

## Supreme Court refers the issue of depreciation rates in computing MAT to a larger bench

The taxpayer was liable to minimum alternate tax ("MAT") on its book profits under section 115J of the Income-tax Act, 1956 ("the Act"). In computing the book profits, it reduced depreciation calculated at the rates prescribed in the Income-tax Rules, 1962 ("the Rules"). The Revenue re-computed the book profits by allowing depreciation using rates prescribed in Schedule XIV to the Companies Act, 1956 ("Co Act") which were lower than the rates prescribed in the Rules. The taxpayer contended that a private limited company was not bound to follow the depreciation rates prescribed under the Co Act. In appeal before the Supreme Court, the taxpayer relied on the Supreme Court ruling in the case of Malayala Manorama and argued that the Revenue cannot alter the audited financial statements prepared in accordance with Schedule VI of the Co Act. However, the Supreme Court observed that section 115J of the Act referred only to Parts II and III of Schedule XIV to Companies Act and does not make a distinction between a private company and other companies. Accordingly, it concluded that the whether Parts II and III of schedule XIV would apply to a private company cannot be questioned. The Court noted that if its earlier ruling in Malayala Manorama were to be accepted, the very purpose of enacting section 115J of the Act would be defeated. Accordingly, the Supreme Court referred the ruling in Malayala Manorama to a larger bench for reconsideration.

### ***CIT vs Dynamic Orthopedics Pvt Ltd vs CIT (2010 TIOL 12)***

#### DIRECT TAX

#### Supreme Court decision

*Charges for roll-over of forward contracts relating to purchase of assets should be capitalized under section 43A.*

The taxpayer had a foreign currency loan for expansion of its existing business. It entered into forward contracts with banks for the loan. After payment of each installment, it rolled over the forward cover for the balance loan amount till the next installment. It claimed the "roll over premium charges" paid as a revenue expenditure. The Revenue rejected this claim and treated it as capital expenditure as it related to purchase of machinery. On appeal to the Supreme Court, the taxpayer contended that the rollover charges represents the interest payable to the

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#### Upcoming Events

- [Transfer Pricing Documentation and Dispute Resolution: Making or Breaking the Corporate Tax](#)
- [Workshop on 'Successful EPC Contracting in India – Addressing Fiscal and Legal Challenges', May 13-15, 2010, New Delhi, India](#)

#### Awards & Recognitions

- [BMR ranked Tier 1 Tax Transactional Firm, International Tax Review's online poll, 2010](#)
- [BMR is Transfer Pricing Firm of the Year and wins India Case of the Year award, International Tax Review Asia Awards, 2009](#)
- [BMR Advisors ranked second most active transaction advisor \(Private Equity\) in 2009, Venture Intelligence League Table](#)

bank for its investment in holding the foreign currency on account of the taxpayer for the period of the term loan. Further, it argued that section 43A of the Act applied only when there was an increase or reduction in liability, consequent to a change in foreign exchange rate and it would not apply to roll over charges. The Supreme Court observed that under section 43A of the Act, any gain or loss on the forward contract had to be taken into account and held that roll over charges should also be taken into account. It rejected the contention that the roll-over charges were not related to the fluctuation in foreign currency. It noted that the notes to accounts of the taxpayer's financials indicated 'adverse' fluctuations in foreign currency rates in respect of loans for assets acquired, which itself presupposed increase in liability. Accordingly, it held that the roll over charges had to be capitalised as per section 43A of the Act.

#### **ACIT vs Elecon Engineering Co Ltd (2010 TIOL 10)**

#### High Court decisions

##### *Payment for securing right of title sponsorship for sports event is not taxable as royalty*

The taxpayer entered into a title sponsorship agreement with a non resident for an international cricket tournament. Under the agreement, the non resident agreed to share the sponsorship benefits with the taxpayer. The title sponsorship package included the title of the tournament referring to the taxpayer's name and logo of the taxpayer being displayed on cricket field, stumps, score board, players clothing and on the official awards and trophies. The Revenue treated the payments under the agreement as royalty as per the India Canada Tax Treaty. On appeal, the Tribunal considered the terms of agreement and held that the payment was not towards acquisition of copyright or the right to use any copyright and held that the payment cannot be treated as 'royalty'. Before the High Court, the Revenue contended that 'royalty' under the Tax Treaty was widely defined and included payment of rentals. However, the High Court held that payment was towards right of title sponsorship. It noted that there was no flow of copyright or right to use copyright from the non-resident to the resident payer. It held that the Tax Treaty refers to "any copyright" and not to "any right". Accordingly, it held that the payment cannot be treated as royalty.

#### **DIT vs Sahara India Financial Corporation Ltd (Delhi) (Unreported)**

##### *Loans to subsidiary written off as irrecoverable can be treated as bad debts*

The taxpayer was carrying on the business of financing and had advanced certain sums to its subsidiary apart from being a guarantor to bank loans of the subsidiary. When the financial position of the subsidiary became weak, the taxpayer advanced further sums and stopped charging interest on the monies advanced. Subsequently, the taxpayer sold the shares of its subsidiary to a third party at a loss. As substantial portion of the interest free loan given subsequently became irrecoverable, the taxpayer wrote it off as a bad debt. The Revenue held that the subsequent loans given to the subsidiary to tide over financial difficulties without charging interest cannot be treated as loans given in the course of business and disallowed the claim towards bad debts. On appeal, the taxpayer contended that the claim for bad debts cannot be disallowed merely because interest was not charged on the loans. It stated that the additional loans were required to sustain the subsidiary and to get over the liability as a guarantor. The Court held that the loans have been given in the course of the business of the taxpayer. Since the business of the subsidiary company slumped, the loans were required and therefore, the loans were extended

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## Snippet

The Centre has given its no objection for de-notification of 12 Special Economic Zones ("SEZs") including nine IT SEZs in States such as Delhi, Haryana, Tamil Nadu, Andhra Pradesh, Orissa, West Bengal and Gujarat.

Source: [Business Line](#)  
March 10, 2010

## Snippet

based on commercial expediency. The Court noted that the interest income on the loans given to the subsidiary had previously been offered to tax. Accordingly, it held that the bad debts arising due to the writing off of loans to subsidiaries was deductible in computing the income of the taxpayer.

