality products for sale to the public at large.

(viii) Government will have the first right to procurement of agricultural products.

To permit 100% FDI in SBRT, subject to the following conditions:

- (i) FDI in single brand retail trading may be permitted up to 100% with Government approval;
- (ii) Products to be sold should be of a 'Single Brand' only;
- (iii) Products should be sold under the same brand internationally i.e. products should be sold under the same brand in one or more countries other than India;
- (iv) 'Single Brand' product-retailing would cover only products which are branded during manufacturing;
- (v) The foreign investor should be the owner of the brand.
- (vi) In respect of proposals involving FDI beyond 51%, 30% sourcing would mandatorily have to be done from SMEs/village and cottage industries artisans and craftsmen.

The condition of 30% sourcing from small scale sector will ensure that our SME sector, including artisans, craftsman, handicraft and cottage industry benefits, especially in sectors like textiles, gems and jewellery, leather and jute. This condition is applicable both for Multi-brand retail in all cases and for single brand retail in cases where foreign equity exceeds 51%.

### Issue of equity shares under the FDI scheme allowed under the Government route A. P. (DIR Series) Circular No.55 dated December 9, 2011

RBI vide A.P. (DIR Series) Circular No. 74 dated June 30, 2011 allowed issue of equity shares/preference shares under the Government route by conversion of import of capital goods / machineries / equipments (including second-hand machineries) and pre-operative / pre-incorporation expenses (including payments of rent, etc.), subject to terms and conditions stated therein. It has now been decided to amend the following conditions of the said Circular.

Ref. Para of A.P. (DIR Series) Circular No. 74 dated June 30, 2011	Earlier condition	Revised condition
Para 3 (I) (d) – w.r.t. Import of capital goods/ machineries / equipments (including second-hand machineries)	All such conversions of import payables for capital goods into FDI should be completed within 180 days from the date of shipment of goods.	Applications complete in all respects, for conversions of import payables for capital goods into FDI being made within 180 days from the date of shipment of goods.
Para 3 (II) (d) – w.r.t. pre-operative/pre incorporation expenses (including payments of rent, etc.)	The capitalization should be completed within the stipulated period of 180 days permitted for retention of advance against equity under the extant FDI policy.	The applications, complete in all respects, for capitalisation being made within the period of 180 days from the date of incorporation of the company.

### Foreign Investment in Pharmaceuticals Sector Amendment to the Foreign Direct Investment Scheme

#### A. P. (DIR Series) Circular No.56 dated December 9, 2011

The Government of India has vide Press Note 3 of 2011 dated November 8, 2011, reviewed and amended the policy for pharmaceuticals sector. Accordingly, the RBI has issued a circular to give effect to the following amendments made in Consolidated FDI Policy Circular 2 of 2011 dated September 30, 2011:

- (i) FDI, up to 100% would continue to be permitted for green field investments in the pharmaceuticals sector, under the automatic route.
- (ii) FDI, up to 100%, would be permitted for brownfield investment (i.e. investments in existing companies), in the pharmaceutical sector, under the Government approval route.

## Foreign Exchange (Compounding Proceedings) Rules, 2000 Compounding of Contraventions under Foreign Exchange Management Act (FEMA), 1999

Press Release: 2011-2012/927 and A. P. (DIR Series) Circular No.57 dated December 13, 2011

The RBI has delegated powers to compound the following contraventions of FEMA to its Regional Offices (ROs):

Contraventions	ROs	Amount of Contravention
Contraventions under paragraphs 9 (1) (A) and 9 (1) (B) of Schedule I to FEMA 20/2000-RB dated May 3, 2000 relating to delay in reporting of inward remittance; and delay in filing of form FC-GPR after allotment of shares respectively	Bhopal, Bhubaneswar, Chandigarh, Guwahati, Jaipur, Jammu, Kanpur, Kochi, Patna and Panaji	Below ₹ 1 crore
Contraventions under paragraphs 8, 9(1)(A), 9(1)(B) of Schedule I to FEMA 20/2000-RB dated May 3, 2000 relating to delay in issue of shares beyond 180 days; delay in reporting of inward remittance and delay in filing of form FC- GPR after allotment of shares respectively	Ahmedabad, Bengaloure, Chennai, Hyderabad, Kolkata, Mumbai and New Delhi	Without any limit

The Compounding Authorities attached to the above ROs of the Foreign Exchange Department have been authorised to compound the above mentioned cases at their level(s) within the financial powers as per the Foreign Exchange (Compounding Proceedings) Rules, 2000. All applications for compounding whether received on the advice of the RO concerned or *suomotu*, relating to the contraventions mentioned above and up to the amount of contravention stated therein, may be submitted by the companies falling under the jurisdiction of the aforesaid ROs directly to the RO concerned, together with the prescribed fee (₹ 5,000/-) and other relevant documents. All other applications may be submitted to the Compounding Authority, Cell for Effective implementation of FEMA (CEFA) at Central Office of RBI, Mumbai.

Further, it has been decided that while applying for compounding of contraventions under FEMA, 1999 the applicant may, along with the compounding application in the prescribed format, also furnish the following documents:

- Details relating to Foreign Direct Investment, External Commercial Borrowings, Overseas Direct Investment and Branch Office / Liaison Office, as applicable, in the prescribed formats as provided in this circular;
- An undertaking that they are not under investigation of any agency such as DOE, CBI, etc.;
- A copy of the Memorandum of Association;
- Latest audited balance sheet

The aforesaid circular is available on RBI website at:

<http://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=6870&Mode=0>

## Risk Management and Inter Bank Dealings

Press Release: 2011-2012/945 and A. P. (DIR Series) Circular No. 58 dated December 15, 2011

Ref.: Foreign Exchange Management (Foreign Exchange Derivatives Contracts) Regulations, 2000

Keeping in view the developments in the foreign exchange market, it has been decided to implement the following measures with immediate effect until further review.

Facility for allowing forward contracts, involving the Rupee as one of the currencies, booked by residents to hedge current account transactions regardless of the tenor and to hedge capital account transactions falling due within one year, to be cancelled and rebooked has been withdrawn. Now, Forward contracts booked by residents irrespective of the type and tenor of the underlying exposure, once cancelled, cannot be rebooked.

