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A MONTHLY JOURNAL OF
THE CHAMBER OF TAX CONSULTANTS

THE CHAMBER'S JOURNAL

SEPTEMBER 2013
VOL. I | NO. 12

YOUR MONTHLY COMPANION ON TAX & ALLIED SUBJECTS

TRANSFORMING INFORMATION INTO KNOWLEDGE

VALUATION UNDER INDIRECT TAX LAWS

Valuation under Indirect Tax Laws (Central Excise, Customs, Service Tax, VAT, etc.) has been a highly controversial subject and prone to extensive litigations which have significant financial implications. Recent Supreme Court ruling under Central Excise in FIAT case has far reaching implications. Further, recent Delhi High Court ruling under Service tax, is likely to have significant implications on the vexed issue of taxability of reimbursements.

(Read further from page 15 onwards)

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Your Questions & Our Answers


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and more

THE CHAMBER OF TAX CONSULTANTS

HEAVEN BE OUR GUIDE

INTERNATIONAL TAXATION COMMITTEE

Advance FEMA Conference jointly with BCAS held on 31st August, 2013 at IMC

CA Yatin Desai, President, CTC welcoming the Guests & delegates. Seen from L to R : CA Nitin Shingala, Vice President, BCAS, CA Paresh Shah, Chairman, CTC, CA Naushad Panjwani, President, BCAS, CA Dilip J. Thakkar, Faculty, C. D. Srinivasan, RBI Chief General Manager, Faculty and CA Naresh Ajwani, Vice Chairman, CTC.

CA Paresh Shah, Chairman, CTC welcoming the delegates. Seen from L to R : CA Nitin Shingala, Vice President, BCAS, CA Naushad Panjwani, President, BCAS, CA Dilip J. Thakkar, Faculty, CA Yatin Desai, President, CTC, C. D. Srinivasan, RBI Chief General Manager, Faculty and CA Naresh Ajwani, Vice Chairman, CTC.

Faculties

CA Dilip J. Thakkar addressing the delegates. Seen from L to R : CA Nitin Shingala, Vice President, BCAS, CA Paresh Shah, Chairman, CTC, CA Naushad Panjwani, President, BCAS, CA Yatin Desai, President, CTC, C. D. Srinivasan, RBI Chief General Manager, Faculty and CA Naresh Ajwani, Vice Chairman, CTC.

CA Anup P. Shah

CA Hitesh Gajaria

Shri C. D. Srinivasan, RBI Chief General Manager

Shri Aditya Gaiha, RBI Official

Dr. Tuli Roy, RBI Official

Ms. Jayshree Gopalan, RBI Official

Shri Pankaj Kumar, RBI Official

Shri Sanjay Kumar, RBI Official

Shri A. O. Basheer, RBI Official

Section of delegates

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The Chamber's Journal

Non-receipt of the Review must be notified within one month from the date of publication, which is 12th of every month.

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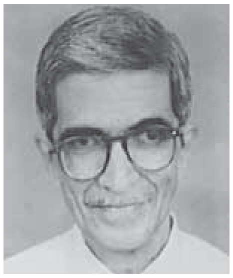


From the Editorial Board

Food Security Bill, 2013

After a long while I am writing the Editorial, the reason being I am concerned with the passing of such Bills, which apart from being economically not viable, and is also, badly timed, when our country is facing economic gloom and long term, deep rooted political crisis. I would not hesitate to say that the economy which is already in I.C.U. may die soon of stupid medicines like the Food Security Bill. I wonder if it is a medicine at all or a poison being served on a national scale.

As far as impact of Food Security Bill is concerned, let us see what the Moody's, an International Credit Rating Agency has to say:-

"The measure (Food Bill) is credit negative for the Indian government because it will raise Government spending on food subsidies to about 1.2 per cent of GDP per year from an estimated 0.8 per cent currently, exacerbating the Government's weak finances."

Moody's currently assigns 'Baa3' rating on India, with a stable outlook which translates into medium grade, with moderate credit risk.

The Food Security Bill was passed by the Lok Sabha earlier this week. The Bill seeks to provide cheap foodgrains to 82 crore people in the country, ushering in the biggest programme in the world to fight hunger.

The annual financial burden, after its implementation is estimated to be about ` 1.30 lakh crore at current cost.

As the Bill is likely to be implemented in the remaining months of the current fiscal, its impact on government finances will be less in 2013-14, but much more in the years to come, Moody's said.

The total food subsidy budgeted in the current fiscal is ` 90,000 crore, of which ` 10,000 crore is towards the implementation of the programme.

"It will raise future subsidy expenditure commitments, hindering the Government's ability to consolidate its finances" Moody's said, adding, the Government subsidies will contribute to the already high food inflation.

The agency further said India's fiscal deficits are already higher than those of its emerging market peers.

It said the high fiscal deficit contributes to the Current Account Deficit (CAD) by keeping domestic demand high and increasing imports.

A high CAD i.e., the difference between inflow and outflow of foreign currency would put pressure on the domestic currency and fuel prices.

The rupee has depreciated about 25 per cent this year and touched a record low of 68.80 to a dollar yesterday.

The Food Bill seeks to provide highly subsidised food grains to 75 per cent of the rural and 50 per cent of the urban population through the public distribution system (PDS).

It will guarantee ` 5 kg of Rice, Wheat and Coarse Cereals per month per person at a fixed price of ` 3, ` 2 and ` 1 respectively.

Mr. Deepak Shenoy, an expert Economic analyst has tested the Food Security Bill on the following six points:

1. The Food Security Bill (FSB) costs 1 per cent or 3 per cent of India's GDP, so it is expensive or inexpensive.
2. The FSB will not affect the larger economy – or us – that much.
3. The FSB will cover 67 per cent of the population.
4. All we have to do is plug the leakages.
5. Warehousing reforms can fix the rot.
6. We could easily afford the FSB if we just paid more taxes.

and concluded that:

"Overall, the FSB will be a bad implementation of a shaky idea. A better solution would be to dismantle the food subsidy entirely and pay people directly. The cost of wheat or rice in the market today is about ` 30 per kg for PDS-provided rice. Buying five kg costs ` 150. A direct transfer of ` 150 into the accounts of the very same 67 per cent of population will cost about ` 1.2 lakh crore (for 70 crore people), without any of the cost of all the warehousing, the procurement, the rotting and the wastage. We could dump all the stored wheat and rice in the market over time and prices would be contained. And direct transfers would be easily traceable, so leakages would be lower.

In another well analysed article published in the well-known magazine ‘India Today’ another economist Mr. Laves Bhandari, under the heading ‘A Recipe for Disaster’ says the Government’s flagship scheme to fight hunger is inherently flawed in many ways. He exhorts all of us “Don’t take it too lightly. It is not about, ` 120 crores or ` 25,000 crores; this Act will weaken the very foundation of India.”

Another well-known Economist Shri F. Patil in the article published in a popular Marathi Daily ‘Pudhari’, after analysing the impact of the provisions of the Act, concludes that it will not be the problem of hunger, but it will lead to more people without food than there are now, as the food reserved for them, will not reach them, the benefit of the Act will go to the corrupt sections of the society like corrupt politicians, corrupt and inefficient administrative officers, and the corrupt traders and the stock shopkeepers. After giving the facts and figures, he says that to supply food worth ` 4, the Government will be spending ` 5 per head. He suggests a better alternative would be to directly credit ` 4 to the account of each person, which would be easier to administer and there would be lesser chance of leakage. The Nobel Laureate Economist Mr. Amartya Sen has commented that “I am all for growth and trade, and I did not make the Food Bill”.

Now I do not want to add anything more and I conclude quoting twitter. ‘In India the problems we face today are there, because the people who work for living are now outnumbered by those who vote for living’.

Ganapati Bappa save this country from the politician Asuras.

The Special Story in the present issue of the Chamber’s Journal is on “Valuation under Indirect Tax Laws”. Mr. Bakul Modi needs special thanks for the initiative he has taken to design and to get the same reach its logical end. I thank all the contributors to this issue of Chamber’s Journal for their co-operation. Once again ‘GANAPATI BAPPA MAURYA'.

V.H. PATIL
Chairman, Editorial Board

From the President

Dear Members,

When I communicated last time, the Rupee was around 61 for one USD. By the time I am writing to you, the Rupee is hovering around 65 after touching almost 70. Newly appointed Governor, Mr. Raghuram Rajan has taken charge and started on a promising note. He removed some of the restrictions put on outbound investments which was taken by the market positively. We hope, Mr. Rajan continues to bring some positive news and help easing pressure on the Balance of Payment position of the Country.

During the period, Chairmen of the Committees organised many successful programmes and each programme received very good response from the participants. Entire August month was full of activities. September, barring few meetings during the first fortnight, will be relatively less hectic for the Chamber's activities. However, our professional brothers will remain extremely busy in filing returns, completing Tax Audits and complying with the new requirements of uploading Annual Accounts and various Audit Reports. The changes brought in by the CBDT, is quite important and necessary for the compliance of the Act, however, it is 'too many and too fast'. The utility software to upload Audit Report undergone a change 9 times. The ninth version has been introduced by the Department as late as 7th September, 2013. How a professional is expected to complete his work on time in the scenario when software itself is changing frequently? Meanwhile, the Special Story for the month, 'Valuation Under Indirect Tax Laws' designed by Shri Bakul Modi worth appreciation. The design covers valuation aspects under ten different laws. I am sure it will be used as reference material by our members for a very long time.

Come October, Chamber will again buzz with its activities and many programmes are on the cards. I would request you to keep a close watch on the Newsletter, lest you may miss some of the important and novel programmes. By the next Newsletter, the RRC & PR Committee would have announced their much awaited schedule of the next RRC. One may surely compare this situation with 'calm before storm'.

The Committee for the 'Uttarakhand Flood Relief' under the Chairmanship of Shri Kishor Vanjara, has chalked out the basic framework of the Relief fund. The Chamber has opened a separate bank account for collecting and utilising the fund. We have started receiving contribution from members. I sincerely thank each one of them and request other members to contribute generously.

Last time almost at this time, i.e., when I was penning down this communication, the Companies Bill was passed. This time, the first phase of the draft Rules has been released under the Companies Act, 2013 for public Comments. Our Law and Representation Committee will take appropriate action for the same before the last date of submission i.e., 8th October, 2013.

During this period, two major festivals will be celebrated by our brothers and sisters. 'Ganesh Chaturthi' and 'Paryushan'. Both have their own importance in everybody's life following respective faith. However, off late the way our festivals are celebrated is surely thought provoking. We cannot afford to forget the origins of our festivals.. I remember the preaching of Shri Ramakrishna Paramhansa. Shri Ramakrishna prescribed simple spiritual practice to attain God. When asked, How and where to meditate or pray? He said 'Mane, bane and kone – in the mind, in the forest, in the corner'. Friends, I am neither a spiritual preacher nor I have mastery in philosophy. I have only put across a thought which has passed my mind.

And I end my communiqué with the Michhami Dukkadam Prayer:

KHAAMEMI SAVVE JEEVA

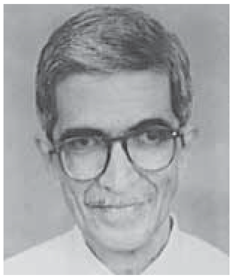
SAVVE JEEVA KHAMANTU ME

METTI ME SAVVE BHUYESU

VAIRAM MAJHAM NA KENAI

MEANING: From the bottom of my heart, I forgive all living beings who may have caused me any pain and suffering either in this life or previous lives, and I beg for the forgiveness from all living beings, no matter how small or big to whom I may have caused pain and suffering in this life or previous lives, knowingly or unknowingly, mentally, verbally or physically, or if I have asked or encouraged someone else to carry out such activities. I have a friendship with everybody and I have no enmity toward anybody.

YATIN DESAI
President



V. H. Patil, *Advocate*

Ved and Vedanta

THE YOGA OF IMPERISHABLE BRAHMAN

Arjuna is confused by the technical philosophical and spiritual expression used by Lord Shri Krishna in the last chapter while dealing with the issue of seeking Brahma by realising and merging true self and with God.

In the first two shlokas, Arjuna asked Lord Shri Krishna as many as 7 questions –

(1) What is that Brahman (2) what is Adhyatma (3) what is karma (4) what is called Adhibhuta and (5) what is karma as Adhidaiva (6) who and how that Adhiyajna and (7) how are you to be known at the time of death by the self-controlled.

In the next 3 shlokas (3, 4 and 5) Lord Shri Krishna answered all the questions raised by Arjuna –

(1) Brahman is the imperishable, the Supreme, (2) His own being is called Adhyatma (inner self) (3) The creative force that causes the birth of beings is called karma (action).

The Brahma ever remains ever the same imperishable changeless the supreme God ((Para Brahma) His own being, His basic nature is known as Adhyatma (Atma) in all beings Atman emanates as individual beings. The emanation that is caused is referred as karma (action).

The Brahman resembles the sun shining above. The sun's being, its basic nature spreads as sun rays. These rays emanate as reflected suns through reflecting media. Rays falling on reflecting surfaces create reflecting suns. Sun rays resemble Atman in beings. Atman functioning through the material equipments produces the world beings. Karma mentioned herein refers to this creation.

Lord Shri Krishna further elaborates –

"Brahma is the imperishable Supreme aspect of God, an adhyatma is the individual soul living in the body of all beings as the doer and the enjoyer. Karma is the process through which all beings come into existence, or in other words, the process of creation. Adhibhuta is Myself as the perishable body, and adhiyajna is the individual soul purified through sacrifice. Thus whether as the body or as the foolish soul or as the purified soul or as Brahma, it is I who am everywhere. And never doubt this that he who meditates on Me in all these aspects at the hour of death forgets himself, is careful of nothing and desirous of nothing will be united with Me. Whatever a man constantly dwells on in his mind and remembers at the time of death is realised by him. Therefore at all times you should remember Me and set your mind and heart upon Me and you will surely come to

Me. You may say that it is hard thus to stabilise the mind. But you take it from Me that one can become singleminded by daily practice and constant endeavour, for as I told you just now, all embodied beings are in the essence Myself in various forms. For this he should prepare himself from the very first so that his mind does not go astray at the time of death, but is steeped in devotion, keeps the life force (prana) steady, and thinks only of Me as the omniscient, the ancient, the ruler, the subtle supporter of all and dispeller of ignorance like the sun which drives darknes away.

This supreme state is known to the Vedas as akshara (the Imperishable) Brahma and is reached by sages who have freed themselves from likes and dislikes. All who desire to reach it observe brahmacharya, i.e. keep body, mind and speech under control and give up all objects of sense in these three ways. Men and women who die, having controlled the senses and uttering the sacred syllable Om and remembering Me as they depart, reach the supreme state. Their mind is never distracted by other thoughts, and when they have thus come to Me, they are not reborn into this painful condition. To come to Me is the only means of breaking the vicious circle of birth and death.

`Men measure time by the human span of a hundred years, and during that period do thousands of questionable deeds. But time is infinite. A thousand yugas (ages) make up the day of Brahma; compared with it a human day or even a hundred years of human life are as nothing. What is the use of counting such infinitesimal measures of time? Human life is as only a moment in the infinite cycle of time. It is up to us therefore to think of God alone to the exclusion of all else. How can we afford to run after momentary pleasures? Creation and dissolution have gone on unceasingly during Brahma's day and night and will do so in future too.

`Brahma who creates and dissolves beings is only an aspect of Me. He is the unmanifested which cannot be perceived by the senses. Beyond this unmanifested there is yet another unmanifested aspect of Mine of which I have spoken to you. He who reaches it is not reborn, for there is no day or night so far as this is concerned. This is a calm and immovable aspect, which can be realised only by single-minded devotion. It supports and pervades the whole universe.

It is said that one who dies in the bright half of the month during Uttarayana (the northward movement of the sun from January to July) comes to Me if he is mindful of Me at last, and that he who dies in the dark half of the month during Dakshinarayan (the southward movement from July to January) is reborn into the world. Uttarayana and the bright fortnight here may be interpreted to mean the path of selfless service; and Dakshinayana and the dark half of month mean selfishness. The path of service is the path of wisdom, and the path of selfishness is the path of ignorance. He who treads the path of wisdom is released from the bondage of birth and death while he who takes the path of ignorance becomes a bond-slave. After having realised the difference between the two, who would be so foolish as to prefer to walk in the way of ignorance? All men should learn to discriminate between the paths, renounce all fruits of merit, act in a spirit of detachment and discharge their duty with all their heart and soul, and thus endeavour to reach the supreme state described by Me.'

This chapter entitled Aksarabrahma Yoga. The Yoga of Imperishable Brahman, comprises 28 shlokas. The preceding chapter spoke of the deluded seeking finite fruit while the wise seek Brahman. Herein, you find the detailed procedure to gain Brahman. How you can reach Brahman through concentrated yoga and single-pointed meditation. A path which leads you to the supreme Abode whence none returns. The chapter also mentions the `path of return' which transports you to a realm of temporary bliss only to bring you back to the world of limitation.

This chapter can be summarised into four topics:

Arjuna uvaca:

Kim tadbrahma kimadhyatmam kim karma Purusottama
adhibhutam ca kim proktamadhidaivam kimucyate 1

adhiyajnah katham kotra dehe' sminmadhusudana
prayanakale ca katham jneyo si niyatatmabhih 2

Arjuna said:

1. What is that Brahman, what is Adhyatma (Inner Self), what is karma (action) O Purusottama? What is called Adhibhuta (above elements) and what is termed as Adhidaiva (above gods)?

2. Who and how is Adhiyajna (above sacrifice) here in this body O Madhusudana? And how are you to be known at the time of death by the self-controlled?

Sri Bhagavan uvaca:

Aksaram Brahma paramam svabhavo dhyatmamucyate
bhutabhavodbhavakaro visargah karmasamjnitah 3

The blessed Lord said:

3. Brahman is the Imperishable, the Supreme. His own being is called Adhyatma (Inner Self). The creative force that causes the birth of beings is called karma (action).

Adhibutam ksaro bhavah purusascadhidaivatam
adhiyajno hamevatra dehe dehabhrtam vara 4

4. Adhibhuta is the perishable nature and Adhidaivata is the indweller. I alone am the Adhiyajna here in the body, O best of the embodied.

Antakale ca mameva smaranmuktvi kalevaram
yah prayati sa madbhavam yati nastyatra samsayah 5

5. And he who casting off the body, goes forth thinking of Me alone at the time of death, he attains My being; there is no doubt about his.

Yam yam vapi smaranbhavam tyajatyante kalevaram
tam tamevaiti Kaunteya sada tadbhavabhavitah 6

6. Of whatever being one thinks at the end while leaving the body, to that alone one goes, O Kaunteya, (because) of constantly thinking of that being.

Tasmatsarvesu kalesu mamanusmara yudhya ca
mayyarpitamanobuddhirmamevaisyasyasamsayah 7

7. Therefore, at all times remember Me and fight. With mind and intellect absorbed in Me you shall without doubt come to Me alone.

I. Brahman and world – you gain what you pursue 1 - 7

The topic covers the transcendental and immanent nature of Brahman. How the imperishable Brahman pervades this perishable world of things and beings. Whatever you pursue in this world you gain that alone. By pursuing the Self you realise the Self. Krsna advise mankind to surrender the mind and intellect to the Self while the body is engaged in action. Bringing you to the ultimate state of Brahman.

Abhyasayogayuktena cetasa nanyagamina
paramam purusam divyam yati Parthanucintayan 8

8. With the unswerving mind made steadfast by the practice of yoga and meditating O Partha, one goes to the supreme, resplendent Being.

Kavim puranamanusasitaramanoraniyamsa manusmaredyah
sarvasya dhataramcintyarupamadityavarnam tamasah parastat 9

9. He who meditates on the Omiscient, Ancient, All ruler, minuter than the minutes, supporter of all, of inconceivable form, effulgent as the sun, beyond darkness.

Prayanakale manasa calena bhaktya yukto yogabalena caiva
bhruvormadhye pranamavesya samyak sa tam param purusamupaiti divyam 10

10. At the time of death, with steady mind and devotion, united by the power of yoga and only by fixing the prana (life-breath) perfectly in the middle of the two eyebrows he reaches the supreme, resplendent Being.

Yadaksaram vedavido vadanti visanti yadyatayo vitaragah
yadicchanto brahmacaryam caranti tatte padam sangrahena pravaksye 11

11. That which the knowers of the Veda call the Imperishable, that which ascetics freed from passion enter, that desiring which they practise brahmacarya (celibacy), that goal I will declare to you in brief.

Sarvadvarani samyamya mano hardi nirudhya ca
murdhyadhayatmanah pranamasthito yogadharanam 12

omityekaksaram brahma vyaharanmamanusmaran
yah prayati tyajandeham sa yati paramam gatim 13

12. Having controlled all gates, having confined the mind in the heart, having fixed his prana (life-breath) in the head, established in yogic concentration.

13. Reciting Brahman, the one-syllabled Om, remembering Me, he who departs, leaving the body, attains the supreme Goal.

Anjanyacetah satatam yo mam smarati nityasah
Tasyaham sulabhah Partha nityayuktasya yoginah 14

14. I am easily attainable by that ever steadfast yogi whose mind constantly and continuously thinks of Me without any other thought, O Partha.

II. Through ever steadfast yoga and meditation you reach Brahman 8 - 14

Turn your attention from the world to the supreme Self within. Control your senses and mind through spiritual practices. Then let your intellect direct the controlled mind to single-pointed meditation upon the mantra Om. By continuous and sustained meditation you will reach the supreme abode of Brahman.

Mamupetya punarjanma duhkhalayamasasvatam
napnuvanti mahatmanah samsiddhim paramam gatah 15

15. Having come to me, the Mahatmas (great sould are no more subject to rebirth which is transitory and the abode of pain; they have reached the highest Perfection.

Abrahmabhuvanallokah punaravartino rjuna
mamupetya tu Kaunteya punarjanma na vidyate 16

16. All the worlds up to Brahmaloka (world of Brahma) are subject to return, O Arjuna, but on reaching Me there is no rebirth O Kaunteya.

Sahasrayugaparyantamaharyadbrahmano viduh
ratrim yugasahsrantam te horatravido janah 17

17. The people who know the day of Brahma which ends in a thousand yugas (ages) and the night which ends in a thousand yugas (ages), they know day and night.

Avyaktadvyaktayah sarvah prabhavantyaharagame
ratryagame praliyante tatraivavyaktasamjnake 18

18. At the approach of day all the manifested stream forth from the unmanifested; at the approach of night they dissolve there only, in what is called the unmanifested.

Bhutagramah sa evayam bhutva bhutva praliyate
ratryagame vasah Partha prabhavatyaharagame 19

19. This multitude of beings, being born again and again, is dissolved helplessly at the approach of night, O Partha and it streams forth at the approach of day.

Parastamattu bhavo'nyo'vyakto'vyaktatsanatanah
yah sa sarvesu bhutesu nasyatsu na vinasyati 20

20. But there exists higher than the unmanifested, yet another unmanifested Being, eternal, which is not destroyed when all beings are destroyed.

Avyakto'ksara ityuktastamahuh paramam gatim
yam prapya na nivartante taddhama paramam mama 21

21. The Unmanifested is called the Imperishable. It is said to be the ultimate goal. Those who reach It do not return. That is My supreme Abode.

Purusah as parah Partha bhaktya labhyastvananyaya
yasyantahsthani bhutani yena sarvamidam tatam 22

22. O Partha, that supreme Being in whom all beings dwell, by whom all this is pervaded is indeed attainable by unswerving devotion.

III. Brahman beyond the manifest and unmanifest world 15 - 22

Every individual being remains as vasanas, unmanifest desires, in deep sleep at night. His vasanas manifest at daybreak upon awaking. This cycle of dissolution and emanation continues until the individual completely exhausts his vasanas, reaching the state of Self-realisation. A similar phenomenon takes place at the macrocosmic level. The entire macrocosm manifests during the day of Lord Brahma. (Lord Brahma, a god of the Hindu Trinity, as distinguished from Brahman, the supreme Reality). Brahma's celestial day consists of 4.32 billion terrestrial years. Similarly, the macrocosm folds back into the unmanifest state during the right of Lord Brahma, covering an equal period as his day. Beyond this unmanifest lies the supreme Unmanifest, Brahman. Humans reach Brahman through spiritual disciplines culminating in single-pointed meditation.

Yatra kale tvanavrittimavrittim caiva yoginah
prayata yanti tam kalam vaksyami Bharatarsabha 23

23. I will tell you indeed, O Bharatarsabha, the time in which yogis departing never return and also the time they do return.

Agnirjyotirahah suklah sanmasa uttarayanam
tatra prayata gacchanti Brahma Brahmavido Janah 24

24. Fire, light, day-time, the bright-fortnight, the six months of the northern path (of the Sun) – there departing the knowers of Brahman go to Brahman.

Dhumo ratristatha krsnah sanmasa daksinayanam
tatra candramasam jyotryogi prapya nivartate 25

25. Smoke, night-time, dark-fortnight, the six months of the southern path (of the Sun) – there obtaining the lunar light the yogi returns.

Suklakrsne gati hyete jagatah sasvate mate
ekaya yatyanavrttimanyaya vartate punah 26

26. These bright and dark paths of the world are verily deemed eternal; by the one (a man) goes not to return, by the other he returns again.

Naite srti Partha Jananyogi muhyati kascana
Tasmat sarvesu kalesu yogayukto bhavarjuna 27

27. Knowing these two paths, O Partha, no yogi is deluded; therefore, O Arjuna, be steadfast in yoga at all times.

Vedesu yajnesu tapahsu caiva danesu yat punyaphalam pradistam
atyeti tatsarvamidam viditva yogi param sthanamupaiti cadyam 28

28. Whatever meritorious fruit is assigned to Vedas, sacrifices, austerities and also to gifts – the yogi rises above all these by having known this and goes to the supreme primeval Abode.

IV Paths of Return and Non-return 23 - 28

The topic covers the Path of Sun, Uttarayana and the Path of Moon, Daksinayana. The Path of Sun takes a seeker to Brahmaloka, the heaven of Lord Brahma whence he goes to the supreme Brahman. Whereas the Path of Moon takes the individual to Pitrloka only to enjoy heavenly pleasures and return to the cycle of birth and death in this world. The latter path provides only temporary pleasures of heaven for meritorious deeds done here. The former, however, takes the seeker to Brahman through heaven because of having mixed meritorious deeds with his spiritual practice. But the true yogi, through his determined effort on the `path of yoga of meditation', goes directly from here to the supreme abode of Brahman.

CA Bakul B. Mody

Valuation under Indirect Tax Laws – A Broad Overview

1. Need for Special Story

Valuation under Indirect Tax Laws (Central Excise, Customs, Service Tax, VAT, etc.) has been a highly controversial subject and prone to extensive litigations which have significant financial implications. Recent Supreme Court ruling under Central Excise in FIAT casehas far reaching implications. Further, recent Delhi High Court ruling under Service tax, is likely to have significant implications on the vexed issue of taxability of reimbursements. Under this backdrop, it was felt that, a comprehensive analysis and discussions of Valuation Concept under different indirect tax laws (including LBT) would be of immense value and benefit to the readers of the Chamber's Journal generally and in particular to the members dealing in Indirect Taxes.

Some of the more important recent developments and current issues under Valuation are discussed hereafter briefly.

2. Supreme Court Ruling under Central Excise in FIAT case

The recent Supreme Court ruling in *CCE vs. Fiat India Pvt. Ltd (2012) [283 ELT 161 (SC)]*, which is in favour of the Revenue, but with due respects, does not appear to be in line with the intention of the government when the transaction value concept for levy excise duty was introduced in July, 2000.

The era of post manufacturing costs and profits came to an end with of the Supreme Court ruling in *UOI vs. Bombay Tyre International (1983) [14 ELT 1896 (SC)]* and the amendment of the old Section 4 of the Central Excise Act, 1944 ("CEA") The "deemed value concept", further continued to have its problems and disputes remained unabated, In 1996, section 4A was inserted in CEA to provide for levy of excise duty on the Retail Sale Price (RSP) or Maximum Retail Sale Price (MRSP) which partially addressed uncertainty in valuation matters. With a clear intention to fully and finally resolve the uncertainty around valuation disputes, effective 1st July, 2000, the transaction value concept was introduced. A new and revamped section 4 dealing with the price actually paid and payable replaced the deemed value concept in Section 4.

Both, under Pre 2000 section 4 and the Post 2000 section 4, cost of manufacture was not the yard stick for measuring the quantum of excise duty. The Supreme Court in *CCE vs. Gurunanak Refrigeration Corporation (2003 - 153 ELT 249 (SC)]* held so for the period prior to July 2000 and the new valuation rules introduced simultaneously with the transaction value concept in the amended section 4 clarified the same.

Under this backdrop, we now have the Supreme Court in Fiat India holding that loss making price is not the 'formal price" and that sale of cars below the cost of manufacture to penetrate the market involved an extra commercial or additional consideration to justify rejection of the transaction value and levy of excise duty on the cost of manufacture.

The Supreme Court ruling in FIAT case has far reaching implications not only on Central Excise Valuation but also could have possible repercussions on Valuation under Indirect tax laws as well

Based on strong representations made by the Trade Bodies across the country, the Government needs to fairly respond to the adverse and negative impact this judgment shall have on the trade and industry. It needs to rise above being a mere collector of revenue, and by a legislative process correct the interpretation put forth by the Supreme Court, by suitably amending Section 4 of CEA so as to nullify the impact of the ruling.

3. Delhi High Court Ruling under Service Tax on taxability of reimbursements

In *Inter Continental Consultants and Technocrats Pvt Ltd (2012) [TIOL – 966 HC – DEL – ST]* the Delhi High Court was confronted with the a question of law wherein it was decisively ruled that Rule 5(1) of the Service Tax (Determination of Value) Rules, 2006 ["Valuation Rules"] providing to include the expenditure or costs incurred by the service provider during the course of providing taxable service, to be part of the value for the purpose of charging Service tax is *ultra vires* sections 66 and 67 of the Finance Act, 1994 ("Act") as the said rule travels beyond the scope and mandate of the said section 67.

While the ruling of the Delhi High Court indeed is extremely welcome, little can be commented about its finality at this stage, pending resolvement by the Supreme Court. The possibility of the Government bringing an retrospective amendment in section 67 itself cannot also be ruled out, considering the fact that a large number of assessees have already paid service tax on the reimbursable expenses and again a large number of them may have paid after recovering the same and of which, CENVAT credit is availed by the recipients of such services. Precedents of retrospective amendment have already been experienced in the service tax administration itself in case of renting of immovable property service and broadcasting service besides the fact that Supreme Court struck down provisions relating to reverse charge made via subordinate legislation as *ultra vires* vis-à-vis services of clearing and forwarding agents and goods transport agencies. [Refer *Laghu Udyog Bharti & Anr. vs. UOI (1999) 112 ELT 365 (SC)* and subsequent retrospective amendment made in Section 68 of the Act by the Central Government to overcome the directives of the Court in the said case]. Therefore, the relief or even the sense of 'fairness' felt on account of the above judgment may remain short-lived and plan of action on the basis of the above ruling may not be an act of prudence is felt by many at this point in time. However, and not withstanding the outcome or the finality in the above context, the rationale laid down by the Larger Bench of the Bengaluru Tribunal in *Shri Bhagawathy Traders vs. CCE (2011) 24 STR 290 (Tri.-LB)* which dealt with the issue of taxability of reimbursable expenses under the service tax law in the scenario when Rule 5(1) did not exist, would be very much relevant. The Larger Bench held that the cost of input service and inputs used in rendering service cannot be treated as reimbursable cost such as rent for premises, telephone charges, stationery charges, courier charges, etc. as such amount represents cost of rendering service. It further held that the concept of reimbursement will arise only when the person actually paying was under no obligation to pay the amount and he pays the amount on behalf of the buyer of the goods and recovers the said amount from the buyer of the goods.

Keeping in view this rationale, if a simple example of architect, consulting engineer or a chartered accountant is examined wherein when an architect visits site of the client outside his home city/town and so does the engineers of a consulting engineering firm or audit team of a CA firm, the travel expenses, lodging and boarding expenses incurred and reimbursed cannot certainly form part of the 'value' of taxable service as the service provider has incurred such expenses only to carry out the assignment of the recipient of service and such cost does not represent its own "professional fee" that is charged for using its proficiency expertise and/or knowledge of the subject. Yet in some cases for the sake of simplicity, sometimes allowances are fixed on a daily basis for employees to avoid cumbersome paper work or to overcome practical difficulties and this many a times acts as a deterrent to prove that the 'reimbursement' of the expense incurred is on "actual basis" in terms of the controversial Rule 5(2) of the Valuation Rules which provides that cost incurred as "pure agent" can be excluded from the value of taxable service, subject to satisfaction of all the conditions laid down in this respect. Taking another example of a custom house agent or a logistics service provider, it is found that when an expense like courier charge is specifically incurred for and on behalf of the recipient and under his specific instructions or a place is acquired on rental basis on behalf of client and fully client-specific and is for their limited purpose, it may not form part of the cost of providing such service and therefore service tax may not be attracted in such cases. Nevertheless, the issue is subjective as observed by the Larger Bench in Shri Bhagawathy Traders wherein admittedly the subject is dealt with a well-balanced approach. The issue therefore may be debatable and therefore litigative in many complex situations as precise parameters are not available in law for the same otherwise than Rule 5 of the Valuation Rules.

In the current scenario, when all services are brought within the sweep of the service tax except the negative list and certain exempt services, if pragmatism is applied by the government and Rule 5 is allowed to remain struck down, to a large extent dual taxation would be avoided and guidelines by revenue may be provided on the lines ruled by the Larger Bench in the case of Shri Bhagawathy Traders. Service tax administration then would not be lopsided in favour of revenue on this aspect and may extend fairness to assessees at large on the issue of levying service tax on reimbursable costs and this may also possibly cover genuine concern of many business enterprises on the open issue of leviability or otherwise of service tax on shared costs among associate / group concerns.

4. Includibility of taxes / statutory levies while computing tax liability

Levy of tax on tax has been one of the burning issues under Indirect tax laws. On account of specific statutory provisions under State VAT laws, for computing the VAT liability, central excise duty component is to be included. This results is cascading effect of tax on taxes increasing the burden on the final consumer tremendously.

Further under Service tax law, there are no clear statutory provisions to the effect that, Service tax should not be computed on other indirect taxes component (say VAT, luxury tax, entertainment tax etc) included in the value of the transaction. However, dept. clarifications have been issued in some cases to the effect that, if a tax or a levy is separately indicated in the invoice, then in such cases, Service tax should not be computed on such tax amount. However, based on practical experience it is observed that, field formations do attempt to demand Service tax on gross amount charged including taxes.

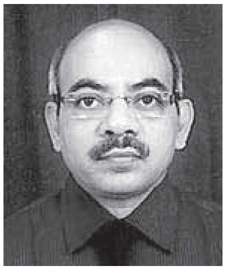
It is also observed that, Sales tax authorities in some cases, have taken a view that Sales tax is to be computed on the Service tax component. This has resulted in litigations.

In any indirect taxation system, it is essential that, cascading effect of tax on taxes, is eliminated to avoid adverse impact on the end consumer. It is expected that proposed GST Regime would address this issue comprehensively.

5. Conclusion

Under any sound indirect tax system, it is essential that, the statutory provisions (including rules framed thereunder) in relation to valuation of goods & services are simple & clear so as to have minimal litigations and at the same time provide clarity to Trade & Industry as to the correct transaction costs, at the time of execution of transaction, itself.

It is expected that, under the Proposed GST Regime, Government would initiate a comprehensive process whereby a "Draft Paper on Valuation Provisions" is issued, for deliberations by all the stake holders so as to arrive at a Simple Valuation Regime for Goods & Services.



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Concept of 'Transaction Value' under Central Excise

1. Introduction

1.1 Section 3 (1) of the Central Excise Act, 1944 ('the CEA'), *inter alia*, provides for the levy and collection of a duty of excise (i.e. 'Central Value Added Tax"), in such manner as may be prescribed, on all excisable goods which are produced or manufactured in India as, and at the rates, set forth in the First Schedule or Second Schedule to the Central Excise Tariff Act, 1985 ('the CETA'). Here, it may be stated that in case of excisable goods covered by the Second Schedule, a special excise duty, in addition to the basic excise duty, is also leviable.

1.2 Once the excisability and duty liability of a product is established, the next question that, arises is "what is the excise duty payable?". Answer to this question lies in Explanation to section 3 (1) of the CETA which reads as under:

"Explanation. - "Form or method", in relation to a rate of duty of excise, means the basis, namely, valuation, weight, number, length, area, volume or other measure with reference to which the duty may be levied."

1.3 Thus, excise duty can be levied on any of the following basis:

- Specific duty, based on some measure like weight, volume, length, number, etc.;
- Duty as % of Tariff Value fixed under Section 3(2) of the CEA;
- Duty on the basis of 'Maximum Retail Price' (MRP), after abatements in terms of Section 4A of the CEA;
- Duty based on Annual Capacity of Production under Section 3A of the CEA;
- Duty under Compounded Levy Scheme;
- Duty as % based on 'Assessable Value' of a product under Section 4 of the CEA (i.e. *ad-valorem* duty).

1.4 However, prescribing 'specific rate of duty' or 'Tariff Value' or levying duty on MRP basis is possible only in case of a few selected commodities. Similarly, levying duty on the basis of 'Annual Production Capacity' or under 'Compounded Levy Scheme' can be resorted to only in case of selected items. A vast majority of the products covered by CETA are, thus, subjected to levy of excise duty on the basis of its 'Assessable Value'. This is called 'Ad Valorem Duty'. Section 4 of the CEA provides for the determination of 'Transaction Value' (or 'Assessable Value') of an excisable product for the purpose of payment of duty thereon.

2. Historical background

2.1 The issue of determination of correct 'assessable value' of a product assumes significance since, as stated above, majority of the products are subjected to levy of duty on *ad-valorem* basis. From the assessee's perspective, the issue shall not pose much difficulty as, he may argue, that the price mentioned in the invoice shall constitute the 'value' of the product. However, it may not be possible, from the Central Excise Officer's perspective to fully rely upon the invoice price' as it is open to manipulation. This opposite viewpoint of the assessee and the Central Excise Officer often leads to valuation disputes. In fact, 'valuation' of the excisable product has always been a thorny issue so far as the taxpayers and tax-collectors are concerned.

2.2 It is, therefore, not surprising that Section 4 of the CEA has always been one of the most litigated provisions of the statute. Section 4 has a chequered history and can be broadly divided into three periods i.e.

- Prior to 01.10.1975
- From 01.10.1975 to 30.06.2000
- From 01.07.2000 onwards.

(a) Period: Prior to 01.10.1975:

2.3.1 During this period, Section 4, as was prevalent, was almost a reproduction of Section 30 of the SEA Customs Act, 1878.

2.3.2 This Section was the subject matter for consideration in two landmark judgments of the Supreme Court – one, in Voltas Ltd's case – 1977 (1) ELT J177 (SC) and another in Atic Industries' case – 1978 (2) ELT J 144 (SC).

2.3.3 In Voltas' case (supra), the Supreme Court held that the wholesale cash price has to be ascertained only on the basis of transactions at arm's length. If there is a special or favoured buyer to whom a specially low price is charged because of extra-commercial considerations e.g. because he is a relative of the manufacturer, the price charged for those sales would not be the 'wholesale price' for levying excise duty. The Court, however, further held that once wholesale dealings at arm's length are established, the determination of wholesale cash price for the purpose of Section 4 may not depend upon the number of such wholesale dealings.

2.3.4 In Atic's case, Revenue contended that Atul and ICI (is connection visible?) are not independent wholesale buyers of Atic as entire production was sold by Atic to these two buyers only who, in turn, sold the products to the wholesalers and retailers. However, Revenue's contention was rejected by the Court relying upon its decision in Voltas' case (supra).

2.3.5 As if the substantial principles of law laid down in these two cases was not enough, much to the chagrin of the Revenue, Hon'ble Justice K. K. Mathew made an *obiter dictum* in Voltas' case (supra) that "Excise is a tax on the production and manufacture of goods". This one simple sentence created havoc in the matter of valuation of the product and assessments of duty. The assessees started claiming that since excise is a duty on manufacture of goods, only manufacturing cost can be taxed. All other expenditures – claimed to be post-manufacturing and post-removal expenses – like, advertisement, after sales service, etc. cannot be subjected to levy of excise duty.

2.3.6 Obviously, these two judgments opened a floodgate of litigation on the issue of valuation and led to huge revenue loss. Government, in those days, used to be quite pragmatic and forward looking and, therefore, 'Retrospective Legislation' was not much preferred to recoup the past revenue losses ! The Government, thus, decided to bring in a new look comprehensive Section 4 which took its birth on 01.10.1975.

(b) Period: From 01.10.1975 to 30.06.2000

2.4.1 The then prevalent Section 4 was substituted by a new Section 4 *vide* Section 2 of the Central Excises and Salt (Amendment) Act, 1973 and was brought into effect from 01.10.1975 by M.F. (D.R) Notification No. 176/75-CE dated 08.08.1975.

2.4.2 However, even under the revamped Section 4, the original concept of 'valuation' remained unchanged. It would be interesting here to refer to 'the Statement of Objects and Reasons' appended to the Finance Bill (later, the Amendment Act of 1973) in respect of the new provision being introduced. A relevant portion of the said 'Statement of Objects and Reasons' is reproduced below:

"In order to overcome the various difficulties experienced in the working of the Section it is proposed to suitably revise the valuation provision contained in Section 4 of the Act, providing as far as practicable, for assessment of excisable goods at the transaction value, except in areas where there may be scope for manipulation (such as sales to or through related persons) and making specific stipulation (such as sales to or through related persons) and making specific stipulations with respect to situations frequently encountered in the sphere of valuation".

2.4.3 Unfortunately, the hopes that the thoroughly revamped Section 4 would significantly curtail – if not completely end – the valuation disputes were soon dashed. The controversies and conflicts between the Assessee and the Department continued unabated even after new Section 4 was brought into effect.

2.4.4 Finally, most of the questions were answered and the controversies were almost set at rest by the historic ruling given by 3-Member Bench of the Supreme Court in Bombay Tyre International's case – *1983 (14) ELT 1896 (SC)*. Certain clarifications were, thereafter, issued by the Supreme Court in the subsequent landmark judgment given in MRF's case – 1995 (77) ELT 433 (SC). The most significant feature of MRF's case was that the concept of 'post-manufacturing expenses', first stated by the Hon'ble Justice Mathew in Voltas' case and later, upheld in Bombay Tyres' case was given a decent burial. Hon'ble Justice Jeevan Reddy called it a phraseological inexactitude. The Hon'ble Justice also gave a new concept called 'post-removal expenses', clarifying, however, that it was only a convenient expression rather than a precise one with a definite connotation.

2.4.5 The new Section 4 held the fort for nearly 25 years and barring some exceptional situations leading to unavoidable legal disputes, the provisions and principles of law governing the valuation stood almost settled. However, for some inexplicable reasons, the Government decided to unsettle the settled position and introduce a new Section 4 and with that, the concept of 'transaction value' effective from 01.07.2000.

(c) Period: From 01.07.2000 onwards

2.5.1 *Vide* Section 94 of the Finance Act, 2000, a new section 4 was introduced, substituting the prevalent Section 4 w.e.f. 01.07.2000. Simultaneously, the old Valuation Rules, 1975 were also substituted by Central Excise Valuation (Determination of Price of Excisable Goods), 2000 *vide* Notification No. 45/2000-CE (NT) dated 30.06.2000 effective from 01.07.2000. The Hon'ble Finance Minister, in his Budget Speech while presenting the Finance Bill, 2000, said:

"I want to make the valuation mechanism simple, user-friendly and along commercially acceptable lines. From 1st July, 2000, I propose to replace the existing Section 4 of Central Excise Act, which is based on concept of 'normal price', by a new Section based on 'transaction value' for assessment. This is a path-breaking departure from the traditional approach".

2.5.2 As a matter of fact, the concept of 'transaction value' was not a new concept to Central Excise. Interestingly, the concept found its recognition in 'the Statement of Objects and Reasons' explaining the rationale behind the introduction of new Section 4 effective from 01.10.1975 (See the reproduced portion in para 2.4.2 above). Moreover, even under the old Central Excise regime, the invoice price was generally accepted as 'assessable value' for the purpose of payment of duty. Invoice price assessment was even in vogue for the goods falling under the erstwhile and residual tariff item 68 prior to the introduction of the CETA, 1985. *Vide* Notification No. 120/75-CE dated 30.04.1975, it had been provided that in respect of goods falling under the tariff item 68, the duty shall be payable only on the basis of invoice-price charged by the manufacturer for the sale of the goods subject to the conditions prescribed therein.

2.5.3 However, with the introduction of new Section 4 effective from 01.07.2000, the concept of 'transaction value' was given a statutory recognition. In the ensuing paragraphs, the various aspects of the concept of 'transaction value' are briefly explained and discussed.

3. Concept of 'Transaction Value' as effective from 01.07.2000

3.1 Section 4, as introduced w.e.f. 01.07.2000, *inter alia*, provides that where the excise duty is chargeable on any excisable goods with reference to their value, then, on each removal of the goods, the value shall be the 'transaction value', provided the goods are sold by the assessee, for delivery at the time and place of the removal, to an unrelated buyer and the price is the sole consideration for the same. If these statutory requirements are not satisfied, then, the valuation will be required to be done as per the Valuation Rules, 2000 [Section 4 (1) (b) refers].

Does the concept of 'transaction value' marks a radical departure from the past ?

3.2 It was clarified by the CBEC *vide* its Circular F. No. 354/81/2000-TRU dated 30.06.2000 that the concept of 'transaction value' marks a fundamental departure from the erstwhile system of valuation. The relevant portion of the Circular is reproduced below:

"4. The definition of "transaction value" needs to be carefully taken note of as there is fundamental departure from the erstwhile system of valuation that was essentially based on the concept of 'Normal Wholesale Price', even though sales were effected at varying prices to different buyers or class of buyers from factory gate or depots, etc. had to be determined.

5. The new Section 4 essentially seeks to accept different transaction values which may be charged by the assessee to different customers, for assessment purposes so long as these are based upon purely commercial consideration where buyer and the seller have no relationship and price is the sole consideration for sale. Thus, it enables valuation of goods for excise purposes on value charged as per commercial practices rather than looking for a notionally determined value."

3.3 Under the old Section 4, the 'assessable value' was, in reality, a notional value called the 'normal wholesale price', which was the price at which such goods are ordinarily sold in the course of wholesale trade by the Assessee at the factory gate to an unrelated buyer. It was, thus, a 'deemed value', which may or may not correspond with the invoice price. Moreover, the phrase 'each removal' was non-existent in the old Section 4. Even, the concept of different prices to different buyers was also not readily accepted and it was permitted only in case of class of buyers. What was being really followed was the concept of 'uniform price' which again was a notional normal price.

3.4 The new Section 4 has brought a sea-change in the sphere of valuation. Now, the price charged on each removal of goods shall be considered as the 'transaction value'. The concept of uniform price is no longer valid. The Assessee may sell his goods at different prices to the different customers and even to the same customers, at different prices, even during the course of the day. In other words, each invoice can carry a different price.

3.5 Aside from the above, the provisions relating to packing charges, durable and returnable packing, class of buyer and trade discount are completely absent in the new Section 4. Earlier, Assessable Value was fixed, as per old Section 4, on the basis of 'Normal wholesale price to independent buyer/s at the factory gate, inclusive of packing cost, but exclusive of (a) all taxes and duties payable (b) Trade Discounts and (c) Cost of durable and returnable containers'.

3.6 In *CCE vs. Grasim Industries – 2009 (241) ELT 321 (SC)*, the issue whether concept of transaction value has made radical departure from deemed normal price under erstwhile Section 4 has been referred to the Larger Bench. The matter is still pending before the Larger Bench as on date.

Basis of 'transaction value'

3.7 As stated above, when duty is chargeable on excisable goods with reference to its value, the 'assessable value' shall be the 'transaction value' for each removal of goods provided the following conditions are satisfied:

- The goods should be sold at the time and place of removal;
- Buyer and assessee should not be related;
- Price should be the sole consideration for sale;
- Each removal will be treated as a separate transaction and 'value' for each removal will be separately fixed.

Each removal is different transaction

3.8 In *GKN Drive Shafts vs. CCE 2003 (154) ELT 177 (CEGAT)*, it was held that each transaction is a separate transaction and has to be valued separately. Thus, separate price for same product to different buyers is permissible. In case of parts, there are different prices if the part is sold to OE (original equipment) manufacturer [for use in manufacture of his final product] and same part sold as spare part. Spare part price may be two to five times more than the original equipment price. This is accepted trade practice. It was accepted in earlier section 4.

Essential features of 'transaction value'

3.9 Section 4(3)(d) defines the term 'Transaction Value' (the provision is not reproduced due to space constraints). From the careful perusal of the definition, it will be observed that following are the main features or requirements of the 'transaction value':

(a) It is the price actually paid or payable;

(b) The price is for the goods when sold;

(c) The price includes any amount that the buyer is liable to pay to, or on behalf of assessee. Thus, payment made by buyer to another person, on behalf of assessee, will be includible;

(d) The payment should be 'by reason of, or in connection with the sale';

(e) The amount may be payable at the time of sale or at any other time. Such time may be before or after sale;

(f) It includes, but not limited to, any amount charged for, or to make provision for, advertising or publicity, marketing and selling organisation expenses, storage, outward handling, servicing, warranty, commission or any other matter. However, these expenses are includible only when aforesaid conditions are satisfied;

(g) Amount of duty of excise, sales tax and other taxes, if any, actually paid or actually payable on such goods is to be excluded while calculating 'transaction value'. The amount may be 'payable' any time in the future.

The definition is subject to charging section 3 & Section 4 (1) of CEA

3.10 In *CCE vs. Acer India Ltd.- 2004 (172) ELT 289 (SC)*, the 3-Member Bench of the Supreme Court observed that the definition of transaction value would be subject to the charging provisions contained in Section 3 of the Act as also Section 4(1). The definition of 'transaction value' must be read in context of Section 3 and not *de hors* the same.

3.11 However, the above view was doubted by a Division Bench of the Supreme Court in *CCE vs. Grasim Industries Ltd. – 2009 (241) ELT 321 (SC)* and it was observed that Sections 3 and 4 of the CEA despite being inter-linked, operating different fields and thus, the following issues were referred to the Larger Bench:

(a) Whether Section 4 of the Central Excise Act, 1944 (as substituted with effect from 1-7-2000) and the definition of "Transaction Value" in Clause (d) of sub-Section (3) of Section 4 are subject to Section 3 of the Act?

(b) Whether Sections 3 and 4 of the Central Excise Act, despite being interlinked, operate in different fields and what is their real scope and ambit?

(c) Whether the concept of "Transaction Value" makes any material departure from the deemed normal price concept of the erstwhile Section 4(1)(a) of the Act?

Assessee and buyer should not be related

3.12 'Transaction value', as explained above, will be acceptable as 'assessable value' only when buyer is not related to the assessee. In other words, the price charged by the assessee will be accepted as 'transaction value' only if the buyer is an independent, unrelated one. This is primarily to safeguard against the revenue loss that might be caused when an unscrupulous manufacturer sells the goods at an artificially lower price to a person related to him who, subsequently, sells the goods at a much higher price.

3.13 As per Section 4(3)(b) of the CEA, persons shall be deemed to be 'related' if –

(i) they are inter-connected undertakings;

(ii) they are relatives;

(iii) amongst them, the buyer is a relative and a distributor of the assessee, or a sub-distributor of such distributor; or

(iv) they are so associated that they have interest, directly or indirectly, in the business of each other.

3.14 The principle behind the concept of 'related person' has been accepted in Bombay Tyre International's case (supra), wherein it was observed:

> "Veil of corporate entity could be lifted to pay regard to the economic realities behind the legal façade, for example, where the corporate entity was used for tax evasion or to circumvent tax obligation... The definition of related person (after 'reading down' it in respect of provision of 'distributor') does not suffer from any constitutional infirmity. It is within the legislative competence of Parliament".

3.15 When the sale is made through 'related person', price relevant for valuation will be 'normal transaction value' at which the related buyer sells the goods to unrelated buyer, as per Rules 9 & 10 of Valuation Rules, 2000.

The amount should be by reason of or in connection with the sale

3.16 The statutory definition of 'transaction value' provides for the inclusion of any amount, for the purpose of determination of assessable value, that a buyer is liable to pay to, or on behalf of the assessee, by reason of, or in connection with the sale.

3.17 Thus, whatever elements which enrich the value of the goods before their marketing and were held by the Supreme Court to be includible in 'value' under the erstwhile Section 4 would continue to form part of 'transaction value' even under new Section 4. Where the assessee charges an amount as price for his goods, the amount so charged and paid or payable for the goods will form the assessable value. If, however, in addition to the amount charged as price from the buyer, the assessee also recovers any other amount 'by reason of sale', or, 'in connection with sale', then such amount shall form part of the transaction value for the purpose of valuation and assessment. Thus, if an assessee splits up his prices and charges a price for the goods and separately charges for packaging, the packaging charges will also form part of assessable value as it is a charge in connection with production and sale of the goods recovered from the buyer.

3.18 Transaction value depends on contract of sale of goods between seller and buyer as ruled by the Larger Bench of the Tribunal in the case of *Commissioner vs. Supreme Petrochem Ltd. – 2009 (240) ELT 38 (Tri.-LB).*

Amount of duty of excise, sales tax and other taxes actually paid or payable is not includible

3.19 The transaction value does not include the amount that is actually paid or actually payable to the Government or other concerned statutory authority by way of excise, sales tax and other taxes. In other words, if any excise duty or other tax is paid at a concessional rate for a particular transaction, the amount of excise duty or such tax actually paid at the concessional rate shall only be allowed to be deducted from the price. The assessee cannot claim that the excise duty or tax payable at the 'normal rate' should be allowed to be deducted.