***CIT vs V Ramakrishna and Sons Ltd (2010 TIOL 64) (Madras)***

*Validity of reopening of assessment should be judged based on law as it stood on the date of issue of notice for reopening the assessment*

The taxpayer, an Indian company, filed its return of income with a book loss under section 115JB of the Act. The Revenue reopened the assessment on the basis that the taxpayer should have added back the provision for bad and doubtful debts. The taxpayer challenged the validity of reopening the assessment in a writ before the Bombay High Court. The taxpayer contended that the law, as it stood on date of reopening the assessment did not provide for the book profits to be increased by the provision for diminution in value of assets. It relied on the Supreme Court ruling in HCL Comnet Systems case wherein it was held that provision for bad and doubtful debts is a provision for diminution in the value of an asset i.e. receivables and that there was no provision to add such provisions to book profits. The taxpayer contended that while the law was amended retrospectively to include provision for diminution in the value of assets in the computation of book profits, such amendment was enacted only after reopening of the assessment,. The High Court held that the validity of reopening an assessment has to be judged only with reference to the law as it stood on the date of issuing a notice for reopening the assessment and the subsequent retrospective amendment cannot be regarded as validating the reopening of assessment. It held that on the date of issuing the notice for reopening the assessment, the law did not provide for adding provision for bad and doubtful debts to the book profit and accordingly, the Revenue was not correct in reopening the assessment.

***Rallis India Ltd vs ACIT (2010 TIOL 173) (Bombay)***

Tribunal decisions

*Granting of interest free loans to overseas subsidiary is not consistent with transfer pricing provisions*

The taxpayer extended interest free foreign currency loans to two of its subsidiaries in Bermuda and Hungary. The Transfer Pricing Officer (“TPO”) held that interest free loans to associated enterprises (“AEs”) were not in compliance with the Transfer Pricing (“TP”) provisions. The TPO applied comparable uncontrolled price (“CUP”) method and assessed interest income for the taxpayer on the basis of monthly US dollar LIBOR for the period with a premium of 1.64 percent. On appeal, the taxpayer contended that the loans were extended for long term step down investments in subsidiaries and were in the nature of ‘quasi-equity’. Since the subsidiaries were start-ups, no lender would have lent money and the taxpayer had to extend such loans as a matter of commercial expediency. The intent of providing funds was to earn dividend and not interest. Further the loans were granted after obtaining requisite approval from the Reserve Bank of India (“RBI”). The taxpayer also contended that the Hungarian entity was highly leveraged and interest paid by the entity would not deductible in light of Hungarian thin capitalisation rules. Further the taxpayer contended Transfer Pricing regulations would not apply in the absence of actual income. The Tribunal observed that there was no clause in the agreement which states that the loan is quasi capital. It held that if the taxpayer’s contention that notional income should not be taxed was accepted, then all interest-free loans

The Securities and Exchange Board of India (“SEBI”) shall soon announce guidelines for listing Small and Medium Enterprises (“SME”)s). About four months ago, SEBI announced the draft guidelines for a separate exchange for SMEs. A limit of INR 250 million of paid up capital is expected to be fixed for a company intending to list on the segment and the minimum initial public offer size would be pegged at INR 0.1 million.

Source: [Business Standard](#)  
March 12, 2010

**Snippet**

In line with the recommendations of the derivatives market review committee, SEBI has granted an in principle approval to Stock exchanges for the introduction of physical settlement of equity derivatives. SEBI has also approved introduction of derivatives with five year tenures and those based on volatility indices. Till date the equity derivative transactions were settled in cash.

Source: [Business Standard](#)  
March 13, 2010

**Snippet**

SEBI has mandated the institutional investors to pay 100 percent application money upfront for public issues from May 1, 2010 as against the earlier limit of 10 percent.

Source: [The Economic Times](#)  
March 9, 2010

given to subsidiaries would fall outside the ambit of Transfer Pricing provisions. Further RBI's approval was not sufficient to prove that the transaction was at arm's length price ("ALP"). Accordingly, the Tribunal rejected the contentions of the taxpayer and upheld the Revenue's computation of the arm's length interest rate. The Tribunal also denied the plea of 5 percent adjustment to the ALP stating that the benefit would be available only when there was more than one ALP for the transaction.

***Perot Systems TSI (India) Ltd vs DCIT (2010 TIOL 51) (Delhi Bench)***

*Domestic rates cannot be taken as TP benchmark for lending to overseas subsidiaries*

The taxpayer granted interest-free loans to two of its wholly owned subsidiaries in Canada and Dubai. In its Transfer pricing study, the taxpayer adopted CUP method and justified the interest free loan on the basis that it had sufficient interest free funds. The TPO rejected the claim and computed notional interest at the rate of 14 percent, based on certain domestic borrowings of the taxpayer. The taxpayer contended that the borrowed funds were not utilized to lend monies to its subsidiaries and the loans were given interest free due to commercial expediency. The taxpayer also contended that even if the adjustment was to be sustained, the TPO cannot benchmark the transaction against domestic interest rates. On appeal, the Tribunal observed that the cost incurred by the taxpayer was not a relevant consideration under the CUP method and held that it was irrelevant whether the loans were advanced out of own funds or out of borrowed funds and whether the interest free loan were commercially expedient for the taxpayer or not. However, the Tribunal held that since the transaction was of lending in foreign currencies to its foreign subsidiaries, the comparable transaction should be foreign currency lending between unrelated parties. Since, the taxpayer itself had a foreign currency loan from a bank, it held that the rate of lending by the bank would be an appropriate comparable, irrespective of whether such funds were actually used for lending monies to the subsidiaries. On this basis, the Tribunal directed the TPO to re-compute the ALP considering the rate at which the taxpayer had borrowed in foreign currency from the bank.

***VVF Ltd vs DCIT (2010 TIOL 55) (Mumbai Bench)***

*Royalty paid to parent company on sales made cannot be adjusted by the TPO on the basis that part of such sales became irrecoverable*

The taxpayer was a sole distributor of software products developed by its US parent. It paid royalty to the parent and claimed it to be at arms length under the CUP method. During the Transfer Pricing scrutiny, the TPO observed that the taxpayer had written off significant amounts of its receivables as bad debts. The TPO held that the payment of royalty on sales, which turned out to be bad debts, was not justified. He noted that if the US parent had licensed the products directly to the customers in India, it would have suffered the bad debts. However, in the instant case, the taxpayer was bearing the bad debts and hence, the royalty related to such sales would not be justified. On appeal, the taxpayer contended that the TPO had to determine the ALP only within the framework of the five methods prescribed under the Act and not by adopting any other method. The Tribunal held the manner in which the ALP is to be determined has been prescribed and bad debts written off cannot be factor to determine the arm's length price of any international transaction. It held that the ALP has to be determined only within the five methods prescribed under the Act and the order of the TPO is not in accordance with the provisions of the Act and accordingly directed the Tax Officer to adopt the ALP reported by the taxpayer.

**Snippet**

The Department of Industrial Policy and Promotion ("DIPP") is expected to present a proposal before the Union Cabinet for permitting 100 percent foreign direct investment ("FDI") in broking business. The Finance Ministry has already given its approval to the proposal after consultations with the RBI.

Source: [The Economic Times](#)  
March 3, 2010

**Snippet**

The Indian Government is inclined to allow an increase in FDI limit beyond the existing 26 percent in the Defence sector on a case-to-case basis. The report on 'Indigenisation of Defence Production-Public Private Partnership' prepared by the Parliamentary Standing Committee on Defence has recommended that an increase in FDI limit to 49 percent be considered.