Under probable exposures based on past performance residents were allowed to hedge currency risk on the basis of a declaration of an exposure and based on past performance up to the average of the previous 3 financial years' (April to March) actual import/export turnover or the previous year's actual import/export turnover, whichever is higher. Further, contracts booked in excess of 75% of the eligible limit were to be on deliverable basis and could not be cancelled.

It has now been decided that

- For importers availing of the above past performance facility, the facility stands reduced to 25% of the limit as computed above. In case of importers who have already utilised in excess of the revised / reduced limit, no further bookings may be allowed under this facility.
- All forward contracts booked under this facility by both exporters and importers hence forth will be on fully deliverable basis. In case of cancellations, exchange gain, if any, should not be passed on to the customer.

All cash/tom/spot transactions by the Authorised Dealers on behalf of clients will be undertaken for actual remittances / delivery only and cannot be cancelled/cash settled.

Foreign Institutional Investors (FIIs) are currently allowed to hedge currency risk on the market value of entire investment in equity and/or debt in India as on a particular date. The contracts once cancelled cannot be rebooked except to the extent of 10% of the market value of the portfolio as at the beginning of the financial year. The forward contracts may, however, be rolled over on or before maturity.

Henceforth forward contracts booked by the FIIs, once cancelled, cannot be rebooked. The forward contracts may, however, be rolled over on or before maturity.

The Board of Directors of Authorised Dealers were allowed to fix suitable limits for various Treasury functions with net overnight open exchange position and aggregate gap limits required to be approved by the RBI.

It has now been decided that

- Net Overnight Open Position Limit (NOOPL) of Authorised Dealers would be reduced across the board. Revised limits in respect of individual banks are being advised to the Authorised Dealers separately.
- Intra-day open position / daylight limit of Authorised Dealers should not exceed the existing NOOPL approved by the RBI.
- The above arrangement would be reviewed on an ongoing basis keeping in view the evolving market conditions.

## External Commercial Borrowings (ECB) for Micro Finance Institutions (MFIs) and Non-Government Organisations (NGOs) engaged in micro finance activities under Automatic Route

Press Release: 2011-2012/965 and A. P. (DIR Series) Circular No. 59 dated December 19, 2011

The existing ECB policy has been reviewed in consultation with the Government of India and it has been decided that henceforth MFIs may be permitted to raise ECB up to USD 10 million or equivalent during a financial year for permitted end-uses, under the Automatic Route. The detailed guidelines on ECB for MFIs with necessary safeguards are contained in the circular.

It has also been decided that NGOs engaged in micro finance activities can avail of ECB up to USD 10 million or equivalent per financial year under the automatic route as against the present limit of USD 5 million or equivalent per financial year. All other conditions remain unchanged.

All other ECB parameters such as minimum average maturity, all-in-cost ceilings, restrictions on issuance of guarantee, choice of security, parking of ECB proceeds, prepayment, refinancing of ECB, reporting arrangements under the Automatic Route should be complied with by MFIs/NGOs availing ECBS. The designated AD has to certify the status of the borrower as eligible and involved in micro finance and ensure at the time of draw down that the forex exposure of the borrower is fully hedged.

These amendments to ECB policy will come into force with immediate effect and the framework with respect to MFIs will be subject to review after one year.

The aforesaid circular is available on RBI website at:

<http://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=6876&Mode=0>

# RECENT JUDGEMENTS

DIRECT TAX  
(Contributed by CA. Paras K. Savla,  
CA. Deepak Tikekar)

## COURT DECISIONS

### s-2(29A), 2(42A) & 54: Date of acquisition in case of DDA flats

Allottee of a flat under self-financing scheme of the DDA gets title to the property on issuance of allotment letter, as clarified vide Circular No. 471, dt. 15th Oct 1986 and, therefore, capital gain arising on sale of flat by the assessee on 6th Jan, 1989 which was allotted to him on 27th Feb, 1982, by issuance of an allotment letter was a long-term capital gain, irrespective of the date of allotment of specific flat number and delivery of possession on 15th May, 1986; assessee was entitled to exemption u/s. 54 on reinvestment of sale proceeds in another house. *Vinod Kumar Jain vs. Commissioner of Income Tax & ORS.* (2011) 244 CTR (P&H) 346

### s-14A & 36(1)(iii): Source of funds for investment in tax free income

Assessee having not produced any material showing the source from which shares were acquired by it, though in earlier year, proportionate interest amount payable by assessee is to be disallowed u/s 14A having regard to the investment in shares and total interest-bearing loan. *Dhanuka & Sons vs. Commissioner of Income Tax* (2011) 244 CTR (Cal) 511

### s-23(1)(b): Security deposit & notional rateable value

Where the security deposit is to circumvent real rent, the same shall fall within its ambit as income from house property; in the facts and circumstances, interest @ 9 per cent per annum on security deposit of Rs. 35,00,000 which was received by the assessee from the tenants, would be treated as taxable income of the assessee under the head 'Income from house property'. *Commissioner of Income Tax vs. K. Streetlite Electric Corporation* (2011) 244 CTR (P&H) 647

### s-28(i) & 56: Interest on surplus funds during construction period.

Interest earned by the assessee on FDs was assessable as 'income from other sources' and any set off of the same could not be given as pre-operative expenses, since its bid for power plant had already been approved by the MPSEB and the funds were lying surplus with the assessee and its business activities had not yet commenced. *Commissioner of Income Tax vs. Madhya Bharat Energy Corp. Ltd* (2011) 245 CTR (Del) 35.