3.20 The phrase 'actually payable', in the context of amount of duty of excise, sales tax and other taxes would normally come into play only in those situations where such duty or tax is not paid at the time of transaction, but paid subsequently like sales tax payable under a deferred payment scheme.

Time and place of removal and valuation:

3.21 Section 4(1)(a) provides that the transaction value shall be the assessable value when goods are sold by the assessee, for delivery at the time and place of removal.

3.22 Thus, transaction value will be relevant and acceptable for the purpose of valuation only when goods are 'sold' at the time and place of removal.

3.23 As per Section 4 (3)(c), 'place of removal' means (i) a factory or any other place or premises of production or manufacture of the excisable goods; (ii) a warehouse of any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty; (iii) a depot, premises of a consignment agent or any other place or premises from where the excisable goods are to be sold after their clearance from the factory from where such goods are removed.

3.24 As per Section 4(3)(cc), in case of sale from depot/place of consignment agent, 'time of removal' shall be deemed to be the time at which the goods are cleared from the factory.

CENVAT provisions and valuation provisions are independent

3.25 CBEC, *vide* its Circular F. No. 137/3/2006-CX.4 dated 02.02.2006 has clarified that availment of CENVAT Credit and valuation for the purpose of payment of duty are two independent issues.

Condition in which goods are removed is relevant for valuation

3.26 It is a settled law that condition of goods as they leave the factory alone is relevant for the purpose of levy of excise duty. Goods are to be assessed at the time of removal from the factory. Therefore, the State in which they are removed is highly relevant for valuation.

3.27 The above principle of law has been duly recognised and laid down in a catena of judicial pronouncements, a few of which are cited below:

1. *Punjab Breweries Ltd vs. CCE – 1985 (22) ELT 513 (Tribunal);*
2. *Jyoti Overseas Ltd. vs. CCE – 2001 (130) ELT 446 (Tribunal);*
3. *Anjaleem Enterprises vs. CCE – 2006 (194) ELT 129 (SC).*

4. Valuation Rules, 2000

Valuation Rules to determine Assessable Value

4.1 Section 4(1)(b) of the CEA states that if Assessable Value cannot be determined under section 4(1) (a), it shall be determined in such manner as may be prescribed by Rules. Under these powers, Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 have been notified and made effective from 01.07.2000.

Valuation Rules required only if conditions of Section 4(1)(a) are not satisfied

In *Grasim Industries vs. CCE – 2004 (164) ELT 257 (CESTAT)*, it was held that if conditions of Section 4(1)(a) are satisfied, one need not take recourse to Valuation Rules – relying on *Filament India vs. CCE – 2003 (160) ELT 314 (CESTAT).*

Conclusion

As will be evident, the concept of 'transaction value' as embodied in the new Section 4 as effective from 01.07.2000 implicitly recognises fair and just commercial practices and accepts the same as part of the law inasmuch as different transaction values for different removals are accepted if the sale is purely on commercial considerations. In short, any payment received for sale, is accepted as a transaction value, provided it satisfies the essential requirements as laid down with regard thereto and explained above. The new concept, while incorporating all the salient features of the erstwhile Section 4, still seeks to tread a different path from the notionally determined normal wholesale price. The minor irritants like includibility of packing charges, discounts, etc. which had agitated judicial bodies for years together, do not even merit a mention in the new Section 4. If packing charges are recovered in connection with the sale, the same will be included in the value. Similarly, all kinds of discounts, if actually allowed, are eligible for deduction. In case of turnover discounts or year-end discounts, which are readily known at the time of transaction, the same are still allowed to be deducted from the price if the Assessee discloses to the department its intention to allow such discounts and requests for provisional assessment as clarified by the Board *vide* Circular dated 30.06.2000 supra.

The new Section 4 thus, does not only signify a marked improvement over the old Section 4 but, seeks to address, in a pragmatic and prudent manner, host of the issues that plagued the erstwhile valuation regime. The law governing the valuation of excisable goods has perhaps now become more market-friendly !

CA Madhukar N. Hiregange

MRP based system (Now RSP)

1. Background to RSP Valuation
2. Applicability of section 4A
3. Central Excise RSP Rules
4. Issues – resolved and unresolved

Background to valuation under RSP

The eternal tug of war between the manufacturer to value goods as near to their raw material cost and the revenue to the sale price at the retail point was especially more for goods for final consumption. These goods are in the nature of consumer durables and fast moving consumer goods where the buyer is only interested in the final price. Intermediate goods would normally not find a place in this list other than those where undervaluation has been a practice.

Section 4A of Central Excise Act, 1944 empowers the Central Government to specify goods on which duty would be payable based on 'retail sale price'.

The "retail sale price" is defined under section 4A of Central Excise Act, 1944 as under:

> "Retail Sale Price" means the maximum price at which the excisable goods in packaged form may be sold to the ultimate consumer and includes all taxes, local or otherwise, freight, transport charges, commission payable to dealers, and all charges towards advertisement, delivery, packing, forwarding and the like and the price is the sole consideration for such sale

Applicability of section 4A

The valuation of goods under section 4A would be applicable only in the case the following conditions are satisfied:

- The goods should be covered under Third Schedule of Central Excise Act, 1944.
- The goods should be such as sold in packed / packaged form.
- There should be a requirement in Legal Metrology Act, 2009 or any other laws or rules for the time being in force requiring declaration of the retail sale price on such package.

When all the above are cumulatively met only then would section 4A be applicable. *(State of Maharashtra vs. Subhash Arjudas Kataria 2012 (275) ELT 289 (SC))*

The value of such goods for the discharge of excise duty would be arrived based on RSP value of such goods as declared on the package less abatement as specified. Illustration AquaFina Mineral Water is sold at ` 10 per bottle of 500 ml. The value under 4A would be = 10 minus [10 x 45%] = ` 5.50

The abatement is for the purpose of covering the other taxes, normal post removal costs which are associated with the product. However there could be some anomalies on comparison.

Central Excise (Determination of Retail Sale Price of Excisable Goods) Rules, 2008

Where the manufacturer removes goods by any means of defiance such as, as under

a. without declaring RSP; or

b. by declaring the RSP, which is not the RSP as per law; or

c. by declaring RSP which later on obliterated

Then the values of such goods shall be determined in accordance with Rule 4 of RSP rules read with Section 4A of Central Excise Act, 1944 as under:

1. Where the manufacturer has removed/cleared the identical goods, then the value of such goods cleared within one month before or after the date of removal of such goods shall be considered as value of such goods under sub-section 4 of section 4A; or

2. Where the value of goods cannot be determined as (1) above, then the value of such goods shall be determined as RSP of identical goods cleared in the market at or about the same time by means of inquiry (such inquiry shall be carried out on sample basis).

3. However, in case the manufacturer declaring more than one RSP on the goods being manufactured and cleared, then the highest RSP declared on such goods shall be considered for the purpose of valuation – *Goa Bottling Co. Ltd. vs. CCE 2001 (121) ELT 743 (Tri.).*

Provided where the manufacturer having multiple RSP for the purpose of sale at different states then the value of goods shall be RSP declared on goods cleared to the respective States – *H & R Johnson India Ltd vs. CBEC, New Delhi 2002 (144) ELT 506 (Kar.).*

Where the manufacturer alters or obliterates the declared RSP on the package after its removal from the place of manufacture or at any time thereafter resulting in the higher RSP, then the value of such goods shall be determined in terms of Rule 5 of RSP rules read with section 4A as under:

- Then the highest RSP shall be considered as value of all such goods cleared within one month before or after the date of removal of such goods.

- If the manufacturer alters the RSP of the goods resulting in more than one RSP of such goods, then the highest of all such RSP declared shall be the value of all such goods.

Issues

1. Valuation of free samples supplied, whether should be valued under section 4 or 4A?

The free sample covered under section 4A would be valued as per section 4 of CEA, 1944. Since, samples are distributed free; MRP is not necessary if clear marking as ‘free sample’ is made on package – *CCE vs. Acme Health Care 2005 (189) ELT 82 (Tri.).*

2. How to value the goods sold in bulk to institutional buyers which are covered under Legal Metrology Act, 2009?

The valuation of goods sold in bulk package to institutional buyers and not for re-sale such as airlines, hotels, companies for captive usage would be the transaction value. Normally to avoid dispute it maybe be so declared. However such goods having RSP declared may not be covered in the absence of sale of such goods in retail – *Jayanti Food Processing P. Ltd. vs. CCE 2007 (215) ELT 327 (SC).*

3. Where the goods are stock transferred from factory to depot, at the port RSP label sticks, what should be the value of goods for payment of excise duty at factory?

The stock transfer from factory to depot does not amount to sale; actual sale takes place at depot. Hence, the value of goods shall be RSP declared at the depot – *Sony India Ltd. vs. Commissioner 2008 (229) ELT A127 (SC).*

4. When the goods are sold in combipack or supplied free along with other goods where RSP is declared on all such goods, how the goods shall be valued under section 4A?

The RSP of the combipack would be the basis of value – *Commissioner vs. Icon Household Products P. Ltd. 2009 (237) ELT A22 (SC).*

5. Where the goods are not covered under Legal Metrology Act, 2009, however manufacturer affixed RSP on the goods, in such a case how the goods shall be valued?

Not under section 4A.

6. Whether Valuation under section 4A is applicable to defective goods, affixed with RSP?

Yes. RSP would be on lower RSP. This is a common in the garment trade.

7. Where the goods are manufactured by job worker, and the goods covered under RSP, valuation of goods shall be made under section 4 or section 4A?

Where a product covered under RSP provisions is manufactured on job work basis, duty would be payable as per provisions of section 4A, i.e. on basis of RSP less abatement.

8. Cement bags of 50 kgs cleared to industrial and institutional consumers – whether declaration of RSP is mandatory?

No, goods/cement sold to industrial and institutional consumers are charged on transaction value u/s 4 of CEA, 1944 as it is sold in bulk not for retail sale.

9. Is section 4A mandatory?

Section 4A is mandatory in character vis-à-vis section 4. When section 4A is applicable, section 4 is inapplicable *(Bata India Ltd. – 1999 (114) ELT 78 – Tri.).* An assessee has no option to choose either of the two; he has to go by section 4A. The *non obstante* clause (use of the words “notwithstanding anything contained in section 4”) in sub-section (2) of section 4A is the sign of mandatory character of the section. In *Mona Electronics vs. CCE 2001 (135) ELT 1293,* it was held that provisions of section 4A are mandatory and assessee has no choice to determine value under section 4.

10. Valuation in case under section 4 or 4A – where goods sold in package containing 10 gms or 10 ml required MRP declarations and would attract section 4A?

The SWM (PC) Rules, 1977 was superseded by the Legal Metrology (Packaged Commodities) Rules, 2011. The exemption under earlier rules was specified in Rule 34 wherein the exemption from application of said rules was available to any packaged commodity if the net weight or measure was 10 g or 10 ml or less, if it was sold by weight or measure.

Presently, under Legal Metrology (Packaged Commodities) Rules, 2011, the said exemptions are provided under rule 26 which reads as follows:

a) The net weight or measure of the commodity in ten grams or ten millilitre or less, if sold by weight or measure;

b) Any package containing fast food items packed by restaurant or hotel and the like;

c) It contains scheduled formulations and non-scheduled formulations covered under the Drugs (Price Control) Order, 1995 made under section 3 of Essential Commodities Act, 1955 (10 of 1955);

d) Agricultural form produced in packages of above 50 kg.

Based on the above, section 4A of the CEA, 1944 is applicable to specified goods in relation to which there is also requirement under the Rules, for declaration of retail sale price on the packages, hence, packages containing commodity more than 10 ml or 10 grams are now to be assessed under MRP based valuation under section 4A.

CCE vs. Kraftech Products inc 2008 (224) ELT 504 (SC)

11. In case product covered under MRP supplied as free gift along with main product, valuation should be as per section 4A?

No, as long as it meets reasonability test of a prudent person. In *Sony India vs. CCE 2004 (167) ELT 385 (SC)* appellant was giving free gift along with TV. It was held that offer of gift was incidental benefit and not part of consideration to be paid in regard to TV set as such. Sale price charged from buyer will not cease to be sole consideration, even if free gifts are offered.

12. In case multi piece package, three soaps having individual MRP ` 12/- on them packed by a bank indicating that soaps for sale for MRP of ` 24/-, whether valuation should be on the basis of individual packs or on pack of three?

Valuation can be in the following matter based on the situation or facts of the case – *Aura Oil Industries vs. CCE 2009 (234) ELT 78 (Tri.)*

1. If the individual items comprising the multi-pack have clear markings that they are not to be sold separately or are packed in such a way that they cannot be sold separately, then the MRP indicated on the multi-pack would be considered for payment of duty u/s. 4A.

2. If the individual items do not contain any such inscription (that they are not to be sold separately) and are capable of being sold separately at the MRP printed on the individual pieces, then the aggregate of the MRPs of the pieces comprising the multi-pack would be considered for payment of duty on the multi-pack under section 4A. This clause will apply to only those multi-packs where the MRPs, both on the multi-pack and each of the individual items comprising the multi-pack, are clearly visible (e.g. soaps, powders, tooth pastes, etc.). Only then can Explanation 2(a) to section 4A apply.

3. If the individual items have MRPs printed on them but are scored out, then the MRP printed on the multi-pack will be taken for purposes of valuation under section 4A.

4. If an individual item is supplied free in the multi-pack and has no MRP printed on it, the MRP printed on the multi-pack will be taken for purposes of valuation under section 4A.

The MRP [Now RSP} based valuation has plugged the major tax advantage of marketing expenses not being captured for purpose of valuation at the factory gate which was exploited for a decade or so. May have also led to the reduction in the number of valuation disputes as the choices became less.

CA Vinod Awtani

Valuation Rules under Central Excise Law

A. Introduction

The Central Excise Law being an indirect tax law levies excise duty on taxable event of manufacture of goods. As a general provision, the statutory scheme envisages collection of the duty at the value prevalent at first point of sale. The duty is also required to be paid only on the removal of the goods. The Hon'ble Supreme Court in the case of *Bombay Tyre International Ltd. 1983 (14) E.L.T. 1896 (S.C.)* has observed that the excise duty is on the manufacture or production of goods however the statutory provisions of collection are not required to be synchronised with the completion of the manufacturing process. It has further being observed that the point of collection of tax has to be located where the statute declares it. The Apex court has held that chargeability of excise duty cannot be limited only to manufacturing cost and manufacturing profit and the excise duty is required to be computed with reference to the price charged for the goods since the legislature has specified so in the statute.

One of the important attributes of any taxation statute is that the valuation provision should be well defined and the computation mechanism should give definite values. The Section 4 (1)(a) of the Central Excise Act, 1944 has been incorporated keeping in mind the said underlying principle. The said section accepts the transaction value of the goods as the assessable value if the following conditions are fulfilled:

a. Goods are sold by the assessee,

b. The goods are sold for delivery at the time and place of the removal,

c. The assessee and the buyer of the goods are not related and

d. The price is the sole consideration for the sale.

However, in certain business / commercial transactions one or many of the above conditions specified under section 4(1)(a) of the Central Excise Act, 1994 may not be fulfilled and in such cases the transaction value cannot be accepted as assessable value. With a view to provide a mechanism to determine the assessable value in such cases, Section 4(1)(b) has been incorporated in the statutory provisions. The said section provides power to the Central Government for prescribing the appropriate rules of valuation in cases where the transaction value cannot be adopted as the assessable value. The Central Excise Valuation (Determination of Price of Excisable Goods) Rules 2000, (referred as Valuation Rules) have been notified under the said provisions.

B. Applicability and Scheme of the Valuation Rules

The Valuation rules are required to be applied only in cases where the transaction value cannot be considered as assessable value in view of the fact that the one or many of the prescribed conditions under section 4(1)(a) are not satisfied. Therefore before proceeding for determination of value under the valuation rules, it is imperative for the assessee as well as the revenue to prove that the transaction value was not capable of being determined in terms of the said section.

The valuation rules consist of various rules for the purpose of determination of the assessable value of excisable goods. The Rule 4 to Rule 10A cover different situations relating to transaction of excisable goods and provide for different mechanism to compute the assessable value for charging excise duty.

Rule 3 of the Valuation Rules specifies that the value of excisable goods for the purpose of Section 4(1)(b) has to be determined in accordance with these rules only. Each valuation rules provides mechanism to determine the value of the goods for specific circumstances and the most appropriate rule is required to be adopted for purpose of arriving at the assessable value of the manufactured goods.

C. Definitions under the Valuation Rules, 2000

The Rule 2 of the Valuation Rules provides the definition of the terms used in the valuation rules. The following terms are defined in the rules as follows:-

(a) "Normal transaction value" (Rule 2(c)) which is defined as the transaction value at which the greatest aggregate quantity of goods are sold. The said value is used for valuation in Rule 7, Rule 9, Rule 10A.

(b) Value (Rule 2(c)) which is defined to mean value under section 4 of the Central Excise Act, 1944. The value under section 4 is required to be adopted in terms of Rule 4 of the Valuation rules.

The meaning of the above terms have been discussed subsequently in the relevant rules. Any other words or expression used in the valuation rules and not defined thereunder will have the same meaning as defined under the Central Excise Act.

D. Rule 4 of Valuation Rules: Applicable for determination of valuation in cases where the price is not available

In situation like removal of free sample, free replacement under warranty, etc the price of the goods manufactured and removed is not available. The Rule 4 of the valuation Rules has been provided for determining the value of goods in cases where the price at which such goods are sold is not available or where the goods are not sold by the assessee.

The Rule 4 of the valuation rules prescribes that the assessable value of excisable goods under assessment is required to be based on the value of "such goods" which are sold by the assessee for delivery at any other time nearest to the time of removal of goods under the assessment. Thus the said rule provides for adopting the value of the identical goods for the purpose of determining the assessable value of goods under assessment. The said rule further provides that the adjustments can be made from such value on account of differences in date of delivery of such goods and of the goods under assessment.

For example, the goods manufactured by an assessee are sold and delivered to different parties from the factory gate at 10.00 a.m., 12.00 noon and 4.00 p.m. respectively. If on the same day, free samples are cleared at 1.00 p.m., then as per Rule 4, the value of goods cleared at 1.00 p.m. shall be determined by taking the value of the goods sold and delivered at 12.00 noon being the nearest to the time of the removal of the goods in question.

Meaning of "such goods"

The said rule seeks to equate the goods cleared free with the goods which are sold so that the transaction value of such goods can be adopted for the purpose of determining the duty. The term "such goods" has not been defined under the statutory provisions.

The Hon'ble Tribunal in the case of *Savita Chemicals 2000 (119) E.L.T. 394 (Tribunal)* has held that goods falling in a particular group would become "such goods" as far as the other goods in the same category or group are concerned but when these goods are placed in juxtaposition with the goods from another group they would not remain 'such goods' but would become comparable goods. The appeal against the said order has been dismissed by the Hon'ble Supreme Court.

The Hon'ble Bombay High Court in the case of *Indian Drugs Manufacturer's Assocn 2008 (222) E.L.T. 22 (Bom.)* has held that the word "such goods" in Rule 4 clearly means that the goods in question must be similar or identical to and have same quality or character to the goods sold and delivered. Thus the value under Rule 4 has to be adopted for such goods which are identical to the goods under assessment and which are manufactured by the same assessee.

E. Rule 5 of valuation rules: Applicable in cases where the goods are sold for delivery at a place other than the place of removal

Many a times for commercial/business reasons or for convenience purpose the manufacturer may incur freight and transportation cost for onward delivery to the customer's premises or to other place. The provisions of Rule 5 will apply in such cases where as per the terms of contract the goods are sold for delivery at the place other than the place of removal and the price charged includes the cost of transportation after the place of removal.

Rule 5 of the valuation rules provides that in a case where the goods are sold for delivery at a place other than the place of removal, then the value of the goods will be the transaction value of the goods excluding cost of transportation from the place of removal to the place of delivery.

As per the explanation 1 under the said rule, the cost of transportation which is eligible for deduction from the value recovered towards the goods includes:

(a) Actual cost of transportation.

(b) In a case where freight is recovered from the buyers on an averaged basis then the cost of transportation calculated in accordance with generally accepted principles of costing is eligible for deduction.

The Explanation 2 under the said rule clarifies that the cost of transportation from factory to the place of removal like; depot, other warehouse, consignment agent's warehouse, cannot be treated as cost of transportation and therefore cannot be excluded from the assessable value.

Thus in cases where the goods are cleared from the factory to a depot and are sold from such depot, then the cost of transportation from factory to depot cannot be excluded from the assessable value. However in case the goods are sold from depot for delivery at customer's premises then the cost of transportation from the depot to customers can be excluded.

i. Exclusion of transportation cost if not shown separately on invoice

CBEC in their circular no M.F. (D.R.) F. No. 354/81/2000-TRU, dated 30-6-2000 has clarified that exclusion of cost of transportation is allowed only if the assessee has shown them separately in the invoice and the exclusion is permissible only for the actual cost so charged from his buyers. However the Hon'ble Tribunal has consistently held that the deduction is permissible even if the transportation charges are not shown separately on the invoice, subject to the condition that the cost of transportation is substantiated with the help of other evidence.

ii. Exclusion of freight on an equalised basis:

The exclusion of transportation charges is also eligible even when the same are recovered on an equalised basis or an average basis.

iii. Exclusion of profit on recovery of transport charges:

The Apex court in *Baroda Electric Meters Ltd. 1997 (94) E.L.T. 13 (S.C.)* has considered the facts and circumstances of that particular case and has held that excise duty is not leviable on the excess freight collected since the excise duty is on manufacture and not on profit made on transportation.

Thus if the sale happens at the factory then the profit earned on transportation activity is not taxable as long as the recovery of such profit does not affect the assessable value of the goods.

iv. Exclusion of transit insurance:

The Hon'ble Supreme Court has in the case of Bombay Tyres International (supra) has held that the cost of transit insurance is also in the nature of cost of transportation and excludible from the value of the goods. The same has also been clarified in Circular No. 643/34/2002-CX., dated 1-7-2002 subject to the condition that the transit insurance should either be shown separately in the invoice or can be included in the transportation cost shown separately.

F. Rule 6: Valuation of goods when the price charged is not the sole consideration for the sale of goods

The Rule 6 of the valuation rules prescribes the mechanism to determine the value in cases where the price is not the sole consideration for the sale of the goods. The said provisions have been incorporated for the purpose of determination of the actual transaction value in cases such as manufacturer assessee receiving free supply of raw material, free supply of moulds, etc. The rule provide for inclusion of the attributable cost of such free supply as the same is over and above the amount charged as the price of the goods.

The provisions of Rule 6 of valuation rules provide that the assessable value in cases where the price is not the sole consideration will be the aggregate of

a. Transaction value of the goods and

b. The amount of money value of any additional consideration flowing directly or indirectly from the buyer of the goods to the assessee.

Thus, the said provisions provides for determining the amount of money value is respect of any other additional benefit or consideration received by the assessee from the buyer. For example if A undertakes a contract for manufacture and sale of chemical for B and B supplies certain raw material available with him for the manufacture of such goods, then the assessable value of goods manufactured by A will be the price charged plus the value of free material supplied by B.

The Hon'ble Supreme Court in the case of *IFGL Refractories Ltd. 2005 (186) E.L.T. 529 (S.C.)* has observed that the where parties take advantage of policies of Government and benefits flowing therefrom, then such benefit can be said to be an "Additional consideration". The Apex court in that case has held that import duty benefit accrued to the manufacturer by way of surrender of Advance Intermediate Licence by the buyer in his name is an additional benefit accrued to the manufacturer. Thus the scope of provisions of Rule 6 is very wide and the term additional consideration will also cover any other indirect benefit received from the buyer of the goods.

Explanation for money value of additional consideration for the purpose of including apportioned cost

The Explanation 1 to the Rule 6 has been inserted to provide that the apportioned value of the following goods and services, whether supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale of goods under assessment, should be added to the assessable value by treating the same as money value of additional consideration, namely:

(i) value of materials, components, parts and similar items relatable to such goods;

(ii) value of tools, dies, moulds, drawings, blue prints, technical maps and charts and similar items used in the production of such goods;

(iii) value of material consumed, including packaging materials, in the production of such goods;

(iv) value of engineering, development, art work, design work and plans and sketches undertaken elsewhere than in the factory of production and necessary for the production of such goods.

The inclusion of value has to be made to the extent that such amount has not been included in the transaction value. The applicability of the above explanation can be explained with the help of the following example:

A manufacturer who manufactures castings for a particular buyer, is required to prepare a mould for the purpose of manufacturing the castings. If the manufacturer prepares the mould himself and recovers the cost of mould as a part of price of the goods, then the value of mould would have suffered the excise duty since the duty would be leviable on transaction value. However, many a times the buyer of the goods may provide the mould free of cost to the manufacturer for the purpose of manufacturing the castings. Obviously in such cases the price charged by the manufacturer will not include the cost of mould used in the manufacture of the goods. Therefore the apportioned cost of such mould would be required to be added to the price of the goods. For e.g. if the value of the mould is ` 10,000 and it is capable of being used for manufacturing 1000 castings, then ` 100 will be the apportioned cost to be included in the value of each casting.

Inclusion of notional interest in the assessable value of goods.

Many a times the assessee manufacturer may take interest free advances from the buyer of the goods before undertaking the delivery. In such cases certain interest may be earned by the assessee manufacturer on the advance amount received prior to the sale of the goods. The revenue had sought to demand excise duty on the notional interest earned by the manufacturer on such advances by treating such notional interest as additional consideration. The Hon. Supreme Court had in the case of *I.S.P.L. Industries Ltd. 2003 (154) E.L.T. 3 (S.C.)* held that where price of the goods is not influenced by the receipt of interest free advance made by the buyer to the manufacturer, the notional interest not includible to the assessable value of the goods.

In view of the said rulings the valuation rule Rule 6 has been amended with effect from 1st April, 2007 and an explanation 2 has been incorporated for the purpose of specifying the circumstances in which the notional interest can be added. .

The Explanation 2 under Rule 6 provides that notional interest on advances received cannot be added to the value of the goods unless and until the Central Excise Officer has the evidence to prove that receipt of such advance has influenced the price of the goods under assessment. Thus if the receipt of interest free advance does not affect the price of the goods then notional interest on such advance cannot be treated as an additional consideration and no excise duty is payable on the same.

G. Rule 7: Valuation of goods which are sold after clearance from the depots, consignment agent premises, etc.

In respect of many products like automotive bearings, lubricating oils, biscuits, etc. the sales are not made from the factory but the said goods are transferred to the depots of the manufacturer or the consignment agents and the same are sold to customers from such places. In case of removal from the factory to depot, it is not possible to determine the final selling price of that particular product and to pay duty on removal of such products from at the time of factory. Therefore, the provisions of Rule 7 have been incorporated to ascertain the value of such goods which are sold from the depot or other premises after their clearance from the factory.

As per the provisions of Rule 7 of the valuation rules, where the excisable goods are not sold at the time of clearance from the place of removal but are transferred to a depot, premises of a consignment agent or any other place or premises from where the excisable goods are to be sold after their clearance from the factory and where the assessee and the buyer of the said goods are not related and the price is the sole consideration for the sale, the value will be

(a) the normal transaction value of such goods sold from such other place at or about the same time and,

(b) where such goods are not sold at or about the same time, at the time nearest to the time of removal of goods under assessment.

Therefore in respect of clearance covered by Rule 7 the manufacturer is required to adopt normal transaction value of such goods being sold from the other location (depot, consignment agent premises, etc.) at or about the same time or at the time nearest to the time of removal of goods under assessment.

Meaning of normal transaction value

The term "normal transaction value" has been defined under (Rule 2(c)) as the transaction value at which the greatest aggregate quantity of goods are sold. The normal transaction value will be the transaction value at which the greatest aggregate quantity of goods are sold and not at the highest rate. The same can be explained as follows:

List of Transactions of product A at Depot on 28-8-2013

Transaction No	Qty	Rate	Total sale price
1	100	24	2400
2	50	26	2600
3	150	22	3300

In the above example the greatest aggregate quantity sold is under transaction number 3 as the greatest quantity of 150 units is sold. Thus the rate of the product being cleared from the factory at or about the same time will be ` 22 irrespective of the quantity being cleared from the factory.

CBEC *vide* Circular No. 643/34/2002-CX., dated 1-7-2002 has clarified that the time period in the context of "greatest aggregate quantity" should be taken as the whole day and the transaction value of the "greatest aggregate quantity" would refer to the price at which the largest quantity of identical goods are sold on a particular day, irrespective of the number of buyers. It has further been clarified that in case the "normal transaction value" from the depot or other place is not ascertainable on the day identical goods are being removed from the factory/warehouse, the nearest day when clearances of the goods were effected from the depot or other place should be taken into consideration.

H. Rule 8 – Valuation in case of captive consumption of manufactured goods

Many a times the dutiable intermediate product manufactured by the manufacturer would be entirely used in the manufacture of the final product which is exempted from the levy of excise duty. In such cases the transaction value of the intermediate product would not be available as the same is not sold. The provisions of Rule 8 have been prescribed to determine the value in such cases.

The Rule 8 of the valuation rules provide that where the excisable goods are not sold by the assessee but are used for consumption by him or on behalf in the production or manufacture of other articles, the assessable value of such goods has to be taken as 110% of the cost of production or manufacture of such goods.

CBEC *vide* Circular No. 643/34/2002-CX., dated 1-7-2002 had clarified that if the same goods are partly sold by the assessee and partly consumed captively, the goods sold would be assessed on the basis of "transaction value" [provided they meet the conditions of Sec. 4(1)(a)] and the goods captively consumed would be valued as per Rule 8 of the Valuation Rules. However the Larger Bench of the Tribunal in the case of *Ispat Industries Ltd 2007 (209) E.L.T. 185 (Tri. - LB)* has held that the provision of rule 8 are applicable only where the entire production of a particular commodity is captively consumed. The Larger Bench has further held that if there are sale to independent buyers of the captively consumed products then the valuation of captive consumed goods is required to be done in terms of Rule 4 of the valuation rules by treating the clearance to independent buyers as clearance of "such goods".

I. Rule 9 – Valuation provisions in respect of sale through the related parties

The provisions of rule 9 have been incorporated to determine the assessable value in respect of transactions between specified related persons.

Meaning of related persons

The term related persons has been defined in Sec. 4 (2)(b) of the Central Excise Act, 1944. As per the said Section, the persons shall be deemed to be "related" if –

(i) They are inter-connected undertakings:

(ii) They are relatives;

(iii) Amongst them the buyer is a relative and a distributor of the assessee, or a sub-distributor of such distributor; or

(iv) They are so associated that they have interest, directly or indirectly, in the business of each other.

The term relative as well as inter-connected undertakings are separately defined under the various explanations given in Section 4(2)(b) of the Central Excise Act, 1994.

The provision of rule 9 of valuation rules do not apply to transaction between related persons when such related persons are interconnected undertaking, since a specific rule 10 have been separately prescribed for transactions between inter-connected undertaking.

Valuation in respect of related party transactions

The provision of Rule 9 for determining the assessable value if the assessee sells the entire production to a related person or through a related person can be summarised as follows:

Sr. No.	Type of transaction	Assessable value
1	Sale made to a related person who in turn sells to unrelated buyer	Value will be the normal transaction value at which these goods are sold by the related person to unrelated buyers, prevailing at the time of removal of goods from the place of removal

2	Sale made to a related person who in turn sells to related retail dealer	Value of such goods will be the normal transaction value at which the goods are sold to the related person who sells the goods in retail, prevailing at the time of removal of goods from the place of removal
3	Sale made to a related person who consumes or uses such goods	Value has to be taken as per rule 8 of the valuation rules i.e. the value will be 110% of the cost of production or manufacture

J. Rule 10 – Valuation of transactions between inter-connected undertaking

Rule 10 has been specifically prescribed for determining the assessable value when the goods are sold by the assessee only to an interconnected undertaking or through an interconnected undertaking.

Meaning of inter-connected undertaking

The term inter-connected undertaking has been defined under section 4(2) of the Central Excise Act, 1944 as follows:

(i) "inter-connected undertakings" means two or more undertakings which are inter-connected with each other in any of the following manners, namely :-

(A) if one owns or controls the other;

(B) where the undertakings are owned by firms, if such firms have one or more common partners;

(C) where the undertakings are owned by bodies corporate,

(I) if one body corporate manages the other body corporate; or

(II) if one body corporate is a subsidiary of the other body corporate; or

(III) if the bodies corporate are under the same management; or

(IV) if one body corporate exercises control over the other body corporate in any other manner;

(D) where one undertaking is owned by a body corporate and the other is owned by a firm, if one or more partners of the firm, —

(I) hold, directly or indirectly, not less than fifty per cent of the shares, whether preference or equity, of the body corporate; or

(II) exercise control, directly or indirectly, whether as director or otherwise, over the body corporate;

(E) if one is owned by a body corporate and the other is owned by a firm having bodies corporate as its partners, if such bodies corporate are under the same management;

(F) if the undertakings are owned or controlled by the same person or by the same group;

(G) if one is connected with the other either directly or through any number of undertakings which are inter-connected undertakings within the meaning of one or more of the foregoing sub-clauses.

Valuation provisions for transaction between interconnected undertaking

The assessable value in respect of transactions of inter-connected undertaking will be determined as follows:

Sr. No.	Type of transaction	Assessable value
1	If the interconnected undertaking also fulfil the criteria of related persons in terms of clause (ii), (iii) & (iv) of the definition of related persons i.e when they are relatives or the buyer is relative and distributor of the assessee or they are associated as having interest in the business of each other	The value has to be determined in terms of Rule 9 of the valuation rules
2	If the buyer is the holding company or the subsidiary company of the assessee in terms of the Companies Act.	The value is required to be determined in terms of Rule 9 of valuation rules by treating such persons as related persons
3	In all cases (other than above) the transaction has to be considered as having been entered into persons who are not related	The value has to be determined either under section 4(1)(a) by accepting the transaction value or under the other valuation rules as applicable

K. Rule 10A – Provisions relating to valuation of goods manufactured or produced by a job worker on behalf of principal manufacturer

In many circumstances a person (referred as principal manufacturer) may not have the requisite facility or technical expertise to manufacture particular goods. In such cases the principal manufacturer may purchase the inputs and send the same to the job worker for manufacture of the goods on their behalf. The job worker is entitled to receive the processing charges (job charges) towards the activity of manufacture of the goods. The Hon. Supreme Court in the case of Ujagar Prints 1989 (39) E.L.T. 493 (S.C.) has held that in the case of job worker the assessable value of the goods would be the cost of production plus job charges. The Apex court had further held that traders profit being post manufacturing profit was not includible in the assessable value. In view of the Apex Court Ruling, the profit earned by the principal manufacturer could not be included in the assessable value for levying excise duty.

The provisions of Rule 10A have been inserted with effect from 1st March, 2007, to provide for levy of excise duty at the value on such goods at which the same are sold by the principal manufacturer in certain circumstances.

Meaning of job worker

The term job worker have been defined under the Explanation to Rule 10A of the valuation rules as a person engaged in the manufacture or production of goods on behalf of a principal manufacturer, from any inputs or goods supplied by the said principal manufacturer or by any other person authorised by him.

The essential characteristic of the definition of 'job worker' is that such person should be engaged in the manufacture or production "on behalf of" the principal manufacturer. The Hon'ble Delhi High Court in *Poona Bottling Co. Ltd 1981 (8) E.L.T. 389 (Del.)* has held that a person can be deemed to be manufacturing on behalf of another in two contingencies, namely - when they are 'employees' of the said companies or when they are their 'agents'.

Valuation in case of goods manufactured on job-work under Rule 10A

The valuation provisions under Rule 10A can be summarised as follows:

Sr. No.	Type of transaction	Assessable value
1	Where the goods are sold by the principal manufacturer for delivery at the time of removal of goods from the factory of job-worker and the principal manufacturer and the buyer of the goods are not related and the price is the sole consideration for the sale	Value of the excisable goods will be the transaction value of the said goods sold by the principal manufacturer to the buyer.
2	Where the goods are not sold by the principal manufacturer at the time of removal of goods from the factory of the job-worker, but are transferred to some other place like depot, consignment agent premises, etc. from where the said goods are to be sold after their clearance from the factory of job-worker and where the principal manufacturer and buyer of the goods are not related and the price is the sole consideration for the sale	Value of the excisable goods will be the normal transaction value of such goods sold from such other place like depot, consignment agent, premises, etc. at or about the same time and, where such goods are not sold at or about the same time, at the time nearest to the time of removal of said goods from the factory of job-worker. Thus valuation will have to be done in accordance with the methodology of Rule 7 of valuation rules.
3	In all other cases, the valuation has to be done in accordance with the earlier valuation rules and the valuation rules will apply mutatis mutandis	The value will be as per the most appropriate valuation rule applicable to the transaction

The Rule 10A specifically provides for exclusion of the cost of transportation from the premises from where the goods are sold to the place of delivery.

L. Rule 11 – Residuary Rule

Even though the valuation rules covers different scenarios and provides the mechanism to determine the value of goods, certain transactions may still not fall under the purview of the above rules.

In such a situation, the provision of rule 11 will apply and the value has to be determined by using reasonable means consistent with the principles and general provisions of the valuation rules and sub-section (1) of section 4 of the Act. The residuary rule gives the power to determine the value of the goods by applying the analogy of the most specific rule and keeping in mind the statutory provisions of the Central Excise valuation.

Although the valuation rules provide for determination of the value in various permutations and combinations, still there are many areas where there is no clarity and suitable clarification from CBEC will give much needed benefit to the various assessees.

Yogesh S. Patki, *Advocate*

Valuation under Central Excise – Related party transaction

1. Valuation under Central Excise is in terms of sections 3, 4, 4A of the Central Excise Act, 1944 ("the Act"). Section 3(2) of the Act empowers the Central Government to fix the tariff value in respect of goods, section 4A of the Act provides that value will be the Maximum Retail Price (as reduced by the permissible abatement) and section 4 of the Act provides that the value will be the transaction value i.e. the value at which the goods are sold for delivery at the time and place of removal where the assessee and the buyer are not related and price is sole consideration for the sale. Where valuation is either under section 3 (2) or section 4A of the Act, provisions of section 4 of the Act are not applicable. The concept of related person in valuation arises only in case of section 4 of the Act.

2. When valuation is under section 4 of the Act, then on each removal of the goods, such value shall:-

(a) in case where goods are sold by the assessee for delivery at the time and place of removal, the assessee and buyer of the goods are not related and price is the sole consideration for the sale, be the transaction value;

(b) in any other case, including the case where the goods are not sold, be the value determined in such manner as may be prescribed.

Therefore, under section 4 of the Act, central Excise duty is payable on the "transaction value" which is to be determined on each removal of the goods. However, such "transaction value" cannot be made the basis for valuation under section 4 of the Act if:

- there is no sale of goods at the time and place of removal;
- the assessee and the buyer of the goods are related persons;
- the price is not the sole consideration for sale

In all the above three scenarios, valuation has to be determined in terms of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 (hereinafter referred to as the "Valuation Rules, 2000"). This article examines valuation under section 4 of the Act when the assessee and the buyer are related, due to which the transaction value is not acceptable.

3. Section 4 of the Act itself provides when the assessee and the buyer shall be termed as related. As per section 4 (3)(b) of the Act persons shall be deemed to be related if:

(i) they are inter-connected undertakings; or

(ii) they are relatives; or

(iii) amongst them the buyer is a relative and a distributor of the assessee, or a sub-distributor of such distributor or

(iv) they are so associated that they have interest, directly or indirectly, in the business of each other.

Inter-connected undertakings have been defined to mean inter-connected undertakings as defined under the erstwhile Monopolies & Restrictive Trade Practices Act, 1969. Relatives have been given the meaning assigned to it in section 2(41) of the Companies Act, 1956.

4. The Central Government has issued the Valuation Rules, 2000 which contain 11 rules and most of the rules deal with valuation vis-à-vis a particular scenario. For instance, rule 5 provides for valuation when the goods are sold for delivery at a place other than the place of removal, rule 6 provides for valuation when price is not the sole consideration for sale, rule 7 provides for valuation when the goods are not sold at the factory gate but are transferred to a depot and so on. Rule 9 and Rule 10 of the Valuation Rules, 2000 deal with valuation vis-à-vis related person and read as follows:

" Rule 9

When the assessee so arranges that the excisable goods are not sold by an assessee except to or through a person who is related in the manner specified in either of sub-clauses (ii), (iii) or (iv) of clause (b) of sub-section (3) of section 4 of the Act, the value of the goods shall be the normal transaction value at which these are sold by the related person at the time of removal, to buyers (not being related person); or where such goods are not sold to such buyers, to buyers (being related person), who sells such goods in retail:

> *Provided that in a case where the related person does not sell the goods but uses or consumes such goods in the production or manufacture of articles, the value shall be determined in the manner specified in rule 8.*

Rule 10

When the assessee so arranges that the excisable goods are not sold by him except to or through an inter-connected undertaking, the value of goods shall be determined in the following manner, namely:

(a) If the undertakings are so connected that they are also related in terms of sub-clause sub-clauses (ii), (iii) or (iv) of clause (b) of sub section (30 of section 4 of the Act or the buyer is a holding company or subsidiary company of the assessee, then the value shall be determined in the manner prescribed in the rule 9

> *Explanation: In this clause "holding company" and "subsidiary company" shall have the same meaning as defined in the Companies Act, 1956.*

(b) In any other case, the value shall be determined as if they are not related persons for the purposes of sub-section (1) of section 4."

emphasis supplied

5. From the above, it is clear that there are two categories of related persons and for each category there is different rule applicable to arrive at the assessable value. The first category covers persons who are related because of being:

a. a relative;;

b. relative and distributor of the assessee or sub-distributor of such distributor or

c. so associated with the assessee that both of them have interest, directly or indirectly in the business of each other.

Rule 9 of the Valuation Rules, 2000 applies to this category and value for this category is the normal transaction value i.e. the transaction value at which the highest aggregate quantities of goods are sold by the related party at the time of removal by the assessee.

The second category applies to inter-connected undertakings as defined under the erstwhile MRTP Act, 1969. Rule 10 of the Valuation Rules applies to this category and this rule has been diluted inasmuch as it requires that apart from being inter-connected undertakings the parties should also be related by being either relatives or the buyer is a relative and a distributor of the assessee or a sub-distributor of such distributor or they are so associated that they have interest, directly or indirectly, in the business of each other. Therefore, if both the criteria are met then valuation is under rule 10 which provides that value shall then be computed in terms of rule 9 of the Valuation Rules, 2000.

6. It has however to be noted that even though the assessee and the buyer are related in terms of section 4 of the Act yet valuation under rule 9 or rule 10 of the Valuation Rules, 2000 will take place only when the assessee so arranges that the excisable goods are not sold by the assessee except to or through the related person. In other words, only when the assessee sells the entire production to or through a related person, valuation will be under rule 9 or rule 10, as the case may be, of the Valuation Rules, 2000. The Tribunal in the case of *Jay Formulations Ltd. vs. CCE reported in 2010 (261) ELT 641* had an occasion to deal with an issue regarding applicability of rule 9 of the Valuation Rules, 2000 when the entire production was not sold to or through a related person and the Tribunal held that rule 9 of the Valuation Rules, 2000 is not attracted.

7. The issue which requires examination is – if goods are sold to a related party and valuation is not under rule 9/rule 10 of the Valuation Rules, 2000 because of the fact that the entire sales are not to or through the related person, how are the goods to be valued?

8. It is but obvious that valuation cannot be under section 4(1)(a) of the Act i.e. the value cannot be the transaction value since the assessee and buyer are related person. In such cases, valuation will be under rule 4 of the Valuation Rules, 2000 which provides that the value shall be the comparable value subject to necessary adjustments. Rule 4 of the Valuation Rules, 2000 reads as follows:

"Rule 4

The value of the excisable goods shall be based on the value of such goods sold by the assessee for delivery at any other time nearest to the time of the removal of the goods under assessment subject, if necessary, to such adjustment on account of the difference in the dates of delivery of such goods and of the excisable goods under assessment as may appear reasonable."

9. Therefore, when the sale is to a related party and valuation is not permissible under rule 9 or 10 of the Valuation Rules, 2000 value in respect of sales made to independent buyers at the time nearest to the time of removal will be taken as the value subject to adjustment as provided for under rule 4 of the Valuation Rules, 2000. The Tribunal in the case of *Balaji Electro Steel Ltd. vs. CCE reported 2007 (219) ELT 563* dealt with valuation of captively consumed goods when there is an independent sale price available. Though rule 8 of the Valuation Rules, 2000 specifically deals with captive consumption valuation, the Tribunal held that since the entire production is not captively consumed, rule 8 is not applicable and value will be the comparable value as provided for under rule 4 of the Valuation Rules, 2000. The ratio of this decision will apply when sale is to a related buyer but the entire sales are not to or through a related buyer due to which rule 9/rule 10 of the Valuation Rules, 2000 will not apply and valuation will have to be under rule 4 of the Valuation Rules, 2000 i.e. the value adopted in respect of independent sale transaction to an unrelated buyer. Though decision given in Stay Application is not a binding precedent, it is worth noting that the Tribunal in the case of *Exide Industries Ltd. vs. CCE reported in 2008 (232) ELT 365* granted an unconditional stay where the assessee in respect of sales made to related parties had adopted the value under rule 4 which was the sale price to unrelated buyer on the ground that the entire quantity was not sold to or through the related person and hence rule 9/rule 10 of the Valuation Rules, 2000 have no

application. However the Central Board of Excise and Customs ("the CBEC") has taken a contrary view in this matter. The CBEC has issued a clarification *vide* Circular No. 643/34/2002-CE dated July 1, 2002, to the effect that when there is a situation where sale is made to a related person and partly to unrelated person, then in respect of valuation of goods sold to related buyers, valuation will have to be under rule 11 of the Valuation Rules read with rule 9 or rule 10.

10. Another important aspect in related party valuation is meaning of the term "interest, directly or indirectly, in the business of each other". Even though section 4 of the Act dealing with valuation has undergone changes, this concept of persons being related as they have an interest, directly or indirectly, in the business of each other has always been present. The Courts time and again have analysed when it can be said that the assessee and the buyer have interest, directly or indirectly, in the business of each other. The Supreme Court way back in 1984 in the case of *Atic Industries Ltd. reported in 17 ELT 323* held that the requirement is that the persons have to be so associated that they must have interest, directly or indirectly, in the business of each other and it is not enough that the assessee has an interest, directly or indirectly, in the business of the person alleged to be a related person nor is it enough that the person alleged to be a related person has any interest, directly or indirectly, in the business of the assessee. The Supreme Court held that it is essential that the assessee and the person alleged to be a related person must have interest, direct or indirect, in the business of each other. It was held that the equality and the degree of interest which each has in the business of other may be different and will depend on the facts of each case. In this case, the Supreme Court held that because 50% shares of the assessee company was held by the buyer company, it could be said that the buyer company was having an interest in the assessee company as shareholder but it cannot be said that assessee company has any interest, direct or indirect, in the business carried on by one of its shareholders. The Supreme Court held that in the absence of mutuality of interest of each other, they cannot be termed as related.

11. Another decision of the Supreme Court in the case of Calcutta *Chromotype reported in 1998 (99) ELT 202* is relevant for the purposes of valuation with respect to related person. In this case while deciding whether parties are related or not, the Supreme Court held that under the Act, there is no bar on the authorities to lift the veil of the company, whether a manufacturer or buyer to see it was not wearing that mask of not being treated as related person when, in fact, both the manufacturer and the buyer are the same persons. The Supreme Court held that once it is found that the person behind the manufacturer and buyer are same, it is apparent that the buyer is associated with the manufacturer and then regard being to the common course of natural events, human conduct, public and private business it can be presumed that they have interest, directly or indirectly, in the business of each other. As to when the veil should be lifted depends on the circumstances of each case.

12. The issue as to whether persons are related or otherwise has been the subject matter of ongoing dispute between the department and the assessee. Few landmark cases on related party transaction are cited below where depending on the facts of the case, the Supreme Court decided whether they are related or otherwise:

Flash Laboratories vs. CCE (Supreme Court) reported in 2003 (151) ELT 241

The assessee was selling 60% of its products to its holding company "PPL" which had another subsidiary company "PBL". The assessee sold remaining 40% to PBL. PPL was incurring expenses for advertisement and sales promotion for sale of the assessee's products. In these facts, the Supreme Court held that the relationship between the assessee and PBL though indirect, they have mutuality of interest in the business of each other and hence they are related persons for the purpose of section 4 of the Act.

CCE vs. I.T.E.C. (Pvt.) Ltd. (Supreme Court) reported in 2002 (145) ELT 280

There were common directors between two units which were relatives of one another. Family concerns managed both the companies and benefits were shared by members of one and the same family. The assessee itself filed price list in Part IV meant for related persons. In these facts, the Supreme Court held that mutuality of interest between two parties is established and they have to be treated as related person.

UOI vs. Playworld Electronics Pvt. Ltd. (Supreme Court) reported in 1989 (41) ELT 368

Merely because goods are produced with customer's brand name and the entire production is sold to customer, sales cannot be treated as sales to related person.

Alembic Glass Industries vs. CCE (Supreme Court) reported in 2002 143 ELT 244

The assessee and the buyer held some shares in each other and had common Chairman and three directors. The Supreme Court held that shareholders of the public limited company do not, by reason only of their shareholding, have interest in the business of the company. Further, the court held that the fact that the two public limited companies have common directors does not mean that they have common interest. It was held that they were not related.

13. To summarise, in respect of valuation under section 4 of the Act vis-a-vis related person:

- Transaction value under section 4(1)(a) of the Act is not applicable when sale is to a related person;
- Rule 9 and Rule 10 of the Valuation Rules, 2000 deal with valuation in respect of sales to or through a related person;
- Rule 9 / Rule 10 of the Valuation Rules, 2000 apply only when the entire sale is to or through a related person. When the entire sale is not to or through a related person, rule 9/rule 10 of the Valuation Rules, 2000 have no application. In such a scenario, valuation will be under rule 4 of the Valuation Rules, 2000 i.e. the comparable price subject to adjustments. The CBEC has taken a contrary view as reflected in Circular No. 643/34/2002-CE dated July 1, 2002.
- There are two categories of related persons under section 4 of the Act. First category covers all persons other than inter-connected undertakings and in this category, valuation is under rule 9 i.e. the normal transaction value at which the related party sells the goods (refer paragraph 5 for meaning of "normal transaction value"). The second category covers only inter-connected undertakings and rule 10 deals with this category. In respect of inter-connected undertakings apart being inter-connected undertakings they also have to satisfy the condition of having an interest directly or indirectly in the business of each other so as to be covered by rule 10 of the Valuation Rules. If both the conditions are satisfied in the second category, then the valuation is as per rule 9 i.e. the normal transaction value at which the related party sells the goods.

Bharat Raichandani, *Advocate*

The "Cost" ing "Fiat" ality

Ever since, the concept of *ad valorem* duty was introduced under the Excise law, "valuation" assumed importance and has been a constant source of dispute between the assessees and the Department. Till recently, there were over a dozen decisions by the highest Court of the Land, whereby a reasonable extent of stability and certainty could have been assured. By the serpentine judgment in the case of *Fiat India Private Limited 2012 (283) ELT 161 (SC)*, that bespoke the nightmare of the manufacturing sector in India, the Hon'ble Supreme Court of India, decided against the assessee, and thereby, set the stage for future litigation on such valuation issues.

As popular novelist, Charles Dickens in his famous work "Bleak House" wrote *"Jarndyce vs. Jarndyce drones on.* This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means. The parties to it understand it least, but it has been observed that no two Chancery lawyers can talk about it for five minutes without coming to a total disagreement as to all the premises."

In similar fashion, in the present case, FIAT sold its cars at prices below the cost of production to enable market penetration in a competitive market. While FIAT cleared its cars on payment of excise duty at its sale price, the department demanded excise duty at the cost of production plus notional profit margin. After losing the case at the adjudication and First Appeal stage, FIAT succeeded before the Appellate Tribunal. However, as the saying goes, won the battle lost the war.

On appeal by the Revenue, per contra, the Hon'ble Supreme Court held as under:

- Selling cars at loss for continuous period of 5 years to penetrate the market amounts to "extra commercial consideration" and thus, price is not the sole consideration in the present case and hence, normal wholesale price under Section 4(1)(a) has to be rejected. It was, further, held that under new section 4 (i.e., post 1-7-2000); such sale of goods below the cost of production to benchmark with the price of the competitors will violate the condition of "price being the sole consideration for sale";
- The Hon'ble Supreme Court observed, in such cases, the department can resort to best judgment assessment;
- It was held that in cases where goods are sold below the actual cost i.e. at a loss in wholesale trade, the value would be manufacturing cost and notional profit thereon in terms of Rule 7 of Central

Excise (Valuation) Rules, 1975 i.e. best judgment assessment.

The Supreme Court, finally closed its doors, by rejecting the review petition *vide* order dated 27-11-2012 *2012-TIOL-110-SC-CX*

Let us, before analysing the impact of the above decision, have a look at the statutory provisions. Section 4 of the Central Excise Act, 1944 provides that where duty any excisable goods is chargeable with reference to the value, then such value of the goods would be the transaction value of the goods or the value as determined in accordance with the Valuation Rules, 2000. Section 4(1)(a) deems that transaction value shall be the assessable value if the following conditions are cumulatively satisfied: (a) There is a sale of excisable goods; (b) The sale is for delivery at the time and place of the removal; (c) The assessee and buyer are not related and (d) Price is the sole consideration for the sale.