Source: [Business Line](#)  
March 4, 2010

**Snippet**

**CA Computer Associates Pvt Ltd vs DCIT (2010 TIOL 68) (Mumbai Bench)**

*Circulars issued by CBDT would apply for past assessment years, even if it is withdrawn subsequently*

The taxpayer, a German company made offshore supply of equipment to an Indian company and received the consideration outside India. The Revenue followed its approach in the preceding years and concluded that the taxpayer had a Permanent Establishment ("PE") in India and held that the income was liable to tax in India. On appeal, the taxpayer contended that the income cannot be deemed to accrue or arise in India under section 9 of the Act. In this regard, the taxpayer referred to Circular no 23 of 1969 and Circular no 786 of 2000 issued by the Central Board of Direct Taxes ("CBDT"), where it was clarified that non-resident exporters would not be liable to tax on sale of goods from abroad to Indian importers on a principal to principal basis. The Revenue contended that the said circulars cannot be relied upon as they were withdrawn by the CBDT vide its Circular no 7 of 2009. The Tribunal observed that the withdrawal of circular was made on October 22, 2009 with 'immediate effect'. Accordingly, it held that the withdrawal was operative only from the said date and not from prior to that date. In this regard, it relied upon the full bench decision of Kerala High Court in *BM Edwards*, where it was held that circulars which are in operation at the commencement of the relevant assessment year will be binding on the Revenue. Accordingly, it held that the income of taxpayer from offshore supply of equipment was not liable to tax. It further held that since the income was not liable to tax under the Act, the existence of PE under the Double Taxation Avoidance Agreement ("Tax Treaty") was not relevant.

**DDIT vs Siemens Aktiengesellschaft (2010 TIOL 102) (Mumbai Bench)**

Please see BMR [Tax Edge Special](#) on Circular 7 of 2009

*Profits earned from providing human resource services with the use of electronic data is eligible for deduction under section 10A of the Act*

The taxpayer entered into an agreement with its US parent company to provide services of recruitment and training of software professionals. The taxpayer provided the services by correspondence through e-mails. It claimed the receipts from the activities performed as exempt under section 10A of the Act, but the Revenue disallowed it. On appeal, the members of the Tribunal differed in their view and the case was referred to the third member for adjudication. The issue before the third member was the applicability of notification dated September 20, 2009 issued under section 10A of the Act which envisaged that information technology enabled products on "human resource services" would be considered as "computer software" for the purpose of Explanation 2 to section 10A of the Act. The third member observed that the notification issued by CBDT covers the activity undertaken by the taxpayer. Further, since the data pertaining to recruitment and training of personnel was stored in an electronic device and transmitted to the parent company, it can be regarded as customized electronic data within the scope of section 10A of the Act. Since the only condition required to be fulfilled was whether the taxpayer has exported any customized electronic data relating to any of the services specified by the Board, the third member held that the profits earned by the taxpayer from the said activity were eligible for deduction under section 10A.

**ITO vs Accurum India Pvt Ltd (128 TTJ 249) (Chennai) (Third Member)**

*Stamp valuation cannot be adopted for computing capital gains arising on transfer of depreciable assets*

With a view to curb the misuse of Test Marketing License, the DIPP is likely to issue new norms for the companies seeking Test Marketing License in India. As per these norms, companies would be permitted to test market their products for a maximum period of two years. They would have to submit detailed manufacturing and investment plans to the DIPP before they are accorded the permission. They would also have to simultaneously set up manufacturing facilities or seek proper retail licence as the case may be. The progress of their manufacturing plans would have to be reported every 6 months to DIPP.

Source: [The Financial Express](#)  
March 8, 2010

**Snippet**

The RBI plans to amend its rules to preempt Non-Banking Finance Companies ("NBFCs") from misusing the liberal rules governing Limited Liability Partnership firms ("LLP"). Accordingly, NBFCs that want to convert themselves to LLP will have to obtain a no objection certificate from RBI. In addition, SEBI and the Foreign Investment Promotion Board ("FIPB") are also expected to amend existing rules to bring LLPs under their regulatory purview.

Source: [Business Standard](#)  
March 10, 2010

The taxpayer sold its office premises, which formed part of block of assets used for the purpose of business and reported the difference between the sale consideration and written down value of the block of asset as short term capital gain. The registration authorities valued the property ("stamp valuation") at a value higher than the sales consideration for the levy of stamp duty. Since the stamp valuation of the property was not disputed by the taxpayer, the Revenue computed short term capital gain tax adopting such value as the deemed sale consideration under section 50C of the Act. On appeal, the taxpayer contended that the provision of section 50 of the Act specifically deals with computing capital gain on transfer of depreciable assets and that it overrides the provisions of section 50C of the Act. The Tribunal held while section 50 of the Act provides an overriding effect, it also modifies the computation provisions of section 48 and 49 of the Act. Hence, when capital gain arises on sale of depreciable assets, computation provision applicable is as per section 50 of the Act and section 50C of the Act would apply only when computation provisions of section 48 and 49 of the Act apply. Accordingly, it held that the capital gain reported by the taxpayer was correct.

***Panchiram Nahata vs JCIT (127 TTJ 128) (Kolkata Bench)***

Authority for Advance Rulings

*Specific place for storing goods of a non-resident in a warehouse for delivery to Indian customers would be regarded as fixed place PE*

The applicant, a Singapore company engaged in the manufacture of hard disk drives, entered into an agreement with an independent logistics service provider in India for warehousing its goods for delivery to Indian customers. The service provider was responsible for clearing the goods from customs port, storing the goods in bonded warehouse and executing customs bond for customs free clearance of goods. They were also registered with authorities for Value Added Tax ("VAT") and were responsible for paying applicable taxes and filing returns in connection with delivery of goods to Indian manufacturers. The ownership of goods remained with the applicant and the sale proceeds were also received directly by the applicant. Under the contract, the service providers were required to make adequate space available including provision of racks to store the applicant's products. The applicant's agent or contractor had the right to enter the warehouse for physical inventory, inspection, audit and other incidental activities. The service providers had to establish necessary systems to support electronic data interchange and furnish receipt, sale advice and inventory reports to the applicant. The applicant approached the Authority of Advance Ruling ("AAR") to determine whether the warehouse would be treated as a PE for the applicant. The AAR observed that though the warehouses were owned and were in the possession of the logistics providers, a distinct, earmarked and identified space in the warehouse catered to the applicant's business operations in India. Accordingly, it concluded that the earmarked space in the warehouse constituted a fixed place of business where the applicant's business was carried on. It held that mere outsourcing of business operations instead of carrying it through applicant's own employees would not rule out the existence of fixed place PE. The AAR further held that the service providers were independent or not would not be of material relevance once the existence of fixed place PE was established.