### s-28(i), 36(1)(vii) & 37(1): Expenditure relating to business

Assessee was not entitled to claim deduction of amount advanced by it to its sister concern for enabling latter to tender a bid to acquire a plot of land when the earnest money paid by sister concern was forfeited by the authority; at the time when the amount was advanced by the assessee, the sister concern was not in position to allot any space in the proposed multi-storey complex to be constructed by it; also, as the sister concern had purchased certain flats from the assessee in the assessment year preceding the assessment year in question and it was paying rent to the assessee, the picture portrayed that the sister concern did not have the necessary funds at hand to return the money paid by the assessee to it is nebulous. *Pragati Construction Co. vs. Deputy Commissioner of Income tax.* (2011) 244 CTR (Del) 479

### s-32(2), 80 & 139(3): Belated return and carry forward of depreciation

Provisions of sec 80 and sec 139(3) apply to business losses and not to unabsorbed depreciation which is exclusively governed by the provisions of sec 32(2) hence, the tribunal was justified in allowing the carry forward of unabsorbed depreciation though the return of loss was not filed within the time provided in sec 139(1). *Commissioner of Income Tax vs. Govind Nagar Sugar Ltd.* (2011) 244 CTR (Del) 266

### s-36(1)(iii): Investment in subsidiary company is in ordinary course of business

Investment made by the assessee company out of bank overdraft in the shares of its subsidiary company to have control over that company being an integral part of its business, interest paid by the assessee which is attributable to said borrowings is allowable as deduction u/s 36(1)(iii). *Commissioner of Income Tax vs. PHIL Corporation Ltd. & ANR.* (2011) 244 CTR (Bom) 226

### s-37(1): Third party mortgage and business expenditure

Assessee having paid money to the bank in his capacity as surety towards discharge of the loan obtained by its sister concern so as to secure release of its immovable property which was mortgaged with the bank and to avoid breach of the terms of the development agreement whereunder assessee was obliged to convey marketable title to the purchasers of the flats to be built on the said property, said payments is allowable as business expenditure. *Commissioner of Income Tax & ANR. Vs. Rudra Industrial Commercial Corporation* (2011) 244 CTR(Kar) 304

### s-40A(2): Subsidiary company is not a related person

Rates for purchase of goods from the subsidiary were not established to be very much excessive or unreasonable; further, subsidiary company is not a related person of the assessee within the meaning of sub-class(ii) or (iv) of cl.(b) of sec 40A(2); therefore, there was no scope for invoking the provisions of sec 40(a)(2) in the matter of purchase of goods by assessee from its subsidiary company. *Commissioner of Income Tax vs. Dempo & Co. (P) Ltd.* (2011) 244 CTR (Bom) 102

### s-45(2) & 48: Conversion into stock in trade & cost inflation index

Assessee firm having converted its immovable property in 1987-88 into stock-in-trade and developed the same by entering into an agreement with a developer, and the revenue not having treated the said arrangement as a transfer at that stage, capital gain arising on sale of flats and registration of deeds in 1992-93 is to be computed by applying the cost inflation index as applicable to 1992-93 and not that applicable in 1987-88. *Commissioner of Income Tax & ANR. Vs. Rudra Industrial Commercial Corporation* (2011) 244 CTR (Kar) 304

### s-80P(2)(a)(i): Deduction available to Co-operative Bank

In so far as the profits and gains from the business of banking by deposit of surplus funds of the bank is concerned, there cannot be any distinction between SLR reserves and non-SLR reserves and therefore assessee co-operative bank was entitled to deduction u/s 80P(2)(a)(i) in respect of income derived out of the investments made from voluntary reserves. *Commissioner of Income Tax vs. Andhra Pradesh State Co-operative Bank Ltd.* (2011) 244 CTR (AP) 86

### s-80IA(4)(iii); Income Tax Rules, 1962 r.18C: Deduction for infrastructural facilities

What was required to be done by the assessee was to provide for infrastructural facilities before the last date envisaged under the Scheme and thereafter, there was no obligation on its part to ensure that industrial units on such plots must also come into existence and commence their production activities; impugned show cause notice for withdrawal of approval of assessee's Industrial Park is liable to be quashed and CBDT is directed to notify the same. *Ganesh Housing Corporation Ltd. vs. Padam Singh, Under Secretary & ORS.* (2011) 244 CTR (Guj) 194

### s-115C & 115H: Concessional rate of tax in respect of income on reinvested funds

Benefit available to the assessee, being concessional levy of tax u/s 115H in respect of the income derived from the foreign exchange asset would not be available to him on the interest earned on the redeposit of interest along with the original investment out of the funds brought by him from abroad. *Dr. M. Manohar vs. Assistant Commissioner of Income Tax* (2011) 244 CTR (Mad) 642

### s-143(2), 147, Explan 2 & 148: Intimation whether assessment order

Intimation with regard to assessment made u/s. 143(1)(a) is not an assessment; further, there is no requirement of notice u/s. 143(2) in the case of reassessment u/s. 147. *Commissioner of Income Tax vs. Madhya Bharat Energy Corp. Ltd.* (2011) 245 CTR (Del) 35

### s-194H: Discount is in the nature of commission

Franchisee acts on behalf of the assessee for selling start up pack and prepaid recharge coupons to the customers of assessee and all the trappings of liability as agent, of the franchisee towards assessee subsist and therefore discount given to the franchisee was in fact commission, subject to TDS u/s 194H. *Bharti Cellular Ltd. vs. Assistant Commissioner of Income Tax & ANR.* (2011) 244 CTR (Cal) 185

### s-263: Order erroneous and prejudicial to the interests of the revenue

Where the AO did not consider applicability of sec 40A(3) in respect of cash payments and applicability of sec 40(a)(ia) in respect of payments to transport contractors, CIT was justified in taking action u/s. 263. *Raja & Company vs. Commissioner of Income Tax* (2011) 244 CTR (Ker) 654

### s-271(1)(c): Concealment penalty and disclosure of all material facts

Even though the claim of the assessee declaring its income as security deposit under liability was not found to be acceptable in quantum proceedings, however, as it was not a case of concealment, the provisions of sec 271(1)(c) attracting levy of penalty were not applicable, more so when all material facts relevant to the said claim were duly furnished by the assessee before the AO. *Commissioner of Income Tax vs. Mahavir Irrigation (P) Ltd.* (2011) 244 CTR (Del) 596

## TRIBUNAL DECISIONS

### s-32 Peripherals are computers

Printers and UPS fall within the class of computer peripherals and therefore, eligible for depreciation at the rate of 60% *Haworth (India) (P) Ltd. vs. Dy. CIT* (2011) (2011) 140 TTJ 446 (Delhi)