If any one of the conditions specified in section 4(1)(a) as enumerated above is not satisfied, then the value of excisable goods shall be determined under section 4(1)(b). For this purpose, Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 have been notified by the Central Government. As per the said Rules, post 1-7-2000, excise duty is to be on the "transaction value", which is the price actually paid or payable for the goods (excluding and including certain specified elements). The new provisions, seemingly, accept that there can be different transaction values and that each removal is a different transaction and duty is to be charged on the value of each transaction.

Before proceeding further, it becomes essential to understand the term "consideration" as used in section 4(1)(a). Consideration used in relation to any commercial transaction shall be in reference to monetary consideration and not otherwise. The term "consideration" appears at two places in the Central Excise Act, 1944, i.e. Section 4(1)(a) and in Section 2(h) which defines "sale" as any transfer of possession of property for cash, deferred payment or any other valuable consideration. The Constitution Bench of the Hon'ble Supreme Court in the case of *Devi Dass Gopal Krishnan vs. State of Punjab & Ors. (1967) 3 SCR 557*, while interpreting the clause: 'Cash, deferred payment or any other valuable consideration' appearing in the definition of 'Purchase and Sale' under the Punjab General Sales Tax has categorically held that the term 'valuable consideration' means nothing else but 'monetary consideration'.

Additionally and more importantly, Rule 6 of the Valuation Rules provides that "Where the excisable goods are sold in the circumstances specified in clause (a) of sub-section (1) of section 4 of the Act except the circumstance where the price is not the sole consideration for sale, the value of such goods shall be deemed to be the aggregate of such transaction value and the amount of money value of any additional consideration flowing directly or indirectly from the buyer to the assessee." In other words, in cases where all conditions of section 4(1)(a), as enumerated above are met, except, the condition that the price being the sole consideration, the value shall be deemed to be the aggregate of such transaction value and the amount of money value of any additional consideration flowing directly or indirectly from the buyer to the assessee. This being so, in light of the facts of the FIAT case, in the arguendo, considering that market penetration is the additional consideration, the same is not monetary consideration and also the same does not flow from the buyer to the assessee. Thus, therein laying the subtlety of situation. However, in saying so, one has to keep an eye out for the decision of the Supreme Court in the case of *Grasim Industries Limited (2009) 241 ELT 321 (SC)*. The issue, whether the concept of transaction value signals a radical departure from the concept of deemed normal price that prevailed prior to

1-7-2000, is pending decision by the Full Bench in the said case.

Apart from this, in FIAT case, the Supreme Court has taken a view different (though not saying so) from its earlier decisions in the Guru Nanak case *(2003) 153 ELT 249 (SC)* and the Bisleri case *(2005) 186 ELT 257 (SC)* and holding that, to decide on which side of the line the case falls, broad resemblance to another case is not decisive and that each case depends on its own facts as a single significant detail may alter the entire conspectus of the ruling.

The FIAT case ran an alarming bell in the already ailing manufacturing sector. There are different scenarios wherein the automobile industry; or the manufacturing sector in general, may be forced to sell their products below cost price. The factors considered by a seller could be of two types: commercial considerations and extra-commercial considerations. "Commercial Considerations" are those factors which are considered with an object of benefiting the business or achieving profit. "Commercial Considerations" would typically include factors such as introduction of a new product in a new market, technological superiority of a product, time of the year, market share, quantity, long-term relationship with the buyer, status and bargaining powers of the buyer, future business potential, matching competitive prices, economic scenario, stock lot, availability of alternatives, customer perception, etc.

On the other hand, "Extra-Commercial Considerations" would refer to all cases where the seller is getting some quantifiable advantage from the buyer like interest free advance, free supply of components, dies, moulds, capital goods, etc. While the Commercial and Extra-Commercial Considerations play a vital role in fixing the price for a transaction or a series of transactions of sale, the same cannot be equated to the 'Consideration for Sale' unless the same is defined in monetary terms as explained earlier. While commercial considerations cannot, in any way, influence the value under section 4(1)(a), extra-commercial considerations can have an effect on the value of the goods sold in case of a monetary value attributable to the same as it is a contractual concept having aspects of contractual privity and monetary value in-built in them. This is where, the crux of the issue lies.

The FIAT decision has raised considerable doubts regarding how the Department shall deal with such commercial and extra-commercial considerations and would affect the extraordinary sales like distress sale, clearance sale, etc., where the manufacturer clears the excisable goods on such contingencies, at a price less than the cost plus margin. Open a Pandora's Box, hope not, rather pray not.

However, a year thereon and multiple show cause notices to various players, there is still no clarity regarding implementation of the said decision. It appears that the Industry has taken up the issue with the Finance Minister in its post-budget interaction and also presented the case to the tax authorities. The Central Board of Excise & Customs, for its part, announced the setting up of a panel to look into the implications of the judgment. However, there has been no specific direction from the government on the same yet. With the entire manufacturing sector in India facing the heat of the decision, clarity on how the department will implement the decision is the need of the hour. To sum up, in essence, by the said "landmark" ruling has blurred the lines between the "reality" and "notion".

CA Jayesh Gogri

Valuation under Central Excise – Snapshot of Key Judicial Pronouncements

Business is quite dynamic and keeps evolving with change in time. Central Excise Laws which were introduced in 1944, would have become redundant if the same were not subjected to suitable amendments to keep pace with changing times. However, Law is still unable to match the speed of the Business dynamism. The result is litigation. It becomes relevant to understand the important principles laid down by the Courts and relevant meanings assigned to statutory interpretations, especially with reference to Valuation.

There are thousands of decisions on Valuation aspect out of which, only select cases have been discussed hereunder:

1. Guru Nanak Refrigeration Corporation vs. CCE (1996) 81 ELT 290 (Tri.-Del.)

The issue under consideration was whether valuation can ever be below manufacturing cost. The Tribunal observed that the value of excisable goods shall be the price at which the goods were sold by the appellants since all conditions specified in Section 4 of the Central Excise Act, 1944 were satisfied. On the sole ground that the price was less than manufacturing cost, valuation adopted by the appellants cannot be rejected.

It may be noted that this case was, thereafter, affirmed by *Hon'ble Supreme Court in (2003) 153 ELT 249 (SC)*. However, interestingly, in the case of *Commissioner of Central Excise, Mumbai vs. Fiat India Pvt. Ltd. (2012) 283 ELT 161 (SC)*, the landmark decision delivered in 2003 has been dissented. In the case of Fiat India, it was held that no prudent business person is expected to incur losses on perpetual basis. Even though the buyers were not related persons, the transaction price below the cost of manufacturing was not accepted as assessable value.

2. Commissioner of Central Excise, Pondicherry vs. Acer India Ltd. (2004) 172 ELT 289 (SC)

The assessee was manufacturing computers which were loaded with operational software. The issue to be decided was whether the value of operational softwares should be included in the transaction value of computers. The Hon'ble Supreme Court observed that computers and softwares were different and distinct goods. Accordingly, transaction value of only excisable goods shall only be chargeable to excise. Further, software does not lose its character even after the same is installed in the hardware system and there was an exemption available to softwares. Therefore, value of operational software was held to be not included in transaction value of computers.

This Hon'ble Supreme Court's ruling was differed by Hon'ble Supreme Court in case of *Commissioner* *of Central Excise, Indore vs. Grasim Industries Ltd. (2009) 241 ELT 321 (SC)*. In Grasim Industries (Supra), Hon'ble Supreme Court held that Interpretation given in Acer is not in conformity with scheme of Central Excise Act, 1944 and the matter is referred to larger bench to decide if Section 4 and Section 3 operate in their independent fields though there may be a link between the two.

3. Maruti Suzuki India Ltd. vs. Commissioner of C. Ex., Delhi – III (2010) 257 ELT 226 (Tri.-LB)

Normally, it is a settled position in the Central Excise Law that post removal expenditure is not includible in the assessable value. The reason being, Central excise is on the event of "manufacture" and therefore, post manufacturing expenses do not form of assessable value for levy Central Excise.

However, in the present case which got affirmed by *Supreme Court in (2013) 291 ELT A81 (SC)* it was held that Pre-delivery Inspection Charges and After Sales Service Charges were includible in transaction value. It was held that all elements integrally connected with sale of excisable goods were liable to Central Excise Duty. Accordingly, not only direct but all indirect benefit resulting from payment by buyer to dealer in connection with or by reason of sale, are includible in transaction value under Central Excise Laws i.e. all that the buyer is liable to pay or incur by reason of sale or in connection therewith is liable to Central Excise Duty and the transaction value is a wider connotation which includes present as well as future consideration towards discharge of sales obligation.

4. MRF Ltd. vs. Collector of Central Excise, Madras (1997) 92 ELT 309 (SC)

This is an old judgment but is important and still holds good.

The appellants were engaged in manufacturing of tyres. The price of the tyres was reduced retrospectively subsequent to clearance of goods on payment of Central Excise Duty as per Government's direction. The appellants claimed that since the price was reduced, the transaction value has been affected which would impact the Central Excise Duty liability. Accordingly, the appellants claimed refund of excess Central Excise Duty paid. Hon'ble Supreme Court held that the price prevalent on the date of removal is relevant unless there was an agreement with Government to refund back Central Excise Duty to the extent of reduced prices.

This case was followed in a recent judgment in case of *Commissioner vs. Indian Oil Corporation Ltd. (2012) 281 ELT A85 (SC)*. However, in the following case, Supreme Court has taken a different view.

5. Commissioner of Central Excise vs. International Auto Ltd. (2010) 250 ELT 3 (SC)

The assessee had cleared certain goods, price of which was raised after the date of removal. On the date of clearance of goods, the assessee cleared the goods at value considering the old price. Later, there was a price difference and the assessee raised a supplementary invoice to recover enhanced price at which the goods were ultimately sold. The department contended that such price differential should be leviable to Central Excise Duty along with interest.

Hon'ble Supreme Court observed that interest under Section 11AB of the Central Excise Act, 1944, was leviable for loss of revenue on any count. The accrual of price differential was not disputed by the assessee. Further, differential price signified that value on the date of removal was not correct and there was a short payment on date of removal which calls for interest liability.

6. Government of India vs. Madras Rubber Factory Ltd. (1995) 77 ELT 433 (SC)

The decision highlighted Hon'ble Supreme Court's decision in Bombay Tyre International (supra) on several issues and held that Bombay Tyre International, though old decision, was applicable to old Section 4 as well as new Section 4 of the Central

Excise Act, 1944. One of the pertinent aspects dealt was, with respect to trade discounts. Hon'ble Supreme Court observed that trade discounts are allowed as per normal trade practice and are known and understood at the time of removal of goods, though the trade discounts may be quantified later. Accordingly, it should be an eligible deduction since it is known prior to removal of goods. Further, this decision also provided the method to compute assessable value in case of cum-duty price at a factory gate sale. Hon'ble Supreme Court held that first the permissible deductions shall be reduced from cum-duty price and then Central Excise Duty element should be calculated.

7. Commissioner of Central Excise, Delhi vs. Maruti Udyog Ltd. (2002) 141 ELT 3 (SC)

Hon'ble Supreme Court in this landmark decision pronounced that whenever the assessee charges its customers on cum-duty price, the Central Excise Duty shall be excluded to arrive at the excisable value of the goods *vide* Section 4 of the Central Excise Act, 1944. Further, elements of taxes such as Central Excise Duty, Sales tax and other taxes included in the wholesale price shall be excluded to arrive at the assessable value under Central Excise Laws.

The above decision was maintained by Hon'ble Supreme Court in the year 2005 in 179 ELT A102 (SC). However, Hon'ble Supreme Court had in case of *Amrit Agro Industries vs. CCE (2007) 210 ELT 183 (SC)* held that there is no general implication that wholesale price would always mean cum-duty price and unless the manufacturer shows that the price of the goods included the duty element, duty element should not be excluded from the price.

8. Pepsi Foods Ltd. vs. Collector of C. Ex., Chandigarh (2003) 158 ELT 552 (SC)

Pepsi was supplying concentrates along with use of trademark of Pepsi to the bottlers. Further, the bottlers were obliged to follow instructions of Pepsi with respect to manufacture, sale and distribution of soft drink beverages. For use of trademark on soft drink beverages, Pepsi was charging royalty to bottlers. The question came up before Hon'ble Supreme Court whether such royalties should form part of assessable value or not. Hon'ble Supreme Court observed that the agreement between Pepsi and bottlers was indicating that all these are integral operations and therefore, sales price was not the sole consideration for sale. Therefore, the royalties were held to be includible in assessable value of the soft drink beverages.

9. Commissioner of Central Excise, Meerut – II vs. Prabhat Zarda Factory Ltd. (2000) 119 ELT 191 (Tri.-LB)

The issue under consideration was when the ownership of the goods remained with the manufacturer up to the place of buyer, what should be the 'place of removal'. It was observed by the Larger Bench of Tribunal that sale of goods is material to decide what is the place of removal. Under Central Excise Laws, transfer of possession of goods is the essence of sales. Therefore, the place, where the possession of goods was transferred, was decided to be the place of removal.

10. Escorts JCB Ltd. vs. Commissioner of Central Excise, Delhi – II (2002) 146 ELT 31 (SC)

The freight and insurance during the transit of goods were, though, arranged by the appellants and charged to the customer, the risk was on buyer once the goods left the factory gate. These sales were held to be ex-factory and the place of removal was held to be factory premises. Therefore, it was held that these charges were not includible in assessable value.

11. Gangotri Electrocastings Ltd. vs. Commissioner of C. Ex. & S. T., Patna (2013) 293 ELT 395 (Tri.-Kolkata)

In this case, the appellants were engaged in manufacture of ingots, part of which were sold to their related company for captive consumption by the related company to manufacture MS bars. The appellants claimed that they were selling these ingots at a similar price at which these goods were sold to independent buyers. Department was of the view that since the goods were cleared to a related party for their consumption, assessable value should be determined @ 115% or 110% of the cost of production of such goods (Rule 8 of Valuation Rules). Whereas, the appellants pleaded that their sales to the related parties must be valued on the basis of sales price charged to independent buyers (Rule 4 of Valuation Rules).

Following the larger bench's decision in case of *Ispat Industries Ltd. (2007) 209 ELT 185 (Tri.-LB)*, the Tribunal held that provisions of Rule 8 does not apply when part of the goods are sold to independent buyers and that where both the provisions i.e. Rule 4 and Rule 8 are applicable, the provisions which occur first in the sequential order should be applicable. Further, in such cases, Rule 4 would be more appropriate in view of Section 4 of the Central Excise Act, 1944.

12. Commissioner of Central Excise, Nashik vs. Kirloskar Oil Engines Ltd. (2013) 293 ELT 319 (Tri.-Mum.)

The assessees were engaged in manufacture of D. G. Sets which were cleared in CKD Condition. The assessees had a separate contract for erection and commissioning of the D. G. Sets at customer's site. The department contended that the total transaction value should be taken into consideration which would include consideration for erection and commissioning as well.

The Tribunal held that since there were two separate contracts, one for supply of D. G. Sets and another for installation, the consideration charged for the installation, cannot form part of the assessable value of D. G. Sets.

13. Ennar Cements Pvt. Ltd. vs. Commissioner of C. Ex., Bengaluru (2013) 292 ELT 245 (Tri.-Bang.)

There were two Private Limited Companies owned by same family. The appellants were one of those Private Limited Companies, which had claimed Small Scale Industries (SSI) exemption. The department contended that the clearances of both the Private Limited Companies should be clubbed for the purposes of claim of SSI exemption. The Tribunal observed that if the one company was dummy, it should have been identified by the Central Excise Department which was not done. Further, in view of Circular No. 6/92 dated 29-5-1992, it was held that there cannot be clubbing of clearances of two independent Private Limited Companies registered separately under Central Excise specifically when there was no flow back of money, just because there existed a mutual interest.

14. Lifelong India Pvt. Ltd. vs. Commissioner of Central Excise, Delhi – III (2013) 292 ELT 88 (Tri.-Del.)

The appellants were collecting sales tax from their customers. However, in view of a benefit under Haryana General Sales Tax Act, 1973, the appellants were required to deposit 50% of such sales tax collected. The question under consideration was, whether 50% sales tax retained by the appellants, should be included in assessable value under Central Excise.

Delhi Tribunal analysed one of the decision of Delhi Tribunal itself in case of *Maruti Udyog Ltd. (2004) 166 ELT 360 (Tri.-Del.)* whereinit was observed that 50% sales tax retained by the appellants were by way of adjustment between the appellants and the State Government towards release of a capital subsidy by the State Government. Therefore, in effect, the adjustment did not alter the nature of sales tax payable. It may be noted that the revenue had filed an appeal against the decision of Maruti Udyog Ltd. (supra) and the same is admitted by *Hon'ble Supreme Court in (2004) 172 ELT A137 (SC).*

Following the decision of Maruti Udyog Ltd. (supra), it was held that in the present case, 100% sales tax is deemed to be paid to the State Government.

15. Commissioner of C. Ex., Bengaluru vs. Ontop Pharmaceuticals Ltd. (2013) 290 ELT 725 (Tri.-Bang.)

The assessees had manufactured certain goods on job work basis. They had paid product development and consultant charges to the principal manufacturer. The issue was whether the same should be included in assessable value under Central Excise. The Tribunal observed that unless such expenses were part of cost of conversion of raw material to finished product, the same cannot be included in assessable value. Further, the assessees were paying Service tax on such product development and consultant charges and therefore, the same charges cannot be levied to Central Excise Duty.

16. Commr. of C. Ex. vs. Textile Corpn. of Marathwada Ltd. (2013) 290 ELT 696 (Tri.-Mum.)

The assessee was engaged in the manufacture of goods on job work basis. The assessee was clearing goods at assessable value which was calculated as cost of raw material and job charges following the Hon'ble Supreme Court's decision in case of *Ujagar Prints vs. Union of India (1988) 38 ELT 535 (SC).* On a conservative basis, the assessee also added *ad-hoc* amount as trader's profit. The department contended that transportation charges, loading/unloading charges, marketing expenses and interest should be included in assessable value.

The Tribunal held that trader's profits are not includible in assessable value *vide* Circular No. 619/10/2002-CX dated 19-2-2002. Further, the *ad-hoc* amount was already added following Ujagar Prints case (supra) and therefore, other charges,in any case, should not be included in assessable value.

17. Hotline Electronics Ltd. vs. Commissioner of Central Excise, Noida (2013) 288 ELT 110 (Tri.-Del.)

The appellants were manufacturing VCD players and CTVs. Both these goods were sold as combo pack and VCD players were supplied free of cost with CTVs. Both these products were leviable to Central Excise Duty on RSP based valuation. Since the MRP of VCD players was NIL, the appellants did not charge any Central Excise Duty. The Tribunal held that Central Excise Duty should be charged separately on VCD players. VCD players can be valued by adopting reasonable criteria.

18. Bihar Sponge Iron Ltd. vs. Union of India (2012) 286 ELT 513 (Jhar.)

The department relied on a Trade Notice No. 19/96 which stated that in case of depot sales, Central Excise Duty shall be levied at the time of clearance of goods from factory gate but at the price at Depot. However, as per amendment through Finance Act, 1996, where price at which goods were ordinarily sold was different places of removal, each price was deemed to be normal with respect to each place of removal.

Hon'ble High Court held that the Trade Notice was contrary to statutory provisions as contained in Section 4(2) of the Central Excise Act, 1944. Following the decision of *VIP Industries Ltd. (2003) 155 ELT 8 (SC)*, it was held that freight, insurance etc. expenses incurred from factory gate up to depot were not includible in assessable value.

19. Sarvotham Care Ltd. vs. Commissioner of Cus. & C. Ex., Hyderabad (2012) 286 ELT 357 (Tri.-Bang.)

The appellants were packing various goods such as shampoo, dish drops, lotion, etc. in individual sachets and then these individual sachets were packed in mono-cartons containing 20 or 30 sachets with marking as wholesale pack. These multi-piece packs were sold in wholesale to a multi-level marketing company whose business was based on sponsorship and sale through distributors. The Retail Sale Price (RSP) was declared on each individual sachets voluntarily though there was no such requirement as per Standard of Weights and Measures Laws.

The Tribunal held that for valuation under Section 4A of the Central Excise Act, 1944, following factors should be satisfied simultaneously:

a) Goods should be excisable

b) Goods should be sold in package

c) There should be a requirement to declare retail price on package either under Standard of Weights and Measures Laws or any other law and

d) The goods should be notified under Central Excise Laws under Section 4A of the Central Excise Act, 1944.

The Tribunal further held that even if a commodity is notified under Section 4A of the Central Excise Act, 1944, if statutorily, it is not required to declare RSP, assessment should be done on the basis of transaction value and not on the basis of RSP.

20. Commr. of Cus. & Central Excise vs. Aquamall Water Solutions Ltd. (2012) 284 ELT 481 (Uttarakhand)

The issue under consideration was in case of depot sales, whether freight and insurance charges can be deducted from retail sale price. Hon'ble High Court held that though Rule 6 of erstwhile Central Excise (Valuation) Rules, 1975, does not prescribe any such deduction, there is no bar in reducing such charges. Hon'ble High Court further held that reasonable carrying cost for shifting the goods from factory to depot should be allowed as deduction vide Section 4 of the Central Excise Act, 1944.

21. Tata Motors Ltd. vs. Union of India (2012) 286 ELT 161 (Bom.)

The appellants were manufacturing cars and were supplying the same to dealers. As per the dealership agreement, pre-delivery inspection charges and free after sales services were required to be provided by the dealer to buyer. As per the agreement, the manufacturer or dealer, were not required to pay any amounts to each other once the car was sold. The issue under consideration was whether cost of such services should form part of assessable value.

Hon'ble High Court observed that these services were rendered by the dealer as their legitimate activity and the labour cost was borne by the dealer who was earning profit by selling cars. Therefore, these expenses were not covered in the term "servicing" as mentioned in the definition of transaction value. Hon'ble High Court held that manufacturer sold the car to dealer with price as sole consideration for such sale and therefore, since all conditions under Section 4 (1) (a) of the Central Excise Act, 1944 were satisfied, transaction value should be the assessable value for the purpose of Central Excise Laws and Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 were not applicable.

However recently, Supreme Court dismissed appeal of Maruti Suzuki India Ltd. *Maruti Suzuki India Ltd. vs. Commissioner - 2013 (291) E.L.T. A81 (S.C.)].* The appeal was filed against larger bench and Tribunal Decision reported in *2010 (257) E.L.T. 226 (Tri.-LB).* The Appellate Tribunal in its impugned order had held that every indirect benefit resulting from payment made by buyer to dealer in connection with or by reason of sale transaction is includible. The amount collected by dealer towards pre-delivery inspection or after sales service from buyer having understanding between manufacturer and dealer or forming part of sales promotion would be payment on behalf of assessee to dealer by buyer and same is includible.

22. Commissioner vs. Gujarat Borosil Ltd. (2012) 284 ELT A163 (SC)

The issue under consideration was whether transit risk insurance was required to be added to assessable value when the same was not charged separately. In case of delivery at buyer's premises, the assessee was charging 7% for special packing. However, the sale was made at factory gate and special packing, transit insurance were optional. Therefore, it was held that these were not includible in assessable value specifically when there was segregation between the two.

Further, another issue was whether discounts, passed on by way of Credit Note and not shown in invoice, are eligible for deduction. Since the duty was payable on transaction value, discount passed on by way of Credit Note was admissible *vide* Section 4 of the Central Excise Act, 1944.

23. Essel Propack Ltd. vs. Commissioner of Central Excise, Mumbai – III (2011) 274 ELT 3 (SC)

The appellants were manufacturing tubes. Plastic caps for such tubes were supplied by their buyers. Hon'ble Supreme Court held that if the tubes were supplied free of cost, the assessable value of tubes should not include the value of caps.

24. Royal Enfield vs. Commissioner of Central Excise, Chennai (2011) 270 ELT 637 (SC)

The appellants were clearing motor cycles in packed condition from factory to depot and the packing charges were passed on to the buyers. The question for consideration was, whether such packing charges should be included in assessable value.

Hon'ble Supreme Court held that as per Section 4(d)(i) of the Central Excise Act, 1944, if the goods are delivered at the time of removal from factory date in a packed condition, value would include cost of packing except cost of durable and returnable packing. Further, Hon'ble Supreme Court followed the decision of *Madras Rubber Factory (1995) 77 ELT 433 (SC)* wherein it was held that the cost of packing which is necessary for putting the excisable article in the condition in which it is generally sold in wholesale market at the factory gate, is includible in value of the goods. Madras Rubber Factory (supra) noted earlier decisions of B*ombay Tyre International Ltd. (1983) 14 ELT 1896 (SC)* and *Godfrey Philips India Ltd. (1985) 22 ELT 306 (SC).*

Accordingly, Hon'ble Supreme Court held that the packing done by appellants to the motorcycles was necessary for putting the goods in the condition in which it was generally sold in the wholesale market at the factory gate and therefore, the same were includible in value of the goods.

25. Commissioner of C. Ex., Chandigarh vs. Kwality Ice Cream Co. (2010) 260 ELT 327 (SC)

The assessee was engaged in manufacture of ice creams. It entered into an agreement for sale of entire production to another party. The department contended that the transaction was not on principal-to-principal basis and therefore, these were related parties and therefore, the assessee should pay Excise Duty on price at which goods were sold from depot of such another party.

Hon'ble Supreme Court observed that the transaction between the assessee and the other party was on principal-to-principal basis since the assessee was not under the control of such another party even though some financial assistance was provided by another party. Further, the relationship was one sided and both of them did not had direct or indirect interest in the business of each other. Hon'ble Supreme Court held that interdependence is a must to hold the parties related and in the present case, the parties were not related and price was the sole consideration for sale.

26. Commissioner vs. P. R. Rolling Mills Pvt. Ltd. (2010) 260 ELT A84 (SC)

The short question arose in the appeal was whether the value of scrap retained by the job worker was includible in assessable value of bars / section cleared by job worker on payment of appropriate duty. Hon'ble Supreme Court dismissed the departmental appeal and maintained the decision of *Bangalore Tribunal in (2010) 249 ELT 232 (Tri.-Bang.).* Bangalore Tribunal followed decision of *International Auto Ltd. (2005) 183 ELT 239 (SC)* and held that value of scrap was not includible in value of bars / section cleared by job worker.

27. Commissioner vs. Elgi Tread (India) Ltd. (2010) 257 ELT A21 (SC)

The assessees were importing raw material and were debiting DEPB for customs duty, surcharge and Special Additional Duty. The assessees were manufacturers of chemical compound which was cleared to a job worker for manufacture of further products. The job worker was supplying the further products to the Assessees. The assessees were not including the customs duty, surcharge and Special Additional Duty debited through DEPB in value of goods cleared to job worker.

Hon'ble Supreme Court held that in case of debit through DEPB, the customs duty was exempted and therefore, the assessee had not paid customs duty, surcharge and Special Additional Duty and accordingly, availment of such benefits cannot be considered to be a cost to be included in assessable value of imported goods cleared to job worker.

28. Commissioner of Central Excise, Ahmedabad vs. Xerographic Ltd. (2010) 257 ELT 11 (SC)

The assessee was transacting with two distributor companies. Department contested that these distributor companies were related to the assessee and therefore, the assessee should pay Central Excise Duty on value adopted by these companies.

Hon'ble Supreme Court observed that before invoking related party concept; following 3 conditions should be satisfied cumulatively:

a) Mutuality of interest

b) Related person as defined in statutory provisions and

c) Price charged from related person should be lower than normal value due to extra commercial consideration.

Hon'ble Supreme Court further observed that, in the present case, though it was found that these were related parties, the department did not prove that there was any extra commercial consideration. Further, the assessee had contended that sale to these distributors was on retail basis which was not rebutted by the department. Department also did not prove that the price at which goods were sold to related persons was not a normal price at which goods were sold to others. Therefore, it was held that there was no undervaluation of goods by the assessee and the assessee need not pay Central Excise Duty on the value adopted by distributors.

29. Commissioner vs. Nestle (India) Ltd. (2008) 226 ELT A183 (SC)

The assessee had claimed following deductions while calculating assessable value of the goods manufactured by him which was disallowed by the department:

a) Non-recoverable taxes

b) Interest on receivable

c) Trade discount

d) Special price given to specified parties

e) Regional discounts

f) Temporary price promotion discount and

g) Price equalisation discount.

In view of Section 4 (4)(d)(ii) of the Central Excise Act, 1944, it was held that any tax payable shall be allowed as deduction. For calculating the tax payable, one should have regard to the charging section and not on contract of manufacturers. Even though the tax is no recoverable, tax payable should be still available as deduction. Referring the decision of *Bombay Tyre International Pvt. Ltd. (1984) 17 ELT 329 (SC),* it was observed that if the discounts are known to trade and if these are known prior to the removal of the goods, the same are deductible from assessable value. The nomenclature of discounts was not pertinent. Therefore, trade discounts, on-going discounts, special discounts given to independent parties, regional discounts, temporary price promotion discount and price equalisation discount, actually given to dealers were allowed to be deducted from assessable value.

Conclusion

These decisions have tried to analyse and rationalise the concept of assessable value to a greater extent. However, as can be seen, the settled laws at a particular date have faced challenges later. The answer to one question can change number of times. Therefore, even after thousands of judgments on valuation aspect, the subject still remains a mystery.

Suresh Nair, *Partner, Ernst & Young LLP*

The Customs Act, 1962 – Valuation System (General)

A peep into History

The concept of taxing foreign goods which enters into a territory or kingdom has its origin centuries ago. In olden days, it was 'customary' for a merchant who entered any kingdom for trading to make a suitable offering of gifts to the ruler. Over the years this 'customary' practice was formalised by the State into 'Customs' duty levied and collected on import/export of goods.

In his treatise "ARTHASHASTRA" (dating back to around 4th century BC), the legendary scholar and acclaimed pioneer of economics in India, Kautilya had the vision and foresight to discuss about import and taxations thereof.

He recognised that taxing imports would contribute to the exchequer of the kingdom / ruler. He also had the foresight to prescribe a high tax on imported foreign luxury goods as compared to other goods which were meant for common consumption. Having thus set in the concept of differential tariffs based on the nature of goods, use, etc., this school of thought set the path for levy of import/export duties based on value of the goods i.e. at *ad valorem* rates even in ancient India and providing for relief by way of exemptions depending upon the relevance of the said goods for the benefits of the society at large.

Concept of Valuation in India

Presently, in India, Customs duty is payable as a percentage of 'value' often called 'Assessable Value' or 'Customs Value'. The value may be either a value defined under Section 14(1) of the Customs Act, 1962 (The Customs Act) or Tariff Value as defined under Section 14(2) of the Customs Act.

'Value' as per Section 14(1) of the Customs Act

The value of imported/export goods for the purpose of customs duty as per Section 14(1) of the Customs Act is based on 'transaction value' of such goods, as determined in accordance with the rules made in this behalf.

Concept of "Transaction Value' could be *inter alia* explained as the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation, or for export from India for delivery at the time and place of exportation, where the buyer and seller of the goods are not related and price is the sole consideration for the sale. However, the concept of 'Transaction Value' also needs to be understood with respect to relevant and applicable provisions of the Customs Valuation Rules also.

Accordingly, Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and Customs Valuation (Determination of Value of Export Goods) Rules, 2007 have been notified to provide for the above.

The Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 provides for valuation methodology to be followed in case of imported goods.

The Customs Valuation (Determination of Value of Export Goods) Rules, 2007 have been framed to provide a sound legal basis for valuation of export goods. The Customs authorities resort to the Valuation Rules to check deliberate overvaluation and misutilization of value based export incentive schemes.

The Transaction Value of imported goods shall also include any amount that the buyer is liable to pay for costs and services including commissions and brokerages, assists, engineering, design work, royalties and licence fees and certain specified costs.

Further, where there is no sale or the transaction value of the imported goods or export goods is not determinable, the value of such goods is determined in accordance to the above mentioned Customs Valuation Rules (depending upon whether the goods are for import or export).

The validity of Customs Valuation Rules was challenged, however the same has been upheld by the Divisional Bench of the High Court in the case of Essar Steel Limited.

Tariff value as per Section 14(2) of the Customs Act

Tariff value can be fixed by the Central Board of Excise and Customs ('CBEC'), Ministry of Finance for any imported goods or export goods. If tariff values are fixed for any goods, *ad valorem* duties are to be calculated with reference to such tariff values. The tariff values may be fixed based on the trend of value of such or like goods and the same is notified in the official gazette.

In recent times tariff values have been fixed in respect of import of Crude Palm Oil, RBD Palm Oil, RBD Palmolein, Crude Soyabean Oil, Brass Scrap, Poppy Seeds, etc. which are subject to periodical revision.

Influence on concepts of Valuation: GATT to WTO

Valuation for the purposes of customs levy is done as per prescribed Customs Valuation rules (as discussed in above para). These rules are based on 'WTO Valuation Agreement' (erstwhile GATT Valuation Code).

General Agreement on Tariff and Trade ('GATT') was an international forum for discussion on customs and other related issues with focus to do away with trade barriers. The genesis for the concept for a common code and framework for valuation to provide for certainty and consistency across nations is credited to this forum and accordingly 'GATT Valuation Code' was drafted.

The new code came into effect in 1981. While some developed members introduced the new code immediately, India implemented the code from 18 August, 1988 by framing the 'Customs Valuation Rules'.

The World Trade Organisation ('WTO') replaced GATT on 1st January, 2005. After formation of WTO, the GATT Valuation system is now termed as 'WTO Valuation Agreement'.

Determining 'Value': Trigger for changes in valuation concept

Under the erstwhile Section 14(1) of the Customs Act which was effective upto 10 October 2007, valuation of goods was based on the concept of 'deemed value'. Further, erstwhile Section 14(1A) provided that the valuation of imported goods shall be based on the concept of 'transaction value'

In other words, the assessable value of the imported/export goods was the price:

a) at which such or like goods are ordinarily sold, or offered for sale.

b) for delivery at the time and place of importation or exportation, as the case may be;

c) in the course of international trade, where the seller and the buyer have no interest in the business of each other; and

d) the price is the sole consideration for the sale or offer for sale.

From the above, the import value *per se* was linked to the concept of 'deemed value'. This was not aligned to the WTO Valuation Agreement (earlier GATT code), wherein price at which goods are actually sold / concept of transaction value was relevant. The Customs Valuation Rules was also framed on the said basis.

The said inconsistency was examined by the Apex Court and two different views emerged thereof. One in the case of Associated Cement Companies Ltd. wherein it was held *inter alia* that full meaning has to be given to Customs Valuation Rules as the same was framed in view of the GATT protocol and the WTO Agreement, whereas in the case of Ispat Industries Limited it was held *inter alia* that Valuation Rule is subservient to Section 14 i.e., Section 14 is 'primary' and valuation rule is secondary.

To remove this inherent contradiction which was resulting in interpretational issues, the provisions relating to customs valuation was recast by introducing the new Section 14 (w.e.f. 10 October, 2007).

The new Section 14(1) of the Customs Act (as it presently exists and discussed herein above) states that 'value' of imported and export goods will be 'Transaction Value' of such goods thus doing away with the concept of 'deemed value' within the said Section of the Customs Act.

However, the erstwhile 'deemed value' concept can still be invoked but only when all other methods in the Customs Valuation Rules fail (reference to the applicable methods as per the Customs Valuation Rules have been touched upon in the subsequent para). The new Section 14 of the Customs Act applies to all goods, whether imported or export goods and whether dutiable or duty free or on which export promotion benefit is claimed.

As discussed hereinabove, the present mechanism of valuation of imported goods contain provisions for specific additions to 'value' on account of cost and services (including commissions/ brokerage, engineering, design work, royalties, insurance, etc.) to the extent and in the manner specified in the Valuation Rules. Though the law does not specifically say so, it could be construed that only those expenses which are in relation to the imported goods alone can be added, subject of course to the provisions of the Customs Valuation Rules.

Methods of valuation – Customs Valuation Rules

The Customs Valuation Rules has six methods of valuation which are as follows:

- Transaction value of imported goods
- Transaction value of identical goods
- Deductive Value (based on value of similar or identical goods imported and sold in India)
- Computed value (based on cost of manufacture of goods plus profits)
- Residual method (based on reasonable means / data available)

If there is no sale or buyer and seller are 'related' or price is not the sole consideration, value of the goods will have to be determined as per the prescribed Customs Valuation Rules.

Further, related party imports are subject to investigation by the Special Valuation Branch (SVB) of the Indian Customs.

Directorate of Valuation (DOV), CBEC

The DOV was established in the year 1997 under the CBEC. It was later rechristened as Directorate General of Valuation in December 2002. The Headquarter of the Directorate General of Valuation is established in New Custom House, Mumbai.

The main functions of the Directorate General are:

- Developing a database on customs / central excise valuation
- Monitoring and examining the quality of orders passed by the SVB
- Monitoring valuation trends of sensitive commodities and taking corrective action
- Assisting CBEC in Policy matters concerning Customs Valuation
- Developing Valuation Tools (including databases) and best practices for the effective and uniform application of valuation law.
    - o A comprehensive electronic data base of imported goods namely National Import Data Base (NIDB) ,
    - o Export Commodity database (ECDB) project is a export valuation data base developed to check over valuation and misuse of export incentive scheme,
    - o Central Registry Database (CRD) which maintains details of SVB cases related to related party imports/ payment of royalties, licence fees etc.,
    - o Central Excise Valuation Database (CEDB) etc.

Practical challenges

In the backdrop of above provisions relating to Customs valuation it would be relevant for the Indian importer/exporter to ensure that their import/export transactions are in sync with the requirements thereof so as to avoid challenge to the valuation by customs authorities leading to potential duty/penal consequences.

Further, the key challenge faced by MNC companies in India is to find a fine balance between the provisions of the Transfer Pricing law in India and the Valuation Rules from a Customs perspective.

On the Direct Tax side, the principles of transfer pricing on imported goods are based on the OECD (Organisation of Economic Co-operation and Development) Guidelines whereas the transfer pricing relating to Customs are based on the Article VII of the GATT (General Agreement on Trade & Tariff), WCO.

Typically the officers enforcing Income-tax law are inclined to ensure that more profit is left behind in India to be taxed which in the case of imports implies lesser import value whereas in contrast the SVB / Customs appraising officer would be happy with a scenario enabling higher customs duty which would mean a higher import value. To this extent, there has always been a disconnect between the approach of the two authorities.

Based on the initiative taken by the Directorate General of Valuation, a Joint Working Group has been constituted by CBEC consisting of officers of CBEC and CBDT (Central Board of Direct Taxes), pursuant to which periodical meetings between the Customs and Directorate of Transfer Pricing are being held. Though effective changes in the approach of both Departments could take time, hopefully this initiative will bring out harmonisation between the provisions linked to related party transactions (Transfer Pricing) between Customs Act and Income-tax Act.

Udayan Choksi, *Advocate*

Customs Valuation Rules

This Article discusses the rules in relation to customs valuation for imported goods and export goods, which were notified in 2007. The 2007 rules in relation to imported goods are essentially a reworking of the earlier 1988 rules – the 1988 rules were based on the GATT Valuation Code that India signed after the conclusion of the GATT Tokyo Round Negotiations in 1979, and the 2007 rules are pursuant to India's obligations under the Agreement on Implementation of Article VII of the GATT, 1994 following the GATT Uruguay Round Negotiations which concluded in 1994. On the other hand, the 2007 rules in relation to the valuation of export goods are something more native to India, and in addition to setting out a sound legal basis for the valuation of export goods, were notified with a view to "check deliberate overvaluation of export goods and mis-utilization of value based export incentive schemes".

Whereas the main areas of controversy in relation to customs valuation continue to be the treatment of related party transactions and the SVB process, and the majority of case law is on these subjects, only a limited reference has been made to these areas in this discussion, as they are the subject matter of other articles in this compendium.

Section 14 of the Customs Act, 1962

The starting point for a discussion on customs valuation is section 14 of the Customs Act, 1962 on 'valuation of goods'. Section 14 provides that for the purposes of the imposition of customs duties, the value shall be the transaction value of the goods, which is to say, the price actually paid or payable for the goods, when sold for export to India / export from India, for delivery at the time and place of importation / exportation, where the buyer and seller of the goods are not related, and price is the sole consideration for the sale. Section 14 also provides that the acceptance of the transaction value is subject to other conditions as may be specified in the valuation rules. The first proviso to section 14 provides that the transaction value in the case of imported goods shall include, in addition to the price for the goods, certain amounts paid or payable for costs or services related to the goods, to the extent and in the manner specified in the relevant valuation rules. The second proviso provides that the valuation rules are also to provide for the circumstances in which the buyer and seller shall be deemed to be related, the manner of determination of value when there is no sale or the buyer and seller are related or price is not the sole consideration for sale or in other specified cases, and the manner for acceptance or rejection of the declared value in case the proper officer has reason to doubt the truth or accuracy of such value and determination of value in such a case. The third proviso sets out in relation to the price that it shall be calculated with reference to the rate of exchange in force on the date of presentation of the bill of entry (in case of import) or shipping bill (in case of export).

The scheme of valuation under section 14 therefore is that one must start with the transaction value, and if for any reason the transaction value cannot be applied, the value for customs purposes has to be determined in accordance with the relevant rules.

Transaction value

The concept of transaction value as set out in section 14 has multiple attributes which operate to specifically define what elements require to be considered or included in the value, and which also serve as conditions, the non-fulfilment of which triggers the rejection of the value in question for valuation purposes. It is therefore important to examine these elements in detail.

i. 'Price actually paid or payable': This element leaves it for the buyer and seller to determine, *inter se*, the value of the goods – this is in contradistinction to the earlier BDV concept of a notional value. Accordingly, this element allows for a variance in price for commercial reasons, such as discounts. In the context of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, it has been clarified in the Interpretative Note (the Interpretative Notes are discussed later in this article) to Rule 3 that the price actually paid or payable is the total payment to be made by the buyer to or for the benefit of the seller, directly or indirectly.

ii. 'For the goods': this element restricts inclusion in value to consideration for the goods, and excludes amounts that the buyer may pay for services or otherwise that are over and above, and separate from, the consideration for the goods. The Interpretative Note to rule 3 specifically refers to the exclusion to the following charges or costs, provided that they are distinguished from the price of the goods, viz. (i) charges for construction, assembly, maintenance or technical assistance, undertaken after importation, (ii) cost of transport after importation, and (ii) duties and taxes in India. It also clarifies that dividends and other payments that do not relate to the imported goods are to be excluded. It may also be noted that the GATT Committee on Customs Valuation has decided that interest payments and advertising and marketing costs are not includible – such a clarification is also set out in the Interpretative Note to Rule 3 for marketing costs.

iii. 'When sold for export to India / export from India': This element requires that the transaction be a sale transaction, the sale being for export across an international border. In this connection, it may be noted that the goods do not require to be shipped from the country that they are invoiced from.

iv. 'For delivery at the time and place of importation / exportation': This element clarifies the timing of determination of the value, and introduces the basis for the extent of inclusion of transport, handling and similar costs.

v. 'Where the buyer and seller of the goods are not related' and 'price is the sole consideration for the sale': These elements serve as a possible reason to trigger the non-acceptance of transaction value for customs valuation purposes.

vi. Inclusions in transaction value: This element lays down the statutory basis for the addition of certain amounts for the determination of the transaction value, in the case of imports. These elements too are considered in detail in the discussion on the Import Valuation Rules (discussed later in this article).

Customs Valuation (Determination of Value of Imported Goods) Rules, 2007

Rules 1 and 2 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 ("Import Valuation Rules"), set out details of title, commencement and application, and the relevant definitions, respectively. The meanings of the defined terms are discussed along with the relevant rule, later in this article.

Rule 3 is the principal rule and states that subject to Rule 12 (re: rejection of the declared value), the value of imported goods shall be the transaction value (the definition of which refers back of section 14 discussed earlier) "adjusted", i.e. to which additions have to be made, in accordance with the provisions of Rule 10. Rule 3 then states that the transaction value can only be accepted subject to certain conditions:

(a) That there are no restrictions as to the disposition or use of the goods by the buyer other than those restrictions which (i) are imposed or required by law or by the public authorities in India, or (ii) limit the geographical area in which the goods may be resold, or (iii) do not substantially affect the value of the goods – the Interpretative Note to this rule gives the example of a buyer of automobiles being required not to sell or exhibit them prior to a date representing the beginning of the model year. The apparent reasoning behind this condition is that such a restriction is unlikely in a *bona fide* transaction and may represent undisclosed consideration.

(b) That the sale or price is not subject to some condition or consideration for which a value cannot be determined in respect of the goods being valued – the Interpretative Note to this rule gives the examples of tie-in sales, countertrade transactions and prices established on the basis of a form of payment extraneous to the imported goods. It may be noted that the Interpretative Note clarifies that conditions or considerations relating to the production or marketing of the imported goods shall not result in rejection of the transaction value.

(c) That no part of the proceeds of any subsequent resale, disposal or use of the goods by the buyer will accrue directly or indirectly to the seller, unless an appropriate adjustment can be made in accordance with the provisions of Rule 10.

(d) That the buyer and seller are not related (as defined), or where the buyer and seller are related, that the transaction value is acceptable for customs purposes for the reason that the circumstances of the sale of the imported goods indicate that the relationship did not influence the price or if the importer demonstrates that the declared value of the goods being valued, closely approximates to one of the prescribed test values, after taking account of demonstrated difference in commercial levels, quantity levels, adjustments in accordance with the provisions of Rule 10 and costs incurred by the seller in sales with unrelated parties. The reason for rejecting the transaction value in case of related party transactions is the fact that such transactions may not take place under fully competitive conditions.

Rule 3 then provides that if the transaction value cannot be accepted, the value shall be determined by proceeding sequentially through Rules 4 to 9. What this therefore means, is that if either the transaction value cannot be determined (as required under section 14, per the criteria laid down therein) or if the transaction value has to be rejected (because any of the conditions in Rule 3 are not fulfilled), the value for customs purposes must be determined in accordance with one of the other rules, followed sequentially.

Rules 4 and 5 provide that the value of the imported goods shall be the transaction value of identical goods or similar goods, respectively, sold for export to India and imported at or about the same time as the goods being valued, other than when the identical or similar goods have been assessed provisionally. Per rule 3, in terms of the sequencing, preference is to be accorded to identical goods over similar goods. The principle behind these rules is that if Customs cannot use the transaction value of the imported goods themselves, the transaction value of like goods that Customs have accepted for valuation purposes in a prior transaction is the next best proxy. 'Identical goods' are defined as imported goods which are same in all respects, including physical characteristics, quality and reputation – barring minor differences in appearance which do not affect the value of the goods, which are produced in the same country as the goods being valued, and, ideally, which are produced by the same producer; however, goods which incorporate engineering, development work, art work, design work, plan or sketch elements undertaken in India, which elements were supplied directly or indirectly by the Indian buyer free of charge or at a reduced cost for use in connection with the production and sale for export of these imported goods to India, do not qualify to serve as proxy (such transactions are referred to in customs valuation parlance as "assists", and are discussed later in the Article in the context of Rule 10). An example of identical goods is that of 2 shirts made of the same material, in the same country by the same designer – though the fabric of each shirt may incorporate a different pattern, the shirts would be considered identical goods. On the other hand, 'similar goods' are defined as imported goods which though not alike in all respects, have like characteristics and component materials which enable them to perform the same functions and to be commercially interchangeable with the goods being valued, having regard to quality, reputation and existence of a trademark, which are produced in the same country as the goods being valued, and, ideally, which are produced by the same producer; the same disqualification as identical goods *vis-à-vis* the supplying of assists applies. An example of similar goods is of tyres of the same type, made of similar raw material composition, the same rim size and made by different manufacturers in the same country – assuming that the raw material composition is comparable, and the manufacturers have an equivalent reputation in the tyre manufacturing industry, the tyres would be considered similar goods. Rules 4 and 5 provide that in applying these rules, wherever possible, a sale at the same commercial level and in substantially the same quantity as the imported goods being valued should be used. Where no such sale is available, the application of this requirement *vis-à-vis* commercial level, quantity or both, can be diluted, but the transaction value of the identical / similar goods will have to be adjusted to take account of the difference attributable to the commercial level, quantity or both provided that the adjustment is made on the basis of demonstrated evidence which clearly establishes the reasonableness and accuracy thereof. The Interpretative Note to Rules 4 and 5 gives the example of a price list (which has been established as *bona fide* through actual sales at different prices as stated therein) as being appropriate evidence. Rules 4 and 5 also allow for an adjustment to be made if there are significant differences between the imported goods being valued and the identical / similar goods in terms of the cost of transportation to the place of importation, or loading, unloading and handling charges associated with delivery to the place of importation, or the cost of insurance, arising out of the differences in distances or means of transport. Finally, these rules provide that if more than one alternative transaction value is found, the lowest of these shall be used to determine the value of the imported goods.

Rule 6 provides that where the transaction value of the imported goods or the transaction value of identical or similar goods cannot be applied, the value of the imported goods shall be determined from the deductive value (under Rule 7) or the computed value (under Rule 8) of the goods. The proviso to Rule 6 allows the importer to request for the application of the sequencing between deductive value and computed value to be reversed; but this selection is subject to the approval of Customs. It may be noted that under the Agreement on Implementation of Article VII of the GATT, 1994, this right of the importer to make an election as to the sequencing is absolute – however, during the negotiation of the agreement, as one of the developing countries, India made a reservation in respect of this provision and reserved the right to provide that the election would be subject to agreement by Customs.

Rule 7 on deductive value uses the sale price in India as the starting point to work back to the value of the imported goods. Rule 7 first considers the case of the goods being valued or identical or similar goods, in the condition as imported, being sold in India at or about the time at which the determination of value is to be made and states that the value of the imported goods shall be based on the unit price at which such goods are sold in the maximum quantity to unrelated buyers in India, from which unit price the following deductions will be made, viz. (i) either the commission usually paid or the additions usually made for profits and general expenses in connection with sales in India of imported goods of the same class or kind (defined as goods within the group or range of goods produced by a particular industry or industrial sector, and [therefore] including identical and similar goods), (ii) usual costs of transport and insurance and associated costs incurred within India, and (iii) customs duties and other taxes payable in India by reason of import or sale. There are several important clarifications in the Interpretative Note to Rule 7. First, cases where assists have been provided cannot be used in an application of Rule 7. Second, the expression 'profits and general expenses' has to be taken as a whole and the information supplied by or on behalf of the importer should be used, unless these figures are inconsistent with those of others undertaking sales of goods of the same class or kind in India, in which case the deduction may be based upon information supplied by a person other than the importer. Third, 'general' expenses include direct and indirect marketing costs, and therefore any local taxes payable by reason of the sale shall be deductible. Fourth, in considering goods of the same class or kind, the narrowest group or range of imported goods sold in India should be considered, and this would include goods imported from the same country as the goods being valued as well as other countries. Rule 7 then considers a situation in which the benchmarking goods are not sold at or about the time of importation of the goods being valued, for which situation it provides that the value shall be based on the unit price at which such goods are sold at the earliest date after the date of importation of the goods in question but before the expiry of 90 days after such importation. The Interpretative Note clarifies that for the application of the rule to this situation, the earliest date shall be the date by which sales are made in sufficient quantity to establish the benchmark price. Finally, Rule 7 provides that if the goods being valued or identical or similar goods are not sold in India in the condition being imported, the value shall be based on the unit price at which the imported goods after further processing are sold in the maximum quantity to unrelated buyers in India, due allowance being made for the value addition and the 3 costs elements discussed earlier. The Interpretative Note clarifies that this method of valuation would normally not be applicable in situations where as a result of the further processing the imported goods lose their identity or where the imported goods retain their identity but form a very minor element of the goods sold, and therefore instructs that each such situation has to be considered individually.

Rule 8 on computed value constructs the value of the imported goods from (i) the cost or value of materials and fabrication or other process employed in producing the imported goods, (ii) an amount for profits and general expenses relatable to goods of the same class or kind which are made by producers in the country of exportation on exports to India, and (iii) the cost or value of transportation to the place of importation, of loading, unloading and handling charges associated with delivery to the place of importation, and of the cost of insurance. The Interpretative Note to Rule 8 clarifies that since in order to determine computed value it may be necessary to examine costs and other details which have to be obtained from outside India and which are outside the jurisdiction of Customs, the use of the computed method will generally be limited to cases where the buyer and seller are related, and the producer is prepared to furnish the necessary details and provide facilities for subsequent verification. Further, the cost or value to be used is to be determined on the basis of information supplied by the producer, and based upon the producer's commercial accounts, provided these are consistent with the local GAAP. Also, the appropriate additions under Rule 10 (discussed later in this article) for cost of containers and cost of packing and for value of assists are to be made. The amount for profits and general expenses have to be determined on the basis of information supplied by or on behalf of the producer unless these are inconsistent with those of other producers in the country of exportation making exports to India. Here the Interpretative Note to Rule 8 makes an important clarification. It states that the amount for profit and general expenses has to be taken as a whole and that it follows that if in a particular case a producer's profit is low and general expenses are high, the profit and general expenses taken together may nevertheless be consistent with those of other producers. The Interpretative Note goes on to state that where a producer can demonstrate a low profit on his sales of the imported goods because of particular commercial circumstances, his actual profit figures should be accepted provided that he has valid commercial reasons to justify them, and his pricing policy reflects usual pricing policies in the branch of industry concerned – the Interpretative Note also gives examples of such a situation: (a) where producers may be forced to lower prices temporarily because of an unforeseeable drop in demand, or (b) where goods are sold to counter a range of goods being produced in India and producers accept a low profit to maintain competitiveness. Notably, there is no mention of a sale at a price below cost.