***Seagate Singapore International (2010 TIOL 8)***

*Foreign Company rendering design and project consultancy from outside India through subcontractor in India will continue to be liable to tax in India*

The applicant, a German company was engaged by the Government of Tamil Nadu

**Snippet**

The Railway Ministry has sought withdrawal of the levy of service tax on rail freight, as proposed in the Budget 2010-11, on the ground that the move would fuel inflation. The Union Railway Minister is expected to take up the matter with Union Finance Minister. The Railway is estimating impact of the levy and has stated that freight charges could be hiked either by 5 percent or INR 100 per tonne.

Source: [Economic Times](#)  
March 3, 2010

**Snippet**

The Central Government has said that it could consider a lower service tax rate on international and domestic air travel and is in talks with the airlines on the issue. The Budget 2010-11 had proposed a service tax of 10 percent on both domestic and international travel. Further the aviation industry has urged the Government to roll back the service tax levy.

Source: [Times of India](#)  
March 3, 2010

**Snippet**

The Constitutional amendment for the GST has been sent to the State Finance Ministers ("State FMs") group. Two alternatives have been proposed to enable this constitutional amendment to go through either setting up of a GST Standing Council, involving State

("Govt.") to provide design consultancy for construction of its legislative assembly building. The engagement comprised of seven stages of consulting and designing. The applicant undertook part of the designing in Germany and electronically delivered the design to the State Government. The rest of the work including preparing detailed engineering, determining pre-qualification criteria for short listing contractors, deploying technical and supervisory personnel at the site, monitoring progress and reporting were sub-contracted to a consultant in India. The sub-contractor was appointed with the approval of the Government. The applicant shared its fees with the sub-contractor from the concept stage to the completion stage in a manner that the applicant's ultimate share was fixed as a percentage of the total contract value. The payment to the sub-contractor was made directly by the Government on the basis of certification of sub-contractor's invoice by the applicant. The applicant approached the AAR to determine whether the payments received by it were liable to tax in India. The applicant contended that supply of drawings and designs would constitute sale of capital asset and if the sub-contracted portions of agreement were excluded, the payments received by it should not be regarded as 'fees for technical services'. The AAR observed that the applicant did not exit from the contract at any stage and remained as a consultant till the completion of work. The applicant continued to be accountable to the Govt. for the entire work including the work executed by the sub-contractor. Though the applicant's personnel were not required to stay in India throughout the contract duration, there was nothing to indicate that the applicant did not undertake periodical monitoring or offer technical advice as and when required by the Govt. Accordingly, the AAR held that the consideration received by the applicant cannot be described as mere sale of drawings and designs and that it was appropriate to treat it as fees for technical services. However, the AAR held that the payment received by the sub-contractor directly from the Govt. cannot be included as the income of the applicant.

**GMP International GmbH (2010 TIOL 03)**

*Consideration received by non-resident for assigning the right to manufacture and supply products to Indian company is not liable to tax in India*

The applicant, an Indian company was in the business of designing and manufacturing antennae and battery packs for mobile manufacturers in India. Its group company in the US had entered into an agreement with Nokia Corporation for manufacture and supply of antennae and battery packs to Nokia globally. Subsequently, the US Company irrevocably assigned its rights to supply products to Nokia India in favour of the applicant for a period of five years and received a consideration. The applicant approached the AAR to determine whether the consideration paid to the US Company would be liable to tax in India and accordingly be subject to withholding tax in India. The applicant contended that 'capital asset' being right to manufacture was located outside India as the original agreement and contract of assignment were executed outside India. Since, the asset was situated outside India, it claimed that the consideration was not liable to tax in India. In the alternate, the applicant contended that if it was assessed as business income, the receipts could not be taxed in India, since the US Company did not have any 'business connection' or PE in India. The AAR observed that in absence of a tripartite agreement between Nokia Corporation, US Company and the applicant there was no valid contract of assignment of rights and obligations in the eyes of law. However the AAR held that the consideration received by US Company from the applicant constitutes "business income" in the hands of the US Company. The AAR observed that since there was nothing to show that the US Company has any role in the manufacturing and supply of products to Nokia India or to indicate existence of any PE, the US Company was not liable to tax in India and

FMs and chaired by the Union Finance Minister or Implementing GST by resorting to article 278 of the Constitution, which allows legislative power delegation to an authority.

Source: [Moneycontrol](#)  
March 4, 2010

**Snippet**

The Aviation Ministry will take up the issue of service tax proposed in the Budget 2010-11, with the Finance Ministry. The Finance Minister in the Budget has proposed extension of levy of service tax on passengers for all class of travels. However the Federation of Indian Airlines, the apex body of Indian carriers, is undecided about the fare hike.

Source: [Business Line](#)  
March 4, 2010

**Snippet**

The Central Government had clarified in the Budget 2010-11 that transactions such as leasing vacant land and commercial spaces; payment made to developers before the grant of completion certificate and imposing preferred location charges etc, would come under the service tax net. The Government had said that the net impact of the service tax on real estate construction would be only 3.3 per cent, since construction attracts service tax only on 33 per cent of the value. However developers said that the proposal would push the

consequently there was no requirement for withholding tax.

***Laird Technologies India Private Limited (2010 TIOL 06)***

*Conducting technical workshop with general material available on the internet does not make available know-how*

The applicant, a non-profit company, engaged an Institute under the auspices of University of Texas ("the Institute") to conduct a workshop for enabling their speedy commercialisation. It made payments towards related expenses incurred by the Institute including the travel of personnel to participate in the workshop. The Institute was a tax resident under the US tax laws and was entitled to tax exemptions in the US on some of its income. The applicant approached the AAR to determine if the Institute was liable to pay tax on the amount received from the applicant. The Revenue contended that the Institute had made available technical knowledge or know-how, as referred to under Article 12 of the India USA Tax Treaty and consequently, it should be treated as 'fees for included services' liable to tax in India. The applicant presented before the AAR, the course material used in the workshop and contended that the workshop only included short sessions where the personnel from the Institute only explained and disseminated information on subjects, which were part of course material available on the website of the Institute. The sessions were similar to class room teaching modules, lasted a few hours and covered only a few important points of a general nature and argued that such information of general nature cannot be regarded as making available technical experience, skill etc. The AAR concluded that though the services fell within the term 'technical, consultancy or managerial services' and should be regarded as 'fees for technical services' under the Act, they did not 'make available' any technical knowledge or know-how for being regarded as 'fees for included services' as per the Tax Treaty. It observed that though the participants in the workshop will benefit, derive motivation and be better equipped to deal with problems in commercialisation of technology, the services will not fall within 'fees for included services' under the Tax Treaty. Since, the Institute did not have a PE in India, the AAR held that the payments would not be liable to tax in India.