### s-40(a)(ia) Shortfall in TDS not liable for disallowance.

It was a case of short of deduction of tax. Assessing officer disallowed the claim. TDS ought to have been deducted u/s 194I, but TDS was deducted at 194C. As assessee had deducted tax it was not a case of non deduction of tax. If there is a difference in opinion as to which TDS provision would apply assessee may be treated as defaulted u/s 201 but no disallowance can be made u/s 40(a)(ia). *Sudhakar M. Shetty vs. ACIT* (2011) 139 TTJ 687 (Mum) (Trib) 58 DTR 289

### s-45: Amount received on retirement of a partner liable for capital gains.

Assessee received a lump sum payment in consideration for relinquishing his right in partnership and its assets in favour of continuing partners. Partner's capital account was artificially increased by revaluing assets. Tribunal held that there was a transfer of interest of the retiring partner over the assets of the firm giving rise to capital gains. *Singareni Collieries Company Ltd. vs Asst CIT* (2011) 141 TTJ 593 (Hyd) (Trib)

### s-194C Hiring of helicopter covered u/s 194C as transport service.

Assessee paid hire charges for hiring helicopter and aircraft services. TDS was deducted u/s 194C. AO and CIT(A) held that assessee ought to have deducted TDS u/s 194I

The argument of the department that assessee had hired vehicles is not correct. Assessee had availed transport charges from the service provider. Assessee paid charges on the basis of flying hours, refueling charges, cost of landing etc. The crew, fuel, maintenance, operation license was with the service provider. Control over the helicopters was with the service providers and not the assessee. If control over the helicopters is not with the assessee then contract is not for hiring but for transport service. Payment for transport service would be covered u/s 194C.

SKIL Infrastructure Ltd. vs. ITO (TDS)(ITAT Mumbai)

**INTERNATIONAL TAXATION**  
(Contributed by CA. Hinesh Doshi,  
CA. Vishal Gada, CA. Dolly Waghela)

**Sandvik Asia Ltd. v. JCIT (ITA No. 758/PN/99 & CO No. 58/PN/05) (Pune ITAT)**

#### Facts:

The taxpayer entered into a research and know-how agreement with A B Sandvik Coromant, in terms of which the taxpayer was liable to pay Swiss Kroner 3,858,000. The duration of contract was for five years and accordingly the taxpayer paid the amount in installments. The taxpayer deducted tax at source on the entire amount at the time of crediting the same in the books of account.

The taxpayer during the year, claimed deduction of INR 4,289,872 as fourth instalment of research and know-how fee in its return of income which included loss on account of fluctuation of foreign exchange rate of INR 882,234.

The AO disallowed the above loss as it was not pertaining to the year under consideration. The CIT (A) restored the case to the AO to decide and allow the loss if the tax was deducted at source.

While giving effect to the order of CIT (A), the AO held that the tax was deducted on the entire amount as agreed in the agreement, but there was no deduction of tax at source during the year on the amount pertaining to loss on exchange rate fluctuation. Therefore, the AO disallowed the above loss under Section 40(a) (i) of the Act.

#### Issue:

Since tax is already deducted at the time of credit in the books of accounts, whether the taxpayer was required to deduct tax under Section 195 of the Act at the time of remittance due to exchange rate fluctuations?

#### Held:

The Tribunal observed that as per Section 195(1) of the Act, tax should be deducted at source either 'at the time of credit' or 'at the time of payment' of an income, whichever is earlier. Accordingly, Section 195 of the Act does not envisage deduction of tax at both instances i.e. 'at the time of credit of income' as well as 'at the time of payment'.

Further, on account of fluctuation in foreign exchange rate the cost of taxpayer increased, but there was no increase in amount of foreign currency payment to be made to A B Sandvik Coromant.

The Tribunal relying on the decision in the case of CIT v Mac Charles (India) Ltd. [2010] 195 Taxman 296 (Kar) held that since the taxpayer had deducted tax at source on the entire amount as agreed between two parties at the time of crediting the same in the books of accounts, no further deduction was required at the time of payment.

The Tribunal relying on the decisions in the cases of DCIT v. Chandabhoj & Jassobhoj (ITA No. 20/Mum/2010) and DCIT v. S. K. Tekriwal (I.T.A No. 1135/Kol/2010) held that Section 40(a) (i) of the Act can be invoked only in the event of non-deduction of tax, but not in the cases involving short deduction of tax at source. Accordingly, the Tribunal held that foreign exchange loss could not be disallowed by invoking Section 40(a)(i) of the Act

*Perfetti Van Melle Holding B.V. [AAR No 869 of 2010, dated 9 December 2011]*

#### Facts:

The applicant is a non-resident company engaged in the business of manufacture and sale of sugar confectionery and gum. It also provides operational and other support services for the benefit of Perfetti Van Melle Group (Perfetti Group) situated in various countries.

The applicant and PVM Benulux B.V. (Group Company) entered into a Technology and Know-how License Agreement (TTLA) with Perfetti Van Melle India Pvt Ltd (Perfetti India), an Indian arm of the applicant, for providing technical know-how in relation to its manufacturing and sales of brands owned by the licensors.

The applicant also entered into a Support Service Agreement (SSA) with Perfetti India. As per the agreement the applicant needs to incur cost in providing various operational and other support services for the benefit of group companies by drawing its own resources as well as on those available from other group companies or third parties.

Further employees and other personnel engaged by the applicant for providing

support services do not visit India. Accordingly, the applicant proposes to raise invoice towards such cost incurred without charging any markup.

#### Issue:

Whether the payment received by the applicant towards various operational and support services is taxable under the tax treaty?

#### Held:

The AAR in the case of Intertek Testing Service, in re [2008] 307 ITR 418 (AAR) observed that the expression 'technical services' cannot be construed in a narrow sense. The term 'technical' ought not to be confined only to technology relating to engineering, manufacturing or other applied services. Professional services with expertise could be regarded as technical services. In GVK Industries v. ITO [1998] 228 ITR 564 (AP) it was held that advice given by a financial consultancy firm on the modalities of procuring loans shall be regarded as technical and consultancy services.