Rule 9 is the tie-breaker rule and provides that where none of the preceding rules can be applied to determine the value of the imported goods (either because they are not relevant to the circumstances or because adequate information is not available), the value shall be determined using "reasonable means consistent with the principles and general provisions of these rules and on the basis of data available in India". The proviso to rule 9 sets out that the value so determined shall not exceed the price at which such or like goods are ordinarily sold in international trade. The Interpretative Note to Rule 9 provides 2 important ideas, viz. (i) that the application of Rule 9 should as far as possible be based on previously determined customs values, and (ii) that the methods of valuation to be employed in applying Rule 9 may be those laid down in the preceding rules after allowing "reasonable flexibility" in their application. The second clause of Rule 9 sets out the limits to the aforesaid flexibility and prohibits the use of certain bases of valuation that are inconsistent with the principles and general provisions of the rules. It may be noted that most of these proscribed methods are those that were being used by various countries prior to the harmonization initiated in the GATT Tokyo Round. Per Rule 9(2), no value shall be determined on the basis of (i) the selling price in India of the goods produced in India, (ii) a system which provides for the acceptance for customs purposes of the highest of the two alternative values, (iii) the price of the goods on the domestic market of the country of exportation, (iv) the cost of production other than computed values which have been determined for identical or similar goods in accordance with the provisions of Rule 8, (v) the price of the goods for the export to a country other than India, (vi) minimum customs values, or (vii) arbitrary or fictitious values.

Rule 10 sets out the 5 sets of additions to be made to the price actually paid or payable for the imported goods to arrive at the transaction value (as defined in section 14). The first is (i) commissions and brokerage, except buying commissions, (ii) the cost of containers which are treated as being one for customs purposes with the goods in question, and (iii) the cost of packing whether for labour or materials; to the extent they are incurred by the buyer but are not included in the price actually paid or payable for the imported goods. The idea behind these inclusions is that they all represent part of the value of the imported goods. The second is assists, which have been referred to elsewhere in this Article – these are certain goods and services supplied by the buyer free or at a reduced cost in connection with the production of the imported goods, and includible to the extent that such value has not been included in the price actually paid or payable. Rule 10 lists the following assists, viz. (i) materials, components, parts and similar items incorporated in the imported goods, (ii) tools, dies, moulds and similar items used in the production of the Imported goods, (iii) materials consumed in the production of the imported goods, and (iv) engineering, development, art work, design work, and plans and sketches undertaken elsewhere than in India and necessary for the production of the imported goods. The Interpretative Note to rule 10 explains that that there are 2 factors involved in the apportionment of assists – the value of the assist itself and manner of apportionment to be applied. The value of the assist is to be determined on the basis of its cost of acquisition or production, adjusted downward for previous use. The manner of apportionment has to be reasonable and appropriate to the circumstances and in accordance with GAAP. The Interpretative Rule suggests 3 possible alternatives to apportion value to production, viz. (a) over the first shipment, (b) over the production up to the time of the first shipment, and (c) over total anticipated production. The third set of additions is for royalties and licence fees related to the imported goods that the buyer is required to pay, directly or indirectly, as a condition of the sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable. Two conditions are inherent in the text of Rule 10(3), viz. that the payment must be related to the goods being valued, and that the payment must be a condition of sale. The first of these considers the existence of linkage between the imported goods and the intellectual property in question giving rise to the payment of royalty or licence fees, and the second applies the test of whether the sale could take place without the payment being made. The Interpretative Note clarifies that charges for the right to reproduce the imported goods in the country of importation shall not be added, and that payments for the right to distribute or resell the imported goods shall not be added if such payments are not a condition of sale for export to India. The fourth addition required by Rule 10 is of the value of any part of the proceeds of any subsequent resale, disposal or use of the imported goods that accrues, directly or indirectly, to the seller. The final omnibus addition is of all other payments actually made or to be made as a condition of sale of the imported goods, by the buyer to the seller, or by the buyer to a third party to satisfy an obligation of the seller to the extent that such payments are not included in the price actually paid or payable. An explanation to Rule 10 also provides that royalty, licence fee or any other payment for a process, shall be added to the price actually paid or payable for the imported goods, notwithstanding the fact that such goods may be subjected to the said process after importation of such goods. This Explanation was added in the 2007 Import Valuation Rules (beyond what the 1988 rules set out) in the context of, and essentially to overcome, the Supreme Court judgment in the case of *J.K. Corporation Ltd. vs. Commissioner of Customs (Port) Kolkata [2007 (208) E.L.T. 485 (S.C.)]* so as to clarify that such amounts, if otherwise includible in terms of Rule 10, will be includible in the value of the goods notwithstanding the fact that such amounts relate to a process which is made operational after the importation of the goods. Rule 10 also provides, following the requirement of section 14, that the value of imported goods shall be the value of these goods for delivery at the time and place of importation and shall include (a) the cost of transport of the imported goods to the place of importation, (b) loading, unloading and handling charges associated with the delivery of the imported goods at the place of importation, and (c) the cost of insurance. In respect of these elements, provisos to Rule 10 provides for the invocation of substitute values based on the FOB value of the goods. Rule 10 also provides that additions made thereunder shall be on the basis of objective and quantifiable data and that no addition to the price paid or payable for the imported goods may be made except as provided therein. The Interpretative Note clarifies that the absence of such data would result in rejection of Rule 3 (transaction value) being the basis of valuation.

This brings us to Rule 11, which is a procedural rule in relation to the declaration to be made by the importer, which provides that the importer shall declare full and accurate details, and provide such other statement, information or document as considered necessary by Customs for proper determination of the value of the imported goods. It also highlights Customs' right to confirm the truth and accuracy of any submission presented for valuation purposes, and reiterates the applicability of penal and prosecution provisions in the Customs Act to cases of misdeclaration.

Rule 12, titled 'rejection of declared value' provides that if Customs doubt the truth or accuracy of the value declared in relation to any imported goods, the importer may be asked to furnish further information including documentation and evidence, and that if after receiving such further information or in the absence of a response there still exists reasonable doubt about the truth or accuracy of the value declared, it shall be deemed that the transaction value of such imported goods cannot be determined. In terms of process, Rule 12 provides that at the request of an importer, Customs shall advise the importer in writing of the reasons to doubt the truth or accuracy of the value declared and provide a reasonable opportunity of being heard, before taking a final decision. An explanation to Rule 12 clarifies that the said rule does not provide a method for determination of value, but rather provides a mechanism and procedure for possible rejection of declared value in situations where reasonable doubt exists as to whether the declared value represents the transaction value, and that the declared value is to be accepted where Customs are satisfied about the truth and accuracy of the declared value. The aforesaid explanation also gives the following illustrative reasons which could form the basis for having doubt about the truth or accuracy of the declared value, viz. (a) the significantly higher value at which identical or similar goods imported at or about the same time in comparable quantities in a comparable commercial transaction were assessed, (b) the sale involves an abnormal discount or abnormal reduction from the ordinary competitive price, (c) the sale involves special discounts limited to exclusive agents, (d) the misdeclaration of goods in parameters such as description, quality, quantity, country of origin, year of manufacture or production, (e) the non-declaration of parameters such as brand, grade, specifications that have relevance to value, and (f) the fraudulent or manipulated documents.

Finally Rule 13 provides that the Interpretative Notes shall apply for interpretation of the Import Valuation Rules. This is in accordance with the Agreement on Implementation of Article VII referred to above, which provides that the notes form an integral part of the Agreement and the articles of the Agreement are to be read and applied in conjunction with their respective notes.

Customs Valuation (Determination of Value of Export Goods) Rules, 2007

There is marked similarity between the layout and principles in the Import Valuation Rules discussed earlier and the Customs Valuation (Determination of Value of Export Goods) Rules, 2007 ("Export Valuation Rules"). Further, they provide the same primacy to transaction value, per section 14.

Rules 1 and 2 set out details of title, commencement and application, and the relevant definitions, respectively. Here the concepts of identical and similar goods have been combined to define 'goods of like kind and quality'; the other definitions of 'transaction value' and related party are along the lines of the definitions in the Import Valuation Rules.

Rule 3 is the principal rule and states that subject to rule 8 (re: rejection of the declared value), the value of export goods shall be the transaction value. Rule 3 then provides that the transaction value shall be accepted even when the buyer and seller are related, provided the relationship has not affected the price and that if the transaction value cannot be accepted, the value of the export goods shall be determined by proceeding sequentially through Rules 4 to 6.

Rule 4, titled 'determination of export value by comparison' is set out along the lines of the methodology of applying the transaction value of identical or similar goods under the Import Valuation Rules. It provides that the value of the export goods shall be based on the transaction value of goods of like kind and quality (per the definition discussed earlier), exported at or about the same time as the goods being valued, to other buyers in the same destination country or in the absence thereof to buyers in other destination countries, after making such adjustments as Customs consider to be reasonable, taking into consideration all relevant factors, including (i) difference in dates of exportation, (ii) difference in commercial levels and quantity levels, (iii) difference in composition, quality, and design, and (iv) difference in domestic freight and insurance charges, depending upon the place of exportation.

Rule 5 on computed value constructs the value of the imported goods from (i) the cost of production, manufacture or processing of the export goods, (ii) charges for design and brand, if any, and (iii) an amount towards profit. The CBEC has clarified in the regard that due consideration shall be given to a cost-certificate issued by a cost accountant or chartered accountant or Government approved valuer, as produced by the exporter.

Rule 6 is the fall-back rule in relation to the valuation of export goods and provides that where none of the preceding rules can be applied to determine the value of the goods, the value shall be determined using "reasonable means consistent with the principles and general provisions of these rules", but that the local market price of the export goods cannot be the only basis of valuation.

Rule 7 requires the exporter to furnish a declaration in relation to the value of the export goods in a prescribed format. The declaration has to be made for every shipping bill, and requires the exporter to state the details of the export transaction, including the nature of the transaction (sale / consignment sale / gift / sample / other), the method of valuation applied, whether or not the parties are related (and whether the relationship has influenced the price), and details of past exports of identical or similar goods.

Rule 8 on rejection of declared value is set out along the lines of Rule 12 of the Import Valuation Rules.

Conclusion

The Import Valuation Rules and Export Valuation Rules provide a comprehensive methodology for determining the value of goods in cross-border transactions. The now long-awaited next step is integration with the transfer pricing provisions, on which the WCO and OECD are deliberating.

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Customs Valuation – Related party transactions

India has over the last two decades witnessed significant economic growth and has been regarded as one of the growth engines of the world economy. As a consequence, a large number of Multi-National Companies (MNCs) have set up their base in India as also have expanded their operations in India. This period has also witnessed a significant increase in what is commonly known as transactions between 'related entities' and this article seeks to analyse from a Customs perspective, the law and issues related to valuation of import of goods between 'related persons'. The issues of customs valuation in relation to import of goods between 'related persons' assumes greater significance, as not only does it have a direct impact on the quantum of revenue in the form of customs duty which will accrue to the Government but also has a bearing on the pricing of imported goods in the Indian market, as also on the revenues and profitability of both the Indian importing entity and the foreign exporting entity.

Law relating to customs valuation and 'related party transactions'

Section 12 of the Customs Act, 1962 ('the Act') which is the charging section provides that the levy of customs duty will be at such rates as may be prescribed under the Customs Tariff Act, 1975 or any other law, on the goods imported into or exported out of India. Section 14 of the Act which deals with valuation, provides that the value of the imported goods and exported goods shall be the transaction value of such goods, that is to say, the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation, or as the case may be, for export from India for delivery at the time and place of exportation, where the buyer and seller of the goods are not related and price is the sole consideration for the sale subject to such other conditions as may be specified in the rules made in this behalf. The section specifically also states that the Rules will provide for the (i) circumstances where the buyer and seller are related; and (ii) manner of determination of value where the buyer and seller are related. It is in this background, that the determination of whether parties are 'related' is important as it has a direct bearing on the valuation as well as the manner of valuation of imported goods for customs purposes.

Rule 2(2) of the Custom Valuation (Determination of Value of Imported Goods) Rules, 2007 (CVR, 2007) provides for the manner of determination of when two parties are deemed to be "related"[1]. In this context it is important to note that the law relating to custom valuation has undergone a sea-change w.e.f. 10-10-2007 from which date the new section 14 of the Act as well as the CVR 2007 have been introduced. To rule out valuation under the erstwhile section 14(1)(a) of the Act, it was a requirement that the seller and the buyer should have 'interest in the business of each other'. One-sided interest was not enough and there had to be a mutuality of interest.[2] This requirement of 'mutuality of business interests' has been dispensed with under the new section 14 regime and therefore more transactions fall within the purview of 'related party' transactions and the provisions of the CVR, 2007.

Once parties are related, the transaction value shall be accepted only in the circumstances provided for in Rules 3(a) and 3(b) of the CVR, 2007.[3] The primary aim of the Valuation Rules is to ensure that the buyer and seller even when related transact on an arm's length basis. To determine whether the import price would be an acceptable basis for the transaction value when the buyer and seller are related, two tests are adopted under the CVR, 2007, namely the "circumstances of sale" test and the "test values" test. Rules 3(3)(a) and 3(3)(b) essentially provide different means of establishing the acceptability of a transaction value. It is not intended under Rule 3(3)(a) that there should be an examination of the circumstances in all cases where the buyer and the seller are related. Such examination will only be required where there are doubts about the acceptability of the price. Where the proper officer of customs has no doubts about the acceptability of the price, it should be accepted without requesting further information from the importer. For instance, where it can be shown that the buyer and seller, although related under the provisions of rule 2(2), buy from and sell to each other as if they were not related, this would demonstrate that the price had not been influenced by the relationship. As an example of this, if the price had been settled in a manner consistent with the normal pricing practices of the industry in

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1 (2) For the purpose of these rules, persons shall be deemed to be "related" only if -

(i) they are officers or directors of one another's businesses;

(ii) they are legally recognised partners in business;

(iii) they are employer and employee;

(iv) any person directly or indirectly owns, controls or holds five per cent or more of the outstanding voting stock or shares of both of them;

(v) one of them directly or indirectly controls the other;

(vi) both of them are directly or indirectly controlled by a third person;

(vii) together they directly or indirectly control a third person; or

(viii) they are members of the same family.

Explanation I. - The term "person" also includes legal persons.

Explanation II. - Persons who are associated in the business of one another in that one is the sole agent or sole distributor or sole concessionaire, howsoever described, of the other shall be deemed to be related for the purpose of these rules, if they fall within the criteria of this sub-rule.

2 CC vs. Maruti Udyog Limited, 1987 (28) ELT 390 (Mum) affirmed by the Supreme Court and reported in 1989 (41) ELT A61 (SC)

3 (3) (a) Where the buyer and seller are related, the transaction value shall be accepted provided that the examination of the circumstances of the sale of the imported goods indicate that the relationship did not influence the price.

(b) In a sale between related persons, the transaction value shall be accepted, whenever the importer demonstrates that the declared value of the goods being valued, closely approximates to one of the following values ascertained at or about the same time.

(i) the transaction value of identical goods, or of similar goods, in sales to unrelated buyers in India

(ii) the deductive value for identical goods or similar goods;

(iii) the computed value for identical goods or similar goods :

Provided that in applying the values used for comparison, due account shall be taken of demonstrated difference in commercial levels, quantity levels, adjustments in accordance with the provisions of rule 10 and cost incurred by the seller in sales in which he and the buyer are not related;

question or with the way the seller settles prices for sales to buyers who are not related to him, this would demonstrate that the price has not been influenced by the relationship.[4] When the prices of products between a related exporter and importer are fixed on the basis of market driven prices and based on the OECD transfer pricing guidelines, it has in such a situation been held that the relationship has not influenced the price.[5] The World Customs Organisation has recently sought to provide guidance on the use of transfer pricing guidelines prepared in accordance with the OECD Guidelines and provided by importers as a basis for examining the 'circumstances surrounding the sale' under Article 1.2(a) of the GATT Valuation Agreement. Commentary 23.1 of the WCO Technical Committee on Customs Valuation (TCCV) on the use of transfer pricing studies for customs valuation, provides that though on the one hand the transfer pricing study submitted by an importer may be a good source of information, if it contains relevant information regarding the circumstances surrounding the sale, on the other hand, such transfer pricing study may not be relevant or adequate in examining the circumstances surrounding the sale because of the substantial and significant differences which exist between the methods prescribed in GATT Valuation Agreement and that prescribed in the OECD Transfer Pricing Guidelines. Accordingly, the use of a transfer pricing study as a possible basis for examining the circumstances of the sale should be considered on a case by case basis. As a conclusion, any relevant information and documents provided by an importer may be utilised for examining the circumstances of the sale. A transfer pricing study could be one source of such information.

Rule 3(3)(b) provides an opportunity for the importer to demonstrate that the transaction value closely approximates to a "test" value previously accepted by the proper officer of customs and is therefore acceptable under the provisions of rule 3. The test values referred to in Rule 3(3)(b) are the (i) transaction value of identical goods or similar goods in sales to unrelated buyers in India. The term "unrelated buyers" means buyers who are not related to the seller in any particular case, and, (ii) the deductive or the computed value for identical goods or similar goods. The manner of computation of deductive value and computed value is detailed in Rules 7 and 8 respectively of the CVR, 2007. Where a test under rule 3(3)(b) is met, it is not necessary to examine the question of influence under rule 3(3)(a). If the proper officer of customs has already sufficient information to be satisfied, without further detailed inquiries, that one of the tests provided in rule 3(3)(b) has been met, there is no reason for him to require the importer to demonstrate that the test can be met. If the value cannot be ascertained in terms of the above rules, then it should be ascertained by proceeding sequentially through the provisions of Rules 4 to 9 of the CVR, 2007.

Rule 3(2) of the Customs Valuation (Determination of Value of Export Goods) Rules, 2007 provides that the transaction value shall be accepted even where the buyer and seller are related, provided that the relationship has not influenced the price. Since most goods can be exported from India without the payment of duty and there are no duty repercussions, the position of transactions between 'related persons' from an export angle has not been examined in this article.

Transactions involving special relationships are investigated by the Special Valuation Branch of the Customs ('SVB') which is an institution specialising in such nature of investigations. Wherever in the declaration prescribed under

4 Interpretative Note to Rule 3(3) of the CVR, 2007
5 Gemplus India Pvt. Ltd vs. CC, 2005 (185) ELT 269 (T-Bang)

the CVR, 2007, the importer has himself made an averment that the transactions are between related persons in accordance with Rule 2(2) of the CVR, 2007, and there is a prima facie, justification for further inquiry, the concerned case of import may be referred to the SVB of the concerned Custom House, where a separate case file should be opened and a registration number assigned to the case. Similar reference to SVB to look into valuation on account of special relationship could be ordered by Commissioner concerned where though not disclosed by the importer, such relationship comes to light on any intelligence or while enquiring into transactions of any importer with a particular supplier.[6] Transactions between 'related persons' which are subject matter of investigations by the SVB authorities are subject to a very high level of scrutiny. The SVB has w.e.f. 1-1-2013 been brought under the functional control of the Directorate General of Valuation ('DGoV'). This assumes significance as one of the stated objectives of the DGoV is to ensure that there is harmonisation between the provisions related to related party transactions (Transfer pricing) between Customs Act and Income-tax Act.

At a global level including in India, transactions between 'related persons' are on the rise and such transactions are subject to greater scrutiny by both the Income Tax and Customs authorities. Though the objectives of the Customs and Income Tax authorities may differ, the basic principle, set out in the Customs law and Income Tax law require that an "arm's length" or "fair" value be set for cross-border transactions between related parties and associated enterprises. That is, the transfer price must not be influenced by the relationship between the parties or it must be set in the same way as if the parties were not related. The trend globally is to seek to harmonise the transfer pricing for Customs and Income tax to the extent possible and this trend is also reflected in India by bringing the SVB under the DGoV as also by the recommendations of the Joint Working Group of the CBEC and the CBDT on the need for increased co-operation and co-ordination between the two departments on 'transfer pricing' issues.[7] Therefore it is necessary and imperative that all these factors also be fully understood and be considered by companies/entities while fixing the import price for customs purposes in transactions between 'related persons'.

6 See Circular 11/2001-Cus. dated 23-2-2001
7 See Customs Circular 20/2007 dt. 8-5-2007

Talent is nurtured in solitude; character is formed in the stormy billows of the world.

— *Goethe*

Providence has given us hope and sleep is a compensation for the many cares of life.

— *Voltaire*

Santosh Dalvi, *Advocate*

Special Valuation Branch Cell – Operational Issues and Challenges

The indirect tax regime in India is both multifaceted and complicated. Together the Central and State governments charge a multitude of indirect taxes. The Central Government levies tax on goods at the point of import (Customs duty), on manufacture of goods (Excise duty), on interstate sale of goods (Central Sales Tax or CST) and on provision of services (Service tax). The State Governments charge tax on goods sold within the State (Sales Tax/Value Added Tax) and on the goods that enter the state (Entry tax). In certain cities there are municipal levies like Octroi and Local Body Tax also. Given the backdrop of the indirect taxes, the various players in the diverse industries functioning in the country have to constantly monitor the tax cost involved in any transaction. The corporate and business houses have to maintain robust documentation to support their tax positions and to justify their prices to various tax authorities.

With the advent of economic progress, the Indian businesses are becoming international and international companies are rapidly and noticeably making their presence felt in India. In a period of globalisation and technological advancement, it is imperative for a business to engage into international transaction such as import of goods from various countries. Particularly in an emergent economy like the Indian economy, such kind of imports plays a significant role in terms of progress and development.

The import transactions are subject to scrutiny by Customs authorities and those from related parties are specifically under significant scanner. The valuation of goods under Customs Law in India is done under Section 14 of Customs Act 1962 which prescribes that valuation of goods shall be at arm's length. Where imports are made from related suppliers, the transaction value is accepted by the authorities only if the importer is able to demonstrate that the value at which imports are made is not influenced by the relationship between the importer and the supplier and that the transaction between them is entered as an arm's length transaction. The importers who import from related suppliers are required to justify their transaction value to Customs i.e. Special Valuation Branch ('SVB') cell of Customs. SVB is a branch of the Customs specialising in investigating the transactions involving relationship between the supplier and importer. It examines the influence of relationship on the import value of goods in respect of transactions between related parties.

However, the justification of the transaction value to the SVB is not as easy as it comes across while reading about it. It can actually prove to be a daunting procedure for the importers. There are several issues and challenges at the operational and administrative level that make the process of justifying the import price to SVB a nightmarish task for most of the importers.

The first stage of obtaining concurrence of the Commissioner for referring a particular related party import transaction to SVB itself is a long driven process which requires constant follow up with the Commissioner. Obtaining a concurrence from the Commissioner of Custom so that the concerned case of import may be referred to the SVB, a separate case file is opened for the particular case and a registration number assigned to the case may itself take several months at times.

Once the case is registered with SVB, a detailed questionnaire is issued by SVB which is to be responded to within 30 days of the receipt. There are various occasions when the issued questionnaire does not reach the importer within 30 days forget responding to it. As a repercussion, the 1% Extra Duty Deposit ('EDD') paid by the importers on the value of imports to the Customs while clearing the goods on a provisional basis during the course of the SVB procedure, is increased to 5% by SVB if the reply to the questionnaire are not submitted within 30 days of receipt. The importers are burdened with the EDD in spite of having already paid the Customs Duty at applicable rates on the import value of goods. Further, the circular 11-2001 dated 23rd February, 2001 which provides the instructions and procedures in connection with SVB also mentions that where provisional assessment is being resorted to, the investigation and finalisation of the assessment must be completed within four months from the date of reply to the questionnaire, beyond which EDD should be discontinued. However, neither the department nor the importer takes any action for discontinuance/refund of EDD. Thus, 1% or 5% (as the case maybe) value of import remains blocked and with the Customs till the time the final assessment is completed and the SVB order is released which, based on a practical experience takes approximately 2 to 3 years. Also, if the refund of EDD is applied for, the importers are required to provide evidence that no unjust enrichment will occur in case the refund of EDD is granted to them.

In almost all the cases the transaction value of import from related parties is never accepted by SVB. The importer of goods substantiates that the relationship between him and the seller did not influence price of the imported goods, by demonstrating that the declared value of imported goods closely approximates to one of the following values:

i. Transaction value of identical/similar goods sold by the seller to unrelated buyer in India;

ii. Deductive value of identical/similar goods: identical goods/similar goods are sold in India in the same condition to the unrelated buyer, the value of the goods for the purpose of customs duty shall be unit price at which goods are sold in India (greatest aggregate quantity) less profit margin (consistent with the profit margin earned by companies engaged in the similar business) and general expenditure incurred towards sales;

iii. Computed value of identical/similar goods: Value of goods for the purpose of customs duty shall be cost of material and other processing involved in producing the goods plus profit and general expenditure incurred by the seller in the country of exports.

From amongst the above methods of valuation provided under Customs Valuation (Determination of Value of Imported Goods) Rules 2007, the most difficult to adopt is the computed value method. Obtaining the details of the cost of material and profit margin of the seller is not an easy task. However, many a times the SVB authorities insist that the buyer should adopt the computed value method for justifying their price which leaves the importer at the mercy of its foreign parent/counterpart for the purpose of justifying the import price to Indian Customs.

Many a times the methods of valuation adopted by the importer are rejected by SVB. The reason being the comparable data on the basis of which the importer substantiates his import price does not synchronise with the data available with the SVB cell. SVB obtains data from various sources like Transfer pricing authorities, various players in the industries, etc. Such data which is available with the SVB cell is generally not available in public domain. The importers use the data available in public domain which obviously does not co-ordinate with the accurate data available with SVB. Thus, the importers and SVB on several occasions face disagreements as far as the valuation is concerned which delays the finalisation of the SVB proceedings and thereby the issuance of the order. Such disagreement also leads to a prolonged litigation.

Further, normally, the order issued by the SVB is in operation for a period of 3 years. However, if there is a change in the terms and conditions of the agreement, or pattern of invoicing, the same is required to be renewed. An ambiguity surrounds the renewal of the order by the SVB. On quite a few occasions there are Transfer pricing adjustments to the invoice value. Whether such Transfer pricing adjustments will be construed as a change in invoicing pattern and thereby whether renewal of the order will be required or not is a question that merits consideration. Also, whether the validity of 3 years of the renewed order is effective from the date of issue of original order or from the date of issue of renewed order is a subject that needs deliberation.

Apart from the above, there are other issues which pose challenges to importers as far as justification of the import value of goods to the SVB is concerned. The importer has to adopt separate valuation methods inorder to justify their import price (paid to related parties) before SVB and Transfer pricing authorities. The Transfer pricing authorities try to value the imports from related party with a perspective that there should be no overvaluation and the SVB tries to value the imports from related party with a perspective that there should be no undervaluation. Thus, the importer keeps on struggling for arriving at a price which is acceptable to both SVB as well as to Transfer pricing authorities.

In certain cases, post import of goods from a related party located outside India, the importer sells the same imported goods to domestic third party under a bond i.e. sells the imported goods without clearing it for home consumption. The importer is not liable to discharge Customs Duty on such imports as he has not cleared the goods for home consumption. Hence, whether the said imports would fall within the ambit of SVB is ambiguous. There is uncertainty associated with respect to such transactions as far as the justification of import value to the SVB is concerned.

The operational/ administrative issues and challenges pertaining to justification of import price to SVB are many and the list can be endless. However, at the centre of all the problems is the fact that , SVBs are located only at four major Customs Houses, i.e. Chennai, Kolkata, Delhi and Mumbai and any decision taken in respect of a particular case in any of these major Customs House is followed by all other Customs Houses/formations. SVB is headed by a Deputy Commissioner of Customs and assisted by one Appraising Officer and necessary Ministerial Staff. Accordingly, there are very few SVB authorities presiding over and deciding on the sanity of the transaction value pertaining to voluminous imports into India from related parties located outside India. This leads to huge number of pending cases thereby delaying the SVB procedure and issue of the final order. Thus, the need of the hour is that the strength of the SVB should be increased and appropriate instructions/ guidance should be provided to the importer for complying with the SVB requirements. This will not only bring a smooth compliance mechanism in play but will also relieve the importers from unnecessary trouble in meeting the requirements of the SVB and minimise the waiting period of the importers to receive the final order from SVB. All in all it will lead to smooth functioning of the entire SVB procedure without causing much trouble to importers as well as to the SVB authorities.

CA Vishal Agarwal

Summary of Key Judicial Pronouncements on customs valuation

1. Prior to 2007, Section 14 value was a deemed value

In the case of *Ispat Industries Ltd. vs. Commissioner of Customs 2006 (202) ELT 561 (SC)*, the Supreme Court held that the expenditure incurred for carrying cargo from the mother vessel which was anchored at Bombay Floating Light (BFL) to Dharamtar Jetty, using barges could not be added to assessable value of imported goods for levy of customs duty as the assessable value is the price at which goods are ordinarily sold or offered for sale, for delivery at the time and place of importation. The relevant observations of the court are extracted herein below:

"23. On first impression the submission of learned counsel for the Revenue appears to be sound, because surely the transportation by barge is also part of the transportation of the goods. However, on a deeper analysis, we are of the opinion that the submission of the learned counsel of the Revenue is clearly untenable. Admittedly, all the contracts entered into with the foreign sellers are either CIF contracts or FOB contracts with Bills of Lading nominating Bombay/JNPT/Dharamtar as the ports of discharge. As such the cost of transport has already been included in the price paid to the seller under the CIF contract or an ascertainable freight determined and paid by the buyer from the foreign port to the Indian port. Hence, a further addition to the transport charges under Rule 9(2)(a) of the Customs Valuation Rules, 1988 is in our opinion clearly impermissible.

24. If we read Rule 9(2) of the Rules independently without considering it along with Section 14 of the Act, then of course the submission of the learned counsel for the Revenue could be sustained. However, in our opinion, Rule 9(2) has to be read along with Section 14 and it cannot be read independently. As already stated above, Section 14 creates a legal fiction and we have to see the ordinary value of the imported goods in the course of international trade at the place and time of import. This means that specific cases of import should be ignored. In fact, it is for this reason that Rules 4, 5 and 6 of the Rules have been promulgated. The actual price paid for the goods can only be taken into consideration provided the sale is in the ordinary course of trade under fully competitive conditions and the other provisions of Rule 4 are satisfied.

25. It is well-known that there are sales in which there is under-invoicing or over-invoicing or for some other reasons the sale is not under full competitive conditions. In such a case, Rules 5 & 6 have to be resorted to and the actual price has not to be seen. Thus, the

Rules have been created to serve the object of Section 14 which was to determine a deeming price and not the actual price of the imported goods.

26. In our opinion if there are two possible interpretations of a rule, one which subserves the object of a provision in the parent statute and the other which does not, we have to adopt the former, because adopting the latter will make the rule *ultra vires* the Act.

27. In this connection, it may be mentioned that according to the theory of the eminent positivist jurist Kelsen (The Pure Theory of Law) in every legal system there is a hierarchy of laws, and whenever there is conflict between a norm in a higher layer in this hierarchy and a norm in a lower layer the norm in the higher layer will prevail (see Kelsen's 'The General Theory of Law and State')

28. In our country this hierarchy is as follows:

(1) The Constitution of India;

(2) The Statutory Law, which may be either Parliamentary Law or Law made by the State Legislature;

(3) Delegated or subordinate legislation, which may be in the form of rules made under the Act, regulations made under the Act, etc.;

4) Administrative orders or executive instructions without any statutory backing.

29. The Customs Act falls in the second layer in this hierarchy whereas the rules made under the Act fall in the third layer. Hence, if there is any conflict between the provisions of the Act and the provisions of the Rules, the former will prevail. However, every effort should be made to give an interpretation to the Rules to uphold its validity. This can only be possible if the rules can be interpreted in a manner as to be in conformity with the provisions in the Act, which can be done by giving it an interpretation which may be different from the interpretation which the rule could have if it was construed independently of the provisions in the Act. In other words, to uphold the validity of the rule sometimes a strained meaning can be given to it, which may depart from the ordinary meaning, if that is necessary to make the rule in conformity with the provisions of the Act. This is because it is a well settled principle of interpretation that if there two interpretations possible of a rule, one of which would uphold its validity while the other which would invalidate it, the former should be preferred.

30. In this connection we may also refer to the Gunapradhan Axiom of the Mimansa Principles of Interpretation, which is our indigenous system of interpretation (see K.L. Sarkar's Mimansa Rules of Interpretation, Second Edition p. 71).

32. ....One of the Mimansa principles is the Gunapradhan Axiom, and since we are utilizing it in this judgment we may describe it in some detail. 'Guna' means subordinate or accessory, while 'Pradhan' means principal. The Gunapradhan Axiom states :-

> "If a word or sentence purporting to express a subordinate idea clashes with the principal idea, the former must be adjusted to the latter or must be disregarded altogether".

36. In our opinion, the Gunapradhan principle is fully applicable to the interpretation of Rule 9(2). Rule 9(2) is subservient to Section 14. We must, therefore, interpret it in such a way as to make it in accordance with the main object that is contained in Section 14 of the Customs Act. It may be that in isolation Rule 9(2) conveys some other meaning, but when it is read along with Section 14 of the Act, it must be given a meaning which is in accordance with the object of Section 14. The object of Section 14

is 'primary' whereas the conditions in Rule 9(2) are the 'accessories'. The 'accessory' must, therefore, serve the 'primary'.

37. In our opinion, it is really not necessary to decide whether the place of importation is the jetty or the BFL. Whether the place of import is deemed to be the BFL or Dharamtar jetty it would make no difference to the conclusion we have arrived at because the cost of transportation of the imported goods has already been included for delivery at the Dharamtar jetty and has already been paid to the seller in the CIF or FOB contract. Hence, a further addition to the transport charges in the form of barge charges for the transportation by barges cannot be said to be contemplated by Section 14 of the Act."

This judgment resulted in Section 14 of the Customs Act being amended w.e.f. October, 2007.

2. Transaction value – Rules 3 (4 of old rules)

2.1 The only situation in which the Transaction value could be rejected has been explained and laid down by the Apex Court in the case of *Eicher Tractors Ltd. vs. CC 2000 (122) ELT 321 (SC)*, where the Supreme Court was dealing with a case where the manufacture of tractors was given a special one time discount of 77% under extenuating circumstances, which price was rejected by the department. It was contended that transaction value would not be applicable in the instant case. It was held that:

"The Rules are framed under section 14(1A) and are subject to the conditions in section 14(1). Rule 4 is in fact directly relatable to section 14(1). Both section 14(1) and Rule 4 provide that the price paid by an importer to the vendor in the ordinary course of commerce shall be taken to be the value in the absence of any of the special circumstances indicated in section 14(1) and particularised in Rule 4(2). Rule 4(1) speaks of the transaction value. Utilisation of the definite article indicates that what should be accepted as the value for the purpose of assessment to customs duty is the price actually paid for the particular transaction, unless of course the price is unacceptable for the reasons set out in Rule 4(2). "Payable" in the context of the language of Rule 4(1) must, therefore, be read as referring to "the particular transaction" and payability in respect of the transaction envisages a situation where payment of price may be deferred.

That Rule 4 is limited to the transaction in question is also supported by the provisions of the other Rules each of which provide for alternate modes of valuation and allow evidence of value of goods other than those under assessment to be the basis of the assessable value. Thus, Rule 5 allows for the transaction value to be determined on the basis of identical goods imported into India at the same time; Rule 6 allows for the transaction value to be determined on the value of similar goods imported into India at the same time as the subject goods. Where there .are contemporaneous imports into India, the value determined under Rule 7 by a process of deduction in the manner provided is not possible the value is to be computed under Rule 7A.When value of the imported goods cannot be determined under any of these provisions, the value is required to be determined under Rule 8 "using reasonable means consistent with the principles and general provisions of these rules and sub-section(1) of Section 14 of the Customs Act, 1962 and on the basis of data available in India." If the phrase 'the transaction value' used in Rule 4 were not limited to the particular transaction then the other Rules which refer to other transactions and data would become redundant.

It is only when the transaction value under Rule 4 is rejected, then under Rule 3(ii) the value shall be determined by proceeding sequentially through Rules 5 to 8 of the Rules. Conversely, if the transaction value can be determined under Rule 4(1) and does not fall under any of the exceptions in Rule 4(2), there is no question of determining the value under the subsequent Rules."

2.2 In the case of *Commr. of Cus. vs. Aggarwal Industries Ltd. 2011 (272) ELT 641 (SC)* the Supreme Court held that when the actual shipment took place, after the expiry of the original shipment period, and the international market price of crude sunflower seed oil had increased drastically; the contract price would still have to be accepted as the 'transaction value' in terms of Rule 4 of CVR 1988 and observed *inter alia* as follows:

"On a plain reading of sections 14(1) and 14(lA), it is clear that the value of any goods chargeable to *ad valorem* duty is deemed to be the price as referred to in Section 14(1) of the Act. Section 14(1) is a deeming provision as it talks of deemed value of such goods. The determination of such price has to be in accordance with the relevant rules and subject to the provisions of section 14(1) of the Act. Conjointly read, both section 14(1) of the Act and Rule 4 of CVR 1988 provide that in the absence of any of the special circumstances indicated in section 14(1) of the Act and particularized in Rule 4(2) of CVR 1988, the price paid or payable by the importer to the vendor, in the ordinary course of international trade and commerce, shall be taken to be the transaction value. In other words, save and except for the circumstances mentioned in proviso to Sub-rule (2) of Rule 4, the invoice price is to form the basis for determination of the transaction value. Nevertheless, if on the basis of some contemporaneous evidence, the revenue is able to demonstrate that the invoice does not reflect the correct price, it would be justified in rejecting the invoice price and determine the transaction value in accordance with the procedure laid down in CVR, 1988. It needs little emphasis that before rejecting the transaction value declared by the importer as incorrect or unacceptable, the revenue has to bring on record cogent material to show that contemporaneous imports, which obviously would include the date of contract, the time and place of importation, etc., were at a higher price. In such a situation, Rule l0A of CVR 1988 contemplates that where the department has a 'reason to doubt' the truth or accuracy of the declared value, it may ask the importer to provide further explanation to the effect that the declared value represents the total amount actually paid or payable for the imported goods. Needless to add that 'reason to doubt' does not mean 'reason to suspect'. A mere suspicion upon the correctness of the invoice produced by an importer is not sufficient to reject it as evidence of the value of imported goods."

2.3 In the case of *Sounds N Images vs. CC 2000 (117) ELT 538 (SC)* the Supreme Court while deciding regarding the rejection of transaction value by the department of unbranded condensers of Japanese origin held that a fax message setting out a quotation by one party in Singapore to another party in Singapore cannot be made the basis of valuation of goods imported into India.

2.4 In *Siddhachalam Exports P. Ltd vs. CC 2011 (267) ELT 3 (SC)*, the Supreme Court deprecated the practice of adopting market enquiries without exhausting the valuation methodology mentioned in the rules. It was held that:

"It is settled that the procedure prescribed under section 14(1) of the Act and particularised in Rule 4 of the CVR 1988 Rules has to be adopted to determine the value of goods entered for exports, irrespective of the fact whether any duty is leviable or not. It is also trite that ordinarily, the price received by the exporter in the ordinary course of business shall be taken to be the transaction value for determination of value of goods under export, in absence of any special circumstances indicated under section 14(1) of the Act and

Rule 4(2) of the 1988 Rules. The initial burden to establish that the value mentioned by the exporter in the bill of export or the shipping bill, as the case may be, is incorrect lies on the Revenue. Therefore, once the transaction value under Rule 4 is rejected, the value must be determined by sequentially proceeding through Rules 5 to 8 of the 1988 Rules" [See: *Commissioner of Customs (Gen), Mumbai vs. Abdulla Koyloth - JT 2010 (12) SC 267 = 2010 (259) ELT 481 (SC).]*

2.5 In the case of *Collector of Customs, Bombay vs. East Punjab Traders 1997 (89) ELT 11 (S.C.)*, it was held by the majority of the Supreme Court Bench that when authencity of photocopies of the documents itself is suspected, presumption under Section 139 (ii) of the Act is not available, especially when documents have not come from proper custody or obtained by Indian Customs from Japanese Customs. It was also held that merely because the Department offered cross-examination of the steamer agent from whom the export declaration had been obtained and the respondents chose not to avail of that opportunity is no ground for holding that the requirements of Section 139 are satisfied for the purpose of raising the presumption.

2.6 The Supreme Court dismissed the Appeal filed by the Department in the case of *Commissioner of Customs, Mumbai vs. Bussa Overseas Properties Ltd. 2007 (216) ELT 659 (S.C).* It was held that:

"We have carefully examined each and every document placed on record and we are in agreement with the factual finding of fact recorded by the Tribunal that there is no evidence of under-valuation in the present case particularly when the Department is relying upon unsigned xerox copies of the documents in support of its case. Even the contents of each of these documents do not support the case of the Department."

3. Value of identical goods – Rule 4 (Rule 5 of earlier Valuation rules)

3.1 In the case of *Radhey Shyam Ratanlal vs. Commr of Cus. (Adjudication), Mumbai 2009 (238) ELT 14 (SC)*, the appeal was dismissed on the ground that assessee did not produce relevant document to establish price at which the goods were imported. Accordingly, price of contemporaneous identical goods was accepted as the basis for valuation of imported goods.

3.2 The Supreme Court of India in the case of *Paul Industries (India) vs. UOI 2004 (171) ELT 299 (SC)* remitted the matter *inter alia* to examine that in terms of Rule 5(3) of the Customs Valuation Rules, 1988, if more than one transaction value of identical goods is found, the lowest of such value shall be used to determine the value of imported goods."

3.3 The Supreme Court in the case of *Commissioner vs. Saudagar Exports 2003 (154) ELT A180 (SC)* dismissed the petitions for Special Leave to Appeal filed by Commissioner of Customs, Chennai against the CEGAT order passed in case of *Saudagar Exports vs. Commissioner of Customs, Chennai 2002 (145) ELT 543 (Tri-Chennai).* The Appellate Tribunal in its impugned order held that imports of identical goods made from different country, and from same country but in comparatively much low quantity, are not to be regarded as contemporaneous imports.

4. Value of similar goods – Rule 5 (Rule 6 of earlier Valuation rules)

4.1 In the case of *Pernod Ricard India (P) Ltd. vs. CC 2010 (258) ELT 3 (SC)*, it was held that the Transaction value of similar goods can be taken, subject to adjustment to take account of the difference attributable to commercial level or to the quantity or both and such adjustment should be made on the basis of 'demonstrated evidence'. In the said case, the Tribunal had granted the adjustment i.e. discount/deduction of 20% from the value of similar goods on the ground that imports made by the assessee were higher in quantity than the comparable imports of the similar goods. Though the grant of discount, in case of larger imports, is a normal commercial practice, but however in the absence of any demonstrated evidence to allow such 20% discount, the adjustment was declared invalid and the Tribunal's decision was set aside.

4.2 In the case of *CC vs Prabhu Dayal Prem Chand 2010 (253) ELT 353 (SC),* the transaction value of brass and copper scraps cleared by the assesse was sought to be enhanced by the department placing reliance on the price as indicated in London Metal Exchange (LME) on the ground that the LME bulletin was a true indicator of current international prices of metals. It was held that since the Revenue could not furnish any evidence of contemporaneous import relying in the LME, the transaction value as declared by the assessee could not be rejected.

5. Computed value method – Rule 8 (Rule 7A of earlier Valuation rules)

5.1 In the case of *Rabindra, Chandra Paul vs. CC (Prv.) 2007 (209) ELT 326 (SC),* the department has alleged that the assessable value declared by the appellant was not proper and that Rule 8 had to be invoked. The Supreme Court made the following observations:

- There was no allegation made by the Department stating that the transaction was tainted. The appellant has proved that the transaction was at arm's length. There was no evidence before the Department to show that the price was pegged at a lower level on account of the circumstances mentioned in Rule 4(2). The Department has not even alleged that on account of discounts the price stood pegged at a lower level.
- Rule 8 refers to Computed Value in contradistinction to Rule 7 which refers to Deductive Value. Computed value under Rule 8 is the value of the imported goods consisting of the cost or value of materials plus amount for profit and cost or value of all other expenses under Rule 9(2).
- In the present case, there is no finding given that the buyer and seller are related. In the interpretative notes to Rule 8, value of imported goods is to be determined by examining the costs of production of the goods and the said interpretative note clarifies that Rule 8 should be applied to those cases where the buyer and seller are related.
- Further, if the officer wants to proceed under Rule 8, the cost or value has got to be decided on the basis of the commercial accounts of the producer, provided that such accounts are consistent with the accounting standards applicable in the country where the goods are produced. In the present case, the producer is from Bangladesh. There is no finding that M/s. United Edible Oils Ltd., has not followed the accounting system of that country (Bangladesh). In such cases, normally the Department should call upon the assessee to furnish the value/cost of raw materials plus all costs (direct, indirect, fixed and variable) plus profit at an average rate. In such cases, the Department should call upon the assessee to produce a certificate from the Chartered Accountant of the foreign seller indicating the turnover, profit and other details on the basis of which computation of the Deductive Value under Rule 7 could be determined.

- This exercise had not been done in the present case. As stated above, in the present case, the Assistant Commissioner has rejected the cost of raw materials and, at the same time, she has accepted the value of the processing charges. Therefore, even if Rule 8 was to be applied, which, in our opinion, is not attracted, the computation made under Rule 8 by the Assistant Commissioner was still erroneous.

6. Residual Method/Best judgment assessment – Rule 9 (Rule 8 of earlier Valuation rules)

6.1 This is essentially a residual method and has to be the last resort. In *Apollo Tyres Ltd. vs. CC 1997 (89) ELT 7 (SC)*, the Supreme Court held that just because certain goods are tailor-made, does not mean that the transaction value should be rejected and best judgment value should be done.

7. Includibility of costs – Rule 10 (Rule 9 of earlier Valuation rules)

7.1 In *UOI vs. Mahindra & Mahindra Ltd. 1995 (76) ELT 481 (SC)*, the Supreme Court held that ordinarily the Courts will look into the apparent tenor of the agreement as the real state of affairs and the burden is on the revenue to prove otherwise. Agreement was also providing for supply of CKD packs of engines to Indian manufacturer at same prices as charged from foreign supplier's other international buyers. Stating so, it held that the know-how fees payable on progressive manufacture of engines cannot be added to the assessable value of engines which were being imported.

7.2 The Supreme Court dismissed the Review petition filed by *Soni Music Entertainment India Pvt. Ltd. [Soni Music Entertainment India Pvt. Ltd. vs. Commissioner - 2012 (284) E.L.T. A58 (S.C.)]* against the judgment in the case of *CCE, New Delhi vs. Living India Media Ltd. 2011 (271) ELT 3 (S.C.)*. The Supreme Court in its judgment-in-question had held that cassettes under question are brought to India as pre-recorded cassettes which carry the music or song of an artist. There is an agreement that royalty payment is towards money to be paid to artists and producers who had produced such cassettes. Such royalty becomes due and payable as soon as cassettes are distributed and sold and therefore, such royalty becomes payable on the entire records shipped less records returned. It could therefore, be concluded that payment of royalty was a condition of sale. Royalties and licence fees relating to imports that buyer required to pay directly/indirectly as condition of sale of goods are includible in price as per Rule 9 of Customs Valuation Rules.

7.3 In the case of *CC vs. Toyota Kirloskar Motor P. Ltd. 2007 (213) ELT 4 (SC)* the dispute revolved around the valuation of capital goods that were imported by the respondent for the manufacture of automobiles from their major shareholder company. Under the agreement a royalty and technical know-how fees were also payable. The revenue contended that these amounts were also includable in the transaction value of the capital goods. It was held that the said amounts would not be includable in the instant case. It was observed as follows:

"The transactional value must be relatable to import of goods which *a fortiori* would mean that the amounts must be payable as a condition of import. A distinction, therefore, clearly exists between an amount payable as a condition of import and an amount payable in respect of matters governing the manufacturing activities, which may not have anything to do with import of capital goods.

Article 4 provided for additional assistance in respect of the matters specifically laid down therein. Technical assistance fees have a direct nexus with the post-import activities and not with importation of goods.

It is also a matter of some significance that technical assistance and know-how were required to be given not as a condition precedent, but as and when the respondent makes a request there for and not otherwise."

It was subsequently held that the amounts received for post-importation activities were not includible in the transaction value.

7.4 The question that rose for decision in the case of *Coromandal Fertilizers vs. CC 2000 (115) ELT 7 (SC)* was whether the Customs authorities could add stevedoring charges to the value of imported goods after having assessed landing charges at the rate of 1 per cent of the CIF value for assessment of customs duty. The Supreme Court in the instant case defined landing charges as follows:

"'Landing charges' are exactly what the words mean, the expenditure incurred by an' importer for bringing goods on board-ship to land. Landing charges, in law, must be assessed on actuals, but, as a matter of practice, particularly to facilitate expeditious clearance, landing charges are assessed at a percentage of the value of the goods and such assessment is accepted. When so assessed, landing charges cover the totality of all that an importer expends to bring imported goods to land.

It was held that the Customs Authorities had an option of assessing the imported goods on actuals or on percentage. Once this option was exercised and goods were assessed on percentage basis, they covered thereby all aspects of landing charges and it would not be open to them then to seek to add any amount thereto on the basis that this or that or the other was not covered thereby."

7.5 In *CC vs. Essar Gujarat Ltd. 1996 (88) ELT 609*, a three-member Bench of the Supreme Court held that the second-hand plant could not have been imported without payment of a licence fee to the manufacturer and therefore, the said payment being a .condition of import had to be included in the value for payment of customs duty. In *Bombay Dyeing and Mfg. Co. vs. CC 1997 (90) ELT 276*, dismantling charges paid abroad for dismantling the machinery items were held includible. In the case of *Commissioner of Customs vs. Living Media (India) Limited 2011 (271) ELT 3 (SC)*, the Supreme Court, while dealing with the valuation of recorded Music CDs or Cassettes which were imported and on which there was an obligation on the importer to pay royalties on subsequent sale in India, held that the value of such music CDs or Cassettes should also include the amount of royalty so payable. In all these cases, it must be understood that the said payments are a condition of import and therefore held includible. This is precisely what the Supreme Court held in *CC vs. Ferodo India Pvt. Ltd. 2008 (224) ELT 23 (SC)* wherein their Lordships specifically held that the department should clearly show the nexus that the royalty payment has to the imported goods and merely asserting the same is not enough.

7.6 In *CC vs. Essar Steel Ltd. 2005 (188) ELT 465 (SC)*, it was held that transportation costs would be includable in the transaction value and when the cost of transportation was not ascertainable, in terms of Rule 9 sub-rule (2) proviso (i), the cost ought to be taken at 20% of the FOB value of the cost.

8. Other key judicial pronouncements

8.1 In the case of *Godrej Industries Ltd. vs. UOI 2004 (171) ELT 5 (Bom.)* the basic issue raised was regarding the validity of the public notices/circular wherein it was declared that the bulk liquid cargo cleared directly on payment of duty under a white Bill of Entry should be assessed at a quantity determined as per ship's ullage survey report. As per the said public notice/circular for assessment, only the quantity as per the ullage report was relevant and not the quantity determined by any other method. Placing reliance on the decision of the Supreme Court in the case of *NOCIL vs. Commissioner 2002 (142) ELT A280 (SC)* the Bombay High Court held as under:

"Where the cargo is discharged directly into the shore tank through 'the regular pipeline, in view of the losses that occur during the storage and transit on account of natural causes, evaporation, etc. the quantity determined at the shore tank by dip measurement basis must be taken into account for levy of customs duty and not the ullage report.

Where the cargo is discharged into a tanker, it cannot be inferred that in cases where the cargo is discharged from the vessel directly into the tanker lorries, the assessment of customs duty has to be done as per the quantity determined on the basis of ullage report. If by any method the actual quantity received by the importer can be determined; then it is not necessary to assess the cargo on the basis of the ullage reports. In other words, it cannot be said that the ullage report is the only basis for assessing the bulk liquid cargo discharged directly into the tank lorries, the High Court decided that the public notices and the circular dated 27-12-2002 had to be read to the effect that wherever it is possible to determine the quantity actually delivered from the vessel into the tank lorry, then such method is to be adopted for the purpose of assessment of customs duty of bulk liquid cargo and it is not proper to direct the assessing authorities to assess only on the basis of ullage report. If there is any other recognised method that gives more accurate results, such method may be taken into account for the purpose of assessment. In the absence of any such method, the quantity determined as per the ullage can be taken into account for the purpose of assessment by ensuring that such ullage survey prior to discharge of liquid cargo is carried out under the supervision of the customs officer and signed by the consignee and the customs officer and after discharge of liquid cargo also survey is carried out in the presence of customs officer and the consignee and report is signed by both of them."

8.2 In the case of *M.S. Shoes East Ltd. 2007 (210) ELT 641 (SC)*, the matter before the Supreme Court was whether post import depreciation could be allowed on an imported Rolls Royce car. It was held that under Section 14 of the Customs Act, 1962, the valuation of the car must be based on the price at the time of the import of the goods. Section 1 4 the Act makes it clear that the rate of duty and tariff valuation has to be determined on the date on which the Bill of Entry in respect of such goods is presented under section 46 of the Act despite the fact that while the Bill of Entry of the car was presented in 1996, the clearance was given on 28-3-2005. Therefore, the claim for post import depreciation was rejected.

9. Related party transactions

9.1 In the case of *Fisher Rosemount (India) Ltd. 2001 (134) ELT 321 (SC)*, the Assistant Collector of Customs, Special Valuation Bench, Mumbai, in a dispute pertaining to determination of the valuation of goods imported by the respondent herein from M/s. Rosemount Inc. USA, had held that the CIF value of the goods imported by the respondent was erroneous on the basis of a finding that the above-mentioned companies were related persons interested in the business of each other and that the prices are not the sole consideration.

It was held that mere holding of a certain percentage of stock by the foreign collaborator in the Indian company like the respondent herein, was not sufficient to constitute the relationship so as to make the two persons as related persons. It was further held that for two parties to be related, it also required the existence of interest by both in the business of each other. On the said basis, it came to the conclusion that mere fact that M/s. Rosemount Inc. USA, had the 40 per cent equity share in the respondent company and had provided technical database for the manufacture of electronic pressure transmitters *ipso facto* did not make the two companies related persons.