***Federation of Indian Chambers of Commerce and Industry (320 ITR 124)***

Notifications and Circulars

*Clarification on TDS/TCS regime*

The CBDT had earlier amended existing rules 30, 31, 31A, 31AA, 37A, 37CA and 37D relating to tax deducted at source ("TDS") and tax collected at source ("TCS"), filing of related returns, issue of certificates by its notification No 31/2009 dated March 25, 2009 with effect from April 1, 2009. The significant aspects of the amended rules were:

- Mandatory electronic payment of TDS/TCS in new challan Form 17 for all deductors and collectors.
- Introduction of Unique Transaction Number for tracking every TDS and TCS transaction.
- Furnishing of annual statement of TDS and TCS in addition to quarterly statements.

However, in view of practical difficulties in the proposed amendment, its implementation was kept in abeyance by a press release dated June 30, 2009. The CBDT has now notified Income-tax (First Amendment) Rules, 2010 restoring the old position that prevailed prior to April 1, 2009. The new notification comes into force

home prices up 10 percent in Tier-II and Tier-III towns and 0.5 4 per cent in big cities.

Source: [Business Standard](#)  
March 4, 2010

**Snippet**

The Budget 2010 proposal to waive service tax on transmission of electricity has come as a relief for power transmission companies in the country. But, service tax has been imposed on services provided by power exchanges. However, the overall impact of the two moves is likely to have a limited benefit for the domestic power sector. The tax exemption would definitely benefit the consumers.

Source: [Business Standard](#)  
March 5, 2010

**Snippet**

The Central Government had said that the proposed GST rate would likely be higher than 12 percent as recommended by the task force of the Thirteenth Finance Commission. As per the Centre's calculations, revenue neutral rate of GST works out to 16 17 percent. However, States have suggested a higher combined GST rate of 16 20 percent.

Source: [Economic Times](#)  
March 5, 2010

from April 1, 2009.

**Notification No SO 424(E) dated February 18, 2010**

*Commerce Ministry amends policy relating to FDI under Government approval route*

The Ministry of Commerce and Industry has amended the approval levels for cases requiring Government approval for Foreign Direct Investment ("FDI") in India. Earlier, the Finance Minister considered investment proposals upto INR 6 billion based on recommendations of the Foreign Investment Promotion Board ("FIPB") and the Cabinet Committee on Economic Affairs ("CCEA") considered proposals exceeding this limit. The Commerce Ministry has amended the policy with immediate effect by increasing the approval level to INR 12 billion from the present INR 6 billion.

Further, the amended policy provides that companies would not require fresh prior approval of the Government, where prior approval of the FIPB/CCEA/Cabinet Committee on Foreign Investment ("CCFI") was obtained for the initial foreign investment in the following cases:

- Where the prior approval was obtained when the activities had earlier required such prior approval or had sectoral caps and subsequently such activities/sectors were placed under automatic route or the sectoral caps were relaxed.
- Where prior approval was obtained due to requirements under Press note 18 of 1998 and Press note 1 of 2005 and the prior approval is not required under the FDI policy for any other reason or purpose. It may be noted that the Press notes referred here related to approval of foreign investment/technical collaborations, when the foreign investor had any previous joint venture or technology transfer/trademark agreement in the same field in India.

**Press Note No 1 of 2010 dated March 25, 2010**

## INDIRECT TAX

### Excise

#### Tribunal Decisions

*Trade Notice issued by a Commissionerate is applicable to other Jurisdictions also*

The taxpayer was engaged in the manufacture of injectors. The issue which arose for consideration was whether nozzles and nozzle holders captively used in the manufacture of injectors were eligible for exemption. A Trade Notice issued by Hyderabad Collectorate clarified that the exemption is available. However the Commissioner (Appeals) declined to rely on the Trade Notice since it was not issued by the Jurisdictional Commissionerate. The Tribunal observed that the Central Excise Law is uniform throughout India and does not change from State to State and that the Trade Notice would be applicable to other Central Excise jurisdictions also, unless the Trade Notice had been withdrawn or issued without any authority of law.

**Bosch Limited vs CCE (250 ELT 273) (Bangalore)**

#### Snippet

Confederation of Real Estate Developers Association of India ("CREDAI"), the apex body of the organised real estate builders and developers, has said that the imposition of service tax will dampen the growth of the entire industry. CREDAI is planning to meet the Union Finance Minister to request on the roll back the service tax imposed on the real estate sector. Further CREDAI has said that the Budget 2010-11 has failed to adequately support the real estate sector.

Source: [Financial Express](#)  
March 9, 2010

*No excise duty leviable on manufacture in customs bonded warehouse*

The taxpayer imported pipes and connectors and welded the connectors to the pipes in the Customs warehouse. The Revenue demanded excise duty on the welded pipes since the process of welding amounts to manufacture. The Tribunal held that the process of welding, testing of welded pipes and coating the pipes with rust or corrosion preventing materials did not amount to manufacture. The Tribunal further held that even if the process amounted to manufacture, since the manufacture was undertaken in the Customs bonded warehouse and not in the Domestic Tariff Area, excise duty was not leviable.

***CCE vs Boiler Tube Co Pvt Ltd (2010 TIOL 270) (Mumbai)****Fabrication and mounting of bus bodies on chassis supplied is a 'job work'*

The taxpayer was engaged in fabricating and mounting the bodies of busses and trucks on chassis manufactured and supplied free of cost. The taxpayer availed Cenvat credit of duty paid on the chassis and other inputs procured by them and paid duty under Rule 6 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 ("Valuation Rules"). The Revenue determined the value under Rule 10A of the Valuation Rules, treating the taxpayer as a job worker of the chassis supplier. The taxpayer contended that the activity was not in the nature of job work and that the activity was not 'on behalf of' the chassis supplier ie, they did not represent to any third party on behalf of the chassis supplier. The Tribunal referred to the explanation under Rule 10A of the Valuation Rules defining a 'job worker' and observed that the use of the words 'on behalf of' does not mean that in order to be a job worker, the taxpayer has to be a representative of the chassis manufacturer to a third party. The Tribunal held that the taxpayer was a job worker and Rule 10A of the Valuation Rules would apply.

***Audi Automobiles vs CCE (249 ELT 124) (Delhi)***

## Customs

## Tribunal decision

*Refund can be granted based on Chartered Accountant certificate that burden of duty is not passed on*

The taxpayer's claim of refund was allowed on merits but the refund amount was directed to be deposited to the consumer welfare fund since the taxpayer had not established the non-passing of incidence of duty to their buyers. The Tribunal observed that the taxpayer had filed a certificate of the Chartered Accountant certifying that the burden of duty had not been passed on to the customers and the taxpayer's Balance Sheet showed the amount as receivable from the Revenue. Relying on the decision of the Madras High Court in Saralee Household & Bodycare India (P) Ltd, the Tribunal directed refund of the amount to the taxpayer.