The SSA clearly indicates that the intention of the parties is to assist Perfetti India by applying the experience of its sister concerns and group companies. Accordingly, the services giving knowledge and experience of the confectionery industry to Perfetti India are technical in nature.

The fact that the services are 'continuous' does not, by itself, imply that they do not enable Perfetti India to independently apply the knowledge/ skill that is provided. Further the word 'enable' is used in the sense that the services should be such that they make Perfetti India able or wiser in the subject matter.

It is evident from the fact that it is Perfetti India who applies the knowledge and skill and the applicant only supports Perfetti India with the knowledge and skill. The services in such a situation are continuous to ensure that the knowledge provided and applied by Perfetti India can be reviewed and continuous for further enabling it to perform its task better.

The phrase 'make available' under Article 12(5) of the tax treaty has reference to technical knowledge, experience, skill, know-how or process and is not affixed and read with the phrase 'consist of the development and transfer of a technical plan or design'. When we read the term 'make available' it would mean that the person for who technical plan or design is being developed would be able to develop such technical plan or design of its own volition.

Even reading without affixing the phrase 'make available', the word 'transfer' occurring in 'development and transfer of technical plan or technical design' cannot be read to mean 'make available' technical plan or design. Such an interpretation would mean sale of technical plan or design to enable the recipient to commercially exploit it or it would mean giving a limited right over the intellectual property in the said plan or design. For the services to fall under 'rendering of technical or consultancy services' mere development and transfer of technical plan or technical design should be sufficient compliance.

The tax treaty is a contract between the two sovereign countries and any diversion from it will need the consent of both the contracting states. Further, a contract with certain country cannot be used to interpret a separate independent contract with another country. However, the protocol attached to the treaty can be applied to find the meaning of an expression used in the treaty, but to refer to a tax treaty to which two countries are not parties, would not be appropriate. Accordingly, no inference/support to the concept 'make available' can be drawn from MOU attached to India-USA tax treaty.

There is no mention of TTLA through which the applicant is getting paid on account of royalty. The applicant does not intend to provide the support services on standalone basis. The SSA has not brought out anything specifically which is not covered in the broad parameters of TTLA. In fact scrutiny of service agreement reveals only details of services mentioned in TTLA. The services are provided in connection with the TTLA through which the consideration in the form of royalty is flowing. Hence, one agreement gives the right to manufacture and the other agreement brings the efficiency in such manufacture.

Accordingly, the services under SSA when read with TTLA, fall within the purview of Article 12(5)(a) of the tax treaty, since such services are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment of royalty described in Article 12(4) of the tax treaty is received.

**CIT v. Wipro Ltd. (ITA No. 2804/2005, dated 15 October 2011) (Kar HC)**

#### Facts:

The taxpayer made a payment for subscription of journal / magazine of a foreign publisher which contained information concerning commercial, industrial or technical knowledge.

The Assessing Officer (AO) held that the payment was royalty within the meaning of Explanation 2 to Section 9(1) (vi) of the Income-tax Act, 1961 (the Act). Alternatively, the said payment was also held as fees for technical services. Further, in both cases the said payment was liable to tax in India in terms of Section 195 read with Section 9(1)(vi) and (vii) of the Act and under the provisions of relevant tax treaty.

In an appeal with the Income-tax Appellate Tribunal, it was held that the payment made by the taxpayer was not royalty as the same was in the nature of subscription

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of journal/magazine and no part of the copyright was transferred. Therefore, the income was not chargeable to tax in India and the taxpayer was not liable to deduct tax under Section 195(1) of the Act.

## Issues:

Whether payment made for a subscription of a database maintained by the foreign publisher is in the nature of royalty?

## Held:

The Tax Department contended that the payment made was in the nature of royalty as there was transfer of copyright to the extent of having access to the database which was a scientific and technical service.

The High Court held that mere fact that the issue in this case was not related to shrink wrapped software/off-the-shelf software and was related to access to database granted online would not make any difference. Therefore, the right to access the database amounted to transfer of right to use the copyright. Further, the payment made by the taxpayer to the foreign publisher was for the license to use the said database and therefore it should be treated as royalty.

The High Court relied on its own recent decision in the case of CIT v. Samsung Electronics Co Ltd and others (ITA No 2808/ and others) and held that the payment made was in the nature of royalty.

## SERVICE TAX

(Contributed by CA. A. R. Krishnan, CA. Girish Raman)

### Incidence of service tax

Where the Municipality rented its premises to the tenant, it was held that even where the contract does not provide for payment of service tax, the Municipality can pass on service tax (additionally) to the tenant since there is no prohibition in the service tax law from doing so [Kishore K.S. vs. Cherthala Municipality 2011 (24 STR 538 (Ker.)).]

### Constitutional validity of imposition of service tax on renting of properties by Municipalities

The imposition of service tax on renting of properties by Municipalities is not in violation of article 289 of the Constitution which imposes a fetter on the power of the Union to levy tax on the property of the 'State' or on its income since the expression 'State' in article 289 does not embrace 'municipalities' which are separately defined under article 243P(c) [Kishore K.S. vs. Cherthala Municipality 2011 (24 STR 538 (Ker.)).]

### Banking and other Financial Services

Profit on dealing in foreign exchange is not liable for service tax under the category of Banking and other Financial Services. [State Bank of Bikaner & Jaipur vs. CCE 2011 (24) STR 425 (Tri-Del)].

### Business Auxiliary Services

Where the appellants acted as agents of their principal who was the main Indian agent of a money transfer organisation abroad, for payment of money by foreign remitters to Indian claimants, the Tribunal following the decision in Muthoot Fincorp Ltd. v. CCE 2011 (17) STR 303 (Tri-Bang.) held that the appellant's services are 'exports' within the Export Rules and accordingly they are not liable for payment of service tax [Kerala State Financial Enterprises Ltd. v. CCE 2011 (24) STR 585 (Tri-Bang.)]