CA Sunil Gabhawalla

Valuation of Taxable Services – Section 67

1. Introduction

1.1 Section 66B of the Finance Act, 1994 levies a charge of service tax at a prescribed percentage of the value of taxable services provided or agreed to be provided. Therefore, service tax is payable on 'value of taxable services'.

1.2 Unlike section 3 of the Central Excise Act, 1944 which does not integrate the valuation of excisable goods within the charging provision, under the service tax regime, the value of taxable service is integrated within the charging provision itself. This therefore implies that in case there is no value, there cannot be any service tax. Unlike Central Excise, where goods manufactured but supplied free are liable for payment of duty, there can be no service tax on services which are provided free of cost.

1.3 Further, since both the value as well as the rate of service tax is integrated into the charging provision itself, any collection of service tax on an alternative basis like composition, abatement, etc. can be optional only. Further, the charge under such alternative scheme cannot exceed the charge of service tax as prescribed under the normal mechanism of section 66B i.e. 12% of the value.

1.4 Section 67 of the Act read with the Service Tax (Determination of Value) Rules, 2006 exhaustively deal with the principles of valuation of taxable services. This article deals with the provisions of section 67 of the Act. The Service Tax (Determination of Value) Rules, 2006 are not discussed in this article.

2. Broad Scheme of Valuation

2.1 Section 67 of the Finance Act, 1994 provides for the valuation of taxable service.

2.2 Sub-section (1) thereof visualises three alternate situations as summarised in the table below:

	Situation	**Valuation Mechanism**
(i)	Where the provision of service is for a consideration in money	Gross amount charged by the service provider for such service provided or to be provided by him
(ii)	Where the provision of service is for a consideration not wholly or partly consisting of money	Such amount in money, with the addition of service tax charged, as is equivalent to the consideration
(iii)	Where the provision of service is for a consideration which is not ascertainable	The amount as may be determined in the prescribed manner

2.3 Sub-section (2) permits the assessee to calculate service tax based on reverse working in a situation where in the amount charged is inclusive of service tax. Sub-section (3) defines the gross amount to include any amount received towards the taxable service before, during or after provision of such service.

2.4 Sub-section (4) empowers the Central Government to prescribe rules to determine the value of taxable services. In exercise of these powers, the Central Government has prescribed the Service Tax (Determination of Value) Rules, 2006 effective from 19-4-2006 to determine the value of taxable services. It may be noted that the said provisions, being in the nature of Rules, are subservient to the provisions of section 67, which command a more stronger statutory backing and should therefore prevail in case of any internal conflicts

3. Tax to be imposed on gross amount charged

3.1 The basic principle of valuation is that the value shall be the gross amount charged. There are no rules for notional valuation. On a perusal of section 67, it is very evident that there is no mechanism to move away from the consideration exchanging hands. This is because of multiple reasons.

- The general understanding of the term "service" itself denotes contract as compared to merely an activity. Therefore, there is no scope from deviating from the concept of consideration under section 25 of the Contract Act and demanding tax on any value other than the said value
- The statutory definition of service under section 65B(44) also endorses this view that a service is defined by the consideration exchanging hands
- The charging section 66B of the Act also clearly integrates within itself the concept of value of services exchanging hands.

3.2 In view of the above principles, it is evident that in cases where no amount is charged to the client, i.e. when services are provided free of cost, there could be no levy towards service tax.

3.3 Similarly, if the services are provided at a value which is lower than the market value or the MRP, service tax can be demanded only on the amount actually charged and not on the gross MRP. Similarly, no service tax can be demanded on discounts offered at the time of entering into the contract of service.

3.4 Since the tax has to be paid on the gross amount charged, it is not possible for the assessee to deduct the expenses from the gross taxable amount. In fact, rule 5(1) of the Service Tax (Determination of Value) Rules, 2006 reiterates this axiomatic position.

3.5 This principle of taxation of gross amount received implies that even in cases where the exact amount of cost incurred is charged to the customers, service tax is still applicable. In cases where the services are subsidised, service tax is applicable only on the subsidised value.

4. Valuation of non-monetary consideration

4.1 Section 67(1)(ii) deals with situations where the consideration is not wholly in money. In such cases, it has been provided that the value of taxable services shall be such amount in money, with the addition of service tax charged, as is equivalent to the consideration (i.e. equivalent market value of the non-monetary consideration)

4.2 It is clarified through the Education Guide that 'consideration' means everything received in return for a provision of service which includes monetary payment and any consideration of non-monetary nature as well as deferred consideration.

4.3 Section 2(d) of the Indian Contract Act, 1872 defines consideration as follows —

"When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or abstains from doing, something, such act or abstinence or promise is called a consideration for the promise"

4.4 Accordingly, it is clarified that 'consideration' means everything received or recoverable in return for a provision of service which includes monetary payment and any consideration of non-monetary nature or deferred consideration as well as recharges between establishments located in a non-taxable territory on one hand and taxable territory on the other hand.

4.5 It is further clarified that monetary consideration means any consideration received in the form of money. 'Money' has been defined in section 65B and includes not only cash but also cheque, promissory note, bill of exchange, letter of credit, draft, pay order, traveller's cheque, money order, postal or electronic remittance or any such similar instrument while non-monetary consideration essentially means compensation in kind.

4.6 Some examples of non-monetary consideration include:

- Supply of goods and services in return for provision of service
- Refraining or forbearing to do an act in return for provision of service
- Tolerating an act or a situation in return for provision of a service
- Doing or agreeing to do an act in return for provision of service

4.7 The non-monetary consideration also needs to be valued as per Section 67 of the Act for determining the tax payable on the taxable service since service tax is levied on the value of consideration received which includes both monetary consideration and money value of non-monetary consideration.

5. Valuation in case the consideration is not ascertainable

5.1 Section 67(1)(iii) deals with situations where the consideration is not ascertainable. In such cases, it has been provided that the value of taxable services shall be as prescribed. Accordingly, the Service Tax (Determination of Value) Rules, 2006 have prescribed mechanism for valuation in such cases.

5.2 There may be several situations wherein it may be difficult to determine the consideration received by service provider for provision of a service. Such situations can arise on account of several factors such as consideration of service being embedded in the total amount received as consideration for a composite activity involving elements of provisions of service and element of sale of goods or consideration for service being included in the gross amount charged for a particular transaction or consideration of service being wholly or partly in the nature of non-monetary consideration and such non-monetary consideration cannot be converted into monetary terms.

5.3 The manner of determining the value has been prescribed under Service Tax (Determination of Value) Rules, 2006. Rule 3 specifically provides that the value of taxable service where such value is not ascertainable, shall be determined by the service provider in the following manner:–

(a) the value of such taxable service shall be equivalent to the gross amount charged by the service provider to provide similar service to any other person in the ordinary course of trade and the gross amount charged is the sole consideration;

(b) where the value cannot be determined in accordance with clause (a), the service provider shall determine the equivalent money value of such consideration which shall, in no case be less than the cost of provision of such taxable service

6. Billing inclusive of Service Tax

6.1 Service tax is payable on the value of services irrespective of the realisation of service tax amount. If the billing is done inclusive of service tax, the assessee can claim that the bill amount should be bifurcated into value and service tax components. Accordingly the service tax payable shall be (12.36 x 100 / 112.36)

6.2 However, one will also have to consider the impact of violation of Rule 4A of the Service Tax Rules which requires the service provider to separately indicate the value of the taxable services and the service tax thereon. The CENVAT Credit claim of the service recipient is also prejudiced in case of an inclusive billing and therefore it is preferable to avoid billing inclusive of service tax.

7. Applicable rate for foreign currency transactions

7.1 Section 67A has been inserted with effect from 28-5-2012 to specifically provide that the rate of service tax, value of a taxable service and rate of exchange, if any, shall be the rate of service tax or value of a taxable service or rate of exchange, as the case may be, in force or as applicable at the time when the taxable service has been provided or agreed to be provided. An Explanation to the said Section further clarifies that for the purposes of this section, "rate of exchange" means the rate of exchange referred to in the Explanation to section 14 of the Customs Act, 1962 (52 of 1962). This is discussed in detail in a separate article

8. Specific deviations from the general rules of valuation

8.1 While the general principle is that service tax has to be paid at the rate of 12% of the value of taxable services charged, there are some specific deviations from the general rule of valuation. Since the general rule of valuation and the rate of service tax is embedded in the charging provision of Section 66B itself, it is important to note that each of these deviations are optional and the assessee can choose the generic mechanism of discharging service tax at the rate of 12% on the value of taxable services.

Valuation of service portion in composite contracts:

8.2 In general, a composite contract should not be vivisected. However, based on the principles laid down by the Supreme Court, in certain cases, the service component in composite contracts can be taxed. It may not be easy to determine such service component and therefore the Service Tax (Determination of Value) Rules, 2006 provide for mechanism of valuation of the service component of a composite contract. The following table summarises the said Rules:

Situation	Rule
Service Component of Works Contract	2A
Service Component in Supply of Food as a part of Service	2C
Service Component in the money changing activities	2B

Abatements

8.3 In addition to the specific rules to determine the value of the service embedded in the composite contracts, the abatement notification has a bearing on the valuation of services. All such abatements for specified category of services have been merged into a single Notification No. 26/2102-ST, dated 20-6-2012.

Compounding schemes

8.4 The law also provides for simplified compounding mechanism for determining the amount of service tax payable. These sub-rules either specify the service tax payable as a certain percentage of the gross amount of a specified sum received by the service provider or also provide for manner of determination of value of taxable service for other specified services. This facility is normally available as an option to the person responsible to pay service tax.

9. Conclusion

9.1 With the comprehensive definition of service, the issues in the field of valuation will now receive more attention than ever before. Due to the intangible and personalised nature of the services, it may not be easy to find comparables and many disputes may arise in this regard.

CA Naresh K. Sheth

Service Valuation – Cross Border Transactions

1. Preamble

Finance Act, 2012 has thoroughly revamped service tax legislation w.e.f. 1-7-2012. This revamped scheme of taxation is popularly known as "Negative List based taxation of services". Under this new taxation regime, the legislators have attempted to bring clarity on some open ended, contentious and litigation prone issues haunting during period up to 30th June, 2012. The valuation of cross border transaction was one such issue for exporters and importers of services in India. This issue was more relevant for importers of service liable to service tax under reverse charge on value of services imported by them.

2. Valuation issues in cross border transactions prior to 30-6-2012

The valuation of cross border services depends on the rate of exchange adopted and such rate fluctuates at various stages of transaction i.e. from mandating the services to final remittance for such services. Assessees usually adopt different exchange rate such as RBI rate, Custom rate, Actual remittance rate, Standard rate or *ad hoc* rate for valuing cross border services for accounting or taxation purpose. There could be significant variation in all such rates. In absence of specific provision as to which rate to be adopted and the rate prevailing on which day to be adopted, there was ambiguity resulting into tax disputes or litigation as to valuation of such services. The valuation of cross border service was a contentious issue as such service could probably be valued at the exchange rate prevailing on date of:

- Mandating or contracting the services.
- Actual import or export of the services.
- Invoice for service.
- Accounting entry.
- Advance / part remittance against service.
- Final remittance for services.

In the era of volatile fluctuation of foreign currency rates, the adoption of exchange rate and relevant date has significant service tax ramifications.

The legislators have enacted Section 67A in Finance Act, 1994 to bring some clarity on this important issue.

3. Relevant legal provisions

Section 67A is introduced w.e.f. 28-5-2012, which reads as under:

"The rate of service tax, value of a taxable service and rate of exchange, if any, shall be the rate of service tax or value of a taxable service or rate of exchange, as the case may be, in force or as applicable at the time when the taxable service has been provided or agreed to be provided.

Explanation.– For the purposes of this section, "rate of exchange" means the rate of exchange referred to in the Explanation to section 14 of the Customs Act, 1962 (52 of 1962)".

The Explanation to section 14 of the Customs Act, 1962 reads as under:

"For the purposes of this section:

(a) "rate of exchange" means the rate of exchange —

   (i) determined by the Board, or

   (ii) ascertained in such manner as the Board may direct, for the conversion of Indian currency into foreign currency or foreign currency into Indian currency;

(b) "foreign currency" and ''Indian currency" have the meanings respectively assigned to them in clause (m) and clause (q) of section 2 of the Foreign Exchange Management Act, 1999 (42 of 1999).]"

4. Implications of section 67A

Prior to the enactment of section 67A, there was no provision in the Service Tax Legislation as to the 'rate of exchange' to be applied for valuing cross border services. The amended statute mandates that the rate of exchange prescribed under section 14 of the Customs Act, 1962 should be applied for valuing cross border transactions for the purpose of service tax. The Central Board of Excise and Customs (CBEC) periodically issues notifications (mostly on a monthly basis) prescribing 'rate of exchange' for relevant period for exporters and importers. On or after 28-5-2012, the assessee (service importer / service exporter) is legally obliged to adopt the CBEC notified rate (not the RBI or other rate of his choice) for service tax purposes.

Section 67A clearly provides that valuation of cross border transaction should be done at the custom rate prevailing on the date of provision of taxable services. In other words, assessee has to determine the point of taxation for cross border transactions and apply notified custom rate for the period in which point of taxation falls for working out value of such taxable services. RBI rate, remittance rate, rate adopted for accounting purpose, etc. is irrelevant for determining value of cross border services. This would result in a difference in value of transactions as per account and value on which tax is paid or declared in ST-3 return. The assessee may have to reconcile these figures at the time of EA-2000 or CERA audit.

5. Table illustrating the implications of section 67A

Nature of transaction	Point of Taxation	Exchange rate to be taken for service tax	Remark
Import of service by Indian service recipient from foreign associated enterprise	Earlier of : a) Date of payment; or b) Date of entry in books of account of importer of service	Custom rate declared by CBEC for the month / period in which Point of Taxation falls.	The actual rate at which remittance is made is irrelevant The RBI rate prevailing on the date of booking of the entry is irrelevant

Import of service by Indian service recipient from foreign vendor (other than associated Enterprise)	Date on which payment is made If payment is not made within 6 months of the date of invoice, the date of completion of service.	Custom rate declared by CBEC for the month / period in which Point of Taxation falls	The actual rate of remittance is irrelevant The RBI rate prevailing on the date of invoice, booking of invoice in accounts, date of completion of service, etc. is irrelevant
Export of services	Earlier of : a) Date of invoice if made within 30 days from the completion of service or date of completion of service where invoice is not made within 30 days of completion of service; or b) Date of realisation of consideration.	Custom Rate declared by CBEC for the month / period in which point of Taxation falls	The actual rate of remittance is irrelevant The RBI rate prevailing on the date of invoice, booking of invoice in accounts, date of completion of service, etc. is irrelevant.

Even after 28-5-2012, the importers of service usually discharge service tax liability wrongly i.e. on actual amount remitted for services imported instead of on value of such service arrived at by applying notified custom rate for the relevant period. This might result in excess/short discharge of liability. The short payment of service tax may lead to interest and other penal consequences.

6. Conclusion

Section 67A of Finance Act, 1994 is a mandatory provision. It might be cumbersome for assessee to restate the foreign currency denominated transactions which are accounted for on the basis of remittance rate or RBI rate at notified custom rates. However section 67A, being a statutory provision, assessee is law obliged to follow the same in letter and spirit.

Reading maketh a full man; conference a ready man and writing an exact man.

— *Francis Bacon*

CA Rajkamal Shah

Valuation under Works Contract Service

Valuation of works Contract is a contentious issue on account of complexities of the portion of goods and services involved in the execution of works contract. The genesis of value of transfer of property of goods involved in the execution of Works Contract is found in the famous decision of Supreme Court of India in *M/s. Gannon Dunkerley and Co. and Others, vs. State of Rajasthan and Others, in Civil Appeal No. 4861-64 of 1992, reported in 1993 (088) STC 0204 (SC)*. The decision was rendered in the aftermath of the 46th Amendment to the Constitution of India *vide* insertion of Article 366 (29A). Per sub-clause (b) of Article 366 (29A), transfer of property in goods involved in the execution of Works Contract is deemed to be a "sale". By this amendment, the states are empowered to tax portion of transfer of property in goods in execution of Works Contract.

In *BSBK Pvt. Ltd. 2010 (18) STR 555,* the Larger Bench held that the said Entry in Article 366 (29A) of the Constitution is capable to impose the service tax liability on service portion in execution of Works Contract. This case was upheld by the Hon'ble Delhi High Court. Similar view was taken in *Alstom Projects India Ltd 2011 (23) STR 0489 (Tri. Delhi)*. In view of the almost settled legal position, it is clear that the states can levy sales tax or Value Added Tax (VAT) on the portion of property in goods transferred and the Centre can levy service tax on the portion of service involved in the execution of Works Contract. This principle finds support from various decisions of the Apex Court some of which are *Bharat Sanchar Nigam Ltd. vs. UOI 2006 (2) STR 164 (SC), Gujarat Ambuja Cement Ltd. vs. UOI 2005 (4) SCC (214)* and *Imagic Creative Pvt. Ltd. vs. Commissioner of Commercial Taxes 2008 (9) STR 337 (SC)*. The valuation aspect in terms of goods and service therefore assumes great importance.

Earlier, service tax of Works Contract was payable at fixed rate, i.e. @ 4.8% of the gross amount charged under the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007. However, the said scheme was rescinded from 1-7-2012. Hereafter the valuation of Works Contract finds place in the Service Tax (Determination of Value) Rules, 2006 wherein the determination of value of service portion in the execution of Works Contract contained in R.2A. These rules provide for valuation based on the formula prescribed in the decision of the Hon'ble Supreme Court in Gannon Dunkerley and Co. (supra). As per R. 2A[1], the value of service portion shall be equivalent to the gross amount charged for the Works Contract less the value of property in goods transferred in the execution in said works contract. Further, the VAT or Sales Tax, as the case may be, paid or payable on such transfer of property in goods shall also be deducted. It has been explained that, where value added tax has been paid or payable on the actual value of property in goods transferred in the execution of the Works Contract, then, such value adopted for

1. W.e.f. 1.7.2012 substituted for original R.2A of the Service Tax (Determination of Value) Rule, 2007

the purposes of payment of value added tax or sales tax, shall be taken as the value of property in goods transferred in execution of the said Works Contract.

The following issues can arise so far as deductibility of value of transfer of property in goods is involved i) when the VAT or Sales Tax is not paid by the assessee and ii) when the VAT or Sales Tax is not paid on actual value of property in goods is transferred but the same is paid at a fixed rate on composite value as provided in the state VAT laws. In the first case, it is not required that VAT or Sales Tax must be paid for the purpose of claim of deduction of value of the goods. It should be sufficient if VAT or Sales Tax is payable on such goods. If VAT or Sales Tax is not payable on account of say, turnover based exemption, it does not mean that the contract is not a Works Contract.

In second case, where the Tax is paid under composition scheme in a particular state, the difficulty may arise to arrive at a value in property of goods transferred in execution of Works Contract. However, in such a case, the value may be arrived on the basis of the generally accepted accounting principles adopted in the books of account of the assessee and deducted from the gross value of the Works Contract to arrive at the value of service portion.

The value of Works Contract shall include [R. 2A(i)]

(i) labour charges for execution of the works;

(ii) amount paid to a sub-contractor for labour and services;

(iii) charges for planning, designing and architect's fees;

(iv) charges for obtaining on hire or otherwise, machinery and tools used for the execution of the Works Contract;

(v) cost of consumables such as water, electricity, fuel used in the execution of the Works Contract;

(vi) cost of establishment of the contractor relatable to supply of labour and services;

(vii) other similar expenses relatable to supply of labour and services; and

(viii) profit earned by the service provider relatable to supply of labour and services;

However, sub-rule (ii) of the said Rule provides for an option to the assessee to work out the value of service portion if the same cannot be ascertained by the normal method as prescribed in sub-rule (i).

Sub-rule (ii) prescribes percentage portion of taxable value as under:

Sr. No.	Nature of Works Contract	Prescribed taxable portion under Rule 2A(ii) of Valuation Rule
1	Original works: (i) all new constructions (ii) all types of additions and alterations to abandoned or damaged structures on land that are required to make them workable (iii) erection, commissioning or installation of plant, machinery or equipment or structures, whether pre-fabricated or otherwise	40%
2	Maintenance repairs or reconditioning or restoration or servicing of any goods	70%
3	Maintenance, repair, completion and finishing services such as glazing, plastering, floor and tiling, installation of electrical fittings of an immovable property and contracts other than 1 and 2 above	60%

Thus, different rates of value shall be applied for different classes of Works Contract in relation to maintenance, repairs, reconditioning, restoration or servicing of the goods, 40% of value (total amount) to tax. However, similar services in relation to immovable property service tax shall be chargeable at 60% value.

B. Determination of Fair market value

Explanation 1 to R. 2A prescribes how to determine the value (total amount) on which the percentage as per sub-rule (ii) can be applied. It lays down that 'total amount' would include:

- Gross amount charged for the Works Contract and
- Fair market value of goods as well as services supplied in or relation to the Works Contract

However, the following amounts are deductible:

- Amount charged for such goods or services
- VAT / Sales tax levied thereon

Thus, the 'Fair market value' of such goods and services will have to be ascertained before working out the taxable portion under sub-rule (ii). The Fair market value of goods and services so supplied shall be determined in accordance with generally accepted accounting principles.

Completion and finishing services in new construction

Issue may arise about completion and finishing services undertaken in a new building. Whether the same would be subjected to 60% of total amount charged for the Works Contract or 40% as in case of 'original Works Contract'. Though not free from doubt, it appears from Sub-clause (C) that services of maintenance, repair, completion and finishing services such as glazing, plastering, floor and tiling, installation of electrical fittings of an immovable property would be chargeable at 60% of the total amount only if they are not otherwise covered in the 'original' Works Contract. Therefore, such completion and finishing services may be liable to tax at 40% of total amount if the same are provided in relation to a new building or construction as defined in the 'original works'.

CENVAT Credit

It has been further provided that the provider of taxable services shall be eligible to take CENVAT credit of input service and capital goods used in providing such service. However, he shall not take CENVAT credit of duties or cess paid on any input used in or in relation to the said Works Contract. In case of payment under reverse charge, the receiver of service shall be eligible to pay credit on payment of service tax of his own portion and in case of the payment made to the service provider, on actual payment as per CENVAT Credit Rules, 2004.

Payment under Reserve Charge

From 1-7-2012, 50% of service tax on Works Contract Service is payable by a business entity registered as body corporate located in taxable territory in relation to the service provided by an individual, HUF or partnership firm, whether registered or not, including association of persons. It has been further provided that, the receiver of service has the option of choosing the valuation method as per his choice, independent of the method adopted by the service provider. This means that the receiver of service may pay service tax on percentage of value as provided in Sub-rule (ii) of R. 2A whereas the service provider may pay on actual basis as provided in Sub-rule (i) of R. 2A.

Conclusion

The valuation aspect in case of Works Contract Service appears to have been fairly settled after amendment to the Service Tax (Determination of Value) Rules, 2006 w.e.f. 1-7-2012. However, the issues as regards what should be termed as the 'original works' and 'completion and finishing services' in relation to immovable property may remain litigation prone and may be required to be resolved on case to case basis.

CA Ashit Shah

Money Changing Services

Foreign Exchange brokers provide services as an intermediary in relation to purchase or sale of foreign currency on a commission/ brokerage basis. Purchase or sale of foreign currency is undertaken by foreign exchange broker and also by persons authorised under Foreign Exchange Management Act, 1999 to deal in foreign exchange and having licence issued by RBI. Such authorised persons are known as money changers or authorised dealers of foreign exchange. Foreign Exchange (Forex) broking service were brought within the ambit of service tax by Finance Act, 2001 w.e.f. 16th July 2001 by incorporating sub clause (zm) in Section 65(105) and sub clause (12) in Section 65 of Finance Act, 1994 and later sub-clause (zzk) had been incorporated in Section 65(105) and amendment had been done in Section 65(12) w.e.f. 16th May 2008 so as to include, authorised dealer in foreign currency and authorized money changer, within the ambit of service tax in addition to a foreign exchange broker. Accordingly, entire money changer community were under the ambit of Service tax from May 2008.

Foreign exchange broker indicates the consideration for the services provided (commission) explicitly. Whereas money changers/authorised dealers of foreign exchange providing same services may not necessarily indicate the consideration explicitly. Hence, an explanation was being added to the effect that explicit mention of the consideration for the services provided in relation to purchase or sale of foreign currency is not relevant for the purpose of levy of service tax.

To determine value of taxable services, Rule 2B had been inserted, in Service Tax (Determination of Value) (Amendment) Rules, 2011, w.e.f. 1st April 2011. Moreover, where the consideration for the services provided in relation to purchase or sale of foreign currency is not explicitly indicated by the service provider, assessee had option, to determine method as provided under rule 6(7B) of the Service Tax Rules, 1994, which had been introduced by amending Service Tax (Second Amendment) Rules, 2008 w.e.f. 16th May 2008 and thereafter Service Tax (Second Amendment) Rules, 2011 w.e,f. 1st April, 2011. It had been explicitly made clear that once such option is exercised in any financial year, such option shall not be withdrawn during the remaining part of that financial year.

Optional Method of Valuation and Computation of Service Tax Liability from 1st April 2011 and onwards:

Value pursuant to Rule 2B of Service Tax (Determination of Value) Rules, 2006	Service Tax payable pursuant to Rule (7B) of Service Tax Rules, 1994
(i) For a currency, when exchanged from, or to, Indian Rupees (INR), the value shall be equal to the difference in the buying rate or the selling rate, as the case may be, and the Reserve Bank of India (RBI) reference rate for that currency at that time, multiplied by the total units of currency. **Example**: US$1000 is sold by a customer at the rate of Rupees 45 per US$. RBI reference rate for US$ is Rupees 45.50 for that day. The taxable value shall be Rupees 500. (ii) In case where the RBI reference rate for a currency is not available, the value shall be 1% of the gross amount of Indian Rupees provided or received, by the person changing the money. **Example**: US$1000 is sold by a customer at the rate of Rupees 45 per US$. Taxable Value = 1% of ` 45,000 (USD 1,000 * INR 45) = ` 450 (iii) In case where neither of the currencies exchanged is Indian Rupee, the value shall be equal to 1% of the lesser of the two amounts the person changing the money would have received by converting any of the two currencies into Indian Rupee on that day at the reference rate provided by RBI **Example**: 1,000 USD is exchanged for 1,250 Euro RBI Reference Rate of INR is ` 45.50 Value = Lower of (i) US$ 1,000 * ` 45.50 = 45,500 (ii) Euro 1,250 * ` 45.50 = 56,875	The person liable to pay service tax in relation to purchase or sale of foreign currency, including money changing, provided by a foreign exchange broker, including an authorised dealer in foreign exchange or an authorised money changer, referred to in sub-clauses (zm) and (zzk) of clause (105) of section 65 of the Act, shall have the option to pay an amount calculated at the following rates towards discharge of his service tax liability instead of paying service tax at the rate specified in section 66 of Chapter V of the Act. (a) 0.1 per cent of the gross amount of currency exchanged for an amount up to rupees 100,000, subject to the minimum amount of rupees 25; and (b) rupees 100 and 0.05 per cent of the gross amount of currency exchanged for an amount of rupees exceeding rupees 100,000 and up to rupees 10,00,000; and (c) rupees 550 and 0.01 per cent of the gross amount of currency exchanged for an amount of rupees exceeding 10,00,000, subject to maximum amount of rupees 5000: **From 01-04-2012** (a) 0.12 per cent. of the gross amount of currency exchanged for an amount up to rupees 100,000, subject to the minimum amount of rupees 30; and (b) rupees 120 and 0.06 per cent of the gross amount of currency exchanged for an amount of rupees exceeding rupees 100,000 and up to rupees 10,00,000; and (c) rupees 660 and 0.012 per cent of the gross amount of currency exchanged for an amount of rupees exceeding 10,00,000, subject to maximum amount of rupees 6,000

Foreign Exchange Brokers, Money Changers and Authorised Dealers can choose either method of valuation pursuant to Rule 2B or service tax payable pursuant to Rule 7B of Service Tax Rule, 1994 and discharge service tax liability. Moreover theoretically, they are at liberty to determine different methods for different transactions. However practically, it would be challenging task to keep a control over numerous transactions by following two separate methods. Hence, majority of the money changing community discharge service tax liability in accordance with Rule 7B of Service Tax Rules, 1994.

CA Girish Raman

Taxability of reimbursements – Impact of Recent Delhi High Court Ruling in Intercontinental Consultants and Technocrats Pvt. Ltd. vs. UOI (2013) 29 STR 9 (Del.)

1. Introduction and relevant provisions of the law

1.1 The topic I have been asked to write upon is 'Taxability of reimbursements – impact of the Delhi High Court ruling in *Intercontinental Consultants and Technocrats Pvt. Ltd. vs. UoI (2013) 29 STR 9 (Del.)*'.

1.2 But before I go into the topic proper, I would set out the relevant provisions of Chapter V of the Finance Act, 1994 ("Act"), the law governing service tax, in the background of which the controversy needs to be understood.

1.3 Section 67 of the Act, that deals with the 'valuation of taxable services' is relevant and the relevant portions are reproduced below as it stood both prior to and post 18.4.2006.

Prior to 18.4.2006

"67. Valuation of taxable services for charging service tax.- For the purposes of this Chapter, the value of any taxable service shall be the gross amount charged by the service provider for such service provided or to be provided by him.

…..".

Post 18.4.2006

"67 . (1) Subject to the provisions of this Chapter, where service tax is chargeable on any taxable service with reference to its value, then such value shall,—

(i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;

(ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money as, with the addition of service tax charged, is equivalent to the consideration;

(iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.

……..

Explanation.—For the purposes of this section,—

(a) "consideration" includes any amount that is payable for the taxable services provided or to be provided;

………"

1.4 Post 18.4.2006, rule 5 of the Service Tax (Determination of Value) Rules, 2006 ("Valuation Rules") is also relevant which is reproduced below.

"5. Inclusion in or exclusion from value of certain expenditure or costs. —

(1) Where any expenditure or costs are incurred by the service provider in the course of providing taxable service, all such expenditure or costs shall be treated as consideration for the taxable service provided or to be provided and shall be included in the value for the purpose of charging service tax on the said service.

(2) Subject to the provisions of sub-rule (1), the expenditure or costs incurred by the service provider as a pure agent of the recipient of service, shall be excluded from the value of the taxable service if all the following conditions are satisfied, namely :–

(i) the service provider acts as a pure agent of the recipient of service when he makes payment to third party for the goods or services procured;

(ii) the recipient of service receives and uses the goods or services so procured by the service provider in his capacity as pure agent of the recipient of service;

(iii) the recipient of service is liable to make payment to the third party;

(iv) the recipient of service authorises the service provider to make payment on his behalf;

(v) the recipient of service knows that the goods and services for which payment has been made by the service provider shall be provided by the third party;

(vi) the payment made by the service provider on behalf of the recipient of service has been separately indicated in the invoice issued by the service provider to the recipient of service;

(vii) the service provider recovers from the recipient of service only such amount as has been paid by him to the third party; and

(viii) the goods or services procured by the service provider from the third party as a pure agent of the recipient of service are in addition to the services he provides on his own account.

Explanation 1. – For the purposes of sub-rule (2), "pure agent" means a person who –

(a) enters into a contractual agreement with the recipient of service to act as his pure agent to incur expenditure or costs in the course of providing taxable service;

(b) neither intends to hold nor holds any title to the goods or services so procured or provided as pure agent of the recipient of service;

(c) does not use such goods or services so procured; and

(d) receives only the actual amount incurred to procure such goods or services.

Explanation 2. – For the removal of doubts it is clarified that the value of the taxable service is the total amount of consideration consisting of all components of the taxable service and it is immaterial that the details of individual components of the total consideration is indicated separately in the invoice.

……………………"

2. What is a reimbursement and the issue of applicability of service tax

2.1 On a reading of the section 67 as reproduced above, it is clear that the value of taxable services would be the 'consideration' which the service provider obtains for providing the taxable service. 'Consideration' is the *quid pro quo* i.e. the return the service recipient provides for the services to the service provider. Post 18.4.2006, the term 'consideration' is defined in clause (a) of *Explanation* to section 67 to include 'any amount that is payable for the taxable service provided or to be provided'.

2.2 The term 'reimbursement' is not a word used in the law relating to service tax or defined in the rules made thereunder. But nevertheless it is term used in common acceptation.

The Black's Law Dictionary defines the term "reimbursement" as follows :

> "Reimburse. To pay back, to make restoration, to repay that expended; to indemnify, or make whole. *Los Angels County vs. Frisbie, 19 Cal. 2d 634,122 P. 2d 526.* See also Restitution".

2.3 To 'reimburse' means to restore or repay that which is expended. In the context of a service provider and a service recipient relationship, it would mean something that is expended (for goods or services) by the service provider and repaid by the service recipient to the service provider.

2.4 A service provider may incur costs for providing the taxable service such as travelling expenses, boarding, lodging, telephone, etc., and charge the service recipient a fee plus 'Out-of-Pocket Expenses' (OPE). The OPE may not have a profit element and maybe separately itemised in the invoice. The service recipient would 'reimburse' the fee and the OPE to the service provider.

2.5 The issue that arises is whether the amount reimbursed by the service recipient to service provider for the OPE incurred by the service provider, in the above example, travel, boarding, etc. for providing the taxable service would be liable for service tax or not?

2.6 The answer to this question would depend upon whether the expenses separately itemised as OPE can be categorised as a 'consideration' for providing the service?

3. Law prior to 18-4-2006

3.1 The law on taxability of reimbursements prior to 18.4.2006 came to be settled by the principle laid down by the Larger Bench of the Tribunal in *Sri Bhagavathy Traders vs. CCE 2011 (24) STR 90 (Tri.-LB)*, where it was held that expenses reimbursed by a service recipient to the service provider would be excludible from the value of taxable service only if the service recipient had a legal or contractual obligation to incur the expense which the service provider incurred 'on behalf of' the service recipient. Cost of input services and inputs used for providing services cannot be treated as reimbursable costs and excluded from the value of taxable service. Thus, where a service provider incurs costs on his 'own account' for providing the taxable service such as travelling expenses, boarding, lodging, telephone, etc., and not as an agent of the recipient of service, such expenses do not become 'reimbursable expenditure' excludible from the value of taxable service. In other words, it would form part of the 'consideration' for services. It would not make a difference even if they are indicated separately in the invoice issued by the service provider to the recipient of service and there is no profit element in the reimbursement.

4. Law post 18-4-2006

4.1 Without first going into rule 5 of the Valuation Rules, the question is whether the expenses separately itemised as OPE can be categorised as a 'consideration' for providing the service? The term 'consideration' is defined in clause (a) of Explanation to section 67 to include 'any amount that is payable for the taxable service provided or to be provided'.

4.2 The author submits that the principles laid down by the Larger Bench in Bhagavathy Traders would hold good even for the law post 18.4.2006. Further, the first principles in this matter are also well articulated in certain decisions in the UK VAT law some of which are discussed below.

4.3 In *Rowe & Maw (a firm) vs. Commissioners of Customs & Excise (1975)* British VAT Cases 51, a solicitor provided legal services for a proposed sale to his client which involved travelling to Rotterdam. The solicitor incurred travelling expenses for providing his services and charged his client the travel as a separately itemised expense and did not pay VAT on the travelling expense. The question arose before the Queen's Bench Division of the High Court of Justice, UK whether the travelling expenses incurred by a solicitor whilst acting on behalf of his client and reimbursed to him would form part of the 'consideration' for solicitor's service. The Court (Bridge J) identified two classes of expenditure which a service provider may incur and get reimbursed and pointed out which one would be considered as 'consideration' and which would not as follows:

"…….. I only add a word in order to emphasise the importance of the distinction between two different classes of disbursement which a solicitor may expend on his client's behalf which lead to different consequences in respect of the incidence of VAT. On the one hand a solicitor (like any other agent) may purchase goods or services for his client, as for instance when paying stamp duty, court fees, or buying, say, a travel ticket to enable the client to travel. The goods or services purchased are supplied to the client not to the solicitor who merely acts as an agent to make the payment. Naturally, no VAT is payable (if the goods or services in question are themselves exempt or zero-rated) because such payments form no part of the consideration for the solicitor's own services to his client. But on the other hand quite different considerations apply where the goods or services purchased are supplied to the solicitor, as here in the form of travel tickets, to enable him effectively to perform the services supplied to his client, in this case to travel to the place where the solicitor's service is required to be performed. In such case, in whatever form the solicitor recovers such expenditure from his client, whether as a separately itemised expense or as part of an inclusive overall fee VAT is payable because the payment is part of the consideration which the client pays for the service supplied by the solicitor.

The same principles and the same distinction would apply to the case of any other professional man or agent……"

4.4 In *Nell Gwynn House Maintenance Fund vs. Commissioners of Customs and Excise [1999] 1 Weekly Law Reports 174 (HL),* the trustees of a maintenance fund which maintained a building employed certain people for cleaning and maintenance of the building on their rolls and paid their salaries. The Trustees argued that the building was not maintained by them for the tenants but they merely arranged for maintenance of the building and therefore the salaries paid by them to the people who cleaned and maintained the building was not consideration for their (trustees') services to the tenants. The House of Lords dismissed the contention and held :

"VAT law draws a clear distinction in principle between

(i) the case when the relevant expenses paid to a third party C have been incurred by A in the course of making his own supply of services to B and as part of the whole of the services rendered by him to B; and

(ii) the case where specific services have been supplied by the third party C to B (not A) and A has merely acted as B's known and authorised representative in paying C.

Only in case (ii) can the amounts of the payments to C qualify for treatment as disbursements for VAT purposes, and on this account as constituting no part of the consideration for A's own services to B ……..

…….It is to my mind clear that once it is established as it is here that the staff being paid were employed by the appellants by means of moneys which became their moneys beneficially for the purpose of paying the appellants' employees, they were not the "repayment for expenses paid out in the name and for the account of" the purchasers or customers.”

4.5 The above UK cases have neatly brought out the test to determine when a reimbursement would form part of ‘consideration’. The author submits that the Indian law is not different from the UK law in so far as the concept of ‘consideration’ goes. Much of Indian law is derived from the UK law. Thus, if a service provider gets reimbursed certain payment made for services as an ‘agent’ of his client then such reimbursements would not be considered as ‘consideration’ since the goods or services are provided to the client and not the service provider. The service provider in this case is only an intermediary acting as a payment conduit. But where the service provider pays for services that he has purchased and consumed on his ‘own account’ for providing his services some of which he may separately recover as an itemised expense from his client without any profit element, these reimbursements would form part of ‘consideration’ which the client pays for services provided by him and accordingly be liable for service tax.

5. Rule 5 of the Valuation Rules

5.1 We now come to rule 5 of the Valuation Rules which is the rule which deals with ‘reimbursements’. Rule 5(1) provides that where any expenditure or costs are incurred by the service provider in the course of providing the taxable service, all such expenditure or costs shall be included in the value for the purpose of charging service tax. A very bare reading of rule 5(1) seems to suggest that every expenditure which the service provider incurs in the course of providing taxable service would be includible in the value even if not charged to the client. However, that is not what is probably meant. Rule 5(1) provides an expenditure incurred during the course of providing a taxable service and charged to the client would be includible in the value. In this context it is important to note that if the service recipient chooses to incur the expense in the first place the question of reimbursement would never arise.

5.2 Sub-rule (2) provides an exception to sub-rule 5(1) in that a reimbursement of an expenditure that is incurred as a ‘pure agent’ would not be includible in the taxable value. Rule 5(2) stipulates 8 conditions that are required to be met to qualify as a pure agent. Although all eight conditions must be met, in practice the key to identifying whether a reimbursement is excludible or not is to see whether –

(a) the expenditure reimbursed is in respect of goods or services supplied by the third party to the client; or

(b) is made to the service provider who has then used the goods or services in making his own supply to the client

[conditions (ii) and (iii) and clause (c) of Explanation 1 to rule 5].

5.3 In case (a) of para 5.2, it would not be a component of the ‘consideration’ received by the service provider who has merely acted as a payment conduit while in case (b) of para 5.2 it would be a component of the consideration received by the service provider. Thus, in the view of the author, the principles laid down in paras 3 and 4 above to determine whether a reimbursement of OPE constitutes ‘consideration’ is enshrined in rule 5 of the Valuation Rules.

6. Delhi High Court judgment in Intercontinental Consultants and Technocrats Pvt. Ltd. vs. UoI (2012) 29 STR 9 (Del.) and author’s views on it

6.1 The assessee in the above case was a consulting engineer who provided services to National Highway Authority of India. He charged service tax on the 'fee component' charged by him but did not pay service tax on the 'out-of-pocket expense' (OPE) component i.e. on air travel, hotel stay, etc. reimbursed by his client to him for providing his services. In a writ petition, the assessee had contended that Rule 5 of the Valuation Rules to the extent it includes reimbursements of OPE in the value of taxable service is unconstitutional. After referring to sections 66 and 67 of the Act and Rule 5 of the Valuation Rules, the High Court held as follows:

(i) The relevant provisions for valuation of taxable service [i.e. s. 66 read with s. 67(1)(i) of the Act] envisage that the value of taxable service is nothing more or nothing less than the "consideration" paid as *quid pro quo* for the service.

(ii) Rule 5(1) of the Valuation Rules which provides for including any expenditure or costs incurred by the service provider in the course of providing the taxable service in the value of the taxable service has gone beyond the charging sections (s. 66 r.w.s. s. 67) under the Act which is not permissible. Hence the said rule is unconstitutional.

It appears that the High Court is of the view that reimbursement of travelling, boarding and lodging expenses cannot be considered as 'consideration' for services.

6.2 The author submits with respect, that the High Court has not dealt with in detail (nor does it appear to have been argued before the court based on the principles mentioned in para 4 above) as to whether 'consideration' for services would include the OPE such as travel, hotel stay, etc. which a service provider incurs for the purpose of performing his services and gets them reimbursed as a separate itemised expense from his client. The High Court judgment does not reveal any detailed reasons why such amounts cannot be considered as 'consideration' for taxable service especially considering the fact that the word 'consideration' is defined in Explanation (a) to section 67 of the Act in a 'inclusive manner' to include "any amount that is payable for the taxable service provided or to be provided". The principles mentioned in para 4 have not been elucidated in the judgment of the Delhi High Court or argued before the Delhi High Court. In the view of the author, rule 5 may not have gone beyond or transgressed the limits of section 67.

6.3 The department has challenged the High Court judgment in a Special Leave Petition before the Supreme Court. If the Supreme Court reverses the judgment of the Delhi High Court then service tax would be payable on the OPE right from 19-4-2006 along with interest and perhaps without the possibility of collecting it from the client.

6.4 Further, the judgment of the Delhi High Court may not have binding effect beyond the territorial jurisdiction of the court and a Central excise officer outside its jurisdiction may take a stand contrary to it *[CIT vs. Thana Electricity Supply Ltd. (1994) 206 ITR 727 (Bom.); Consolidated Pneumatic Tool Co. (India) Ltd. vs. CIT (1994) 209 ITR 277 (Bom.)].*

6.5 Hence, in the author's view, it would be prudent to take a more conservative view and continue charging service tax on reimbursements of expenses (like travelling, boarding and lodging expenses) which are incurred by the service providers on their own account to provide taxable services to the clients.

CA Rajiv Luthia

Snapshot of Key Judicial Decisions under Valuation of Services

Valuation under Service Tax is always remained most debatable and disputed topic and there are various controversies involved therein. In this journal, various aspects of valuation under indirect tax provisions are covered by various co-authors. I have identified few important judicial pronouncements of Tribunals & Courts covering issues rotating around reimbursement of expenses, sale of goods during rendering of services, free supplies by the service receiver, goods sold vis-a-vis goods consumed, concept of additional consideration based on principal of notionality, etc.

For the better understanding of readers, I preferred for detailed analysis as against the compact snapshot. Hope this would benefit the readers.

1) Shri Bhagavathy Traders vs. CCE, Kochi (2011) TIOL 1155.... Hon'ble Bengaluru CESTAT (LB)

Facts of the case

- The appellants are engaged in the business of rendering C&F agency services to several persons including M/s Indian Oil Corporation Ltd.
- Appellants were preparing two invoices, one for service charges and another for amounts claimed as reimbursement of expenses incurred towards transportation charges, loading and unloading charges, rent, salary to the staff, electricity, telephone charges, stationery charges, courier charges, etc. and paying service tax only on the service charges.
- The lower authorities have included the reimbursement expenses in the value of taxable service and raised the demand of service tax on entire amount.
- The Tribunal (Referral Bench) noted various contrary decisions, few of which holding that reimbursement should not form part of gross value of service as against a decision in the case of *Naresh Kumar & Co. Pvt. Ltd. vs. CST* that the reimbursement expenses are to be included in the gross value of taxable services.
- Due to these contrary decisions, the matter is referred to Larger Bench.

Issue

- Whether reimbursement of expenses is to be included for determining the value of taxable service for the period from April, 2003 to March, 2006?

Arguments of the appellant

- Section 67 provides that the value of taxable service is defined as "gross amount charged for the services rendered".
- Board's Circular No. B 43/1/97 dated 6-6-1997 clarifies that value of Customs House Agent Service and Steamer Agent Service did not include several expenses incurred on account of exporter/importer.
- Circular No. F No. 343/5/97 dated 2-7-1997 clarifies that the value of Consulting Engineering Service and Manpower Recruitment Service did not include amount incurred on behalf of the clients and which are reimbursed on actual basis.
- Circular No. B 11/1/1998 TRU dated 7-10-1998, issued in the context of value of Market Research Agency Service and Security Agency Services clarifies that expenses incurred on travelling, boarding and lodging which are reimbursed are not to be included in the value of taxable service.
- Only with effect from 19-4-2006, the provisions of section 67 have undergone changes and the concept of "consideration" has been introduced and by virtue of Rule 5 of the Service Tax (Determination of Value) Rules, 2006, the consideration is defined to include reimbursement of expenses also.
- Appellant relied upon various decisions of Hon'ble Tribunals wherein it is held that reimbursement of expenses do not form part of value of taxable services.

Arguments of the respondents

- In view of section 67 of the Finance Act, 1994 during the relevant period, the service tax has been levied on the gross amount paid by service recipient and that the gross amount will include all expenses incurred towards provision of service till the same is consumed at the destination, since the service tax is a destination based consumption tax.
- Rule 6(8) of Service Tax Rules, 1994, as it existed in the relevant time, provided that "the value of taxable service in relation to service provided by Clearing and Forwarding Agent to a client for rendering services of clearing and forwarding operations in any manner shall be deemed to be gross amount of remuneration or commission (by whatever name called) paid to such agent by the client engaging such Agent".

Observations of the Court

- The concept of reimbursement will arise only when the person actually paying was under no obligation to pay the amount and he pays the amount on behalf of the buyer of the goods and recovers the said amount from the buyer of the goods. Similar is the situation in the transaction between a service provider and the service recipient. Only when the service recipient has an obligation legal or contractual to pay certain amount to any third party and the said amount is paid by the service provider on behalf of the service recipient, the question of reimbursing the expenses incurred on behalf of the recipient shall arise.
- The various Circulars of the Board relied upon by the learned Advocate for the assessee clearly referred to amounts payable on behalf of the service recipient. For example, the Customs House Agent paying the Customs duty to the Customs Department, paying the charges levied by the Port Trust to the Port Trust, paying the fee for testing to the Testing Organisation are clearly on behalf of the importer/exporter and the same are recoverable by the CHA as reimbursement, that too

on actual basis. These Circulars cannot be held to be in support of the claim of the assessee that they can split part of the amount as reimbursable expenses and the rest as towards service charges.

- What are costs for input services and inputs used in rendering services cannot be treated as reimbursable costs.

Held

- Reimbursement of expenses is to be included in the value of taxable service to the extent the obligation primarily is on the service provider to incur and pay for the same.

Passing remarks

Hon'ble Delhi High Court in the case of *Intercontinental Consultants & Technocrats Pvt. Ltd. vs. UOI (2012) TIOL 966* has held that

- Rule 5 (1) which provides for inclusion of the expenditure or costs incurred by the service provider in the course of providing the taxable service in the value for the purpose of charging service tax is *ultra vires* sections 66 and 67 and travels much beyond the scope of those sections. To that extent it has to be struck down as bad in law.

- The expenditure or costs incurred by the service provider in the course of providing the taxable service can never be considered as the gross amount charged by the service provider "for such service" provided by him.

- Apart from travelling beyond the scope and mandate of the section, the Rule may also result in double taxation. If the expenses on air travel tickets are already subject to service tax and is included in the bill, to charge service tax again on the expense would certainly amount to double taxation.

A specific article containing detailed analysis of this decision is covered in this journal by CA Girish Raman.

2. CST, Chennai vs. Sangamitra Services Agency (2013) TIOL 606.... Hon'ble Madras High Court

Facts of the case

- The respondent was carrying on the business of clearing and forwarding services and recovered various reimbursable expenses from the principal on actual basis over and above his commission / service charges.

- The respondent did not pay service tax on reimbursement of expenses such as freight, labour, electricity, telephone, etc. and the Hon'ble Tribunal has allowed the claim of the respondent that the reimbursable expenses do not form part of taxable services.

Issue

- Whether reimbursement of expenses recovered by the respondent are to be included in the value of taxable services of clearing & forwarding agent's services when Rule 6(8) of the Service Tax Rules, 1994 stipulates that gross amount of remuneration / commission should be the taxable value in relation to the services provided by C & F agents?

Arguments of the petitioner

- Rule 6(8) provides that value of taxable service for C & F Agent shall be the gross amount of remuneration / commission (by whatever name called) paid to such agent by the client therefore reimbursement of expenses such as freight, labour, etc. would form part of remuneration.

Arguments of the respondents

- None appeared.

Observations of the Court

- In absence of any documentary evidence between the principal and the client; it is difficult to hold that the commission payable by principal was all inclusive of reimbursement of expenses.
- The phrase "by whatever name called" must have some link or reference to the receipt of remuneration/commission.
- Rule 6(8) envisages inclusion of such sum in the gross amount which bears the character of remuneration/commission. Reimbursement of expenses in the instant case does not bear such character.

Held

- The revenue's contention that reimbursement of expenditure to be included in the value of taxable service is rejected.

3. Chate Coaching Classes Pvt. Ltd. vs. CCE, Aurangabad (2012) TIOL 714.... Hon'ble Mumbai CESTAT

Facts of the case

- The appellant is engaged in the business of commercial training and coaching.
- Appellant issued study materials to students which were procured by them from Chate Publications Pvt. Ltd. and claimed the benefit of exemption Notification No. 12/2003- ST dated 20th June,2003 while discharging the service tax liability on the fees collected from the students for coaching.
- The lower authorities alleged that the appellants are wrongly availing the benefit of the exemption notification & hence adjudicated the show cause notice confirming the demand by including the value of study material in the assessable value and denying the benefit of above exemption notification.
- The reason stated by the lower authorities for denying the benefit of exempting the value of study material sold by the appellant was that it was a part of their service and in view of Circular No. 59/8/2003 –ST dated 20th June, 2003; the said exemption was available only to the "standard textbooks" sold by the commercial coaching and training institute.
- Aggrieved by the same, the appellant is before the Hon'ble CESTAT.

Issue

- Whether the appellant is eligible for the benefit of exemption Notification No. 12/2003-ST dated 20th June,2003 and accordingly should not include the value of study material sold by them in the value of taxable services?

Arguments of the Appellant

- Notification No. 12/2003–ST dated 20th June, 2003 exempts the value of goods or material sold by the service provider to the service recipient from the levy of service tax only on the condition that there is a documentary evidence specifically indicating the value of the goods and materials.
- Appellant has fulfilled the said condition and the same is not in dispute that the value of study material supplied is separately shown in the invoice.
- Therefore, they were eligible to take the benefit of the exemption notification issued by the Central Government.
- Appellants also relied upon the verdict of the Hon'ble Delhi CESTAT in the case of

Pinnacle vs. CCE, Chandigarh (2011) TIOL 1865, wherein the Tribunal allowed benefit of the said exemption notification in the similar case.

Arguments of the respondents

- The supply of study material to the students is a part of the coaching services rendered to them and hence the value of the study material shall be includible in the assessable value to levy service tax on it.

- CBEC *vide* its circular No. 59/8/2003 dated 20th June, 2003 clarified that the exemption to the commercial coaching and training institutes is only in respect of the sale of standard textbooks which are priced. Any study material or written text provided by such institutes which does not satisfy above criteria would be subjected to service tax.

Observations of the Court

- The circular issued by the department clarifying that the exclusion as per Notification No. 12/2003 shall be applicable only to sale of standard textbooks and not to any other study material sold by the commercial coaching institutes is not in consensus with the notification issued by the Central Government.

- The question as to what is "standard textbook" can lead to disputes. The language of the Notification does not restrict the exemption only to sale of standard textbooks. Hence, the respondent's arguments that the benefit of said exemption notification cannot be availed by the appellant are not in concurrence with the notification.

- The verdict of the decision relied upon by the appellants in the case of *Pinnacle vs. CCE,* Chandigarh squarely applies to their case also. Accordingly there is no merit in the impugned order and it is to be set aside.

Held

- The value of the study material supplied by the commercial coaching institutes shall not be includible in the value of taxable services of coaching in view of Notification No. 12/2003–ST dated 20th June, 2003.

4. Agrim Associates Pvt. Ltd. vs. GST, New Delhi (2011) TIOL 1232…. Hon'ble Delhi CESTAT

Facts of the case

- The appellants were in the business of civil contractors and discharged their service tax liability under the category of "Commercial or Industrial Construction Services". They availed the benefit of abatement of 67% under the exemption Notification No. 1/2006–ST dated 1st March, 2006.