***Global Ventures vs CC (2010 TIOL 360) (Chennai)****Excess duty paid can be refunded by subsequent amendment to Bill of Entry*

The taxpayer imported goods on payment of duty. The taxpayer subsequently realized that Countervailing Duty ("CVD") had been wrongly paid in excess without considering the benefit of an exemption Notification. The taxpayer filed a refund claim and also furnished the required documents. The refund claim was rejected since the assessment order in pursuance of which the duty was paid was not challenged.

Relying on the decision of the Chennai Tribunal in the case of Senka Carbon Pvt Ltd, the Commissioner (Appeals) directed amendment of the Bill of Entry under section 149 of the Customs Act, 1962 ("Act") which provides for an amendment even after clearance of the goods, if documentary evidences were in existence at the time of clearance. While considering the Revenue's appeal against the order of the Commissioner (Appeals) the Tribunal observed that there was no time limit for amendment of any document under Section 149 of the Act and upheld the order of the Commissioner (Appeals).

***CCE vs Crest Chemicals (2009 TIOL 2125) (Mumbai)***

Service Tax

Tribunal decisions

*No service tax on value on which VAT is paid*

The taxpayer was engaged in commercial and residential construction. The taxpayer paid tax ("VAT") under the Karnataka Value Added Tax Act, 2003 ("KVAT Act") on 70 percent of the contract value and paid service tax on 30 percent of contract value ie the taxpayer claimed exemption under Notification 12 of June 20, 2003 in respect of the value of goods on which VAT was paid. The Revenue denied the benefit under the Notification on the ground that the goods were consumed in providing the construction services and were not sold by the taxpayer. The Revenue also observed that the taxpayer had not produced documents to evidence sale of goods on which exemption was claimed and that the percent formula prescribed under the KVAT Act had been wrongly adopted for determining the value of goods and materials involved in the construction contract.

The Tribunal observed as under:

- The exemption notification requires that the materials are sold in the course of provision of service and record is maintained for such sale.
- The Bangalore Tribunal held in the case of Shilpa Colour Lab that the Notification does not require the inputs to be mentioned in the invoice issued to customer.
- The taxpayer's contention that it has paid VAT on 70 percent of the Contract value under Karnataka VAT was not disputed.
- The mutual exclusivity of service tax and sales tax and the powers assigned by the Constitution to the States and Centre had been highlighted in the decisions of the Supreme Court in Gujarat Ambuja Cements and BSNL.
- The attempt to collect service tax on value on which VAT had been paid is contrary to principles of fiscal federalism adopted in the Constitution.

The Tribunal thus held that the demand of service tax on the value of material supplied in the course of providing construction service was not sustainable.

***Sobha Developers Ltd vs CCE&ST, Bangalore (24 STT 425) (Bangalore)***

*Time limit for refund would not apply for amounts paid in the nature of deposit*

During the course of investigation by the Revenue, the taxpayer deposited an amount towards service tax liability. A show cause notice was issued demanding service tax and seeking to appropriate the amount already deposited against the

demand. However, the proceedings were subsequently dropped and the taxpayer claimed refund of the tax paid. The refund was sanctioned by the original authority. However, the Commissioner set aside the order sanctioning the refund on the ground that the claim was filed beyond the limitation period of one year from the date of payment and on the ground of unjust enrichment. The taxpayer contended that the amount paid was only a deposit and was made under protest and hence the Revenue should have suo moto granted the refund. The Revenue contended that the challan for payment of tax did not indicate that the payment was under protest and that the taxpayer had not proved that the tax burden was not passed on to the service recipient.

The Tribunal observed that the Revenue had treated the amount only as a deposit since it proposed to adjust the amount against the demand in the show cause notice, and that the amount can be treated as service tax only if it had been appropriated. Thus, the Tribunal held that the refund was filed within the time limit. The Tribunal also observed that the service provider had not included the service tax amount in the invoices and tax was paid later as a deposit. Thus, the Tribunal held that the taxpayer had not passed on the burden of tax and unjust enrichment would not arise.

***Wazir Singh Swaran Singh Consignment Stockist (P) Ltd vs CCE (24 STT 158) (Delhi)***

*No restriction on utilisation of Cenvat credit if credit on common input services is not availed*

The taxpayer was engaged in manufacture of EPABX systems and also providing erection, commissioning, installation, maintenance and other services. The Revenue demanded service tax on the ground that the taxpayer availed Cenvat credit on services used in respect of exempted services and that the Cenvat credit can be utilized only to the extent of 20 percent of the service tax on output service. The Revenue also contended that the taxpayer was required to maintain separate records for Cenvat credit on input services.

The taxpayer did not avail any Cenvat credit on common services used for both taxable and exempted services and therefore contended that the question of maintenance of separate records does not arise and that the restriction of utilization of Cenvat credit to 20 percent would not apply.

The Tribunal observed that a taxpayer is required to maintain separate accounts for receipt, consumption and utilisation of input services only if he avails Cenvat credit on input services used in providing exempted as well as taxable services. The Tribunal also observed that the demand cannot be sustained unless the input services on which credit has been availed have been used for providing the exempted services. The Tribunal remanded the case back to the Commissioner for fresh adjudication after verifying the factual contentions of the taxpayer.

***Avaya Global Connect Ltd vs CCE (2010 TIOL 397) (Ahmedabad)***

*Services used for post manufacturing activities are not eligible 'input services' for Cenvat credit*

The taxpayer was denied Cenvat credit of service tax paid to consignment agents and selling agents on the ground that the Cenvat credit was taken based on debit notes issued by the service providers, which were ineligible documents.

The Tribunal observed that the Revenue had examined the validity of credit based on debit notes but had not determined whether the services are eligible 'input

services'. The Tribunal referred to an unreported decision of the Division Bench of the Tribunal in the case of Indian Furniture Products Ltd wherein it was observed that the Central Government is not empowered to make rules to provide for credit of service tax on taxable services which are neither 'used in or in relation to manufacture of excisable goods' nor 'used for providing output services'. The Tribunal observed as under:

- Rules have to be framed conforming to the rulemaking powers contained the Statute.
- The consignment agents' services and the selling agents' services are not in the nature of input services which are used in or in relation to the manufacture of excisable goods.
- The definition of input service under the Cenvat Credit Rules, 2004, which includes 'activities relating to business', cannot be interpreted to include an activity which is a post manufacturing activity.

Based on the taxpayer's contention that they were not put on notice on the eligibility to Cenvat credit on the input services on the above grounds, the Tribunal remanded the case for fresh orders.