The following incomes of the appellant were held not liable for service tax under the category of business auxiliary services:

- (i) Earnings from NTBCL (the owner and constructor of the Delhi – Noida bridge under BOT) as a percentage of toll for – (a) collection of toll from the users of the bridge; (b) managing the bridge by ensuring that the facility is available to the public at all times, would not be liable under clause (iii) viz., 'customer care services on behalf of the client', prior to 10.9.2004 or under cl. (vi) 'provision of service on behalf of the client' or Cl. (vii) 'incidental or auxiliary support services' post 10.9.2004 since the users of the bridge could not be said to be the customers of NTBCL or the appellants. Further, the said services would be more appropriately liable for service tax under the category of 'management, maintenance and repair services' (of immovable property) w.e.f 16.6.2005 and not under business auxiliary services prior to that date.
- (ii) Remuneration earned from M/s. Banas Sands who had right to collect toll from users and sub-contracted to the appellant the work of collection of toll levied by the Municipal Corporation of Delhi, was not liable for service tax since it was exempt under notification no. 13/2004 dated 10.9.2004 as being a service in relation to collection of duties and taxes levied by the Government.

[Intertoll India Consultants (P) Ltd. v. CCE 2011 (24) STR 611 (Tri-Del.).]

Where a Chartered Accountant provided the services to a bank consisting of verification of contact point verification of addresses of residence and offices of its customers, the Tribunal held that such services cannot amount to a service equivalent to promotion or marketing of services provided by the client or evaluation of prospective customers and hence, is not liable for service tax under the category of business auxiliary service [Rakesh Porwal & Associates vs. CCE 2011 (24) STR 408 (Tri-Del)].

Where the appellant who purchased ingots from a supplier did some grinding and

annealing operations to the ingots as they were defective and recovered the costs from the supplier, the Tribunal held that the appellant has not rendered any service to its supplier and hence, the question of assessee being liable to service tax does not arise [Bay Forge Ltd. vs. CCE 2011 (24) STR 434 (Tri-Chennai)].

Discounts or incentives received by an Advertising Agency from print media is not liable for service tax under the business auxiliary services in view of the following:

- (i) Since discounts/incentives are received by the assessee for providing advertising agency services and was held as not be liable to service tax under the category of advertising agency services by the Tribunal in
  - a) Kerala Publicity Bureau [2008(9) STR 101 (Tri-Bang)];
  - b) Euro RSCG Advertising Ltd. [2008 (7) STR 277 (Tri-Bang);
  - c) Marketing Consultants & Agencies Ltd. [2006 (4) STR 136 (Tri-Bang)];the same cannot be considered for the purpose of taxability under the category of business auxiliary services; and
- (ii) the amounts are discounts and incentives and are not the charges for services [P. Gautam & Co. vs. CST 2011 (24) STR 447 (Tri-Ahmd)].

### Clearing and Forwarding services

Where the assessee was involved only in canvassing of orders for his principal without any involvement in material handling, it was held that the assessee is not liable for service tax under the category of clearing and forwarding agent's services [CCE v. Risansi Industries Ltd. 2011 (24) STR 575 (Tri-Del.)]

### Commissioning and Installation services

Civil construction services necessary for the commissioning of petrol pump (without actually installing/commissioning the petrol pumps) would not be liable for service tax under the category of "Commissioning and Installation services" [Subhash Khandelwal & Sons vs. CCE 2011 (24) STR 461 (Tri-Del)].

### Maintenance and repair services

Where the contract required the assessee to – (i) transport faulty transformers; and (ii) repair them, each for a distinct price, the Tribunal affirmed the decision of the CCE(A) holding that there were two distinct services and the value of transportation of faulty transformers would not be liable for service tax under the category of maintenance and repair services [CCE vs. Technical Associates 2011 (24) STR 567 (Tri-Del.)].

### Management Consultancy service

Where the main object of the appellant's activity was to find investment proposal/to explore possibility of investment involving fund allocation, the Tribunal held that the appellant was not providing the service of management consultancy [Punjab Venture Capital Ltd. vs. CCE 2011 (24) STR 410 (Tri-Del)].

### Pandal and shamiana Service

Section 65(77a) defines a "Pandal and Shamiana" as a place specially prepared for organizing an official, social or business function and the Explanation provides that a social function includes marriage. The High court dismissed the writ petition for considering the Explanation to section 65(77a) as unconstitutional on the contention that Hindu marriage is sacred institution and not a social function in view of the following:

- (i) When a "pandal or shamiana" is used for marriage, it earns the status of social function as service component is involved.
- (ii) The statute itself postulates that marriage is to be regarded as a social function and full effect has to be given to the same.

[All India Tent Dealers Welfare Organisation vs. UoI 2011(24) STR 385 (Del)].

### Telecommunication service

Leased lines capable of providing voice communication are covered under the "telephone service" even prior to 16.07.2001. However, leased lines capable of providing only data communication are covered under 'Leased circuit Services' only from 16.07.2001 and cannot be brought under "telephone service" prior to 16.07.2001 [BSNL vs. CCE 2011 (24) STR 435 (Tri-Del)].

### Valuation

Where the appellant providing Commercial Training and Coaching services recovered the cost of books purchased from another company and supplied to the students in addition to the coaching fee, the Tribunal held that the cost of such books is excludible from the taxable value on the basis of Notification No. 12/2003-ST dated 20th June, 2003 which seeks to exempt value of goods/material sold during the course of provision of taxable service. The Tribunal also held that the exemption cannot be restricted only to 'standard textbooks' as was clarified by CBEC in Circular no. 59/8/2003 dated 20.06.2003 since the notification has not used expression "standard textbooks" [Pinnacle vs. CCE 2011 (24) STR 453 (Tri-Del)].

### Demand - limitation

Where the appellant had disclosed the amount of credit in its service tax returns and the adjudicating authority also had dropped the imposition of penalty holding no

mens rea, the extended period of limitation cannot be invoked merely on the ground that he did not disclose the nature of input services since the returns did not contain columns requiring the assessee to do so [CCE v. Medicaps Ltd. 2011 (24) STR 572 (Tri-Del.)].