- The appellants had entered into contract with Asian Hotels Ltd for dismantling work, civil work like construction of walls, POP work, flooring work, wood work, painting and finishing works and supply of manpower.

- The revenue authorities alleged that the appellants were providing only finishing services to their clients and hence they were not eligible to the benefit of exemption Notification No. 1/2006 on account of exclusion provided in the said notification to the completion and finishing services.

- The department also argued that the appellants did not include the value of the free of cost material received from their clients in the gross amount charged to their clients before availing the abatement of 67% as per the said notification.

Accordingly revenue confirmed the demand of service tax on the entire value of the gross amount charged by the appellants denying the abatement of 67%.

- Aggrieved by the same, the appellant is before the Hon'ble CESTAT.

Issue

- Whether the construction services provided by the appellants at first place fall within the meaning of "completion and finishing services" in view of the clause (c) of section 65(25b)?
- Are the appellants eligible for the exemption of 67% under Notification No. 1/2006, even if the value of free of cost material received by them from their clients is not included in the gross amount charged to their clients?

Arguments of the appellant

- The contracts undertaken by them were in the nature of composite works contract which are leviable to service tax only w.e...1st June, 2007 and hence not liable to pay service tax on such contracts for the period prior to 1st June, 2007.
- Even if they are liable to pay service tax on such contracts, they are eligible for the benefit of exemption notification 12/2003- ST dated 20th June, 2003 wherein exemption is provided to the value of goods or material sold by the service provider to the service recipient from the levy of service tax only on the condition that there is a documentary evidence specifically indicating the value of the goods and materials.
- However they have claimed abatement of 67% under Notification No. 1/2006 in spite the value of materials involved is much higher than 67% and hence there is no question of short payment of service tax by them.

Arguments of the respondents

- The contention of the appellants that their services are liable to service tax only w.e.f 1st June, 2007 is improper since the nature of completion and finishing services provided by them were squarely covered by the other entries of the Finance Act, 1994 and hence leviable to service tax even before 1st June, 2007.
- The benefit of abatement of 67% claimed by the appellant was eligible only if the value of material received by them from their clients is included in the gross receipts before claiming such exemption under notification 1/2006.
- Even the benefit of exemption notification 12/2003 can be availed only if the invoice indicates the value of material sold.

Observations of the Court

- The construction services rendered by the appellants are not in the exact nature of completion and finishing services as provided in section 65(25b)(c). The appellants services can also fit in the 4th limb i.e. clause (d) of section 65(25b).
- Even the Notification No. 1/2006 does not speak of the inclusion of material supplied free of cost by the service receiver. Many cases are under dispute before the various Tribunals and other courts in respect of inclusion of the value of materials supplied by the receiver in the "gross amount charged" or "consideration" in terms of section 67 of the Finance Act, 1994.
- Further, the Notification 12/2003 nowhere requires that the assessee should indicate the value of materials sold in each invoice. When the appellants assert that they have paid Sales Tax/VAT on more than 67% of the gross receipts and same is evident from the VAT returns filed by them, any other documentary evidence is absolutely

not required to claim the exemption under notification 12/2003.

Held

- In view of the above circumstances, the appellants are rightly eligible for the exemption of 67% in terms of notification 1/2006 and have made strong case for complete waiver of the demands.

Passing remarks

- The issue of inclusion of value of materials supplied free of cost by the service receiver is under controversy before the various judicial authorities.

- The Hon'ble Madras High court in the case of *M/s Larsen & Toubro Ltd. Chennai (2007) TIOL 176*, while granting interim stay, *prima facie* held that insistence of including the value of goods supplied by the service receiver for calculating the service tax is not in accordance with the explanation provided by Notification No. 1/2006.

- Hon'ble Delhi High Court in case of *M/s Era Infra Engineering Ltd (2008) TIOL 386* disposed the appeal ordering the department to proceed with the adjudication without including the value of materials supplied in the gross receipts, subject to the final orders of the above writ petition of Madras HC.

- Hon'ble Mumbai CESTAT in the case of *New Consolidated Construction Co. Ltd. vs. CST, Mumbai (2013) TIOL 283* has granted stay and waived the pre-deposit based on above decisions.

- However, the Hon'ble Ahmedabad CESTAT in the case of *M/s Jaihind Projects Ltd vs. CCE, Ahmedabad (2010) TIOL 124* held that the no exemption benefit under Notification 1/2006 shall be eligible if the assessee has not included the value of materials supplied by the service recipient in the gross amount for claiming abatement of 67%. The intention of the explanation to the notification is to bring parity among all the providers of such services. The appellants aggrieved by the above decision are before the Hon'ble Supreme Court.

5. CCE, Pune vs. Laxmi Tyres (2013) TIOL 1261…. Hon'ble Mumbai CESTAT

Facts of the case

- The respondents are engaged in the business of retreading of tyres. The process of retreading of tyres consist of the following:

  (i) Carrying out the inspection of worn out tyres to check the suitability of retreading

  (ii) Buffing of the tyres

  (iii) Patching on the cuts and applying of solution/adhesives on the surface

  (iv) Fixing the piece of the tread rubber

  (v) Heating the tyre to ensure the bonding given to fix tread rubber.

- The lower authorities issued a show cause notice on the respondents to pay the service tax on the above services rendered by them under the category of "Management, Maintenance or Repair Service" on the entire amount charged by them which includes the value of material sold.

- The respondents contested the demand before the CCE (Appeals) and argued that their services are liable under the proposed category only w.e.f. 16th June, 2005, since till then the services of maintenance or repair where taxable only when the services were covered under a maintenance contract. They also contended that they are entitled for exemption of value of material sold along with rendering of the service in terms of Notification 12/2003–ST dated 20th June, 2003, as the said transaction is deemed sale under Article 366(29A)(b) and subject to state VAT.

- The adjudicating authority CCE, Pune satisfied by the arguments of the respondents confirmed the demand only on the service portion of the gross receipts and allowed the benefit of said notification. Hence, aggrieved by the same the department is before the Hon'ble CESTAT.

Issue

- Whether the respondents are eligible for the exemption benefit under Notification 12/2003 and liable to service tax only on the service/labour charges?

Arguments of the appellant

- The sale of material is not independent transaction to attract the benefit of the exemption notification. The materials such as tread rubber, cushion gum, adhesives are actually consumed while rendering the services of retreading of tyres. It is not an independent sale and as per the provisions of section 67 of the Finance Act, 1994; the gross value of taxable services is the gross amount charged for the services rendered including the value of goods consumed in providing the services.

- The appellants relied on the decision of the Hon'ble Delhi CESTAT in the case of *Aggarwal Colour Advance Photosystem (2011) TIOL 1208* wherein the Larger bench held that for the purpose of section 67 of the Finance Act, 1994, the value in relation to photography would be the gross amount charged including the cost of the materials used and consumed during the rendering of service.

- Further, the appellants contended that the value of 70% approximately attributed to the value of the material and 30% to the value of service charges is based on the personal whim of the respondents without any specific reason/basis given. They relied on the decisions of the Hon'ble Delhi CESTAT in the case of *Speedways Tyre Services (2009) 14 STR 339* and Hon'ble Chennai CESTAT in the case of *Safety Retreading Co. (2012) TIOL 697* having the similar issue wherein it was held that invoices unilaterally raised by the appellants indicating the break-up of value of materials and value of services without substantiating the value of material is not proper documentary proof for availing the exemption benefit under Notification 12/2003.

Arguments of the Respondents

- The transaction of retreading of tyre is a deemed sale for the purpose of levy of State VAT on the value of materials sold along with the rendering of retreading services. They have already discharged sales tax on the value of the material sold and its inclusion in the value of taxable services for the purpose of service tax shall amount to double taxation.

- They relied on the decision of the Hon'ble Bengaluru CESTAT in the case of *Chakita Ranjini Udyam (2009) 16 STR 172*, wherein it was held that value of material sold during the tyre retreading is transfer of property and therefore the benefit of the exemption notification 12/2003 shall be admissible.

- They also relied upon the decision of Hon'ble Chennai CESTAT in the case of *PLA Tyre Works (2009) TIOL 304* wherein the benefit of Notification No. 12/2003 was allowed when VAT was paid on 70% of the gross value of tyre retreading services.

Observations of the Court

- The value of material and service charges as indicated on the invoices of the respondents are arrived without any basis and are arbitrarily determined by them, as the invoice does not indicate any details with respect to description, quantity, unit rate of goods/materials sold.

- The benefit of Notification 12/2003 is eligible only on the documentary evidence as to what is the value of goods/materials sold. Unless the documentary proof clearly reveals and indicates the description, quantity, unit rate of materials sold, it is difficult to accept the plea of the respondents that the condition of the notification is satisfied.

- The court relied upon the decision of the Larger Bench in the case of the Aggarwal Colour Advance Photosystem wherein it was held that the concept of the deemed sale under Article 366(29A)(b) cannot be taken for interpretation of the value of materials sold as per the provisions of the notification. The term "sale" should be given the meaning of section 2(h) of the Central Excise Act, 1944. The deeming fiction can be with respect to the concept of sale, but the same cannot be in respect of the value of goods sold as provided in the exemption notification.

- The contention of the respondents that including the value of material sold in the assessable value for the purpose of service tax shall lead to double taxation cannot be admitted. There is no jurisdictional bar in the law for overlapping measure of tax for the purposes of sales tax and service tax. The fact that there is overlapping does not detract from the distinctiveness of the aspects.

Held

- The benefit of the exemption Notification 12/2003 is not eligible to the respondents and the gross value of amount charged is leviable to service tax.

Passing remarks

- The Hon'ble Delhi CESTAT in the case of Aggarwal Colour Advance Photosystem held that materials such as papers, consumables, chemicals are used to bring the existence of photograph. What the service recipient expects from the photograph service provider is the photograph and no consideration is separately paid for the goods consumed during rendering of service. The consumables and the chemicals used loses its existence or disappear when the photograph emerges.

- However, if the value of the other goods & materials is sold separately such as the unexposed film; then the benefit of notification 12/2003 can be availed.

6. Bharti Airtel Ltd. vs. CST, New Delhi (2013) TIOL 654.... Hon'ble Delhi CESTAT

Facts of the case

- The appellant is rendering "telecommunication services".

- The appellant has provided free telephone connections to it's employees and their family members under employee phone policy wherein the limit for free usage was prescribed based on the grade of such employee and the employee was charged at a prescribed rate for usage beyond the prescribed limit.

- Lower authorities raised demand of service tax along with interest and penalties for the period from October, 2004 to September, 2009 on such free usage allowed to the employees hence the aggrieved appellant is before the Hon'ble CESTAT.

Issue

- Whether free telephone connections provided by telecom service provider to their employees are liable to service tax?

Arguments of the appellant

- Free service provided to employees of the appellant is service to self and that is not taxable under Finance Act, 1994.
- Circular No. 23/3/97-ST dated 13th October, 1997 clarified that "the value of taxable services in relation to telephone connection provided to subscribers is the gross total amount received by the telegraph authority from the subscriber. In case the service is provided free and no amount is received by the telegraph authority, the question of service tax liability does not arise."
- Such transaction cannot be subject to service tax when the service provided to the employees does not give rise to any benefit/amenity to them. It cannot be termed as perquisite in the hands of employees since such facility was provided purely for the purpose of business and commercial and not for any personal use/benefit gained by the employees.
- There being no flow of any consideration/ value from employees to the appellant company, there shall be no levy on the appellant.

Arguments of the respondents

- Value of free service provided by appellant was "for a consideration other than cash" hence taxable. Such value of consideration was determinable according to Service Tax (Determination of Value) Rules, 2006 to form part of the assessable value of taxable service.
- Had such services been meant for use in business of appellant, then there was no necessity of giving option to its employees to avail free facility of appellant and there was no necessity of recovery of charges of such service beyond certain limit. That means free services were provided at the cost of Revenue, evading service tax liability.
- The policy clearly specified that extra calls made beyond permitted limit need to be proved by user that those were made for the purpose of business proving that free call services provided to certain extent was unaccounted to avoid service tax liability to serve mutual interest of service provider and service recipient and charged calls were recovered.
- Circular relied upon by the appellant was withdrawn by Circular No. 96/7/2007-ST dated 23-8-2007 and the circular so withdrawn cannot even override the law relating to taxation of taxable service provided.
- Valuation Rules u/s. 67 is invokable in this case and no consideration, no taxation is baseless plea of the appellant because free service was good consideration to employees to serve their mutual interest at the cost of Revenue while suppression of benefit of free calls to evade service tax was consideration of the appellant.

Observations of the Court

- Service recipients of free telecom service provided by appellant were employees of the appellant, their relatives and Bharti Group companies who otherwise would have paid service tax for the telecom service availed had there been no exercise of option by them under the Policy of Appellant or availed such service from other telecom service providers.

- The manner of providing free telecom service by appellant was made apparently to show that perquisite was given to the employees in the garb of free calls at reduced rate beyond certain call limit without payment of service tax and the appellant was enriched at the cost of Revenue.
- Employees were encouraged to avail telecom service provided by the appellant granting an option to avail so at a lesser tariff rate, instead of switching over to avail such service provided by other telecom service providers.
- Varied choice and options granted by appellant, *prima facie*, demonstrate that the value of calls provided to employees and relatives were less than the market value and unaccounted. Such service provided was at the cost of Revenue. Had the call charges been valued and as per market value and disclosed in the accounts, Revenue would not have been affected.
- Merely creating a fiction of no consideration received by the appellant in respect of the aforesaid nature of free service provided by it, the appellant appears to have been immensely benefited by reduction of monetary package of remuneration to its eligible employees, their relatives and employees of Bharti Group of companies. Such undisclosed benefit of appellant was at the cost of Revenue.
- The appellant failed in the course of hearing to satisfy that value of service were disclosed as perquisite to its employees in its account and disclosed to Income tax Authority.

Held

- Appellant directed to deposit ` 80 crore as an interim measure and stay granted on balance recovery subject to compliance.

Passing remarks

- Hon'ble Delhi High Court in the case of *Bharti Airtel Ltd. vs. UOI (2013) TIOL 436 (WP No.2954/2013)* has reduced the amount of pre-deposit to ` 25 crores.
- While reducing the pre-deposit, the Hon'ble HC noted that the Circular dated 13th October,1997 relied upon by the appellant was in force till 23rd August, 2007 till the same was withdrawn by Circular No. 96/7/2007-ST dated 23rd Augst, 2007.

7. Magarpatta Township Development & Construction Co. Ltd. vs. CCE, Pune-III (2013) TIOL 1068…. Hon'ble Mumbai CESTAT

Facts of the case

- The appellant provided its commercial property on rent to various lessees. They are discharging their service tax liability on the amount of rent received under the category of "Renting of Immovable Property Services".
- The appellant collected a security deposit from the tenants in respect of the rented premises. The department issued a show cause notice alleging that notional interest @ 18% shall be calculated on the security deposit received by them and shall be included in the value of taxable services to levy service tax on it.
- The demand was confirmed by the CCE, Pune-III and hence aggrieved by the order of the Commissioner; the appellants are before the Hon'ble CESTAT.

Issue

- Whether the consideration received in the form of rent shall be added by the notional interest on the security deposit collected by the appellants?

Arguments of the appellant

- The security deposit taken from the lessees is towards the damage of the property and furniture and fittings supplied along with the premises.

- There is no nexus of the amount collected as security deposit with the area of the property and also the amount of rent is not influenced by the amount of security deposit. The respondents have not produced any evidence to show that the value of rent is influenced by the interest free security deposit.

- The appellants relied on the decision of Hon'ble Apex Court in the case of *ISPL Industries Ltd (2003) 154 ELT 3 (SC)* wherein it was held that the notional interest on the advances received by the assessee cannot be added to the assessable value of the goods cleared unless there is an evidence to show that interest free deposit has influenced the price of the goods.

Arguments of the respondents

- The amount of security deposit collected is equal to six months of the rent charged. Hence, the amount of notional interest on the said deposit is also a consideration for the renting of immovable property and should be included in the value of taxable services for the purpose of levy of service tax.

Observations of the Court

- It is generally accepted practice to collect the security deposit for the premises rented out throughout the country.

- The quantum of security deposit varies with the location and the nature of property i.e. whether it is commercial or residential. It cannot be said that the rent or the price is influenced by the lessor by taking heavy amount of security deposit from the lessee.

- The department have no record on evidence that interest free deposit has an impact on the rent charges. The notional interest on the security deposit cannot be included in the assessable value only on presumption on the part of the revenue.

- The verdict in the case of ISPL Industries Ltd. relied upon by the appellant is squarely covered with their issue and hence would apply to them.

Held

- *Prima facie* unconditional waiver from pre-deposit is granted to the appellants.

Conclusion

Service tax law is still at a nascent stage, the issues involved in valuation being very complex, will take its own time to settle down at higher forums. One needs to look into the facts of each case before applying any of the decision for the issue involved therein.

C. B. Thakar, *Advocate*

Valuation under Central Sales Tax Act, 1956

Introduction

Under Indirect Taxation, Laws for levy of VAT and CST are important laws. States levy tax under State VAT Acts, whereas on inter-State sale transactions, tax is levied under CST Act,1956. For discussion about Valuation Rules under Indirect Taxation, discussion here is made with reference to Maharashtra Value Added Tax Act, 2002 (MVAT Act, 2002) and Central Sales Tax Act, 1956 (CST Act,1956).

Valuation Rules

Normally tax is levied on the consideration agreed between seller and buyer. Valuation Rules are provided when such consideration is not ascertainable due to nature of transaction or for any other reason. Generally, the function of Valuation Rules is to arrive at assumed price for given transaction.

MVAT Act, 2002

Under MVAT Act, 2002, there is no specific provision about Valuation Rules. Normally, the tax is payable on 'sale price'. The term 'sale price' is defined in section 2(25) of MVAT Act as under:

"2(25) "sale price" means the amount of valuable consideration paid or payable to a dealer for any sale made including any sum charged for anything done by the seller in respect of the goods at the time of or before delivery thereof, other than the cost of insurance for transit or of installation, when such cost is separately charged.

Explanation I — The amount of duties levied or leviable on goods under the Central Excise Act, 1944 or the Customs Act,1962 or the Bombay Prohibition Act, 1949, shall be deemed to be part of the sale price of such goods, whether such duties are paid or payable by or on behalf of the seller or the purchaser or any other person.

Explanation II — Sale price shall not include tax paid or payable to a seller in respect of such sale.

Explanation III — Sale price shall include the amount received by the seller by way of deposit, whether refundable or not, which has been received whether by way of a separate agreement or not, in connection with or incidental or ancillary to, the said sale of goods."

The above section cannot be said to be Valuation Rules.

The inference can be that when sale price is not ascertainable, no tax can be attracted under MVAT Act, 2002.

For example, if the sale is of movable/immovable property at composite price, then movable items cannot be subjected to sales tax as there is no ascertainable consideration for movable items.

The above situation arises due to non availability of Valuation Rules under MVAT Act. A question can arise whether legislature can provide for such rules. In other words, an issue is whether legislature has such constitutional power?

It appears that there is no such power.

Reference can be made to judgment of Hon. Supreme Court in case of *Rajasthan Chemists Association (147 STC 542)(SC)*. In this case the Rajasthan Sales Tax Law contemplated to levy tax on MRP of the goods though the goods were sold at lesser than MRP. Supreme Court held that the tax cannot be levied on price more than the actual price received from the buyer. The levy of tax on MRP value was held as unconstitutional by the Supreme Court. The relevant observations of the Supreme Court are as under.

"30. The question of tax on sale of goods may be examined in the said back-ground. The subject of tax being sale, measure of tax for the purpose of quantification must retain nexus with "sale" which is subject of tax. As noticed above, tax on sale of goods, is tax on vendor in respect of his sales and is substantially a tax on sale price. The vendor or buyer cannot be taxed *de hors* the subject of tax that is sale by the vendor or purchase by the buyer. The four essential ingredients of any transaction of sale of goods include the price of the goods sold, therefore, in any taxing event of sale, which become subject-matter of tax price component of such sale, is an essential part of the taxing event. Therefore, the question does arise whether a particular taxing event of sale could be subjected to tax at the prescribed rate to be measured with such price which is not the component of the transaction of sale, which has attracted the sales tax".

In Para 52, Hon'ble Supreme Court further observed as under:

<u>"Substitution of assumed price or the assumed quantity in place of actual price/quantity in a completed sale transaction, for the purpose of levy of tax on the subject-matter of tax results in taking away from it the character of "sale of goods" as envisaged under the Sales Act."</u>

(underlining ours)

TISCO General Office Recreation Club (126 STC 547)(SC)

In this case the subsidy was given by the TISCO to TISCO club which provided food to the employees and issue was whether this subsidy amount received by the club is also liable to tax in the hands of club. Supreme Court held that since it is not relatable to any particular item, it cannot become a sale price i.e. it is not part of the turnover and accordingly no tax is payable on the said amount. This judgment of the Hon. Supreme Court has also been applied by the Hon. Tribunal in case of Colgate Palmolive (I) Ltd. Factory Canteen (S.A. 464 and 465 of 97 dt. 5-10-2002).

Above judgments show that sales tax can be levied on actual price which is identifiable. Conversely, it also comes out that there is no power to assume price by rules or by any other manner.

Substitution of Price – Section 57

Though there are no positive Valuation Rules in MVAT Act, as discussed above, a note can be taken of section 57 of the MVAT Act, 2002. The said section is reproduced below for ready reference.

"57. Agreement to defeat the intention and application of the Act to be void:

(1) If the Commissioner is satisfied that an arrangement has been entered into between two or more persons or dealers to defeat the application or purposes of this Act or any provision of this Act, then the Commissioner may by order declare the arrangement to be null and void as regards the application and purposes of this Act. He may, by the said order, provide for increase or decrease in the amount of tax payable by any person or dealer who is affected by the arrangement whether or not such dealer or person

is a party to the arrangement, in such manner as the Commissioner considers appropriate so as to counter act any tax advantage obtained by that dealer from or under the arrangement.

(2) For the purposes of this section,–

(i) "arrangement" includes any contract, agreement, plan or understanding, whether enforceable in law or not, and all steps and transactions by which the arrangement is sought to be carried into effect;

(ii) "tax advantage" includes,–

(a) any reduction in the liability of any dealer to pay tax,

(b) any increase in the entitlement of any dealer to claim set-off or refund,

(c) any reduction in the sale price or purchase price receivable or payable by any dealer.

(3) Before passing any order under this section, the Commissioner shall afford a reasonable opportunity of being heard to any such person or dealer whose tax advantage is sought to be counteracted."

It can be seen that the authorities can substitute the price under above provision, if there is allegation of tax avoidance. Therefore, it can be said that there is valuation method by negative manner in specified circumstances.

Works Contract

One of the categories of "sale" is "works contract". As held by Hon'ble Supreme Court in case of *Builders Association of India (73 STC 370)* in case of Works Contract, tax is leviable on the value of the goods and the service (labour) portion is required to be separated from the total contract price. The contractor is entitled to determine the said service portion based on guidelines given by Hon'ble Supreme Court in case of *Gannon Dunkerley & Co. (88 STC 204).*

However, in case the contractor is not in position to segregate the same as per above guidelines then an alternative method to grant deduction for labour / service portion at pre-determined percentage is provided. Such percentages are provided in proviso to rule 58(1). The said proviso is reproduced below for ready reference.

"58. Determination of sale price and of purchase price in respect of sale by transfer of property in goods (whether as goods or in some other form) involved in the execution of a Works Contract. –

(1) The value of the goods at the time of the transfer of property in the goods (whether as goods or in some other form) involved in the execution of a Works Contract may be determined by effecting the following deductions from the value of the entire contract, in so for as the amounts relating to the deduction pertain to the said works contract:–

(i) labour and service charges for the execution of the works;

(ii) amounts paid by way of price for sub-contract, if any, to sub-contractors;

(iii) charges for planning, designing and architect's fees;

(iv) charges for obtaining on hire or otherwise, machinery and tools for the execution of the Works Contract;

(v) cost of consumables such as water, electricity, fuel used in the execution of Works Contract, the property in which is not transferred in the course of execution of the works contract;

(vi) cost of establishment of the contractor to the extent to which it is relatable to supply of the said labour and services;

(vii) other similar expenses relatable to the said supply of labour and services, where the labour and services are subsequent to the said transfer of property;

(viii) profit earned by the contractor to the extent it is relatable to the supply of said labour and services.

Provided that where the contractor has not maintained accounts which enable a proper evaluation of the different deductions as above or where the Commissioner finds that the accounts maintained by the contractor are not sufficiently clear or intelligible, the contractor or, as the case may be, the Commissioner may in lieu of the deductions as above provide a lump sum deduction as provided in the Table below and determine accordingly the sale price of the goods at the time of the said transfer of property…."

It can be said that to above extent there is Valuation Rule for Works Contract. However it is not mandatory but optional.

CST Act

Under CST Act also there are no specific valuation rules. Under CST Act also tax is required to be discharged on the sale price as defined in section 2(h) of the CST Act,1956. The definition is almost similar to the definition of 'sale price' under MVAT Act, 2002 reproduced above and hence not reproduced again.

Branch/Consignment transfer

However, reference can be made to provisions of section 6A of the CST Act, 1956. The said section provides that if there is claim of inter-State branch transfer or consignment transfer then such claim should be supported by 'F' Form. It is also provided that in case of failure to produce 'F' Form, the transaction will be deemed to be sale for all the purposes of CST Act.

In case of branch transfer / consignment transfer, the transferor may not assign the values, as it is not sale. Some time value may be given for different purposes like Octroi, check post etc.. However, strictly speaking, this cannot be said to be sale price.

Therefore the question arises that if there is a branch transfer but 'F' Form is not available and hence the said transaction is deemed to be inter-State sale, what should be the taxable price for the said transaction. In my view, in such situation, the valuation rules are required to be provided. The assessing authority may determine value on estimation basis. However, this cannot be said to be correct as per law. This issue can be challenged at proper forum that even if the inter-State branch transfer is deemed to be sale, in absence of method and manner of deciding sale price, no tax can be attracted on the same.

Taxation of Works Contracts under CST Act

Under CST Act also the transactions of Works Contracts are liable to tax.

Under CST Act, at present, there is no separate provision like rule 58 of MVAT Rules for determining value of taxable quantum in Works Contract. Therefore, it can be said that the CST Act is lacking in providing valuation rules in respect of Works Contract taxation.

However, it can be noted that the law cannot become inapplicable because of above lacuna. Reference can be made to the judgment of Hon'ble Supreme Court in case of *Mahim Patram Pvt. Ltd. vs. U.O.I. (6 VST 248)(SC)* in which Supreme Court has turned down argument on similar line. Hon'ble Supreme Court has also held that the local provisions about taxation of Works Contract will apply to CST Act.

Conclusion

From above discussion, it can be seen that in general there are no speaking provisions to be called as Valuation Rules. However, there are provisions which indirectly lead to such situation. It is desirable that wherever necessary and allowable by law, the legislatures should provide such rules to avoid ambiguity and unwarranted litigation.

Nikita R. Badheka, *Advocate & Notary*

Valuation under MVAT Act, 2002

It would be improper to use the words valuation under MVAT Act. There is no provision for Valuation as such. What is taxable under the Act is sale. Therefore what needs to be determined is sale price. I shall therefore discuss hereinbelow some aspects of determination of sale price under the MVAT Act (Act for short).

First of all, a very important distinction which many fail to make between the erstwhile Bombay Sales Tax Act and MVAT Act is, that the deem sales like Works Contract, Lease, Hire Purchase are all specifically included and covered by the definition of ”sale“ u/s 2(24) of MVAT Act. Therefore in the Act ,wherever word sale is used, it should include all the categories of sale, unless the context otherwise requires or unless specifically provided for in the Act otherwise.

A. Definitions

With the above background lets understand what is sale price, purchase price and turnover of sale and purchase under the Act.

Sec. 2(25) defines the sale price to mean

“Sale price means the amount of valuable consideration paid or payable to a dealer for any sale made including any sum charged for anything done by the seller in respect of the goods at the time of or before delivery thereof, other than the cost of insurance for transit or of installation, when such cost is separately charged.

Explanation I. **”**The amount of duties levied or leviable on goods under the Central Excise Act, 1944 (1 of 1944) or the Customs Act, 1962 (52 of 1962) or the Bombay Prohibition Act, 1949 (Bom. 25 of 1949), shall be deemed to be part of the sale price of such goods, whether such duties are paid or payable by or on behalf of the seller or the purchaser or any other person.

Explanation II. ”Sale price" shall not include tax paid or payable to a [seller] in respect of such sale.

Explanation III. ”Sale price" shall include the amount received by the seller by way of deposit, whether refundable or not, which has been received whether by way of a separate agreement or not, in connection with or incidental or ancillary to, the said sale of goods;

Purchase price is defined u/s. 2(20) of the Act as follows:

“Purchase price" means the amount of valuable consideration paid or payable by a person for any purchase made including any sum charged for anything done by the seller in respect of the goods at the time of or before delivery thereof, other than the cost of insurance for transit or of installation, when such cost is separately charged;

Explanation I. The amount of duties levied or leviable on the goods under the Central Excise Act, 1944, (I of 1944) or the Customs Act, 1962 (52 of 1962) or the Bombay Prohibition Act, 1949 (Bom. XXV of 1949) shall be deemed to be part of the purchase price of such goods, whether such duties are paid or payable by or on behalf of the seller or the purchaser or any other person.

Explanation II. Purchase price shall not include tax paid or payable by a person in respect of such purchase.

Explanation III. Purchase price shall include the amount paid by the purchaser by way of deposit whether refundable or not which has been paid whether by way of a separate agreement or not, in connection with or incidental or ancillary to, the said purchase of goods.

The Turnover of Sale and Purchase are defined as follows:–

"Sec.2(32) – Turnover of purchases means the aggregate of the amounts of purchase price paid and payable by a dealer in respect of any purchase of goods made by him during a given period, after deducting the amount of,-

(a) purchase price, if any, refunded to the dealer by the seller in respect of any goods purchased from the seller and returned to him within the prescribed period; and

(b) deposit, if any, refunded in the prescribed period to the dealer by the seller, in respect of any goods purchased by the dealer.

Explanation I. "In respect of goods delivered on hire-purchase or any system of payment by installment or in respect of the transfer of the right to use any goods for any purpose (whether or not for a specified period) the amounts of purchase price paid or payable during a given period shall mean the amounts paid or, as the case may be, due and payable during the said period.

Sec. 2(33) Turnover of sales means the aggregate of the amounts of sale price received and receivable by a dealer in respect of any sale of goods made during a given period after deducting the amount of –

(a) sale price, if any, refunded by the seller, to a purchaser, in respect of any goods purchased and returned by the purchaser within the prescribed period; and

(b) deposit, if any, refunded in the prescribed period, by the seller to a purchaser in respect of any goods sold by the dealer.

Explanation I. "In respect of goods delivered on hire-purchase or any system of payment by instalment or in respect of the transfer of the right to use any goods for any purpose (whether or not for a specified period) the amounts of sale price received or receivable during a given period shall mean the amounts received or as the case may be, due and payable during the said period;

Explanation III. "Where the registration certificate is cancelled, the amounts of sale price in respect of sales made before the date of the cancellation order, received or receivable after such date, shall be included in the turnover of sales during a given period;

Section 6 deals with the levy of tax

1 Sec. [6. Levy of sales tax on the goods specified in the Schedules :-

2 (1)There shall be levied a sales tax on the turnover of sales of goods specified in column (2) in Schedules B, C, D or, as

the case may be, E, at the rates set out against each of them in column (3) of the respective Schedule.]

3 [(2) Notwithstanding anything contained in sub-section (1), there shall be levied a sales tax, in addition to the sales tax leviable under sub-section (1), on the sales of any motor spirits specified in Schedule D at such rate per litre, if any, as may be set out from time to time against each of the Motor spirits, in column (3) of the said schedule.]

The levy of tax is on turnover of sale of goods. Therefore what is to be determined is value of goods sold and nothing more. What about works contract? What is taxable under the Constitution mandate and as per definition of sale under the Act, the tax is on Transfer of property in goods involved in execution of works contract. The entire works contract price is not taxable. Therefore how to determine the value of goods involved in execution of works contract is prescribed in rule 58. We shall see some issues of Works contract little later on.

Issues of determination of sale price under normal sale – The definition is already reproduced by me hereinabove. so lets go straight to some of the issues.

B. Treatment to discounts

The discounts given as per the prevalent trade practice are usually allowable deductions. Cash discount given on the face of invoice is also allowable deduction. The Supreme Court laid down the law relating to discount in one of the earliest decisions of *Motor Industries reported in 53 STC 48 (SC)*. The SC held that the additional trade discount called "service discount", allowed by the assessee in accordance with trade agreement to its main distributors, over and above the normal trade discount in consideration of the extra benefit derived by the assessee by reason of the marketing of its goods through them, and reflected truly by the accounts of the assessees was deductible as a discount, from its turnover and the fact that the discount was not allowed at the time of sale but on a later date at the end of the month did not make it any-the-less a trade discount.

Ordinarily a concession shown in the price of goods for any commercial reason would be a trade discount which can legitimately be claimed as a deduction from the turnover. Such a concession is usually allowed by a manufacturer or a wholesale dealer in favour of another dealer with the object of improving prospects of his own business. It is common experience that when goods are marketed through reputed companies, firms or other individual dealers the demand for such goods, increases and correspondingly the business of the manufacturer or the wholesaler would become more and more prosperous and its capacity to withstand competition from other manufacturers or other dealers dealing in similar goods would also improve. Hence any concession in price shown in such circumstances by way of an additional incentive with a view to promote one's own trade does qualify for deduction as a discount. it cannot be termed as a service charge or a trading-in.

All amounts allowed either as cash discount or other discount on the price payable in respect of any sale in accordance with the regular practice of the dealer or the terms of any contract entered into between the dealer and the purchaser will not form part of the total turnover of the dealer. When the statute uses the expression "any cash or other discount", the benefit of the exemption cannot be denied to a dealer merely because the discount is not given either in cash or at the time the invoice is prepared. The discount allowable under the Act can relate not only to a particular sale but can also be based on the aggregate of the sale price during a particular point of time. The dealer may adopt a scheme of discount which suits him. Whether may be the scheme adopted by him, so long as it is found that the deduction is from the price payable by the customer, such a discount will have the benefit of the statutory provisions.

While giving discounts for the purpose of promoting the goods in the market, some times huge discounts are offered. Allahabad HC was concerned with one such issue in the case of *Saurashtra Chemicals 100 STC 448 (All)*. The Court held. If the dealer thought it proper in order to promote sales of its product in the market, to allow trade discounts of varying amounts to its customers, depending upon the market situation and other relevant factors, the Revenue cannot legally object to it nor can it take any exception to the manner in which the dealer conducts its business. The account books can be rejected only on certain grounds which are well-established. A claim made by the dealer that it had sold the goods below the expected market price, may put the Revenue on alert and may call for a thorough and detailed scrutiny of the account books. However, if no adverse material is found despite the scrutiny, the account books cannot be rejected on suspicion and surmises alone. Where the genuineness and regularity of the accounts are not challenged, the accounts are relevant and are *prima facie* proof of the entries and the correctness thereof under section 34 of the Evidence Act. If the returns are substantiated and the figures disclosed therein are verifiable from the account books, and no defect is noted in them, the assessing authority is not legally empowered to reject the accounts and to proceed to make an assessment on best judgment in disregard of the account books and the disclosed results.

One more recent decision which takes note of discount issues is *Nagarjuna Fertilizers Chemicals Ltd. (51 VST 453 (WBTT)*. The claims for deduction of cash discount, quantity rebate and special rebate were disallowed. It is well-settled principle that in commercial transactions sale price is arrived at after deducting the trade discount. The concept of sale price does not permit inclusion of trade discount in sale price. It was the case of the applicant that the trade discounts offered by it through credit notes were allowable post-sale without any scope to show such deductions in the invoices / bills, that the agreement existed beforehand for allowing of rebate / discount with increase in lifting of materials and / or making of early payment and that they were deductible from the sale price under clause (31) of section 2 of the said Act: The HC Held as follows :-

(i) that under the definition of “sale price” in clause (31) of section 2 of the Act, cash discount according to ordinary trade practice was admissible for deduction from sale price. In the case of credit sales there was no scope to show cash discount in the invoices / bills. In such case, only the credit period was mentioned in the invoices / bills. If payment was made within the credit limit, a discount was obtainable by the purchasers / distributors by way of credit notes issued in their favour. As such, the applicant was entitled to get deduction of such cash discount from its taxable turnover subject to the verification of credit notes issued and other supporting documents.

(ii) that though the quantity rebate on catalogue price, relating to the lifting of certain quantity of goods as declared by the applicant, was not mentioned in the original invoice, the admissibility of the quantity rebate was approved by the management of the applicant and was also circulated among the urea dealers. This was a discount which was known and understood at the time of removal of the goods though it was quantified later. Such system of grant of discounts was not uncommon in the trade. Therefore the applicant was eligible to get deduction of quantity rebate on verification of the credit notes and relevant supporting documents.

(Government of India vs. Madras Rubber Factory Ltd. [1995] 77 ELT 433 (SC) applied. DCCT vs. M.R.F. Ltd. [2008] 14 VST 124 (WBTT) followed.)

(iii) However for the special rebate, for extraordinary performance of business on consideration of retaining the business relationship, was given by issuing credit notes the object being the promotion of sale. This discount was really in the nature of a concession contingent upon the purchasers' future purchase from the applicant and could not be treated as a "trade discount". Thus the applicant was not entitled to get any deduction on this account. Therefore the appellate and revisional orders were set aside to the extent of disallowance of cash discount and quantity rebate.

DCCT vs. M.R.F. Ltd. [2008] 14 VST 124 (WBTT) followed.

[The court observed that filing of revised statement of claims in the form of returns at the time of assessment instead of a revised return would not be a bar to consider such claims at the time of assessment.]

It is very common in pharmaceutical, FMCG or other cosmetic items to provide incentive, monthly, periodically or like. The crux of the matter is all the discounts/rebate scheme should be well documented in advance and known both to buyer and seller.

Under MVAT we have a special provision for allowing the passing of credit by debit note or credit note i.e. sec. 63(6). It reads as follows.

"Sec. 63(6) If the sale price or, as the case may be, the purchase price of any goods is varied and credit notes, or as the case may be, debit notes, are requested to be issued to give effect to such variation, then,—

(a) the credit notes or, as the case may be, debit notes, shall separately specify the component of tax, if any, and the component of price, and

(b) such credit notes or, as the case may be, debit notes, shall be accounted for in the return in the period in which appropriate entries for debit notes and credit notes are taken in the books of account.]"

One very important impact of such allowance can be on the claim of ITC by the buyer. At times the buyers are not willing to reverse their claim of ITC, even when they are given clear credit note with the tax separately mentioned. This results in J1–J2 mismatch. It is therefore advisable that the credit note be given in time to the buyer as also a ledger confirmation be obtained from the buyer. In the absence of such care, the dealer may end up facing charge for excess collection, and non payment of tax collected, etc.

Can the authorities deny the discount under the guise that the discount is not shown in the invoice recent Supreme Court judgment speaks otherwise. In case of *IFB Industries Ltd. - (49 VST 1 (SC)*. The Apex Court held that,

The definition of "turnover" under section 2(xxvii) of the Kerala General Sales Tax Act, 1963 recognises discounts other than cash discount and provides that those other discounts too like the cash discount shall not be included in the turnover. Rule 9(a) of the Kerala General Sales Tax Rules, 1963, does not speak of invoices but stipulates that the discount must be shown in the accounts. Under the rule the exemption is allowable subject to two conditions: first, the discount is given in accordance with the regular practice in the trade and secondly, the accounts should show that the purchaser has paid only the sum originally charged less the discount. There is nothing in rule 9(a) to read it in the restrictive manner to mean that a discount in order to qualify for deduction under its provision must be shown in the invoice itself.

C. One very important decision about the dispute relating to motor vehicle sale is whether the Registration charges and Insurance charges which are shown in the invoice forms part of the sale price. The Bombay High Court held that the goods which formed the subject-matter of the contract between the respondent and its buyer were in a specific and deliverable state. The transfer of property in the goods in pursuance of the sale contract took place against the payment of the price of the goods. Delivery of the goods was effected by the seller to the buyer. Registration under the Motor Vehicles Act, 1988 was not an event which took place prior to the acquisition or transfer of ownership. The obligation under the law to obtain registration of the motor vehicle was cast upon the buyer. Rule 42 of the Central Motor Vehicles Rules did not—as it could not—override section 39 of the Motor Vehicles Act imposing the obligation of obtaining registration on the owner. The service of facilitating the registration of the vehicle was rendered by the seller-respondent to the buyer and in rendering that service, the seller acted as an agent of the buyer. The registration certificate was issued in the name of the owner. The handling charges which were recovered by the respondent could not therefore be regarded as forming part of the consideration paid or payable to the respondent for the sale. Those charges could not fall within the extended meaning of the expression "sale price", since they did not constitute a sum charged for anything done by the seller in respect of the goods at the time of or before the delivery thereof.

D. Whether service tax is to be included in the sale price under the MVAT Act and VAT be paid on the same? The issue arose from the DDQ for works contract.

The Commissioner of Sales Tax in case of Sujatha Printers. In this DDQ dt. 20th January, 2012, the Commissioner was concerned with the determination of Sale Price for the applicant who was in the business of works contract of powder coating. As per Rule 58 by following the Standard Deduction Formula. In response to answer as to whether the service tax forms part of the Sale Price, the Commissioner referred to the definition of Sale Price and then relied on the judgment of Supreme Court tin case Hindustan Sugar Mill. The judgment of Hindustan Sugar Mill was the judgment in relation to determination of sale price for sale of goods.

This judgment is explained by Bombay High Court in case of *Ballarpur Industries Ltd. (99 STC 101(Bom))* and later on in case of Kolsite Industies recently. The Hindustan Sugar Mills case was a case of control order and it was held that control order is paramount. In Ballarpur Industries the Bombay High Court has explained the Hindustan Sugar Mill case cannot be applied generally. I am attaching herewith the judgment of Ballarpur Industries as also the judgment of Kolsite Industries for your reference. Thus the reliance of the Commissioner on this case was not justified.

Excise duty would normally not be covered as it is not anything done in relation to goods and that is why the definition of sale price specifically include the excise duty as also the duty levied under the Bombay Prohibition Act. Both these levies are stated to be deemed to be part of sale price by way of explanation.

But for the explanation, they will not be part of sale price.

The sale price also specifically excludes the tax paid or payable to a seller in respect of such sale. Apart from the judicial history the definition of sale price reproduced hereinabove include anything done in respect of goods before the delivery. That would not include the service portion, much less the service tax part.

The Supreme Court has very clearly excluded services from the scope of Works Contract for the purpose of levy. If that be the case there is no reason to include service tax as part of sale price.

E. Composition amount

Composition as the name suggests, the notification determines the amount on which the composition has to be paid. There is very little scope for argument as to what is composition amount. Yes if discount is offered, it can be reduced but no other deductions like normal sale price are permitted. Perhaps that is the reason, in Nikhil Printers, case the MSTT decided that from lump sum amount subjected to composition, one is not allowed to reduce the service tax portion when the price is all inclusive. The ratio of Nikhil Printers cannot be applied to all the cases.

The position for composition is to be determined as per section 42(3). The composition under section 42(3) is on the percentage of the total contract value of the works contract. The total contract value of the works contract will not include the tax payable on sale.

Take following example, if the total contract value is ` 10 lakhs the composition amount is on the total value of 10 lakhs only. Normally we have seen the contract may be inclusive of all the taxes. The law does not allow reducing service tax component from this 10 lakhs for the purpose of composition. However if the service tax is charged separately it would not be forming part of the sale price.

F. There are many specific issues of sale price like in case of medicine when the tax was on M R P. For the liquor dealer there is separate circular. Not discussed here as they are typical issues of a trade for limited period.

G. Transport charges

Whether transportation forms part of sale price or not depends on terms of contract. In each case the evidence needs to be evaluated .The case of India meters will be discussed in the *Article of CST sale price (34 VST 273) (SC)*. The SC held that in the contract for sale of electric meter, the property in goods was intended to transfer at the place of buyer, the recovery of freight charges for delivery of goods to the place of buyer shall form part of the sale price. In that case, under the contract the selling dealer was under an obligation to transport the goods to the place of the buyer and the transfer of property in goods took place at the place of the buyer when goods were delivered to him. Therefore the SC held that such charges shall form part of sale price.

Under the MVAT Act, transport charges, freight, etc. do not form part of sale price. Therefore if under the contract, sale is complete at the place of business or factory of the seller and transportation is arranged at the request of buyer and the selling dealer recovers actual amount of freight for delivery of goods to the place of the buyer as reimbursement then such charges do not form part of sale price being a post sale charges. *(State of Kerala vs. Bangalore Soft Drinks Pvt. Ltd-117 STC 413).*

H. Valuation of sale price for works contract

Determination of sale price liable to sales tax for a works contract was never an easy job .The law is clearly laid down by supreme Court (88 STC 204 SC 2nd Gannon Dunkerly Case – GD for short),yet what is to be deducted is always a debatable question. Refer to rule 58 of the MVAT Act. As stated earlier what is taxable for the purpose of MVAT in a Works Contract is not the total contract value , but only the value of goods transferred in execution of Works Contract.

The deductions provided in Rule 58 are the deductions laid down by the Supreme Court in the 2nd GD case. Therefore from the total contract value the dealer will have to first claim deductions . Logically goods(A) plus Labour/ Service (B) = Works Contract (C). Mathematically therefore C-B should be equal to A or C-A = B. However it is canvassed by the State Authorities that the second option of reducing value of goods plus profit from the total contract value to arrive at the deductible portion in terms of Rule 58 is not permissible . This is my opinion cannot be the correct interpretation. The sales Tax Department is trying to gain benefit by interpreting the deductions in narrower sense, so that the taxable amount remains on the higher side. It is therefore going to be a long battle, before the High Court intervenes in a suitable case as to how to determine the value of deductions under Rule 58 of MVAT Act.

Once the deductions are arrived at the balance portion of the total contract value is the value on which the tax is payable under the Works Contract. This balance portion will have to be apportioned between 4%, 12.5% and tax free if any, by taking ratio of the inputs. If a dealer is able to identify, he may identify the goods transferred at various rates.

Proviso to rule 58 refers to the standard deductions which the officer may opt for if the maintenance of accounts of a dealer is not upto mark or if the Assessing Authority is of the opinion that the method of accounting by the dealer is not proper. The dealer may also voluntarily adopt this method for determining sale price for a works contracts. The standard deduction chart provided in the proviso to rule 58 takes away the apprehension of the Assessee to prove the deductions. The amount which remains after the standard deductions is the taxable amounts and the tax will be payable in the proportionate manner as explained in rule 58.

Section 42(3) provides for composition option for the Works Contractor. For the contracts covered by the notification of construction contract, the rate of tax for the Contracts covered by the notification as also all the Contracts incidental to the main construction contract, if entered into prior to the completion of the construction work is 4%-5%. The Contracts other than construction contracts are liable to 8% composition.

This composition of Works Contract does not provide for any deductions except the amount payable towards sub contract involving goods. The Composition can be opted qua a contract. Unlike the valuation u/r.58, under sec 42(3) the tax is on the total contract value.

You all must have witnessed the great uncertainty surrounding the Developers litigation. Well that's a whole big chapter by itself. We await the decision of Apex Court before taking any further study on this subject.

What is discussed herein above is a small fraction of many big controversies.

Kantilal P. Jain *Advocate*

Valuation under Bombay Tax on Luxuries Act, 1987

A valuation is an important issue under any fiscal statute. Nowadays when self assessment is becoming prime aspect of taxation, it becomes necessary to know how to value luxuries for the purposes of the Luxuries Tax Act.

Preliminary

The Maharashtra Tax on Luxuries Act, 1987 first came into effect from 1-1-1988. Initially, it was tax on luxury provided in a hotel, lodging house and club. To increase revenue the Maharashtra Government extended the scope of said Act by providing for tax by way of cess on other facilities, services, enjoyments, utilities, consumption, etc. and thereby provided for tax on supply of tobacco and tobacco products (w.e.f. 1-5-1993) and then superior and costly textiles (w.e.f. 1-11-2000).

These levies were challenged by way of writ petition in many high courts and finally the issue was settled by the Supreme Court in Godfrey Philips India Ltd., holding that word "luxuries" in Entry 62 of List II of the Constitution means the activity of enjoyment of or indulgence in that which is costly or which is generally recognised as being beyond the necessary requirement of an average member of society and not articles of luxuries. Thus, concluding that this entry does not permit the levy of tax on goods or articles.

After the said judgment, the Commissioner of Sales Tax issued the Circular No. 16A of 2005 dated 9-8-2005 clarifying the effect of said judgment and providing course of action to be taken by the department as a fall out of judgment.

Currently luxury tax is applicable on luxury provided in hotel, lodging house or club. Luxury for the purpose of Act is providing accommodation and other services in a hotel. Hotel includes a residential accommodation, a club, lodging, a house, an inn, etc. In simple language a public place where a residential accommodation or stay provided by way of business for consideration. It also includes a club where supply of food or any other article for human consumption or any drinks, whether intoxicated or not, by way of service is made for consideration.

Receipts – Valuation

Turnover of receipts means the aggregate of the amounts of valuable consideration received or receivable by a hotelier or his agent in respect of the luxuries provided in a hotel during a given period. What is taxable under Luxury Tax Act is aggregate of receipts in given period. What is receipts for the purpose of Luxury Tax Act?

A receipt means the amount of valuable consideration received or receivable for any luxury provided in a hotel by hotelier or his agent. Thus, it will include all charges that are charged by a hotelier for any services provided in addition to accommodation. The charges can be for air-conditioning, telephone, television, radio, music, entertainment, etc. The extra charges levied for providing extra bed will also form part of receipt.

It may be noted that when charges for food and drinks are separately charged, then such charges shall not form part of 'Luxury' provided the hotelier has already paid the tax under the Maharashtra Value Added Tax Act, 2002.

Charges for incidental services such as health club services, swimming pool facilities, etc. shall form part of luxury and would attract tax, irrespective of whether they are separately charged for or not. It may be noted, however, that when any charges are charged over and above tariff for providing any optional services on the basis of actual services availed then it may not form part of luxury. It can be any service like telephone call when the same are charged based on the actual call made, laundry services, velvet services, limousine service, postal services, health club services, secretarial services, xerox services, etc. However, if the bill is inclusive of all services provided then the luxury tax will be payable on such composite receipts shown in the bill.

There may be a hotel where service charges levied and appropriated by the hotelier from the customer but not paid to the staff of the hotel will be treated as part of the luxury for the purpose of levy of tax.

The luxury tax is levied on the charges for luxury provided in a hotel per day per accommodation. In a case where the charges are levied otherwise than on daily basis then the charges shall be determined proportionately for a day per residential accommodation based on total period of such accommodation for which the charges are levied.

The luxury tax collected separately by the hotelier shall not be considered as part of the receipt or the turnover of receipts. For example, the rate for single bed room charged is ` 1,200/- per day, on which, hotelier collects ` 48/- separately by way of tax then the tax shall not be considered as part of receipt and hence the receipt at ` 1,200/- will be taken for the purpose of levy of tax.

In the same case, if the hotelier does not collect tax separately but makes a consolidated charge of ` 1320/-, then for the purpose of levy of tax, receipt will be taken at ` 1320/- based on which tax is payable in the higher slab of ` 1,200/- and above, on net receipts of ` 1,200/-after a reduction of luxury tax from receipts of ` 1,320/- under rule 18.

The 'Expenditure tax' levied by the Central Government on hotel. The Expenditure tax is levied on the expenditure which may not relate to the accommodation. For example, a customer visiting a restaurant in a Five Star hotel and paying expenditure tax on food consumed by him there, may not necessarily stay in that particular hotel. On the other hand, luxury tax is payable only on such receipts which are necessarily borne by the customers staying in a hotel. Therefore, the expenditure tax collected separately from the customer would not form part of the receipts for the purpose of levy of luxury tax.

CA Anup P. Shah

Valuation under the Bombay Stamp Act, 1958

I. Introduction

1.1 Stamp duty is a significant cost which must be reckoned while entering into an immovable property transaction. Stamp duty is also the second most important source of revenue for the Maharashtra Government. Last year, the Maharashtra Government earned a revenue of around ` 17,700 crores from stamp duty. Maharashtra has the infamous distinction of covering the maximum number of instruments under the ambit of the stamp duty net.

Stamp Duty in Maharashtra is leviable on an every Instrument (not a transaction) mentioned in Schedule I to the Maharashtra Stamp Act, 1958 ("the Act") at rates mentioned in that Schedule. An Instrument as defined under the Act includes every document by which any right or liability is created, transferred, limited, extended, extinguished or recorded.

1.2 Stamp duty under the Act may be levied on any one the following three basis :

- the Fair Market Value of the property;
- the Consideration mentioned in the instrument; or
- the Area of the property involved

1.3 This Article limits itself to the determination of the Fair Market Value under the Act for the purposes of levy of the duty. The instruments where stamp duty is levied on the basis of the Fair Market Value are as follows :

- Conveyance
- Lease Deed
- Gift deed
- Transfer of lease
- Development Rights Agreement
- Power of Attorney granted for consideration and authorisation to sell an immovable property
- Power of Attorney which is for development rights
- Trust deed
- Partition deed
- Release deed
- Partnership deed - if the capital contribution is brought in by way of property
- Dissolution/retirement deed - if a partner who did not bring in a property takes it on dissolution / retirement
- Settlement deed
- Instrument of Exchange of property

1.3 By virtue of the insertion of s.32A of the Act, the above Instruments are subjected to duty on the basis of consideration recorded in the Instrument or market value of property whichever is higher. The term "market value" is defined by s. 2(na) of the Act to mean the higher of :

- the price which the property covered by the Instrument would have fetched if sold in an open market on the date of execution of the Instrument; or
- the consideration as stated in the Instrument

1.4 S.32A of the Act read with Rule 4 of Bombay Stamp (Determination of True Market Value of Property) Rules, 1995 empowers the Joint Director of Town Planning and Valuation to prepare an Annual Statement of Average Rates of market value for different types of immovable properties situated in every tahsil, municipal corporation or local body area. This Statement is prepared for a Calendar Year, i.e., 1st January to 31st December of every year. Once it is approved by the Chief Controlling Revenue Authority it remains in force for the entire year. The Statement is popularly known as the "Ready Reckoner". While working out the average rates of land and buildings for the Ready Reckoner, the concerned officers are required to take into account the established principles of valuation and any other details that they deem necessary.