***Chemplast Sanmar Ltd vs CCE (2010 TIOL 180) (Chennai)***

*All Input services should satisfy the condition of use in on in relation to manufacture or clearance of final products*

The taxpayer availed Cenvat credit on mobile phone services and certain other input services. The Cenvat credit on mobile phones was denied on the ground that the phone bills were not in the name of the company. The Cenvat credit on other services was denied on the ground that they were not used in or in relation to manufacture. The Tribunal held as under:

- The mobile phones were procured by the company and supplied to the employees and then the mobile phone bills were paid by the company. Thus, there is a presumption that mobile phones were meant to be used in connection with the business of the company, which had not been rebutted by the Revenue and therefore credit is admissible.
- In respect of other services, such presumption would not be available. Input services covered by the inclusive part of the definition have to satisfy the essential condition of the main part and the taxpayer has to prove that the services were used in or in relation to manufacture of final product or clearance of final products. Since this burden was not discharged, credit is not eligible on these services.

***Telenet Systems Pvt Ltd vs CCE (17 STR 163) (Mumbai)***

*Services used in relation to business activity is eligible for Cenvat credit*

The taxpayer, a hundred percent Export Oriented Unit, claimed refund of Cenvat credit availed on various 'input services' including rent-a-cab, telephone, outdoor catering services etc. The Revenue rejected the refund claims on the ground that certain services were not used in or in relation to manufacture of final product and relied on the decision of Supreme Court in the case of Maruti Suzuki Ltd. The Tribunal allowed the claim of refund after observing as under:

The legislature has not used the words 'in or in relation to manufacture' in the inclusive part of the definition of 'input service'.

- The Bombay High Court in Coca-Cola India categorised the definition of 'input service' into five limbs and stated that credit can be denied only when the taxpayer is not eligible to credit under any of the limbs.
- The definition of 'Input' and 'Input service' are not comparable and therefore the decision of the Supreme Court in the case of Maruti Suzuki, which was rendered in the context of the definition of 'Input', cannot be relied upon.
- The taxpayer is entitled to Cenvat credit availed on services which are used in relation to the business activity.

***Semco Electrical (P) Ltd vs CCE, Pune (24 STT 508) (Mumbai)***

*Cenvat credit can be taken based on supplementary invoices issued by service providers after taking registration*

The taxpayer received certain input services from service providers who were not registered with the Service tax authorities. The service providers subsequently took service tax registration and issued supplementary invoices for service tax. The taxpayer took Cenvat credit based on the supplementary invoices, which was denied by the Revenue since the service providers were not registered at the time of provision of service. The Tribunal observed that the taxpayer had received the input services and used the services for providing taxable output services and thus, credit of service tax cannot be denied, even if the tax is paid subsequently under supplementary invoice.

***Secure Meters Ltd vs CCE (2010 TIOL 416) (Delhi)***

*Credit allowed on the basis of Challan for tax payment*

The taxpayer availed Cenvat credit on security services. The service provider was not registered at the time of provision of service, but the applicable service tax was paid by a group company registered with the service tax authorities. The service provider subsequently got registered under service tax and paid the applicable tax. The Revenue denied the credit based on invoices issued by the service provider who was not registered with service tax at the time of provision of service. The taxpayer contended that the TR6 challan of the group company evidencing payment of tax was a valid document for taking Cenvat credit.

The Tribunal observed that credit cannot be denied since the group company had disclosed the facts to the Revenue and the service provider had also subsequently taken registration and paid the service tax again. The Tribunal held that credit was allowable on the basis of the TR 6 challan of the group company evidencing payment of tax.

***Federal Mogul-Goetze (India) Ltd vs CCE (17 STR 182) (Delhi)***

*Cenvat credit availed on input services need not be reversed on removal of inputs as such*

The issue under consideration before the Tribunal was where inputs are removed as such, whether credit availed on Goods Transport Agency ("GTA") service for transportation of inputs to the factory should also be reversed under Rule 3(5) of the Cenvat Credit Rules, 2004 ("Cenvat Rules"). The Tribunal observed that Rule 3(5) of the Cenvat Rules required reversal of an amount equal to credit availed in respect of such 'inputs' and that the word 'inputs' would cover only the input goods and not the

input services. The Tribunal thus held that Cenvat credit taken on GTA services need not be reversed.

***A R Castings (P) Ltd vs CCE and ST (2010 TIOL 245) (Delhi)***

***Bansal Alloys & Metals Ltd vs CCE (2010 TIOL 298) (Delhi)***

VAT/CST

High Court Decisions

*Lease of machinery taxable in the State where machinery is used*

The taxpayer gave machinery on lease for use in the State of Uttar Pradesh ("UP"). The Revenue demanded tax on the lease in the State of UP. The taxpayer contended that the stamp paper for the lease agreement was purchased in Delhi and therefore, the lease was taxable in Delhi and not in UP, in light of the decision of the Supreme Court in the case of 20th Century Finance Corporation Ltd. The Court observed that mere purchase of stamp paper at Delhi does not indicate that the lease deed was also executed at Delhi. Since the provisions of the Uttar Pradesh Trade Tax Act, 1948 specifically provided that sale is deemed to take place in the State of UP if the goods are used by the lessee within the State, the Court held that the decision of the Supreme Court in the case of 20th Century Finance Corporation Ltd (that the transfer takes place in the State where the lease deed is executed) would not apply. The Court thus held that the lease is taxable in the State of UP, even if the agreement was executed at Delhi.

***Vysya Bank Ltd vs Commissioner (1 GST 257) (Allahabad)***

*Sale of goods in bonded warehouse is a high seas sale*

The taxpayer imported goods into India, and warehoused the goods on execution of bond. Before the goods were cleared for home consumption, the taxpayer sold the goods and claimed exemption on such sale under section 5(2) of the Central Sales Tax Act, 1956 as a 'High Seas Sale'. The Revenue denied the exemption on the ground that the sale happened after the goods crossed the customs limit since the goods were warehoused by the taxpayer, the warehousing charges and insurance charges were paid by the taxpayer. The Tribunal upheld the exemption after considering the import invoice, bill of Lading with endorsement, high seas sale contract, high seas sale invoice, bill of entry etc. The Court observed that the warehouse is regarded as a customs station under the Customs Act, 1962, that the goods had not been cleared from customs and that the transfer of title of the documents was well prior to the clearance of goods for home consumption on payment of customs duty. The Court held that the warehoused goods cannot be regarded as having crossed the customs frontier and therefore the taxpayer was entitled to exemption.