Where the appellant surrendered his certificate of registration on 19.6.05 on the ground that his turnover was less than the threshold limit and hence exempt, a show cause notice dated 30.4.2008 demanding service tax for the period 10.9.04 – 31.1.08 was held to be barred by limitation since on surrender, the onus was on the department to investigate the cause for surrender within a year of surrender and a surrender of certificate of registration cannot be considered as for evading payment of service tax [Amalner Co-operative Bank Ltd. vs. CCE 2011 (24) STR 618 (Tri-Mum.)].

Where on facts, the assessee, a public sector undertaking, failed to show their bonafide, the Tribunal held that the contention of the assessee that it being a public sector unit and hence cannot be attributed any malafides is not acceptable and accordingly, the extended period of limitation is invocable [BSNL vs. CCE 2011 (24) STR 435 (Tri-Del.)].

Where there were doubts about taxability of certain activities undertaken by the appellants and there was a Board Circular clarifying the doubts, non-payments of tax (for a period prior to the Board Circular) could not be held to be with an intent to evade tax and mere failure to approach the department for a clarification does not give a ground to invoke the extended period of limitation. [Aadishwar Motors Pvt Ltd v. CST, 2011 (24) STR 81]

Where on facts the Tribunal found that the appellant bona fide believed that the repairs carried by them for their client was under a 'rate contract' and hence not liable for service tax under the category of 'maintenance or repair services' for the period 1.7.03 – 31.3.2005 which was also the initial stage of the levy, the Tribunal held that the extended period of limitation is not invocable [Mitul Engineering Services v. CCE 2011 (24) STR 323 (Tri-Del.)].

#### Show cause notice

Where the show cause notice and the O-I-O did not quantify and reason out why each of the several distinct activities of the appellant were liable for service tax under the proposed categories, the Tribunal set aside the demand observing that a "show cause notice is basic foundation of proceedings which may give rise to different consequences of law. Composite show cause notice issued left the matter in dark." [O.P.Khinchiv. CCE 2011 (24) STR 579 (Tri-Del.)].

Where the show cause notice did not show how a 'carrier' without seats could be considered as a 'cab' or for what purpose – transportation of goods or passengers – were the vehicles used, the Tribunal set aside the demand observing that an ill founded show cause notice not giving rise to a specific charge neatly is fatal to adjudication [CCE vs. Shemco India Transport 2011 (24) STR 409 (Tri-Del.)].

#### Penalty

Where the tax was paid immediately on being pointed out by the Revenue and the appellant also co-operated with the Revenue authorities during the investigation, and the penalty u/s. 78 for suppression was waived by the adjudicating authority exercising his discretion u/s. 80 (reasonable cause ground), it was held by the Tribunal that the discretion exercised by the adjudicating authority cannot be faulted [CST v. Competent Automobiles Co. Ltd. 2011 (24) STR 561 (Tri-Del.)].

Where the assessee suo motu paid tax along with interest and filed returns after payment of late fee, the Tribunal held that no show cause notice can be served on the assessee in terms of section 73(3) and accordingly, no penalty can be imposed u/s 76, 77 and 78 as there is no willful misstatement or suppression of facts on the part of the assessee [Hajarilal Jangid Vs. CC, CE&ST 2011 (24) STR 510 (Tri-Mum.)].

The respondent- exporter did not pay service tax due to confusion prevailing in the law, but had they paid the tax they would have been eligible for refund. The Commissioner (Appeals) held that there was 'reasonable cause' for the failure u/s 80 but instead of waiving the penalty in full he reduced it below the minimum prescribed. On appeal by the department to increase the penalty the Tribunal held that penalty if imposed cannot be reduced below minimum limit but can be altogether waived u/s 80. The CCE(A) though did not give full play to the provisions of S.80 since there was no appeal/cross objection filed by the respondent assessee, the penalty cannot be set aside. However there being a reasonable cause u/s. 80 the enhancement of penalty is not justified. [CCE v. Chillies Export House Ltd, 2011 (24) S.T.R. 40 (Tri-Chennai)]

Where the assessee-manufacturer was under a bonafide belief that in the light of provisions of EXIM Policy, they were not liable to service tax on the commission paid to agents as a recipient of services even post 18.4.06, but paid the tax on being pointed out by the department prior to issue of show cause notice [and the interest before adjudication] penalty was set aside especially since the assessee would have been entitled to take Cenvat credit. [Paradigm International v. CCE, 2011 (24) S.T.R. 69 (Tri-Chennai)]

Though the scope of Sections 76 and 78 are different and it would be incorrect to

conclude that if penalty under section 78 of the Act was imposed penalty under section 76 of the Act could never be imposed, penalty levied under Section 78 could be taken into account while levying penalty u/s 76 of the Act. Hence non imposition of penalty u/s 76 by the appellate authority since penalty equal to service tax had already been imposed u/s 78 of the Act was proper and in consonance with the 2008 amendment u/s 78 that if penalty is payable u/s 78 of the Act, then penalty u/s 76 of the Act would not apply. [CCE v. Pannu Property Dealers, 2011 (24) S.T.R. 173 (P&H)]

Where assessee gave a godown on rent but the department sought to allege that they provided storage and warehousing services and accordingly sought to demand tax and impose penalties, the Tribunal based on the fact that the Department itself treated the assessee's services as renting of immovable property for the subsequent period i.e from 1.10.2007, and not as storage and warehousing services held that the assessee cannot be treated as providing storage & warehousing services and accordingly the penalties were set aside. [ CCE, Ludhiana v. Gill Godown 2011(24) S.T.R. 226 (Tri-Del)]

Section 73(3) provides that no notice could be served on the assessee if tax alongwith interest has been paid before the issue of SCN and there was no willful statement or suppression of facts on the part of the assessee. Thus, where the assessee suo motu discharged their service tax liability alongwith interest and also filed a return after payment of late fee much before the issue of the SCN, penalties u/s. 76, 77 and 78 were set aside based on section 73(3). [Saraswati Engineering v. CST, 2011(24) S.T.R. 298 (Tri-Mumbai)]

Where the appellants a proprietorship concern providing cargo handling service bona fide believed that there were not liable to pay service (being an individual service provider) based on Circular No. B-11/1/2002-TRU dated 1.8.2002 the Tribunal waived the penalty imposed under Section 75A, 76, 77 and 78. [Vicky Enterprises v. CCE, 2011(24) S.T.R. 304 (Tri-Del.)].