1.5 Hence, the Ready Reckoner is applicable for the valuation of immovable properties in case of certain instruments. The term 'immovable property' is defined in s.2(ja) of the Act to include land, benefits to arise out of land and things attached to earth or permanently fastened to anything attached to the earth. It is extremely essential to ascertain whether or not the property in question is an immovable property. The Supreme Court's decisions in *Duncan's Industries Limited vs. State of U. P. (2000) 1 SCC 633; Triveni Engineering & Indus. Ltd., 2000 (120) ELT 273 (SC)* and *Sirpur Paper Mills (1998) 1 SCC 40*0 would be useful in this respect.

II. Ready Reckoner

2.1 The Reckoner divides Mumbai City/Suburbs into various Village numbers and Names. Each Village is further sub-divided into Zones & Sub-Zones. Each Sub-Zone has different Cadastral / City Survey Numbers for various properties.

2.2 The Reckoner gives the market values for 5 different types of properties, namely:

- Shops/Commercial
- Offices
- Industrial Property
- Residential Property
- Developed Land

2.3 In addition, the Reckoner prescribes different rates for different premises such as Row Houses, Bungalows, Terraces, Bungalows without RCC Slabs, Mezzanine Floors, Dispensaries, Banks, Shops facing the Road, Shops not facing the Roads, Shops in Basement, Godowns in Basement, etc.

2.4 There are nine major steps to using the Ready Reckoner which are as follows :

(i) Find out the Village Number and Village Name in which the property is located

(ii) Ascertain the Zone and the Sub-Zone

(iii) Find out the CTS No. of the property

(iv) Determine the type of property, e.g., Residential, Office, etc.

(v) Calculate the Built-up Area of the Flat / Office.

(vi) Find out the Market Value for the type of Property

(vii) Ascertain if there are any Special Factors as prescribed in the Reckoner

(viii) Make the prescribed Adjustments to the Market Value

(ix) The Market Value of the Property for Stamp Duty purposes = Adjusted Fair Market Value * Built-up Area of the Property

2.5 It is essential to note that the fair market values given in the Ready Reckoner are per square metre of Built-up Area. Hence, the area of the flat must also be converted from square feet to square metre and must be expressed in terms of the Built-up Area.

The Reckoner calculates the Built-up Area as Carpet Area * 1.20. The Carpet Area in common parlance means the wall-to-wall area of the flat, whereas the Built-up Area also includes the area of the walls. In addition, there is the concept of Super Built-up or Saleable Area which is very popular amongst the Builders. It means the Built-up Area plus the pro-rata area for common facilities such as lift, lobby, staircase, passage, etc. It is very important to bear in mind that the stamp duty valuation is neither on the basis of the carpet area nor on the basis of the super built-up area. It is the built-up area alone which is relevant for valuation under the Reckoner. The conversion rate from sq. metre to sq. feet is 1 Sq. Mtr. = 10.764 Sq. Ft.

2.6 One of the Special Factors on account of which an adjustment is to be made is whether the building in which the property is located has a lift. Depending upon the number of floors in the building and the fact whether or not the building has a lift, an increase or decrease must be made in the value of the property.

2.7 Another adjustment is to be made on account of depreciation. The Reckoner prescribes different depreciation rates based on the age of the property. The lowest rate is Nil for a 5 year old structure and the highest rate is 50% for a structure which is 40 years old or more. Depreciation is granted on the adjusted fair market value of the property as given in the Reckoner. The stamp authorities insist upon the proof of the age of the building before allowing the claim of depreciation. Some of the proofs relied upon are the Building Occupation Certificate (OC), Municipal Assessment, etc. However, according to the latest guidelines, depreciation must be provided according to the age of the building by the Sub-Registrar of Assurances himself and no adjudication is necessary.

2.8 The example given below illustrates the method of calculating the fair market value of a residential flat by using the Ready Reckoner. The facts are as follows:

(i) Residential Flat on 12th floor of a building at Nepean Sea Road

(ii) The Carpet Area of the flat is 1,800 sq. ft.

(iii) The Building was constructed in 1975 (36 years old) and it has 15 Floors.

(iv) The Agreement Value of the flat is Rs. 8.00 crores.

The fair market value calculation would be done as under :

Village Name and Number : Malabar Hill & Khambala Hill – No. 7

Zone / Sub-zone : 7 / 61

CTS No. of Plot - 1 / 600

Built-up Area of Flat : 1800 * 1.2 = 2160 sq.ft.

= 2160 / 10.764 = 200 sq. mtr.

Built-up Area Rate / sq. mtr. as per the Ready Reckoner: ` 6,72,000

Depreciation as per Table : 40%

Add for Lift : 10%

Rate after Depreciation & Lift increase : ` 4,43,520

Area (sq.mtr) : 200 sq. mtr.

Value as per Reckoner : ` 8.87 crores

Agreement Value : ` 8.00 crores

Value for levying duty – Higher of two Values: ` 8.87 crores

Stamp Duty on Reckoner Value : ` 44.35 lakhs

Stamp Duty on Agreement Value : ` 40.00 lakhs

Higher Stamp Duty due to Reckoner : ` 4.35 lakhs

2.9 Closed garages or parking spaces under stilts are valued at 25% of the rate applicable to flats in that zone.

2.10 The Ready Reckoner also lays down the method of valuation of tenanted property. The accepted method of valuation is the Rent Capitalisation Method. There are two methods of valuation depending upon whether the tenanted area is less than or equal to the FSI available or more than the FSI available. Further, in case the tenants are given any alternative accommodation then an adjustment is required to be made for the same.

2.11 S.28 of the Act specifies that the market value and all facts and circumstances affecting the chargeability of the instrument with the duty should be fully and truly set forth in the instrument. Rule 3 of Bombay Stamp (Determination of True Market Value of Property) Rules, 1995 requires that any instrument relating to any immovable property should mention the area of the plot, the type of construction, the built-up area and the year of construction.

2.12 Stamp duty is calculated on the market value arrived at as per the above procedure. The Rate of duty is as specified by the relevant Article of Schedule 1 to the Maharashtra Stamp Act, 1958, i.e., @ 3%, 4% or 5% depending upon the location of the property.

III. Issues with the Ready Reckoner Valuation

3.1 The Ready Reckoner does not consider various factors socio-economic / legal factors which may influence a valuation such as :

- Differences in buildings located within the same area, e.g., condition of buildings, quality of construction, amenities, surroundings, view, proximity to slums, etc.
- Differences between flats in the same building, e.g., condition of flats, higher floor premium, sea view, front and back flats, etc.
- Defects in the title of the owner, impact of various regulations such as Costal Regulation Zone, Urban Land Ceiling Act, etc.
- Special factors such as distress sale

3.2 In many cases, the Registrar refuses to register a document if the stamp duty is not paid on the fair market value as per the Ready Reckoner valuation. The Bombay High Court in *Prasadnagar Co-operative Housing Society, 2005 (3) Bom CR 478* has held that Ready Reckoner values are to be treated sheerly as guidelines and as a declaration of "prima facie" market value. As far back as in 1993, the Maharashtra State Government has given an undertaking before the Bombay High Court, in the case of *Ashok Bansilal Mutha vs. State of Maharashtra & Ors. (Contempt Petition No. 28 of 1993)*, that it will not use the Ready Reckoner for calculating stamp duty. Inspite of this, the Sub-registrars always insist upon payment of duty as per the Reckoner.

3.3 In a landmark decision in the case of *Bharat Bijlee Ltd. vs. State of Maharashtra, 2003(1) All MR 18*, the Bombay High Court has levied a personal fine on the Superintendent of Stamps for insisting on the payment of duty as per the ready reckoner valuation in a case of sale under an Income-tax Auction.

3.4 The landmark decision in this respect is that of the Supreme Court in the case of *R. Sai Bharathi vs J. Jayalalitha, Special Leave Petition (Crl.) 477 of 2002* which held as follows in respect of the stamp duty guideline value / reckoner value :

"…The guideline value is a rate fixed by authorities under the Stamp Act for purposes of determining the true market value of the property disclosed in an instrument requiring payment of stamp duty. Thus the guideline value fixed is not final but only a prima facie rate prevailing in an area. It is open to the registering authority as well as the person seeking registration to prove the actual market value of property. The authorities cannot regard the guideline valuation as the last word on the subject of market value. ….

………… guideline value will only afford a prima facie basis to ascertain the true or correct market value undue emphasis on the guideline value without reference to the setting in which it is to be viewed will obscure the issue for consideration. It is clear, therefore, that guideline value is not sacrosanct as urged on behalf of the appellants, but only a factor to be taken note of if at all available in respect of an area in which the property transferred lies. ……….."

Another important Supreme Court decision is that in the case of *Jawajee Nagnatham, (1994) 4 SCC 595 (SC)*, extracts of which are given below:

"………… The Basic Valuation Register prepared and maintained for the purpose of collecting stamp duty has no statutory base or force. It cannot form a foundation to determine the market value mentioned thereunder in instrument brought for registration. Equally it would not be a basis to determine the market value ………..

Evidence of *bona fide* sales between willing prudent vendor and prudent vendee of the lands acquired or situated near about that land possessing same or similar advantageous features would furnish basis to determine market value."

3.5 The Ready Reckoner Values may give absurd results in the event there is a fall in the property values in a particular year. For instance, under the current Ready Reckoner the value of all Office premises in a certain area at Nariman Point is ` 51,200 per square feet. While some buildings may be able to command such prices, not all buildings and within them not all offices can get such a price! The average increase in the rates in the 2013 Reckoner over the 2012 is 14% while the corresponding increase in the 2012 Reckoner was 18%. Thus, while the State Government has brought down the stamp duty rates to a maximum of 5% it is increasing the Reckoner Rates every year.

3.6 Of late there is a new trend in the Reckoner. The same CTS No. appears in two different zones of the same village with different rates for the same CTS No. To give an example, in the Colaba Division, there is one CTS No. which has a rate of ` 5,30,800 / square metre and also a rate of ` 2,60,600 per square metre, i.e., a variation of more than 100%! There are several such duplications in the Reckoner.

IV. Importance of Stamp Duty Valuation

4.1 The Stamp Duty valuation of an immovable property is increasingly becoming important also as a reference point under various other laws:

(a) S. 50C of the Income-tax Act states that if the sale consideration received for transfer of a land or building or both, held as a capital asset, is less than the value adopted for payment of stamp duty, then the value adopted would be deemed to be the sale consideration. In this context, the decision of the Kolkata ITAT in the case of Chandra Bhan Agarwal, [2012] 21 taxmann.com 133 (Kol. ITAT) rendered in the context of fair market value u/s. 50C is very appropriate to our case:

"….The expression 'fair market value', in relation to any immovable property transferred, means the price the immovable property would ordinarily fetch on sale in the open market on the date of execution of the instrument of transfer of such property. The fair market value is the best price which vendor can reasonably obtain in the circumstances of the particular case and what is required to be done for the ascertainment of such market value is to ascertain the price which a willing, reasonable and prudent purchaser would pay for the property. In ascertaining that, all factors having any depressing or appreciative effect on the value of the property have to be taken into account ….. The value of a property cannot be stated in an abstract form and it varies from time to time and can only be stated with reference to so many factors, i.e., the locality, situation, general appearance in the area, availability of shopping and marketing facilities, condition of public ways and transportation, availability of utilities, and many other things. …..The provisions of section 50C, in the present context, state the fair market value and value is estimation of a probable price of the property, i.e., the deeming fiction. The deemed value is to be ascertained and for that, as discussed above, section 50C has postulated certain conditions. In the instant case, the fair market value estimated by DVO has been challenged as DVO's report has no basis, because it has not discussed any of the factors, such as locality, situation, general appearance in the area, availability of shopping and marketing facilities, conditions of public ways and transportation, availability of utilities etc. and etc. The DVO's report is a cryptic one, and the assessment is based on value as assessed by Registrar and that also on the basis of additional stamp duty asked for. .... In this case, the DVO has not ascertained any market value which a willing, reasonable and prudent purchaser would pay for this property. Even the DVO has not considered the factors having any depressing or appreciative effect on the value of the property."

Thus, the ITAT has very clearly stated that even the valuation must consider all value depressing factors.

(b) Similarly, s.43CA of the Income-tax Act provides that if the sale consideration received for transfer of a land or building or both, held as stock-in-trade, is less than the value adopted for payment of stamp duty, then the value adopted would be deemed to be the sale consideration.

(c) If an Individual or an HUF gets any immovable property without consideration, the stamp duty value of which exceeds ` 50,000 then the stamp duty value would be treated as his Income u/s.56(2). Similarly, if he buys any immovable property for a consideration which is lower than the stamp duty valuation by ` 50,000 or more, then the difference would be treated as the Income of the buyer.

(d) The Maharashtra VAT Act, 2002 levies VAT for builders under the Composition Scheme @ 1% of the value adopted for payment of stamp duty or the agreement value, whichever is higher.

(e) The final nail in the coffin is the recently introduced Property Tax which levies property tax based on the Stamp Duty Ready Reckoner Valuation.

Thus, the reckoner value is becoming an increasingly important source of revenue not just for the Stamp Office but also for other Revenue Departments.

V. Dispute over Valuation

5.1 If any person is unhappy with the stamp duty valuation, then under the Act, he can submit the instrument for voluntary adjudication by the Collector.

5.2 An appeal lies against the adjudication done by the Collector to the Chief Controlling Revenue Authority.

VI. Inadequately Stamped Instruments

6.1 Instruments which are inadequately / not stamped are inadmissible in evidence for any purpose, e.g., in a Civil Court. Such instruments can be admissible in evidence only on payment of the requisite amount of duty and a penalty @ 2% per month on the deficient amount of duty calculated from the date of execution. However, the maximum penalty cannot exceed twice the amount of duty involved.

6.2 Further, s.59 of the Act provides for a penalty for executing an improperly stamped instrument with an intention to evade stamp duty. The penalty consists of a rigorous imprisonment for a term which shall not be less than one month and which may extend up to six months and a fine of up to ` 5,000.

VII. Conclusion

The simplest definition of value is by Justice Hardley as "A price is a fact and a value is an estimate of what the price ought to be". Thus, a valuation should be a combination of objective data and subjective judgment. However, the Reckoner takes away all elements of discretion when it comes to valuing immovable property and uses an 'one-size-fits-all' approach. Let us all hope we reach a utopian situation of having leeway in valuation for stamp duty for immovable properties!

CA Janak Vaghani

Valuation for Levy of LBT

1. Introduction

The Maharashtra Municipal Corporation Act provides for levy of Local Body Tax on entry of goods into local municipal area for consumption, use or sale therein. The LBT is payable on entry of goods into local area and not on any transaction of sale or purchase of goods. The entry of goods into local area may be by way of purchase, or for any reason from any person or branch or agent, but tax is payable on it. There is no specific provision under the Act providing for levy of tax on value of goods or on turnover of purchase or sales of goods. There is no specific provision under the Act defining the term sale price or purchase price of the goods although sections 2(70A) and (70B) of the Act provides for definition of term turnover of purchase or sales respectively. In this article some important provisions relating to determination of value of goods are discussed.

2. Value of the Article S. 2(70C)

Section 2(70C) of the Act provides definition of the term "value of the article". Accordingly value of the article in relation to the goods imported into the city, where "octroi" or "cess" is charged on such goods on *ad valorem* basis, shall mean the value of the article as mentioned in the original invoice, and include the shipping dues, insurance, customs duties, excise duties, counterveiling duty, sales tax (if any), Value Added Tax (VAT), transport charges, vendor freight charges, carrier charges and all other incidental charges.

This provision is made for levy of octroi or cess but it is very much debatable whether it will apply for levy of LBT. Anyway as per this provision the value of article includes not only the value of the article mentioned in the bill but also includes following;–

i) Shipping dues

ii) Transport charges

iii) Freight charges

iv) Sales tax or VAT

v) Customs duty, excise duty etc.

3. Tariff Value (R. 24)

Rule 24 of LBT Rules 2010, provides that the Commissioner, with a view to prevent evasion of tax, may, having regard to the trend of the value of such or like goods, by displaying on notice board of the corporation, fix, from time to time, tariff value of such goods, and where any tariff value of such goods are fixed the LBT shall be payable on such tariff value.

Under this rule, blanket powers are conferred upon the Commissioner to fix tariff value of any goods imported into the city without taking approval of any legislative authority or without proving or recording reasons for evasion of any tax. Even he is not required to issue any notification for this purpose. It is provided under the rule to fix the tariff value of any goods by displaying on the notice board of the office of the corporation. The rule expects the tax payer to visit the office of the corporation, from time to time, and verify whether the commissioner has fixed any tariff value of the goods imported by him so that he can pay LBT on such value. Further, it is not provided in the rule for time period for which the notice should be affixed in the notice board of the corporation. It is quite possible that Commissioner fixed the tariff value of any goods on earlier occasion and it is removed from the notice board, then issue is whether the dealer is require to pay LBT on tariff value of such goods? If, answer is yes, then how the dealer would come to know about fixation of tariff value of any goods by the Commissioner?

Further, no guidance is provided under rule to fix tariff value of any goods. Rule simply provides that the Commissioner may fix tariff value having regard to the trend of such goods or like goods. It is not provided that the value of goods should be taken at wholesale price or MRP. The Commissioner is free to fix value of tariff of such goods in any manner and the dealer or person is required to pay LBT on it.

The Government should reconsider the provisions contained in this rule giving unrestricted power to the Commissioner to fix tariff value of goods.

4. Determination of Fair Market Price (Rule 25)

Rule 25 provides for determination of Fair Market Price of goods by the Commissioner, for the purpose of passing any order in any proceeding under the rules, after giving reasonable opportunity of hearing in following circumstances;-

i) Where sale or purchase of any transaction of sale or purchase between related persons is less than the fair market price,

ii) Where sale or purchase price of the goods imported by the dealer or person is not ascertainable,

iii) Where goods have not been obtained by sale or purchase.

Under these rules also, the Commissioner is given power to determine Fair Market Price of the goods imported, in specified circumstances, without defining the term Fair Market Price of the goods. Only solace is that the rule provides for giving reasonable opportunity of hearing to the dealer or person concerned before determining the Fair Market Price of the goods. This rule may apply in case of entry of goods by way of stock transfer from branch or agent or gift, job work etc. where the entry of goods is not by way of sale or purchase of any goods. The dealer would be require to prove before the Commissioner in each such cases, the fair market price of the goods imported on which LBT is paid. In order to avoid litigation the Government should provide rules to determine the Fair Market Price of goods so that LBT is paid by the dealer correctly.

5. Conclusion

In this article I have tried to discuss the provisions of the Act relating to determination of value of goods on which LBT is payable. In absence of clear and specific law the levy of LBT on entry of goods into local area in lieu of octroi or cess would lead to unavoidable litigation. It is high time that Government should form a committee consisting of members from trade and legal fraternity to study the existing provisions of the Act to determine the value of goods on which LBT would be payable and should make simple and clear provisions to determine the value of goods liable for LBT at the earliest point of time.

Case Laws Index

"Media – A voice of ..."

Saurabh Rajendra Wagle

"Four hostile newspapers are to be more feared than thousand bayonets." Napoleon Bonaparte had clearly depicted effectiveness of Media in one sentence. What makes the media hostile?....

The term media is derived from the word 'Medium' which means communication channels through which news, entertainment, education, data, or promotional messages are disseminated. In common parlance, the term media refers to anything that serves as means of mass communication. As human being is social animal, communication plays a vital role in bonding the relationship. The process of communicating at very large level is being done with the help of appropriate medium.

The history of mass media can be said to have started from ancient Greece. Philosophers, generals and politicians of the ancient Society discuss issues and after that spread to the public by the use of word of mouth. The ancient Greek Drama and poetry can be considered as a form of mass media, communicates a message to the society. In other words since the early years people have always been influenced by mass media. Long ago, when a chieftain used to rule a particular territory the process of communicating at grass root level was done through town criers. Important announcements, any change in laws & regulations, proclamations, ruler's order used to be circulated by beat of drums. As the inventions were made, the means to disseminate the information got changed. Various means of media are evolved over the period of time as there has been progress in Science & Technology. Media is facilitator of creating and transmitting information to large, anonymous, and heterogeneous audience. Media is the only channel that has resources and motivations to create real impact on masses.

In today's scenario, Media can be categorised as Printing media, Broadcasting media and Web media. Printing has helped to circulate a particular message or information at large scale. Printing media includes Newspaper, Periodical, and Magazine. Newspaper includes many features like news, advertisement, editorial, opinions, caricatures, advertisements, questions & answers, etc. That's why Printing media has thrived in fierce competition from other mediums. Broadcasting media means spreading the message through audio or video mediums. Broadcasting media includes radio, news channel, and film. Broadcasting media has an effect on eyes & ears simultaneously. So it has got an impact on the brain directly. There has been mushroom growth in number of news channels and television programs which has led to competition and hence there is quality deterioration. Web media is an emerging concept. There has been growth in internet users & hence news or information circulated through social networking sites, various websites gets disseminated quickly. It has played pivotal role in influencing the masses.

Web media is widespread, it is getting importance now-a-days. Web media includes social networking sites like Twitter, Face book, Orkut, Google+, etc. which are popular among youth all over the world. In many countries, there is censorship board for Printing media and Broadcasting media i.e., government can control the information disseminated. But setting the board for Web media is difficult. The only way is to restrict or ban some websites.

For any type of Media the primary objective should to be 'To educate people with factual knowledge without any kind of bias which would be helpful for them to form opinion on social and political issues.' In general the objectives of Media are to inform and entertain the public, to safeguard our freedom, to improve personal and social lives, to make the masses think on society's problems and getting concrete solution for the same. The job of media person is to replenish the facts without any manipulation. Freedom of speech regulates the Government and hence regulates the law. The media plays a vital role in any kind of social system be it an Authoritarian or a Democratic state. Authoritarian States do not permit political freedom or individual rights and are usually governed by monarchs, military juntas, or ideologues. The media are largely owned and/ or controlled by the ruling regime to promote its legitimacy. The dividing line between news and propaganda is usually blurred, and censorship and self-censorship are pervasive. In Democratic States there is freedom for media subject to certain conditions. There are government agencies which act as censor body for some type of releases. Democratic States are assumed to be more transparent in dealings than Authoritarian States because of freedom of media. It can be said that in Authoritarian States media is voice of Monarch and in Democratic states media is mixed voice of one who influence the masses and the masses. Media has great power. It is rightly said that "One who controls the media, controls the mind of people." Therefore, it is journalist's responsibility to be ethical in his/ her work.

In this age of globalisation, Information Technology (IT) has played important role at international level. The contribution of 'WikiLeaks' as media partner at global level cannot be ignored. The organisation got its initiation in 2006 by way of website called "http://wikileaks.org/". Although the name itself suggests that the report is based on 'Leaked Information' from anonymous sources, the information is supported by true evidence. WikiLeaks which is an international non-profit organization and is funded largely by volunteers and is dependent on public donations. It has claimed to have huge database of many government's record across the world. WikiLeaks relies to some degree of volunteers, journalists, mathematicians, hackers from all over the world for getting the information. WikiLeaks is based on several softwares, including Tor to preserve anonymity. WikiLeaks was implemented on Media Wiki software between 2006 and October 2010. WikiLeaks strongly encouraged postings via Tor because of the strong privacy needs of its users. All the documents are assessed before its release in order to prevent fraudulent or misleading leaks. WikiLeaks would act as an intermediary for whistleblowers for leaking the important information which would protect them from any physical or psychological harm. **As per Julian Assange (the founder of WikiLeaks) the main objective of WikiLeaks is "to provide the public most classified, diplomatic and historical significant, true information which is kept as secret by government." He claims that this is IT revolution without any national base which is rebel against those who are controlling the power. It is action against those who are hoarding the information and abusing the power of masses. He wants to make it a worldwide movement for mass publicising classified information. The information leaked endangers innocent lives and hence it is subjected to veracity. WikiLeaks posted its first document in association with The Guardian (UK newspaper) regarding corruption by the family of the former Kenyan politician Daniel Arap Moi. After that, it released some prisoners were off-limits to the International Committee of the Red Cross by U.S. military which U.S. army refuted. The leak of information of allegations of illegal activities at the Cayman Islands branch of the Swiss Bank Julius Baer caused suspension of the website for some time. During 2010, the leak of U.S. diplomatic cables in redacted format caused stir at international level. It was claimed that the leaks may harm national security and compromise international diplomacy. All U.S. federal government staff has been blocked from viewing WikiLeaks. Since its inception it has released number of documents which have become headlines for newspapers across the world. The WikiLeak's Cash-for-votes scandal involving the delayed leak of a diplomatic cable describing an Indian legislative aide showing a US embassy official "chests of cash" used to bribe Indian lawmakers over a vote on an Indo-U.S. nuclear deal back in July 2008. WikiLeaks had leaked information of 'Cash for Vote Scam' of UPA government of India. The point was raised by Opposition party and the alleged are under scanner of CBI. Many documents relating to scams, corruption by higher authority, and forgery were revealed by WikiLeaks. WikiLeaks was called as reliable source of information by general public. The organisation including the staff and the founder was criticised by many.

** In "Documentary on WikiLeaks" on YouTube: - http://www.youtube.com/watch?v=pS_UvV6_Cwg

Some social networking sites were pressurised to remove any content related to WikiLeaks by powerful nations of the world. Some nations have blocked the website. But WikiLeaks was successful in revealing the information openly to the public. It is voice of leaked information. The loud voice of WikiLeaks has created problems for some nations at international level.

Another case which got fame at international level would be the closure of English newspaper - "News of the World" in July, 2011. It was Sunday sister paper of "The Sun" newspaper. The newspaper was wholly engaged in publicising celebrity scoops, sex scandals and false reports of famous personalities, presenting flowery stories by exercising improper influence. It gained a nickname called "News of the Screws and Screws of the World" for the same. Since its inception, it was a reputed newspaper having talented journalists and editors. It was cheapest newspaper in London at the time of inception. The newspaper was first published by John Browne in October, 1843 with objective "To literate the general public." The newspaper sustained for many years due to its quality articles, writings. The ownership of newspaper was transferred to News International Ltd. (One of the largest Media conglomerate companies in the world) in the year 1969. Since June, 1969 Rupert Murdoch became Chairman and Chief Executive Officer of News International Ltd. and he was heading the entire operations. News of the World was one of the best selling newspapers in United Kingdom. In order to augment sales, it involved in framing unique stories and appointing private investigators to obtain private information of celebrities, politicians, ordinary citizens as well as members of Royal British family. Publication used to buy the information from former police officers and civil servants. The paper became notorious for chequebook journalism as it was often discovered attempting to buy stories, typically concerning private affairs and relationships, of people closely involved with figures of public interest as politicians, celebrities and high-profile criminals. False reporting, phone tapping, hacking, bribery for gaining private information were the activities in which the newspaper was engaging itself. In 2006, it gained illegal access of many mobile phones, voicemails held by variety of people. The newspaper had hacked many accounts in order to intercept and to snoop. Some former editors of the newspaper were involved in police bribery. In 1988, David Scarboro (English film star) committed suicide due to media intrusion. Some stories were made against him by News of The World which called him as "Zombie" and "Dracula". He was purported as drug addict. David suffered from mental illness due to false stories reported against him. It is rightly said that "Media can infuse life in a corpse and *vice versa* life of a living man may get into grave." During 2005 to 2008 many England football players like Wayne

Rooney, David Beckham, and Ashley Cole filed suit against the newspaper for defaming them. Many cooked stories were published. There had been increase in demand for the paper as the reader got attracted because of such news. The sales shot up to 7.5 million per week during 2010. But many journalists, employees have been alleged for cases of bribery, hacking, etc. News of the World had paid billions of Euros for settling various cases. Public outcry and boycott by advertisers were the factors responsible to shut operations of the paper. In 2011, News of the World was forced to shut its operations and hence the closure was made on July 7, 2011 with front page of "Thank you and Good bye". The closure story of 168 years old newspaper states the running behind only on scoops would turn into end. The publications for last 30 years by News of the World was voice created by journalists themselves by taking pictures of famous personalities. It was voice of gossip news which ended with its closure.

"Lotus Revolution" by youth of Egypt is worth mentioning. In Egypt President Hosni Mubarak's regime of 30 years caused the problems like all pervasive corruption, lethargy in bureaucracy, hyper inflation, high unemployment, stagnant economy, low standard of living. The President or impliedly a dictator was not taking any step to maintain the balance in society and to tackle the problems faced by the masses. Inheritance of power was emerging as another issue. State of Emergency laws were used to be enforced for many times in which thousands of the people were arrested without any charge or trial. Even constitutional rights were suspended and there was violation of human rights. There was restriction on freedom of speech even though it is fundamental right as per Constitution of Egypt. Many reporters were tortured; arrests had been made of those who would oppose the government. Bloggers were fined with heavy penalty. Police abuse, corruption in Government officials, electoral arrangement were the factors which led to harassment of public at large. To vent out the anger of the Government, youth of Egypt started the movement through social media websites. They developed virtual networks through blogs, Face book, Twitter. Protestors from all over the country thronged at Tahrir Square in downtown Cairo on January 25, 2011. There were ten thousand protesters. The wild outcry of the people rocked the capital city. The demonstration was planned to be non-violent movement with the objective of ousting the existing President Hosni Mubarak. It turned out to be violent as the riot police used various means to disperse the protestors. As the march intensified within 2-3 days the Government deployed military. Many clashes happened, but no major causalities were reported.

After 16 days of continuous civil disobedience movement President declared resignation on February 11, 2011. The Egyptian government shut down the internet to most of Egypt during the recent protests in order to limit communication between protest groups. Still, international media outlets aired inspiring images of the masses at Tahrir Square, and Twitter disseminated continual updates from protesters in Egypt, bolstering international solidarity for Egyptians. European internet service providers freed up Internet lines for Egyptians to use free of charge; an American graduate student used landline phones to collect updates from his friends in Egypt and post them on his Twitter account; and Google launched its Speak2Tweet initiative, allowing Egyptians to call a phone number and leave a message that would automatically be posted to Twitter. The peculiarity of "Revolution of the youth in Egypt" is that this is the first movement which had its seeds sown through social networking sites. Media across the globe had made this movement a giant success and hence the basic demand of the protestors to oust the President got fulfilled within 16 days. The successful overthrew of a dictator in Egypt gave inspiration to its neighbouring nations and people of Libya, Syria, Tunisia are also making demonstrations against draconian rulers. Out of which Libyan and Tunisian demonstrations have made the triumph. Demonstrations in African nations had attracted eyeballs of many nations across the world. Social media has made it possible to connect the people all over the globe which has helped in speeding up the process of mass communication. As mentioned earlier, it is very difficult to set up censorship board to have watch on content of the websites; one can express his opinion very candidly.

In India one remarkable movement which became famous because of 24x7 coverage of broadcasting media is "Movement of India against Corruption (IAC) regarding the draft of Jan Lokpal Bill". The march was headed by a septuagenarian Anna Hazare who hails from Maharashtra. The core team of the protest was headed by Anna Hazare with eminent social servants like Kiran Bedi (Retired IPS officer), Arwind Kejariwal (RTI activist), and Prashant Bhushan (an Advocate). The objective of the people's movement was "To eliminate the corruption from India". There was just assembly of people at Jantar Mantar prior to one month of inception of the movement. Signature campaign was launched before two days of the movement. It had attracted between 5,000 and 6,000 signatures. Anna Hazare began his indefinite fast on 5th April 2011 at Jantar Mantar in Delhi to press for the demand to form a joint committee of the representatives of the Government and the civil society to draft a stronger anti-corruption bill with stronger penal actions and more independence to the Lokpal and Lok Ayuktas (Ombudsmen in the states), after his demand was rejected by the Prime Minister of India Manmohan Singh. He stated, "I will fast until Jan Lokpal Bill is passed". Anna Hazare decided that he would not allow any politician to sit with him in this movement. Kapil Sibal said, "This is happening like mad. The more concessions are given, the more these people are trying to climb over the head and that no more concession to be given and the movement need to be stopped." It caused eruption of anger from youth of the nation. The movement became more intensified. Protests spread to numerous other places, including Mumbai, Kolkata, Thiruvananthapuram, Hyderabad, Jaipur, Chennai, Patna, Bhopal, Ahmedabad, Ranchi, Pune, and the University of Jammu. Bollywood came out in support of the protests, with actors, musicians and directors speaking in support of the movement and Hazare. Director Farah Khan, actor Anupam Kher, music director Vishal Dadlani, poet-filmmaker Pritish Nandy and actor Tom Alter all visited Jantar Mantar; others stated their support for the movement via social networking websites or the media. Oscar winning Indian composer A. R. Rahman also declared his support for the anti-graft movement. Many business tycoons also supported the people's movement. Some of them were - Delhi Metro chief E. Sreedharan (also called the Metro Man of India), Punj Lloyd Chairman Atul Punj, Maruti Suzuki Chairman R. C. Bhargava, Hero group's Sunil Munjal, Tata Steel Vice-Chairman B Muthuraman, Bajaj Auto Chairman Rahul Bajaj, Godrej Group head Adi Godrej, Biocon Chairman and Managing Director Kiran Mazumdar-Shaw and Kotak Mahindra Bank Vice-Chairman & Managing Director Uday Kotak. ASSOCHAM President Dilip Modi and FICCI Director General Rajiv Kumar too came out in support of the movement. Within 4 days of the protest the government conceded all demands made by India against Corruption (IAC).

On 9th April, 2011 government of India issued an Official Hazette saying that the draft of the Lokpal would be made and presented in the coming monsoon session of Lok Sabha. The Government of India accepted the compromise formula that there a politician chairman and an activist non-politician Co-Chairman. It was reported that Pranab Mukherjee will be the Chairman of the draft committee while Shanti Bhushan will be the Co-Chairman. Bhushan was one of the original drafters of the Lokpal Bill along with Hazare, Justice N. Santosh Hegde, advocate Prashant Bhushan, and RTI activist Arvind Kejriwal. The first meeting regarding a draft of the Lokpal Bill was held on 16 April, 2011. The Government agreed to audio-record all meetings of the Lokpal Bill panel and to hold public consultations before a final draft is prepared. Anna Hazare demanded that the proceedings be televised live but the Government refused. Then two committees arrived at consensus of proposed Jan Lokpal bill. But Anna Hazare team claimed that all of the demands are not accepted by Government committee. And India against Corruption (IAC) waited for monsoon session of Lok Sabha. The Government failed to pass the bill in that session. Therefore Anna Hazare decided to go to on fast unto death. Anna Hazare announced at a press conference that he and his supporters were determined to go ahead with the fast on 16 August 2011 as planned. He also urged people to court arrest to push for a stronger Lokpal bill. He went to Delhi as per the plan. Anna Hazare was detained by Delhi Police in the early morning before he could start his hunger strike at JP Park, Delhi. Delhi Police had asked Anna not to leave his home, which he declined, and Anna was detained at his residence in Mayur Vihar. Arvind Kejriwal, Kiran Bedi, Manish Sisodia and more than 1,200 supporters were also taken into preventive custody by the Police. Anna Hazare was sent to seven days judicial custody to Tihar jail after refusing to sign a personal bond to be released on bail. With the Government of India, preparing to release Anna Hazare late in the night, however Anna refused to come out of Tihar jail until the Government agreed to an unconditional permission to hold protests at JP Park. Demonstrations were held all over India protesting Anna Hazare's arrest. He set a deadline for government to pass the bill. But government failed to do so. Anna Hazare ended his 12-day fast after 288 hours on Sunday morning at around 10 am before thousands of cheering supporters at Ramlila Maidan. Hazare was driven straight to Medanta Medicity run by eminent cardiologist Dr. Naresh Trehan who was attending to him along with his team during his entire period of fast. Thousands of supporters gathered at India Gate following anti-corruption crusader's call to celebrate their victory. On December 11, 2011 Anna Hazare sat on a day-long fast at Jantar Mantar protesting against proposals of Parliamentary Standing Committee on the anti-graft measure. On the second day of his fast, a day ahead of schedule, Hazare repeated his threat to campaign against Congress in the five poll-bound states for not bringing a strong Lokpal. Due to deteriorating health of Hazare and low turn out across the country were among the reasons for ending up his fast. He said that, the movement is not stopped, just postponed. The participation of the movement lowered over the period of time. Till today, Lokpal bill is passed in Lok Sabha, but it has not got Constitutional status. The movement was sieged by cameras of media. Many Congress leaders had said that it was a blitzkrieg against UPA by opposition party. The media had infused life in the movement by giving coverage throughout the movement. The Facebook page of this movement got millions of Likes within short period of time. The broadcasting media i.e. News channels were promoting this people's protest. The team members of India against Corruption (IAC) also participated in many of the realty shows of television. The movement caught eyeballs of Indian people because of continuous bombarding by news channels on television. The updates regarding the people's protest were headlines for many national newspapers as well as vernacular newspapers. And hence the response from people was getting very well. As mentioned earlier, the popularity lowered over the period of time due to take out support by the media. During the process, the members got recognition at national level. There was split among the members of the team and Aam Adami Party (AAP) was formed by Arvind Kejriwal. The hype of the movement has resulted into publicity of the new party. This case depicts that media's voice had raised a particular person and gave a platform to promote his actions. If the support would have been given till the end pass of stringent bill, then it would be said that media had done its job. But the support was taken out in between the process.

In 2011, when Anna Hazare met Irom Chanu Sharmila (Iron lady of Manipur) the case of movement against Armed Forces (Special Powers) Act, 1958 (AFSPA)- came into the picture. There was no or least publicity of this movement at national level. She had started the indefinite fast against The Draconian and Xenophobia Law in the year 2000 itself. As the government had given no attention to the same, the protest continued for 12 years. Having refused food and water for more than 500 weeks, she has been called "the world's longest hunger striker". On 2nd November 2000, in Malom, a town in the Imphal Valley of Manipur, ten civilians were allegedly shot and killed by the Assam Rifles, one of the Indian Paramilitary forces operating in the State, while waiting at a bus stop. The incident later came to be known to activists as the "Malom Massacre". The next day's local newspapers published graphic pictures of the dead bodies, including one of a 62-year old woman, Leisangbam Ibetomi, and 18-year old Sinam Chandramani, a 1988 National Child Bravery Award winner. It ignited mind of the young lady- Irom Chanu Sharmila. She started the protest from 2000. By 2004, Sharmila had become an "icon of public resistance". Following her procedural release on 2nd October 2006, for around four months, Irom Sharmila Chanu went to Raj Ghat, New Delhi, which she said was "to pay floral tribute to my idol, Mahatma Gandhi." Later that evening, Sharmila headed for Jantar Mantar for a protest demonstration where she was joined by students, human rights activists and other concerned citizens. On 6th October, she was re-arrested by the Delhi police for attempting suicide and was taken to the All India Institute of Medical Sciences, where she wrote letters to the Prime Minister, President, and Home Minister. At this time, she met and won the support of Nobel-laureate Shirin Ebadi, the Nobel Laureate and human rights activist, who promised to take up Sharmila's cause at the United Nations Human Rights Council. Sharmila's simple Gandhian fast is an epic protest that remains unparalleled in history. The government has not come with concrete plan for Armed Forces (Special Powers) Act, 1958 (AFSPA). The public of Manipur wants peace and development. Hence, rejection of the gun culture was demonstrated in the towns by burning the replica of guns - and footballs were replaced in their hands. Sharmila was awarded the 2007 Gwangju Prize for Human Rights, which is given to "an outstanding person or group, active in the promotion and advocacy of Peace, Democracy and Human Rights". She shared the award with Lenin Raghuvanshi of People's Vigilance Committee on Human Rights, a northeastern Indian human rights organization. In 2009, she was awarded the first Mayillama Award of the Mayilamma Foundation "for achievement of her nonviolent struggle in Manipur". In 2010, she won a lifetime achievement award from the Asian Human Rights Commission. Later that year, she won the Rabindranath Tagore Peace Prize of the Indian Institute of Planning and Management, which came with a cash award of 5,100,000 rupees, and the Sarva Gunah Sampannah "Award for Peace and Harmony" from the Signature Training Centre. The whole contribution of Irom Sharmila to Manipur is ignored by the media. The media had provided coverage for anti graft movement so called "People's movement" of Anna Hazare, but Irom Sharmila's work was completely neglected. Even Rajdeep Sardesai (Editor-in-Chief of IBN18 Network) said, "Anna Hazare became icon, but Irom Sharmila is forgotten".

In an environment where the event happened at any corner of the world gets disseminated within short period, the effectiveness of the same depends on how much time that event is shown on news. Media is a major influence in today's society. The media provides the public with information regarding current events however the media tends to submerge the information given and thus manipulates the public. Through false television portrayal, biased news coverage, erroneous stereotypes, and the submersion of information, the manipulation of the media is beyond belief. The media has its fair share of mistake yet many of these misrepresentations are not merely innocent mistakes but falsely revealed information. Their selectivity is highly questionable. The media creates stereotypes despite their efforts to not do so. Often times, the media determines whether or not the subject at hand is a positive or negative label. Never before has it been so important to have independent, honest voices and sources of information. We are - as a society - inundated and overwhelmed with a flood of information from a wide array of sources, but these sources of information, by and large, serve the powerful interests and individuals that own them. The main sources of information, for both public and official consumption, include the mainstream media, alternative media, academia and think tanks. The mainstream media is the most obvious in its inherent bias and manipulation. The mainstream media is owned directly by large private corporations, and through their boards of directors are connected with a plethora of other major global corporations and elite interests. Media manipulation is a series of related techniques in which partisans create an image or argument that favours their particular interests. Such tactics may include the use of logical fallacies and propaganda techniques, and often involve the suppression of information or points of view by crowding them out, by inducing other people or groups of people to stop listening to certain arguments, or by simply diverting attention elsewhere. There are various methods of mass media to distract minds of public.

Although a sizable portion of mass media offerings - particularly news, commentaries, documentaries, and other informational programmes - deal with highly controversial subjects, the major portion of mass media offerings are designed to serve an entertainment function. These programmes tend to avoid controversial issues and reflect beliefs and values sanctified by mass audience. Individuals become 'irrational victims of false wants' - the wants which corporations have thrust upon them, and continue to thrust upon them, through both the advertising in the media (with its continual exhortation to consume) and through the individualist consumption culture it promulgates. Sometimes information provided is loop sided or biased. During the invasion of Iraq in 2003 by the United States and its allies, casualty figures of their military personnel were highlighted and hardly any news on the figures for Iraqi civilians and its military personnel. News reported on websites appears more reliable and transparent though one has to be careful about the accuracy of the facts reported. The media news too can misrepresent information to serve the objectives of certain people or authorities in power. When Osama Bin Laden was assassinated by U.S. militants some of the news channels and newspapers had reported that "Obama is killed in secret operation of U.S. soldiers." When the respective channels got their blunder, they regretted it. In many Asian nations, there are limits to press freedom. Although the media is allowed to present news and its views as well as perspectives, it is barred from providing news that can potentially create unrest and violence. The Government has instituted the Official Secrets Act and Internal security act that allows it to detain anybody including those working in the media for inciting racial or religious violence. However, there is still a degree of freedom in these countries' press compared to other more conservative countries. We have access to news from all around the world and readers are invited to send their views and contributions to be published in the media. Thus, the media plays an important role in our lives as we cannot envisage a life without the daily reporting of national, regional and international news. It would be like returning to the Stone Ages. However, consumers must ensure the news reported in the media is accurate and not one-sided by looking at its contents critically and voicing their views on certain issues.

Usage of language also has its role in media. If a document is translated one then efforts are to be made for getting it most accurate. Mass media, despite its ability to project worldwide, is limited in its cross-ethnic compatibility by one simple attribute - language. Ethnicity, being largely developed by a divergence in geography, language, culture, genes and similarly, point of view, has the potential to be countered by a common source of information. Therefore, language, in the absence of translation, comprises a barrier to a worldwide community of debate and opinion, although it is also true that media within any given society may be split along class, political or regional lines. Furthermore, if the language is translated, the translator has room to shift a bias by choosing weighed words for translation. Language may also be seen as a political factor in mass media, particularly in instances where a society is characterized by a large number of languages spoken by its populace. The choice of language of mass media may represent a bias towards the group most likely to speak that language, and can limit the public participation by those who do not speak the language. The perfect example to depict the same is Maharashtra Navnirman Sena (MNS)'s growth. In Maharashtra evolution of new political party Maharashtra Navnirman Sena (MNS) and fame to its founder, Raj Thackerey is attributed to media promotion.

Even Raj Thackerey has agreed the same. He founded the party on March 9, 2006. **The agenda of MNS is to give prime importance to Marathi manus in Maharashtra. Marathi Manus to be the person living in the Maharashtra State and born to Marathi parents, or one, though of a different linguistic origin, born in Maharashtra, who speaks Marathi and loves Maharashtra. With this agenda Raj Thackerey started to oppose North Indians and non-Marathi speaking people staying in Maharashtra. He criticised "Politicisation of Chatth Puja". He got fame because of his fiery speeches against Samajwadi Party (SP) leader- Abu Asim Azmi, Bahujan Samajwadi Party (BSP) leader- Mayawati, and some Bihari leaders. Each and every statement made by him used to get publicised on news channels and in newspapers. According to Raj Thakare, for Hindi news channels he was a "Playing puppet". As he always insisted to speak in Marathi, his remarks were used to translate in Hindi. And hence there was distortion of statements made by him. He got negative publicity from the same and hence the party enjoyed fame within short span of time. MNS has 13 MLAs in state assembly, 1 MP in Lok Sabha, 28 corporators in Brihanmumbai Municipal Corporation, 28 corporators in Kalyan-Dombivali Municipal Corporation and 40 in Nashik Municipal Corporation. MNS would be the only regional party in India which got robust growth within six years. Raj Thakare had agreed that all this happen because of media only. He stated "Shivsena (another regional party from Maharashtra) was formed in 1966. Chagan Bhujbal was first MLA of Shivsena who got elected in 1985. Shivsena required 2 decades to spread its agenda in hook and nook of Maharashtra. On the other hand, MNS got the fame within 6 years itself. New avenues of mass communication have made this possible. I can share my thoughts with large number of people and dissemination process is also speedy." Currently, spat between Raj Thakare and Ajit Pawar (National Congress party leader) is going on. They are making derogatory statements against each other. Marathi news channels have got this as a burning issue. This had led to making negative publicity of these 2 individuals. Media is using the clash as a mean of entertainment and making many episodes of the same. As Raj Thackerey is an eloquent personality, his speeches are shown on almost all Marathi news channels.

** Given on official web site of Maharashtra Navnirman Sena: https://www.manase.org/en/maharashtra.php?mid=67&smid=15&id=279

"Paparazzi" is another issue related to exploitation of power by media. Paparazzi are the photographers who hunt and exploit athletes, celebrities, politicians, and other prominent people. Some celebrities have opined that it is attack on their privacy. In June, 2006 when Rakhi Sawant was kissed by Mika Singh, the news became front page article for many newspapers. And many episodes were made by Hindi news channels for almost a month. The photo was shown on almost all newspapers on its front page. Although the news is immaterial, only for the sake of publicity it was picked by majority of the newspapers. It is rightly said that celebrities are made to feed the journalists. On October 13, 2011, three young men, reportedly belonging to fringe Hindu groups, beat up Supreme Court lawyer and Team Anna member Prashant Bhushan at his chamber on Wednesday for his recent remarks supporting a referendum in Kashmir. The video footage of that was taken up by 'Times Now' news channel and it was shown as "Exclusive news" on that day. And the anchor was proudly stating that "Times Now is the only news channel who has got this video tape." How shameless the reporters are becoming!!!!

In Assam molestation case, a gallant television channel reporter Gaurav Jyoti Neog pictured the teenager rape case and shown the footage on local news channel. It was considered as "Exclusive news" on that day. The victim suffered mental illness. These are the events which suggest that there has to be censorship board for every news being aired at national level. Most recently,

**Hon'ble Finance Minister of India was shown dancing Gangam style on next day of the budget. Although there was no relation between the picture and the article written, just to attract the eyes it is publicised.

Media should have been the voice to educate masses and keep them updated with current affairs. But in current scenario of fierce competition, it is becoming voice of publicity. Whichever news that would entice the viewers is being shown again and again. Harsha Bhogale has once sarcastically said "One thing that I have learnt from being in media is - Never let the truth to come in the way of picture." That sarcasms is nothing but a fact.

** On page 2 of Times of India-Mumbai edition dated March 1, 2013

Bibliography:

WikiLeaks :-

1) http://wikileaks.org/
2) http://en.wikipedia.org/wiki/WikiLeaks

News of the world :-

1) http://www.youtube.com/watch?v=dZV8LGnnGgU
2) http://www.independent.co.uk/topic/NewsOfTheWorld
3) http://en.wikipedia.org/wiki/News_of_the_World

African revolutions :-

1) http://www.movements.org/case-study/entry/the-egyptian-peoples-revolution
2) Newspapers during the year 2011-12
3) http://www.pbs.org/newshour/bb/world/july-dec12/protests1_09-14.html

Movement by Anna Hazare & Irom Sharmila :-

1) Newspapers of last years
2) Television news
3) http://www.indiaagainstcorruption.com/
4) "Torchbearers for Victims in a Violent Land". The New York Times. Archived from the original on 22nd October, 2012.
5) http://indianmilitarynews.wordpress.com/tag/irom-chanu-sharmila/

P. Chidambaram's dancing photo :-

http://epaper.timesofindia.com/Default/Client.asp?Daily=TOIM&showST=true&login=default&pub=T

OI&Enter=true&Skin=TOINEW&AW=1362302527556

Overall information of Media & Media manipulation :-

1) Interview of Rajdeep Sardesai on YouTube
2) http://www.youtube.com/watch?v=3XcN-HyqSx8
3) http://www.shareyouressays.com/84329/short-essay-on-the-power-of-media.

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DIRECT TAXES
Supreme Court

Alternative Efficacious Remedy – Writ Jurisdiction of the High Court

CIT vs. Chhabil Dass Agarwal – Civil Appeal No. 6704 of 2013 dated 8th August, 2013.

The assessee, a Sikkim based non-Sikkimese, had filed his first return of income for A.Y. 1997-98. Upon assessment, it was discovered that he had a net profit of ` 5,78,832/- during the A.Y.1996-97. Since no return was filed by the assessee for the A.Y.1996-97 proceedings under section 147 of the Act were initiated against him for the said assessment year. Accordingly, on 26.05.1998 the notice was issued under section 148 of the Act. Further, the Revenue has found out that as on 31-3-1996 the assessee had brought forward closing capital of ` 1,73,90,397/- including the aforesaid net profit during the A.Y.1996-97. The same remained unexplained as the return of income for A.Y.1995-96 was also not furnished by the assessee. Hence, another notice under section 148 was issued to the assessee for the A.Y. 1995-96, dated 30-3-2000. It has come on record that the assessee did not comply with the aforesaid notices issued under section 148 of the Act.

The assessments were completed ex-parte under Section 144 of the Act raising a tax demand of ` 2,45,87,625/- and ` 6,32,972/- for A.Ys.1995-96 and 1996-97, respectively by orders dated 9-7-2001 and 28-3-2001, respectively. Further, penalty proceedings under Section 271(1)(c) of the Act were also initiated for both Assessment Years.

Aggrieved by the aforesaid, the assessee instead of exhausting the statutory remedy available under the Act, i.e., appeal before the Commissioner of Income-tax (Appeals), approached the High Court under Article 226 of the Constitution of India. The Writ Court delved into the merits of the case and quashed the order of the assessing authority by judgment and order dated 5-10-2010.

Being aggrieved by the aforesaid Judgement and Order of the Writ Court the Revenue filed an appeal before the Hon'ble Supreme Court questioning the correctness of the impugned Judgement of the High Court.

Their Lordships of the Supreme Court set aside the Judgement of the High Court and held that the Writ Court ought not to have entertained the Writ Petition filed by the assessee. Their Lordships further held that the Act provides complete machinery for the assessment/re-assessment of tax, imposition of penalty and for obtaining relief in respect of any improper orders passed by the Revenue Authorities, and the assessee could not be permitted to abandon that machinery and to invoke the jurisdiction of the High Court under Article 226 of the Constitution when he had adequate remedy open to him by an appeal to the Commissioner of Income-tax (Appeals). The remedy under the statute, however, must be effective and not a mere formality with no substantial relief. In *Ram and Shyam Co. vs. State of Haryana, [(1985) 3 SCC 267]* the Supreme Court has held that if an appeal is from "Caesar to Caesar's wife" the existence of alternative remedy would be a mirage and an exercise in futility. Neither the assessee-writ petitioner described the available alternate remedy under the Act as ineffectual and non-efficacious while invoking the writ jurisdiction of the High Court nor the High Court ascribed cogent and satisfactory reasons to have exercised its jurisdiction in the facts of the case.