***State of Tamil Nadu vs Rajan Universal Export (Mfrs) Pvt Ltd (28 VST 279) (Chennai)***

*Principal contractor is eligible to deduct payments to subcontractor from his turnover*

The taxpayer was engaged in construction of residential apartments and was registered under the Karnataka Value Added Tax Act, 2003 ("KVAT Act"). The taxpayer opted for payment of tax under composition at a compounded rate of 4 percent. The taxpayer engaged subcontractors who were also registered dealers and paying tax under the KVAT Act. On application from the taxpayer, the Authority for Advance Ruling held that payments made to subcontractors should be included in

the turnover of the tax payer since there was no specific provision for deducting such payments prior to April 1, 2006. Aggrieved by the decision, the taxpayer preferred an appeal before the High Court. Relying on the decision of the Supreme Court in *Larsen & Toubro Ltd*, the High Court held as under:

- Once the work is assigned to a subcontractor, the only transfer of property in goods is by the subcontractor. The property passes by accretion from the subcontractor to the contractee. There is a deemed sale by the subcontractor, who is the dealer executing the work. The principal contractor ceases to execute the work.
- Inclusion of payments made to subcontractors in the turnover of the contractor would lead to double taxation.
- The principal contractor is entitled for deduction of payments made to the contractor only if the subcontractor is a registered dealer and he has paid the tax on such payments.

***Skyline Constructions & Housing Pvt Ltd vs AAR (1 GST 173)***  
***(Karnataka)***

*Composition can be opted for a part of the divisible contract for supply, fabrication, installation etc*

The taxpayer was engaged in fabrication, supply and installation of kitchen cabinets with top, fittings, partitions etc. The issue arose for consideration was whether the taxpayer was entitled to pay tax at the compounded rate under the provisions of the Kerala Value Added Tax, 2003 ("KVAT Act"). Under the KVAT Act, compounding is not permissible if the works contract involved supply of goods in the same form as such. The Court observed that work orders for installation of kitchen cabinets may vary from customer to customer and that the contract may be for supply of standard items taxable at schedule rate or for supply of specified items at agreed rates and for execution of work like fabrication, installation of kitchen top, partitions etc. The Court further observed that the provision for supply of goods in execution of a works contract does not make the entire contract as sale of goods. The Court held that in respect of every divisible contract, supply of goods will attract tax at the schedule rates and that the fabrication, installation etc will be assessed as works contract, on which compounding is permissible.

***Orchid Designs Pvt Ltd vs CTO (27 VST 295) (Kerala)***

Notifications and Circulars

Excise

*E-filing of returns mandatory for specified taxpayers and threshold limit for e-payment reduced*

Rule 8 of the Central Excise Rules, 2002 ("Excise Rules") prescribes the procedure for payment of excise duty. Hitherto, mandatory electronic payment ("e-payment") was required for taxpayers who have paid excise duty of Rs 50 lakhs or more (either through Cash or Cenvat credit) during the preceding financial year or who have paid excise duty of Rs 50 lakhs in the current financial year.

The Excise Rules have been amended to reduce this threshold to Rs 10 lakhs. Consequently, taxpayers who have paid excise duty of Rs 10 lakhs or more (either through Cash or Cenvat credit) in the preceding financial year have to pay excise duty by e-payment mode through internet banking.

Further, the electronic filing of monthly or quarterly returns has been mandated for the taxpayers who have paid excise duty of Rs 10 lakhs or more (either through Cash or Cenvat credit) in the preceding financial year. The amendment is effective from April 1, 2010.

**Notification No 04/2010-Central Excise (NT) dated February 19, 2010**

*Valuation of free samples to be done under Rule 4 of the Valuation Rules*

The Central Board of Excise and Customs ("Board") had clarified earlier in Circular No 813/10/2005-CX of April 25, 2005 ("Circular") that in the case of free samples, the value should be determined under Rule 4 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 ("Valuation Rules"). There were some disputes as to whether such valuation would apply to valuation of goods based on Maximum Retail Price ("MRP") under Section 4A of the Valuation Rules. Consequent to the judicial developments, the Board has now reiterated vide this Circular that valuation of samples which are distributed free as part of marketing strategy or as gifts or donations shall be determined under Rule 4 of the Valuation Rules. The valuation would apply to goods irrespective of whether final products are assessed under MRP or otherwise.

**Circular No 915/05/2010-CX dated February 2010**

*Commissioner (Appeals) ceases to have the power to remand after May 11, 2001*

The Board has clarified that the Commissioner (Appeals) ceases to have the power to remand the cases for fresh adjudication to the original adjudicating authority beyond May 11, 2001, when section 35A(3) of the Central Excise Act, 1944 ("Excise Act") was amended. There were some contrary decisions which held that Commissioner had power to remand even after the amendment. The Board has instructed the authorities to strictly follow the decision of the Supreme Court in the case of MIL India Ltd which held that the power of remand by the Commissioner (Appeals) has been taken away by amending Section 35A of the Excise Act.

The Board has also clarified that though the power to remand has been taken away, in view of the Supreme Court's observations, the Commissioner (Appeals) continues to exercise the power of adjudicating authority in the matter of assessment and can add or subtract certain items from the order of assessment. Further, the order of Commissioner (Appeals) could also be treated as an order of assessment.

**Instruction F No 275/34/2006-CX 8A dated February 18, 2010**

Customs

*Customs duty exemption granted for imports for the purpose of organizing Common Wealth Games, 2010*

Importation of specified goods for the purpose of organizing the Common Wealth Games, 2010 have been exempted from the whole of duty of Customs leviable under the Customs Tariff Act, 1975, subject to conditions specified.

The exempted goods includes sports goods, sports equipment and sports requisites; fitness equipments; team uniform/clothing; spares, accessories and consumables of the same, ammunition for shooting events; broadcasting equipment; furniture and fixtures etc.

**Notification No13 /2010-Customs dated February 19, 2010**

*Permission to carry domestic cargo between domestic airports on international flights*

*have been extended to all airlines*

The Board vide Circular No 15/1999-Customs of March 22, 1999 allowed Air India to carry domestic cargo between domestic airports on international flights. The Circular now extends the facility to other private airlines, subject to fulfillment of certain conditions. The Board has further clarified that any violation of the conditions would result in withdrawal of the facility and imposition of penalty under the Handling of Cargo in Customs Areas Regulations, 2009.

***Circular No 4/2010-Customs dated February 15, 2010***

Service Tax

*E-filing of returns mandatory for specified taxpayers and threshold limit for e-payment reduced*

Rule 6 of Service tax Rules, 1994 ("Service Tax Rules") prescribes procedure for payment service tax. Hitherto, mandatory electronic payment ("e-payment") of service tax was required by taxpayers who have paid service tax of Rs 50 lakhs or more (either through Cash or Cenvat credit) during the preceding financial year or who have paid service tax of Rs 50 lakhs in the current financial year.

The Notification has amended the Rules to reduce the threshold to Rs 10 lakhs. Consequently, taxpayers who have paid service tax of Rs 10 lakhs or more (either through Cash or Cenvat credit) in the preceding financial year have to pay service tax by e payment mode through internet banking.

Further, Rule 7 of the Service Tax Rules has been amended to prescribe mandatory electronic filing of Half yearly returns for taxpayers who have paid service tax of Rs 10 lakhs or more (either through Cash or Cenvat credit) in the preceding financial year. The amendment is effective from April 1, 2010.

***Notification No 01/2010 – Service Tax dated February 19, 2010***

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