Where on facts the Tribunal found that the appellant bona fide believed that the repairs carried by them for their client was under a 'rate contract' and hence not liable for service tax under the category of 'maintenance or repair services' for the period 1.7.03 – 31.3.2005 which was also the initial stage of the levy, the Tribunal set aside the imposition of penalties. [Mitul Engineering Services v. CCE 2011 (24) STR 323 (Tri-Del.)].

Where the appellant a sole proprietor bona fide believed based on the advice of his clients that he was not liable for service tax on the rent-a-cab services provided and paid almost 90% of the tax on being pointed out before the issue of SCN and was also ready to pay the balance amount, the Tribunal set aside the penalty u/ss. 76, 77 & 78 there being a 'reasonable cause' u/s. 80 [K. Prabhakar Reddy v. CCCE 2011 (24) STR 330 (Tri-Bang.)].

#### Refunds

Notification no. 41/2007 requires a written agreement between the buyer and the exporter for testing and analysis of the goods as condition to the grant of refund of tax paid by the exporter on the technical testing and analysis services. It was held by the Tribunal that even in the absence of such an agreement, a term in the letter of credit opened by the exporter with the Bank requiring a technical testing report would meet the condition as a liberal view of the refund notification needs to be taken in the light of the principle that taxes cannot be exported [Texport Industries P. Ltd. v. CST 2011 (24) STR 553 (Tri-Mum.)].

Where tax was paid on overseas agent's commission in December 2009, after the amendment in notification no. 41/2007 was made on 1.4.2008 whereby the restriction of allowing the exemption only upto 2% of the FOB value of the goods exported was removed, it was held that refund of the whole amount would be admissible even for the services rendered prior to the amendment [CCE v. ABG Shipyard Ltd. 2011 (24) STR 620 (Tri-Ahmd.)].

Service tax paid on transportation of empty containers from yard to factory (from where they were stuffed and transported to port for export) being "in relation to transport of export of goods" is entitled to refund vide notification no. 41/2007 as amended by notification no. 3/2008 dated 19.12.2008 [Balkrishna Industries Ltd. vs. CCE 2011 (24) STR 433 (Tri-Mum.)].

Where the duty element was not shown separately in the invoice and the assessee also produced a Chartered Accountant's Certificate certifying that the assessee did not collect the duty and the amount of duty was also shown as receivable in balance sheet, the Tribunal held that refund is admissible especially when the revenue could not reject the documents put forth. [CCE v. Shrinathji Dyg 2011(24) S.T.R. 108]

Where although at the time the duty was paid on the directions of the Central Excise Officers, no protest was specifically recorded, yet the payment was considered to be made under protest since-

- The duty was paid on the directions of the preventive officers; and
- The assessee contested the demand when SCN was issued

Hence there was no time bar for refund.

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[*Star Coolers & Condensers Pvt Ltd v. CCE, Nashik, 2011(24) S.T.R. 110*]

The appellant reversed certain credit under directions of the department but since no show cause notice was issued for more than a year, the appellant took back the credit. On appeal, the Tribunal relying on BDH Industries case [2008(229) ELT 364 (Tri-LB)] directed the appellants to reverse the credit with interest and file and refund claim; and also directed the department to sanction the refund within a period of one month from the date of filing the claim since there is no unjust enrichment or limitation [*Automotive Metal Stampings Pvt Ltd v. CCE, 2011 (24) S.T.R. 57*].

Where on facts it was found that the assessee's consideration under the contract was inclusive of service tax and the service tax shown in the invoice was only excess service tax not collected by them for which subsequently credit notes have been issued and it was also substantiated by a Chartered Accountant's certificate and a certificate from the service recipient, it was held that the assessee's claim for refund would not be barred by unjust enrichment [*CCE v. Modest Infrastructure Ltd. 2011 (24) STR 369 (Tri-Ahmd.)*]

## Appeals

An appeal before the CCE(A) by a manufacturer against an adjudication order disallowing input credit on input services used for payment of excise duty is to be preferred u/s. 35 of the Central Excise Act, within a period of 2 months and not u/s. 85 of the Finance Act, 1994 within a period of 3 months from the date of receipt of the order and an appeal filed beyond the said period of 2 months was held to be time barred [*Hi Tech Arai Ltd. vs. CCE & ST 2011 (24) STR 577 (Tri-Chennai)*].

Appeal against an order of the Tribunal holding service tax not recoverable based on the income shown in the income tax returns being a question relating to valuation, is

maintainable only before the Supreme Court and not the High Court. [*CST v. ALP Management Consultants P. Ltd. 2011 (24) STR 287 (Kar.)*]

## Appeal – New ground

In the present case, the assessee was issued a show cause notice demanding service tax on its activities under the category of 'site formation and clearance, excavation, earth moving and demolition services'. The adjudicating authority dropped the proceedings since the assessee's activities were in the nature of 'mining services' which came within the ambit of service tax only w. e. f. 1.6.2007. Revenue filed an appeal against the order of adjudicating authority seeking to tax the assessee's activities under the category of 'cargo handling services'. The Tribunal held that demanding service tax on a new ground not mentioned in the SCN at the appellate stage is not permissible [*CCE vs. Minerals Management Service (I) Pvt. Ltd. (2011) 24 STR 91 (Tri-Kol)*]

## Rectification of order by Tribunal

The Tribunal held that in the absence of any express statutory provision for filing application for rectification in orders in service tax appeals disposed of by the Tribunal, such an application for rectification of Tribunal order cannot be made. [*CCE vs. Fairline Worldwide Express 2011 (24) STR 411 (Tri-Chennai)*].

## Exemption

Where the appellant claimed the benefit of an exemption at the time of filing a reply to the SCN and not prior to that, the Tribunal held that if the exemption is otherwise available, it cannot be rejected on the sole ground that the same is claimed belatedly. [*CCE v. Suresh C. Nayi, 2011(24) S.T.R.123*]

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