Their Lordships further observed as under:

> "It is settled law that non-entertainment of petitions under writ jurisdiction by the High Court when an efficacious alternative remedy is available is a rule of self-imposed limitation. It is essentially a rule of policy, convenience and discretion rather than a rule of law. Undoubtedly, it is within the discretion of the High Court to grant relief under Article 226 despite the existence of an alternative remedy. However, the High Court must not interfere if there is an adequate efficacious alternative remedy available to the petitioner and he has approached the High Court without availing the same unless he has made out an exceptional case warranting such interference or there exist sufficient grounds to invoke the extraordinary jurisdiction under Article 226. (See: *State of U.P. vs. Mohammad Nooh, AIR 1958 SC 86; Titaghur Paper Mills Co. Ltd. vs. State of Orissa, (1983) 2 SCC 433; Harbanslal Sahnia vs. Indian Oil Corpn. Ltd., (2003) 2 SCC 107; State of H.P. vs. Gujarat Ambuja Cement Ltd., (2005) 6 SCC 499).*"



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DIRECT TAXES
High Court

1. Object of trust to benefit any particular community, Trust not entitled to registration u/s 2(15) of the Act

Gowri Asram vs. DCIT (2013) 356 ITR 328 (Mad)

Assessee trust filed an application for registration u/s 12AA of the IT Act. The application was rejected by Commissioner and upheld by Tribunal. On further appeal in High Court, the court approved the findings of CIT(A) and Tribunal and held that the objects and activities of the assesse to provide accommodation and facilities for the purposes of marriages and other auspicious functions of a particular community were not covered by the definition of "Charitable Purpose" within the meaning of s/2(15). Therefore the assessee was not entitled to registration.

2. Reasonable cause shown for failure to file audit report in time, no penalty leviable u/s 271B of the Act

CIT vs. Iqbalpur Co-operative Cane Development Union Ltd (2013) 356 ITR 343 (Uttarakhand)

Assessee was a co-operative society registered under the UP Co-operative Societies Act, 1965. The turnover of the assessee exceeded ` 1 Crore for the relevant previous years. By virtue of the provision to s. 44AB of the Act, the assessee was not required to have one more audit to be conducted in addition to the audit to be conducted by the Registrar in terms of 64 of the 1965 Act. As per prescribed limit mandated in s.44 AB such auditing was required to be conducted before the specified date and the auditor was required to sign and verify the audit report on or before the specified date. However there was delay and it was audited after the specified date. Penalty was levied u/s 271B of the Act. CIT(A) confirmed the penalty. Tribunal deleted penalty by viewing that the assessee had been able to establish that there was reasonable cause for the delay inasmuch as the appointment of the auditor was not within its domain nor was it within its domain to have the auditor to be appointed by the State Government to complete audit within the time. On appeal in High Court, it affirmed the findings of Tribunal deleted the penalty.

3. Income declared in Return or in books of account not assessable as an undisclosed Income

CIT vs. B. Satynarayana (2013) 356 ITR 323 (AP)

A search & seizure operation was carried on in the residential premises of the assessee u/s 132(1) of the Act. After the search & seizure, a notice u/s 158 BC of the Act was issued to the assessee for filing a return of Income for the block period. Assessee filed its Return of income for the block period as "NIL". Thereafter 143(2) notice was issued and four items were taken into account in calculating the undisclosed income in the block assessment. On appeal in Tribunal, the Tribunal allowed the appeal of the assessee. On revenues appeal in High Court, the High Court affirmed the findings of CIT(A) and Tribunal and held that the information sought to be relied upon by the Assessing Officer was already available in the balance sheets or the books of account of the assessee. As such, therefore additions were not valid.

4. Irrecoverable advance money given in an ice-cream manufacturing concern for construction of cold storage is not allowable as business loss or trading loss

Kwality Fun Foods & Restaurant (P) Ltd. vs. DCIT (2013) 356 ITR 170 (Mad).

An assessee an ice-cream manufacturing concern placed an order with an engineering concern for construction of a cold storage plant at its factory and advanced a sum for the purpose . The concern did not commence its business due to its financial constraints. The assese claimed deduction as "business loss" of the amount which was not recovered. The claim was disallowed by the Assessing Officer, CIT(A) and Tribunal. On appeal in High Court, the High Court affirmed the findings of lower authorities and held that when the amount advanced to a contractor for execution of work for the purpose of business becomes irrecoverable, the amount was not allowable as business loss.

5. Where the assessee establishing identity & genuineness of transactions, it is the duty of the Assessing Officer to investigate creditworthiness of investor

CIT vs. Peoples General Hospital Ltd. (2013) 356 ITR 65 (MP)

The Assessing Officer made an addition of ` 21,27,50,403 and assessed the income of the assessee on the ground that a non-resident Indian Company had made share subscription to the capital of the assessee. The Assessing Officer doubting the creditworthiness of the share applicant company and directed addition of amount of the share subscription provided by the company to the assessee. The Tribunal deleted the addition. On an appeal in High Court by the revenue, the High Court dismissed the appeal of the revenue and held that the non-resident Indian company by way of share subscription was in fact the money of the assessee. The assessee had established the identity of the investor who has provided the share subscription and that the transaction was genuine. Also the court held that though the assessee's contention was that the creditworthiness of the creditor was also established in this case, the establishment andidentity of the investor alone was to be seen. The addition was rightly deleted.

6. Due compliance of TDS while incurring expenditure by agent would help principal in claiming deductions on reimbursement

CIT vs. Gujarat Narmada Valley Fertilizers Co. Ltd. [2013] 35 taxmann.com 638 (Gujarat)

Assessee claimed deduction under section 40(a)(ia) of ` 6,93,372/- towards reimbursement of CHA charges paid to C & F agent and ` 76,00,509/- towards reimbursement of expenses towards consignment agents. The aforesaid expenses were disallowed by the Assessing Officer solely on the ground that the assessee has not deducted the TDS on the aforesaid accounts. Commissioner (Appeals) allowed such deductions observing that so far as the amount of ` 6,93,372/- is concerned as such the agent had already deducted the TDS and deposited in the Government and, therefore, there was no further liability of the assessee to deduct the TDS. With respect to ` 76,00,509/-, the CIT(A) observed that the said amount was towards the reimbursement of the expenses to the consignment agent, which was in fact incurred on behalf of the assessee and there was no profit element. The CIT(A) held that the assessee was not required to deduct the TDS on such reimbursement and, therefore, the Assessing Officer was not justified in making the above disallowance and accordingly directed to delete the same. On an appeal by revenue in Tribunal, the Tribunal held that the expenses were incurred by the agent on behalf of the assessee for transportation and other charges, which has been spelt out in the bill itself including the commission to the agent. The Tribunal also observed that the relation between the assessee and the agent was of principal and an agent. The Tribunal also observed that so far as the obligation to deduct tax at source from the payment of transport charges and other charges is concerned, the same was complied with by the agent, who had made payment on its behalf. On the aforesaid facts the Tribunal also observed that the circular relied upon by the revenue that it is the liability of the assessee as principal agent to deduct the TDS will not be applicable and the said circular would be applicable for payment made to principal to principal. On further appeal by revenue in High Court, the court confirmed the order passed by the Tribunal by deleting the disallowance of ` 6,93,372/- and ` 76,00,509/- claimed by the assessee under section 40(a)(ia) of the Income-tax Act by affirming the findings of lower authorities.

7. Utilising borrowed funds in advancing loans to its directors instead of using same for business purpose, disallowance is justified for claiming deduction of interest on borrowed capital under section 36(1)(iii) of the Act.

A. Murali & Co. (P.) Ltd. vs. ACIT [2013] 36 taxmann. com 126 (Madras)

The assessee was engaged in the business of export of beedi leaves and food grains. For the assessment year under consideration, the assessee declared certain loss. The Assessing Officer opined that the funds borrowed for business were diverted for advancing loans to Directors. He thus disallowed interest payment. The Commissioner (Appeals) as well as the Tribunal upheld the order of the Assessing Officer. On appeal in high Court, the court dismissed the appeal of assessee and supported the findings of lower authorities that when the assessee had not showed any such nexus of the borrowed funds utilised in the business and continued to be used in the business, there was no justification to allow interest u/s 36(1)(iii) of the Act.

8. Section 54 – Exemption from capital gains tax on investment in a residential house

CIT vs. Syed Ali Adil [2013] 89 DTR (AP) 386.

Two flats acquired with adjacent kitchens & toilets which have a common meeting point constitute 'one house' for the purpose of section 54, even though they were purchased by way of two separate deeds from two separate persons.

9. Section 40 (a)(ia) – Disallowance of certain expenditure for failure to deduct tax at source

CIT vs. Hardarshan Singh [2013] 89 DTR (Del.) 389.

The assessee was a transporter who also used to book cargo for other transporters for a commission. The assessee used to pay the amount received from clients, to the transporters, after retaining commission. On the issue of deduction of tax while paying to the transporters, it was held that the assessee being only a conduit for payment of sum, was not required to deduct tax at source.

10. Section 35DDA – Deduction for expenditure incurred on VRS by the assessee

CIT vs. State Bank of Mysore ITA no. 48 of 2013 dated 11th July 2013. Karnataka High Court.

The rigours of Rule 2BA apply only to the recipient of VRS emoluments and do not apply to the assessee (i.e. the company offering the VRS) while claiming deduction u/s 35DDA. In other words if Rule 2BA is not complied with the same can have an adverse impact in the hands of the recipient but the assessee claiming deduction u/s. 35DDA will be eligible to claim the deduction notwithstanding the fact that Rule 2BA has not been complied with.

11. Section 263 – Revision – AN intimation u/s. 143(1) cannot be revised by invoking the jurisdiction u/s. 263

CIT vs. LARK Chemicals-ITXA/2426, 2427, 2440/2011 (Bombay High Court. Order dated 6th August 2013.

In case of a reassessment where some issues accepted u/s. 143(1) are not dealt with, the limitation to invoke jurisdiction does not start from the order passed u/s. 147. In other words, the order passed u/s. 147 does not extend the limitation so as to cover even those issues which are untouched by the reassessment.

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DIRECT TAXES
Tribunal

REPORTED

1. Gift/Prizes/Awards/Rewards received by a non-professional sportsman – Shall not be income chargeable to tax under section 2(24) of the Act

Abhinav Bindra vs. DCIT (2013) 35 Taxmann.com 575 (Del.)(Trib.)

The assessee was a shooter who won medals international events including a gold medal in Olympic Games. During the previous year relevant to the impugned assessment year, the assessee received various awards/prizes/gifts from various Governments as well as local authorities. The Assessing Officer while finalising the assessment took a view that gifts, etc. received from a Government, local authorities and registered trusts are exempt, but the prizes received from other persons are liable to be taxed on the ground that the Circular No. 447 is inapplicable due to amendment in section 10(17A) and insertion of new section 56(2)(v). On appeal, the first Appellate Authority confirmed the view of the Assessing Officer and also enhanced the income of the Appellant by bringing the awards/rewards received from various Governments under the tax net. The assessee being aggrieved by the order of the Ld. CIT(A) preferred a further appeal before the Hon'ble Appellate Tribunal, Delhi. The Hon'ble Tribunal relying on the Circular No. 447 dated 22-1-1986 held that the CBDT has distinguished a sportsman who is a professional and who is not a professional. In the case of a professional sportsman, the award received by him will be in the nature of benefit in exercise of his profession, and therefore, will be liable to tax. But, in the case of a non-professional, the award received by him will be in the nature of gift or personal testimonial and it will not be liable to be taxed. Since, in the present case, the assessee is a non-professional sportsman, the rewards and awards received by him is not liable to be taxed.

2. Reassessment – Section 147 of the Income-tax Act, 1961 – Notice for reopening was served on one company and assessment order passed on another company, reassessment held to be void – Reasons for reopening of assessment were not furnished to assessee before completing reassessment proceedings – reassessment held to be invalid. A.Y.: 2002-03

Suez Tractebel S.A. vs. Dy. CIT (Int. Tax) – [(2013) 143 ITD 614 (Bang.)]

Assessee a company incorporated in Belgium entered into a joint venture with an Indian company. However, dispute arose between the, assessee and Indian joint venture, to settle the dispute Arbitration proceedings were initiated. Assessee appointed a fully owned Indian subsidiary to act as a conduit for the transaction between the assessee and the Indian joint venture. The Assessing Officer issued notice for reopening of assessment u/s. 148 to the Indian subsidiary and treating it as a representative of the assessee u/s. 163. Accordingly, the Assessing Officer completed reassessment u/s. 147 in hands of assessee without furnishing reasons for reopening of assessment.

On appeal the Tribunal held that if a notice is issued on one person and the order of assessment is passed on another person who has not been served the said notice, then such assessment order, passed u/s. 143(3) r.w.s. 148 is bad in law and *ab-initio*, null and void, as the order is passed by the Assessing Officer on an invalid assumption of jurisdiction. The Tribunal negated the contention of the Revenue that the aforesaid error on the part of the Assessing Officer, of issuing a notice u/s. 148 on one person in one capacity and completion of the assessment on another person who had not been served the said notice is curable defect.

On issue of non-communication of reasons for reopening, the Tribunal held that where reasons recorded by Assessing Officer for initiating reassessment proceedings were never furnished to assessee before completion of assessment despite request, subsequent furnishing of such reasons by Commissioner (Appeals) would not mitigate illegality of action of depriving assessee its right to raise objections, and therefore, assessment order passed was invalid and unsustainable on this ground also.

UNREPORTED

3. Set off of losses – Section 70(1) r.w.s. 73(1) – Set off of losses suffered in regular business activity against the income from Speculation income – permissible. A.Y. 2009-10

ITO vs. Mittal Investments [I.T.A. No.: 4774/Mum/2012; order dated 30-8-2013; Mumbai Tribunal]

The Appellate Tribunal in this case allowed the claim of the assessee by observing that section 70(1) of the Act provides that where the net result for any assessment year in respect of any source falling under any head of income other than "Capital gains", is a loss, the assessee shall be entitled to have the amount of such loss set off against his income from any other source under the same head. This provision is subject to other provisions of the Act. At this juncture it is relevant to consider section 73(1) which deals with loss in speculation business. It provides that any loss computed in respect of speculation business carried on by the assessee shall not be set off except against profits and gains, if any, of another speculation business. When we consider section 73(1) in juxtaposition to section 70(1), the picture which emerges is that loss from one source under the head "Profits and gains of business or profession" is eligible for set off against another source under the same head. As both speculation business and regular business fall under the head Chapter IV-D, such adjustment is permissible except to the extent contained in section 73(1). The latter provision, in turn, prohibits the setting off of loss from speculation business against income from non-speculation business. In-so-far as the facts of the instant case are concerned, we find that the assessee claimed set off of speculation income (not speculation loss) against the loss from regular business. Such a course of set off is fully permissible as per the relevant provisions.

4. Levy of concealment penalty – Section 271(1)(c) – Books of accounts duly audited and examined by the A.O. without any adverse remark – Voluntary surrender of income during the course of assessment proceedings

to buy peace of mind and to avoid litigation – Penalty not leviable. A.Y. 2009-10

Smt. Vinay Sharma vs. ITO [I.T.A. No.: 871/ Del/2013; Order dated: 30-8-2013; Delhi Tribunal]

The assessee in this case was engaged in supply of earth soil, purchased from farmers by way of excavation of land from their fields and sold to other contractors for land filling at various sites. The assessee filed its return of income declaring net income of ` 4,35,757/-. The A.O. during the course of the assessment proceedings asked the assessee to justify the cash payment made to the farmers for purchase of earth/ soil and also asked the assessee to produce them. The assessee in reply submitted that it had already filed the relevant details and therefore the profit declared deserved to be accepted. However, the assessee voluntarily offered to be assessed at a net profit of ` 75,00,000/- inclusive of the income declared in the return subject to the condition that no penalty is leviable. The A.O. passed the assessment order as per the declaration made by the assessee. Subsequently the A.O. levied penalty under section 271(1)(c) of the Act on the income declared by the assessee during the course of assessment proceedings. On appeal the first Appellate Authority confirmed the action of the A.O. The assessee being aggrieved by the order passed by the Learned CIT(A) preferred further appeal to the Delhi Appellate Tribunal. Hon'ble Tribunal was pleased to cancel the penalty levied by observing that the finding in assessment order is not of concealed income but that of a voluntary surrender and hence cannot be made a sole basis for imposing penalty. Thus, the finding in the assessment order itself does not militate against the stand taken by the assessee that it was a voluntary surrender. In view of the above facts and circumstances we have no hesitation to hold that the assessee made this surrender offer voluntary in peculiar circumstances of this case. Assessing Officer himself accepted it as voluntary offer, reproduced the same in his order and assessed the income on exactly the same amount. There is no reference to any investigation or adverse material. Thus, the assessee's offer is to be held as voluntary surrender, accepted by the department accordingly. There being no adverse material available on record or any reliance thereon, the observations of Assessing Officer and CIT(A) about concealment or inaccurate particulars are not borne from the record and the same are contradictory to each other. In view thereof, we delete the penalty imposed on the assessee.

5. Depreciation – Section 32 of the Income-tax Act, 1961 – Even if a vehicle is used in contravention of Rules provided by Transportation Department, assessee is eligible to claim depreciation under the Act. A.Y.: 2005-06

R. Vishwanath vs. ITO – [I.T.A. No.: 1726 / Hyd / 2012; Order dated: 24-5-2013; Hyderabad Tribunal]

The assessee was engaged in the business of hiring of vehicles for transportation. In the course of assessment proceedings the Assessing Officer found that the assessee did not have a certificate and permission from the authorities to transport the goods and transporting goods on a chassis without a body was violation of law. Accordingly, the Assessing Officer disallowed the claim for depreciation on the vehicle, as the same was not put to use during the relevant previous year.

On appeal the Tribunal held that under the Income-tax Act, to allow the claim of depreciation, the assessee has only to prove that he has put the vehicle to use before the relevant date. If the vehicle is used in contravention of the Rules provided by the respective Transportation Department, it would not affect the claim of depreciation under the Income-tax Act. It is for the respective transportation department to take action for the contravention of its Rules, but the Income-tax authorities cannot disallow the claim of depreciation for such contravention.

6. Rectification of mistake – Section 154 of the Income-tax Act, 1961 – Limitation – Intimation issued u/s. 143(1) in June1999 not served on assessee – In March, 2006 assessee having come to know that credit of TDS amount was not properly granted, preferred an application u/s. 154 seeking rectification of the intimation – Assessing Officer rejected the Rectification Application, as filed beyond the limitation prescribed – Held, as the impugned intimation was not sent to assessee, question of limitation as raised by Assessing Officer was not justified – The Assessing Officer directed to entertain the rectification application and dispose it of as per law. A.Y. 1998-99

Liberty Pesticides & Fertilizer Ltd. vs. Asst. CIT – [I.T.A. No.: 337/Ahd/2010; Order dated: 10-5-2013; Ahmedabad Tribunal]

Return of income filed by assessee was processed u/s. 143(1) and intimation was issued on 30-6-1999, without giving proper credit of tax deducted at source. The said intimation not served on assessee and remained in the department's record. In the year 2006 the Assessing Officer called upon assessee to make payment of outstanding demand for year. Upon enquiries made, the assessee came to know that demand was raised only because credit of TDS amount was not properly being granted. Accordingly, the assessee made an application u/s. 154 seeking rectification of intimation issued u/s. 143(1) dated 30-6-1999, in March 2006. Assessing Officer rejected Rectification Application on ground of limitation holding that return for assessment year 1998-99 was processed u/s. 143(1) on 30-6-1999; therefore, time limit u/s. 154(7) of four years expired on 31-3-2004.

On appeal Tribunal relying upon the circulars issued by the CBDT, being Circular No. 73, dated 7-1-1972 and Circular No. 4 dated 20-6-2012 held that CBDT being conscious about the limitation prescribed u/s. 154(7) has directed that in the cases of genuine hardship the Assessing Officer has to make appropriate corrections in the figures of disputed arrears demand after due verification and reconciliation as also after examining the merits of the case, by way of rectification, irrespective of the fact that the period of limitation of four years as provided u/s. 154(7) has elapsed. The Tribunal further observed that an authority must not be allowed to take advantage of its own default or failure. The authority has to act in accordance with law. Thus, when as per law an intimation raising demand was required to be sent to the assessee, the Assessing Officer was duty bound to send the same. In the present case, as the Assessing Officer had failed to discharge its statutory duty, the assessee is justified in raising this issue as the only recourse available to it was to move a application u/s. 154 to get its grievance redressed.

7. Reassessment – Section 147 of the Income-tax Act, 1961 – Within four years – Return processed under section 143(1) – While reopening such case it is essential that Assessing Officer should have tangible material before him justifying his reason to believe that income had escaped assessment.

Transfer – Section 2(47) of the Income-tax Act, 1961 – Section 53A of the Transfer of Property Act, 1882 – During the previous year only an agreement to develop the property was entered into, whereby assessee assigned his landed property in favour of joint venture between him and developer, without

commencement of construction activity – Held there was no transfer as contemplated u/s. 2(47) so as to attract capital gains tax. A.Y. 2006 – 07

S. Ranjith Reddy vs. Dy. CIT - [I.T.A. Nos. 290, 292 & 336/Hyd/2012; Order dated: 7-6-2013; Hyderabad Tribunal]

The assessment was completed u/s. 143(1) of the Act. Thereafter, on 15-12-2009, the Assessing Officer reopened the assessment by issuing notice u/s. 148 of the Act on the reason that the assessee entered into an Agreement during the year whereby land was to be handed over by the assessee for development. In lieu thereof, the assessee was to receive developed plots. The Assessing Officer was of the opinion that the value of developed plots so received were taxable in the year of execution of the development agreement, as it was like an agreement for sale and the transfer of land is a transfer as per sec. 2(47)(v) of the Act.

On appeal quashing the reassessment proceedings the Tribunal held that even in a case where only intimation is issued u/s. 143(1) (a), it is essential that the Assessing Officer should have before him tangible material justifying his reason to believe that income had escaped assessment. The Tribunal observed that the information that was considered by the Assessing Officer to reopen the assessment in the present case, was already on record and if the Assessing Officer failed to consider the same for framing the assessment by issuing notice u/s. 143(2), he was precluded from considering the same material for reopening of the assessment u/s. 147 r.w.s. 148.

On merits the Tribunal held that during the previous year nothing happened other than execution of agreement, whereby assessee assigned his landed property in favour of joint venture between assessee and developer as such, there was no transfer u/s. 2(47) as there was no extinguishment of rights or receipt of consideration. Further, there was no progress or construction had taken place on said landed property since date of signing of the agreement thus, it could not be said that developer had performed its obligations as envisaged in section 53A of Transfer of Property Act, and therefore, there was no transfer as per section 2(47) so as to attract capital gain tax liability.

8. Income from other sources – Section 56 of the Income-tax Act, 1961 – Assessee as per divorce agreement executed in year 1990 received lump sum payments from her ex-husband in August, 2007 – Held, receipt by assessee represented accumulated monthly installments of alimony, which had been received as a consideration for relinquishing all her past and future claims, and, therefore, provisions of section 56(2)(vi) would not be applicable. A.Y. 2008-09

Asstt. CIT vs. Meenakshi Khanna - [I.T.A. No.: 644 / Del / 2012; Order dated 14-6-2013; Delhi Tribunal]

During previous year, assessee received lump sum payment from her ex-husband, a foreign national. She did not admit any tax liability on said amount. Assessing Officer held that as the amount was received without consideration and the assessee had not received the same from persons covered under definition of relative as provided in exceptions to section 56(2)(vi), he treated amount received by assessee as income from other sources taxable under provisions of section 56(2)(vi).

On appeal the Tribunal held a lump sum receipt by assessee from her ex-husband represented accumulated monthly installments of alimony, which had been received as a consideration for relinquishing all her past and future claims, therefore, there was sufficient consideration in getting said amount thus, provisions of section 56(2)(vi) were not applicable.

CA Sunil K. Jain

DIRECT TAXES
Statutes, Circulars & Notifications

Notifications

Income-tax (Eleventh Amendment) Rules, 2013 – Amendment in Rule 21 AB and insertion of Form 10F

The Central Board of Direct Taxes made the rules further to amend the Income-tax Rules, 1962, which may be called the Income-tax (11th Amendment) Rules, 2013 and shall be deemed to have come into force with effect from the 1st day of April, 2013, in connection with Certificate for claiming relief under an agreement referred to in sections 90 and 90A which states that the following information shall be provided by an assessee in newly inserted Form No. 10F : Status (individual, company, firm etc.) of the assessee; nationality (in case of an individual) or country or specified territory of incorporation or registration (in case of others); assessee's tax identification number in the country or specified territory of residence and in case there is no such number, then, a unique number on the basis of which the person is identified by the Government of the country or the specified territory of which the asseessee claims to be a resident; period for which the residential status, as mentioned in the certificate referred to in sub-section (4) of section 90 or sub-section (4) of section 90A, is applicable; and address of the assessee in the country or specified territory outside India, during the period for which the certificate, as mentioned in (iv) above, is applicable. The assessee shall also keep and maintain such documents as are necessary to substantiate the information provided under sub-rule (1) and an income-tax authority may require the assessee to provide the said documents in relation to a claim by the said assessee of any relief under an agreement referred to in sub-section (1) of section 90 or sub-section (1) of section 90A, as the case may be." Therefore in Appendix II, after Form No. 10E, Form 10F has been inserted.

(Notification No. 57/2013 dt. 1-8-2013)

Income-tax (Twelfth Amendment) Rules, 2013 – Substitution of Rule 37BB and Form Nos. 15CA and 15CB in connection with payment to non-resident

The Central Board of Direct Taxes made the rules further to amend the Income-tax Rules, 1962 which may be called the Income-tax (12th Amendment) Rules, 2013 and shall come into force on the 1st day of October, 2013. Accordingly for Rule 37BB, the following Rule has been substituted

(1) The person responsible for making any payment to a non-resident, not being a company, or to a foreign company shall furnish the following, namely:—

(i) The information in Part A of Form No. 15CA, if the amount of payment does not exceed fifty thousand rupees and the aggregate of such payments made during the financial year does not exceed two lakh fifty thousand rupees;

(ii) The information in Part B of Form No.15CA, if the payment is not chargeable to tax and is of the nature specified in column (3) of the specified list;

(iii) The information in Part C of Form No.15CA for payments other than the payments referred in clause (i) and clause (ii) after obtaining—

(a) A certificate in Form No. 15CB from an accountant as defined in the Explanation below sub-section (2) of section 288; or

(b) A certificate from the Assessing Officer under section 197; or

(c) An order from the Assessing Officer under sub-section (2) or sub-section (3) of section 195.

(2) The information in Form No. 15CA shall be furnished by the person electronically to the website designated by the Income-tax Department and thereafter signed printout of the said form shall be submitted to the authorised dealer, prior to remitting the payment.

(3) An income-tax authority may require the authorised dealer to furnish the signed printout referred to in sub-rule (2) for the purposes of any proceedings under the Act.

(4) The Director General of Income-tax (Systems) shall specify the procedures, formats and standards for ensuring secure capture, transmission of data and shall also be responsible for the day-to-day administration in relation to furnishing the information in the manner specified.

A specified list also refers to the payments of the nature as indicated in the said notification.

(Notification No. 58/2013 dated 5-8-2013)

Income-tax (Thirteenth Amendment) Rules, 2013 – Substitution of Rule 12C and Form No. 64 regarding statement under sub-section (2) of section 115U

The Central Board of Direct Taxes made the rules further to amend the Income-tax Rules, 1962, called the Income-tax (13th Amendment) Rules, 2013 and shall come into force on the date of their publication in the Official Gazette. Accordingly for Rule 12C, the following rules have been substituted, namely:—

(1) The statement of income paid or credited shall be furnished by the 30th November of the Financial year following the previous year during which such income is paid or credited, to the Chief Commissioner or Commissioner of Income-tax, within whose jurisdiction, the principal office of the Venture Capital Company or the venture Capital Fund, as the case may be, is situated. (2) The statement of income paid or credited which is to be furnished under sub-section (2) of section 115U by the Venture Capital Company or the Venture Capital Fund, as the case may be, shall be in Form No. 64, duly verified by an accountant in the manner indicated therein and shall be furnished electronically under digital signature. (3) The Director General of Income-tax (Systems) shall specify the procedure for filing of Form No. 64 and shall also be responsible for evolving and implementing appropriate security, archival and retrieval policies in relation to the statements so furnished.;

Further in Appendix-II, for Form No. 64, has also been substituted.

(Notification No. 59/2013 dated 5-8-2013)

Section 35(1)(ii) of the Income-tax Act, 1961 – Scientific Research Expenditure – Approved Scientific Research Associations/Institutions

National Institute of Mental Health and Neuro Science (NIMHANS) Bangalore, (PAN-AABTN6120B), Centre for Development of Telematics (C-DOT), New Delhi (PAN-AAATC3895K) and The Indian Institute of Technology, Gandhi Nagar, (PAN-AAAT17352M) have been approved by the Central Government for the purpose of clause (ii) of sub-section (1) of section 35 of the Income-tax Act, 1961 (said Act), read with Rules 5C and 5E of the Income-tax Rules, 1962 (said Rules), for 2012-2013, from 1-4-2002, and 1-4-2012 respectively onwards in the category of 'University, College or Other Institution' , 'Scientific Research Association', 'University, College or Other Institution' respectively subject to the conditions mentioned in the respective notifications.

(Notification Nos. 60-62-65/2013 dated 7-8-2013, 13-8-2013 and 22-8-2013 respectively)

Section 90 of the Income-tax Act, 1961 – Double Taxation Agreement – agreement for avoidance of double taxation and prevention of fiscal evasion with foreign countries – Sweden – amendment in Botification No. GSR 705(e), dated 17-12-1997

A Protocol amending the convention between the Government of the Republic of India and the Government of the Kingdom of Sweden for the avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to taxes on Income and on Capital has been signed.

The date of entry into force of the said Protocol is the 16th day of August, 2013, being the thirtieth day after the receipt of the later of the notifications of the completion of the procedures required by the respective laws for the entry into force of this Protocol, in accordance with Paragraph 2 of Article 3 of the said Protocol. Now in exercise of the powers conferred by section 90 of the Income- tax Act, 1961 (43 of 1961), the Central Government hereby directs that all the provisions of the said Protocol, as set out thereto, shall be given effect to in the Union of India with effect from the 16th August, 2013.

(Notification No. 63/2013 dated 14-8-2013)

Section 10(48) of the Income-tax Act, 1961 – exemptions – Foreign oil company selling crude oil in India – Notified foreign oil company

The Central Government, having regard to the national interest, notified for the purposes of the said clause, the National Iranian Oil Company, as the foreign company and the Memorandum of Understanding entered between the Government of India in the Ministry of Petroleum and Natural Gas and the Central Bank of Iran, as the agreement subject to the condition that the said foreign company shall not engage in any activity in India, other than the receipt of income under the agreement aforesaid.

This notification shall be deemed to have come into effect from the 20th day of January, 2013.

(Notification no. 64/2013 dated 19-8-2013)

Circulars

Circulation of the published notifications of the agreement between the Government of the Republic of India and the Government of the Oriental Republic of Uruguay for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to taxes on income and on capital in the Gazette of India (Extraordinary)

The Notification along with the Agreement between the Government of the Republic of India and the Government of the Oriental Republic of Uruguay for the avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to taxes on income and on capital was published on 5th July, 2013 through S.O. 2081(E).

Notification No. 53/2013/500/138/2002-FTD-II.

2. All the provisions of the said Agreement between the Government of the Republic of India and the Government of the Oriental Republic of Uruguay for the avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to taxes on income and on capital shall be given effect to in the Union of India with effect from the 1st day of April, 2014.

(Circular [F. No. 500/138/2002-FTD-II], dated 16-8-2013)

Instructions

Section 143 of the Income-tax Act, 1961 – Assessment – General – procedure and criteria for selection of scrutiny cases under compulsory manual selection of returns during Financial Year 2013-14

In supersession of earlier instructions on the above subject, the Board laid down the following procedure and criteria for manual selection of returns/cases for scrutiny during the financial year 2013-14:

2. The targets for completion of scrutiny assessments and strategy of framing quality assessments as contained in Central Action Plan document for Financial Year 2013-2014 has to be complied with. It is being reiterated that all scrutiny assessments including the cases selected under manual criteria will be completed through AST system software only.

3. The following categories of cases/returns shall be compulsorily scrutinised:—

(a) Cases where value of international transaction as defined under section 92B of IT Act exceeds ` 15 crores.

(b) Cases involving addition in an earlier assessment year on the issue of transfer pricing in excess of ` 10 crores or more which is confirmed in appeal or is pending before an appellate authority.

(c) Cases involving addition in an earlier assessment year in excess of ` 10 lakhs on a substantial and recurring question of law or fact which is confirmed in appeal or is pending before an appellate authority.

(d) All assessments pertaining to survey under section 133A of the IT Act excluding the cases where there are no impounded books of account/documents and returned income excluding any disclosure made during the survey is not less than returned income of preceding assessment year. However, where assessee retracts the disclosure made during the survey will not be covered by this exclusion.

(e) Assessment in search and seizure cases to be made under sections 158B, 158BC, 158BD, 153A & 153C read with section 143(3) of the IT Act.

(f) All returns filed in response to notice under sections 147/148 of the IT Act.

(g) Cases claiming exemption of income under section 11 or under section 10(23C) which are hit by proviso(s) to section 2(15) of IT Act.

(h) Entities which received donations from countries abroad in excess of ` One crore during the Financial Year 2011-12 (relevant for the A.Y. 2012-13) under the provisions of Foreign Contribution Regulation Act (FCRA). Such information is maintained by Ministry of Home Affairs and is available on its Website (http://mha.nic.in/fcra.htm). Respective Cadre-Controlling Chief-Commissioners/ Directors-General of Income-tax may identify the cases pertaining to their respective Jurisdiction after downloading from the website and disseminate the information to various field offices.

(i) Cases in respect of which information is received from other Government Department(s) or other authorities pointing out tax-evasion. The Assessing Officer shall record reasons in such cases and take approval from jurisdictional CCIT/DGIT before selecting such case for scrutiny.

4. In order to ensure the quality of assessment orders, CCsIT/DGsIT would evolve suitable monitoring mechanism. The shall analyse at least 50 quality assessments of their respective charges and send the report to respective Zonal Member with copy to Member (IT) with suggestions for improvement by 30th April, 2014. CCsIT/DGsIT would further ensure that cases selected for publication in 'let us share' are picked up from quality assessments as reported.

(Instruction No. 10/2013 [F. No. 225/107/2013/ITA. II], dated 5-8-2013)

Action on unmatched challans reflected in Form 26AS – direction of the Hon'ble Delhi HC in the case *'Court on its own motion vs. UOI & Ors. in WP(C) 2659/2012 & WP(C) 5443/2012 [2013] 31 taxmann.com 31 (Delhi) :*

1. The Hon'ble Delhi High Court vide its judgment in the case *Court On its Own Motion vs. UOI and Ors (W.P.) (C) 2659/2012 & W.P. (C) 5443/2012, dated 14-3-2013)* has issued seven mandamuses for necessary action by Income-tax Department, one of which is regarding the issue of 'Unmatched Challans' reflected in Form 26AS where the report by the deductor in the TDS statement are not found available in the OLTAS database resulting in TDS mismatch.

2. The unmatched challans belong to two categories of TDS statements, viz. -

(i) Statements pertaining to F.Y. 2011-12 and earlier which have been processed by jurisdictional TDS Assessing Officers [hereinafter AOs (TDS)]

(ii) Statements pertaining to FY 2012-13 onwards, now processed by CPC(TDS)

3. The Hon'ble Delhi High Court (reference: para 42 of the order), has directed that

"...with regard to unverified TDS under the heading 'U' in Form 26AS for verification and correcting unmatched challans within a time period, which should be fixed by the Board keeping in mind the date of filing of return and processing of return by the assessing officer."

4. In view of the above direction of the Hon'ble High Court, it has been decided by the Board that the CPC (TDS)/AOs (TDS) shall immediately issue letters to the deductors, in whose case TDS challans are unmatched, with a view to verify and correct these challans. If necessary, the deductors may be asked to file correction statements, as per the procedure laid down and necessary follow up action be taken. The task should be completed by 31st December, 2013 for FY 2012-13 in the case of CPC (TDS) and FYs 2011-12 & earlier in case of AOs (TDS).

(Instruction No. 11/2013 [F. No. 275/03/2013-IT (B)], dated 27-8-2013)

CA Tarunkumar Singhal & CA Sunil Lala

INTERNATIONAL TAXATION
Case Law Update

A] AUTHORITY FOR ADVANCE RULINGS

I. Section 245R – Application for advance ruling rejected as the question raised in the application already reported in the return of income filed by the applicant and notice under section 143(2) also issued before filing of application

Hyosung Corporation, Korea, In re [2013] 36 taxmann.com 150 (AAR – New Delhi)

Facts

1 The applicant, a company based in Korea, entered into a contract with PGCIL for offshore supply of equipments and materials and also performed supervisory activities in India.

2 The applicant filed applications before the Hon'ble AAR for various projects after filing the return of income for the relevant Assessment Years.

3 The applicant sought an advance ruling on taxability in India of the income received/ receivable by the applicant for offshore supply of equipment and provision of supervisory activities.

Ruling

1 The Hon'ble AAR held that even when a return was filed but the question was not pending adjudication, there is no jurisdictional bar in admitting the application. Only when the question posed for advance ruling was pending determination then the jurisdictional bar applies. Mere filing of return does not attract the bar, unless the question raised in the application for advance ruling was an issue in the return filed.

2 In the instant cases, notices under Section 143(2) were already issued before filing of the application. The transaction on those where the rulings of the AAR were sought, were admittedly shown in the return of income-tax filed.

3 With the issue of notice under Section 143(2) of the Act, particulars of income and claims of the assessee in the return were pending for adjudication before the AO and hence the bar created under the proviso to Section 245R(2) would apply. Accordingly, the Hon'ble AAR rejected the applications for advance ruling.

4 The Hon'ble AAR rejected the plea of applicant that the bar contained in Section 245R(2) was patently discriminatory since bar is applicable only to non-resident applicant and not to resident applicant and held that

the Hon'ble AAR had no jurisdiction to deal with such an issue. It held that it is settled position in law that any authority created under a statute cannot pronounce upon the constitutional validity or vires of any provision of the Act.

II. Section 245R read with Rule 19 of Authority for Advance Rulings (Procedure) Rules, 1996 – Application for rectification under Rule 19 rejected as mistake not a mistake "apparent from record" – Earlier wrong (by earlier AAR bench) can't be a basis for committing same mistake again

CTCI Overseas Corporation Ltd., In re [2013] 36 taxmann.com 268 (AAR – New Delhi)

Facts

1 The applicant had filed an application before the Hon'ble AAR seeking a ruling on the taxability in India of income the received/ receivable from offshore supplies to Petronet LNG Ltd. in respect of contract for engineering, procurement, construction and commission entered by the Consortium formed by the applicant.

2 The Hon'ble AAR vide its order dated 1 February 2013 ruled that the above income was not taxable in India and also observed that that the taxable unit in respect of the transaction entered by the applicant was an Association of Persons ("AOP") within the meaning of Section 2(31) (v) of the Act.

3 The Revenue had filed an application under Rule 19 of Authority of Advance Rulings (Procedure) Rules, 1996 ('Rules') contending that the ruling was given considering that the applicant alone was the assessee under the Income-tax Act, 1961 ('the Act') thereby ignoring the effect of its finding that the recipient was an AOP.

4 The Hon'ble AAR allowed the rectification application of the Revenue vide its order dated 27 August 2012 observing that that the earlier ruling of the AAR was inconsistent with the finding that the applicant was an AOP and posted the application for fresh hearing.

5 The applicant filed the instant application under Rule 19 contending that the original AAR order did not cite any reasons for coming to conclusion as to why the consortium between the applicant and CINDA Engineering and Construction Pvt. Ltd. would constitute an AOP.

Ruling

1 The Hon'ble AAR held that "mistake apparent from record" under Rule 19 means such error which is apparent on mere looking at the records, without going into long-drawn process of reasoning. It observed that the exercise which the applicant wants to be undertaken cannot come within the ambit of rectification of error apparent from record.

2 The Hon'ble AAR rejected the arguments of the Applicant that since while disposing of earlier application, the Authority had expanded the scope and ambit of expression apparent from record, same parameters should be used while disposing of this application. It held that even if it is accepted for the sake of argument that the authority did not keep in view the appropriate parameters while dealing with the earlier application under Rule 19, the concept of negative inequality cannot be pressed into service. A party cannot claim that since something wrong has been done in another case, direction should be given to do another wrong. It would not be setting a wrong right, but would be perpetuating another wrong.

B] HIGH COURT JUDGMENTS

III. Article 226 of the Constitution of India, Rules 18 and 19 of AAR rules – AAR cannot decline a ruling merely

on the assumption that applicant has illegally circumvented SEBI Guidelines when SEBI did not find any violation. – Application for modification/ rectification under Rule 18 and Rule 19 of Advance Ruling Rules wouldn't lie against AAR's order declining a ruling.

Mahindra BT Investment Co. (Mauritius) Ltd. vs. Director of Income-tax, [2013] 35 taxmann.com 535 (Bombay)

Facts

1 The petitioner, a company incorporated and tax resident in Mauritius, filed a petition under Article 226 before the Hon'ble High Court against the order of the Hon'ble AAR refusing to give a ruling on the questions formulated while admitting the application of the petitioner on the ground that the applicant has illegally circumvented SEBI Guidelines.

2 A clarification was issued by SEBI dated 7 May 2013, clarifying that there was no breach/ circumvention of the SEBI Guideline 2.6.1.

Judgment

1 As regards the Revenues contention that in view of the communication dated 7 May 2013 the petitioner should move the Authority for appropriate relief and the Court should not entertain the petition, the Hon'ble High Court held that Rule 18 would not apply as in the instant case as no ruling was rendered by the Authority in view of its refusal to give a ruling. Further rectification application would also not lie against the impugned order of Hon'ble AAR declining to give a ruling since Rule 19 presupposes that the order to be rectified is an order on which a ruling is rendered.

2 The Hon'ble High Court held that the Authority can exercise its discretion not to give a ruling only in cases where fraud and/ or illegality is ex facie evident or the fraud or illegality has been established in some proceedings and such a discretion cannot be exercised on a mere suspicion of illegality or fraud having taken place.

3 The Hon'ble High Court observed that the Authority had refused to give a ruling merely on the assumption that an illegality had been committed. In the instant case, there was in fact no contravention of the SEBI Guidelines by the petitioner as per the communication received by the Director of income-tax from SEBI. In these circumstances, the Authority was not correct in refusing to give a ruling at the time of final hearing in the absence of any fresh material, merely on the basis of the suspicion.

4 Accordingly, the Hon'ble High Court set aside the impugned order of the Hon'ble AAR with direction to the AAR to give ruling on the questions framed by the applicant-writ petitioner.

IV. Expatriates – Tax paid on employee's behalf is non-monetary perquisite and covered u/s 10(10CC) - Amounts paid by foreign employer to pension, social security funds and for medical benefits of its expatriate employers in India were not includible in salary as perquisites in hands of the employees under section 17(2)(v) –Hypothetical tax not taxable income in the hands of the employees

Yoshio Kubo vs. CIT [2013] 36 taxmann.com 1 (Delhi)

Facts

Payment of Income Tax on behalf of the employee

1 The assessees, expatriate employees, received tax-free income from their non-resident employers. The tax on such income was borne by the employers and the assessees claimed exemption on such payment under Section 10(10CC) under the Act.

Social security, pension and medical insurance contributions

2 The foreign employer of the assessees had made contributions in compliance with legal requirements in the country of its incorporation, towards social security benefits of the employees. These employees were seconded to India to serve in the Indian subsidiary, or assist in the Indian operations of the foreign company. The Revenue sought to tax such contributions.

Perquisite value of rent free accommodation provided to an employee, in view of Rule 3 of IT Rules, 1962

3 The Revenue had also included the amount of tax paid by the employer while computing the perquisite value of rent-free accommodation provided to employee according to Rule 3 of the Income-tax Rules, 1962 ('the Rues').

Hypothetical Tax

4 The expatriate employee in their Computation of income offered actual salary received as income after deducting hypothetical tax. The Revenue contended that the employee was liable to include the hypothetical tax in their income.

Grossing up under Section 195-A

5 The Revenue also held that the tax borne by the employer was a monetary perquisite and that therefore further tax thereon should be added to the salary by a multiple stage grossing up process. The tax on other perquisites were also sought to be grossed up.

Assessability of TDS refunds received by the employee

6 Certain refunds were payable in respect of the TDS amounts deposited with the income tax authorities, by the assessee's employers. The AO contended that these excess amounts (refunds) were not exempt u/s 10(5B) but were taxable income of the assessee, as "disguised perquisites".

Legal expenses incurred

7 The foreign employers had paid to an accounting firm for filing of return of income, representation of appeals, rectification, etc of the seconded employees. The AO treated the said sum as perquisites in the hands of the assessee.

Judgment

Payment of Income Tax on behalf of the employee

1 The Hon'ble High Court held that amount paid directly by the employer to discharge its employees' income tax liability was covered by Section 10(10CC) of the Act. Correspondingly, the employer could not claim deduction of the same by virtue of Section 40(c)(v) of the Act.

Social security, pension and medical insurance contributions

2 The Hon'ble High Court held that the employees did not get any vested right at the time of contribution by employer to the welfare scheme and hence contributions to pension, or social security funds, or for medical benefits, were not perquisites under Section 17(1)(v) and hence not taxable in the hands of the employee assessee.

Perquisite value of rent free accommodation provided to an employee, in view of Rule 3 of IT Rules, 1962

3 Relying on *CIT vs. HD. & Co. (135 ITR 1)*, the Hon'ble High Court held that Section 17(2) and Rule 3 had to be considered co-extensively and hence amount of tax had to be excluded while computing the perquisite value of rent-free accommodation.

Hypothetical Tax

4 Relying on *CIT vs. Dr. Percy Batlivala [ITA 1308/2008 dated 16-12-2009)*, the Hon'ble High Court held that the employee could not be burdened with tax on hypothetical tax when he had already paid tax on actual salary received.

Grossing up under Section 195-A

5 The payment of taxes to the government being a non-monetary payment, are eligible for benefit under Section 10(10CC) and hence no grossing up is required.

Assessability of TDS refunds received by the employee

6 The Hon'ble High Court observed that erroneously the employer paid excess amounts to the State, which were refunded to the assessee instead. In such a case, the amount was not paid to the employee but to the government over and above the tax due on salary; therefore, it had never borne the characteristic of salary or perquisite. It held that before a receipt was brought to tax, the nature and character of the receipt in the hands of the recipient had to be considered.

7 Every receipt or monetary advantage or benefit in the hands of its recipient was not taxable unless it is established to be due to him. It ruled that the receipt of money or property which one was obliged to return or repay to the rightful owner, as in the case of a loan or credit, could not be taken as a benefit or a perquisite. Thus, HC held that the amounts paid in excess by the employer, and refunded to the employee never belonged to the employee; therefore the employee could not be taxed on the same.

Legal expenses incurred

8 The Hon'ble High Court held that that the assessee was beneficiary to his employer's policy of consulting tax experts for filing income tax returns as appears to have been the prevailing practice of his employer, in respect of other employees as well, would not transform the expense borne by the employer into income in the assessee's hands .

V. Section 44BB – Fees received by a non-resident assessee for providing service in connection with prospecting for, or extraction or production of mineral oil, would be covered by Section 44BB until before proviso to Sub-section (1) of Section 44BB was inserted

Director of Income-tax (International Taxation) vs. Western Geco International Ltd. [2013] 35 taxmann.com 345 (Uttarakhand)

Facts

1 The assessee, a non-resident received fees for providing service in connection with prospecting for, or extraction or production of mineral oil. It claimed that it was covered under Section 44BB of the Act.

2 The Revenue held the assessee was not covered by Section 44BB and it fell either under Section 115A or 44DA in view of insertion of the proviso to Sub-section (1) of Section 44BB by the Finance Act, 2010 with effect from 1st April, 2011.

Judgment

1 The Hon'ble High Court held that proviso to Sub-section (1) of Section 44BB of the Income Tax Act inserted with effect from 1st April, 2011 had no application prior to 1st April 2011. Accordingly, it upheld the ruling of the Hon'ble Tribunal that in respect of fees received by a non-resident assessee for providing service in connection with prospecting for, or extraction or production of mineral oil, such assessee would be covered by Section 44BB until before proviso to Sub-section (1) of Section 44BB was inserted.

C) Tribunal Decisions

VI. Where the associated enterprise, which is also a dependent agent PE, is remunerated at arm's length, nothing further remains to be attributed to the PE – India-Singapore DTAA

ANL Singapore Pte. Ltd vs. DDIT(IT) TS-194-ITAT-2013(Del)-TP / 2013-TII-133-ITAT-MUM-INTL : Assessment Year: 2007-08

Facts

i) The assessee was a shipping company incorporated in, and a tax resident of Singapore. It had earned freight and detention receipts. After applying section 44B of the Income-tax Act, 1961 (the Act) the assessee computed income at the rate of 7.5% for 178 voyages. It claimed non-taxability under Article 8 of the India-Singapore DTAA for which it furnished a copy of its tax residency certificate. The assessee paid commission to its Indian AE, CMA CGM Global (India) Pvt. Ltd. (CMA India) for availing shipping agency services.

ii) The assessing officer (AO) denied relief under Article 8 of the tax treaty in respect of freight and detention receipts earned from 98 voyages. Of this, in respect of 37 voyages, there was no evidence of a pool arrangement as claimed by the assessee, and in respect of 61 voyages, the receipts were in respect of slot hiring charges. The AO also held that the assessee had a dependent agent PE in India in the form of CMA India, according to the agency agreement with CMA India.

iii) The assessee challenged the assessment order before the Dispute Resolution Panel (DRP), which directed the AO to allow relief according to Article 8 of the tax treaty after examining fresh evidence in respect of the 98 voyages. As the assessee failed to provide the relevant details in respect of 21 of these 98 voyages, the AO computed income from these at a rate of 10% of gross receipts.

Decision

i) The Tribunal observed that commission was paid to CMA India, which was the assessee's AE and also its dependent agent PE. This commission was also in respect of income from 21 voyages that had been considered as chargeable to tax under Article 7 of the tax treaty. This commission had been received by CMA India at arm's length. No further attribution was required to be made to the PE.

ii) The Tribunal noted that while there was some merit in the contentions of the revenue, the ratios of the decisions in *Set Satellite (Singapore) Pte. Ltd vs. DDIT(IT) [2008] 307 ITR 205 (Bom)* and *Delmas, France vs. ADIT [2012-TII-14-ITAT-MUM-INTL]* stood in the way. In these cases it had been held that where the AE that was also the PE had been compensated at arm's length, nothing further could be attributed to the PE.

iii) The assessee's contention was therefore upheld. Accordingly, income in respect of 21 voyages was held not to be chargeable to tax. In view of this, the Tribunal did not consider the taxability of income relating to 21 voyages under Article 8 of the tax treaty.

VII. Transfer Pricing – Tribunal upholds selection of foreign AE as tested party in accordance with international best practices

General Motors India P. Ltd. vs. DCIT 2013-TII-162-ITAT-AHM-TP : Assessment Years: 2006-07 and 2007-08

Facts

i) General Motors India Pvt. Ltd. was engaged in manufacture and trading of automobiles and its parts. The assessee entered into several international transactions with its associated enterprises. The key international transaction under dispute was purchase of CKD kits from General Motors Daewoo Auto & Technology (GMDAT), an AE. The assessee adopted a transaction-by-transaction approach to benchmark its international transactions.

ii) In respect of the transaction of purchase of CKD kits, the assessee selected the AE (i.e., GMTAD) as the tested party and benchmarked using foreign comparables.

iii) The TPO rejected this approach, and proposed an adjustment by selecting the assessee as the tested party instead, and benchmarking it against local comparables. The DRP upheld the TPO's approach.

Decision:

i) The Tribunal acknowledged that tested party should be the least complex entity, for which reliable data in respect of itself and in respect of comparables is available. The Tribunal accepted that tested party could be the local entity or a foreign AE, and upheld selection of foreign AE as tested party in the instant case.

ii) The Tribunal placed reliance on the UN TP Manual and judicial precedents in the cases of *Development Consultants P. Ltd. vs. DCIT [2008] 115 TTJ 577 (Kol),, Mastek Ltd. vs. ACIT [2012] 53 SOT 111 (Ahd), AIA Engineering Ltd. vs. ACIT [2012] 50 SOT 134 (Ahd), Ranbaxy Laboratories Ltd v. ACIT [2008] 110 ITD 428 (Delhi), and Sony India P Ltd. vs. DCIT [2008] 114 ITD 448 (Delhi): [2009] 315 ITR 150 (Delhi) (AT)].* In respect of judicial precedents, the Tribunal agreed with the majority view and accordingly, rejected the direct applicability of the divergent decision in the case of Onward Technologies Ltd. vs DCIT (2013) 35 taxmann.com 584 (Mum) to the instant case.

iii) The Tribunal acknowledged the assessee's submissions that all financial details of comparable companies and segmental data of the AE had been furnished and were reliable.

iv) The Tribunal found inconsistency in the stand taken by the TPO where in another transaction the TPO had proposed an adjustment by selecting the foreign AE as the tested party.

v) The Tribunal negated the TPO's argument that foreign comparables do not fall within his jurisdiction and he can therefore neither call for any additional information nor scrutinize their books of accounts etc. In this regard, the Tribunal stated that Revenue can get all relevant information from across the globe by using technology or by directing the assessee to furnish the same.

VIII. Force of attraction' rule not applicable to Indian Permanent Establishment if services not performed in India – Article 7 of India-USA DTAA

ADIT v. M/s WNS North America Inc. 2013-TII-145-ITAT-MUM-INTL – Assessment Year: 2007-08

Facts

i) The Assessee, a US tax resident entered into a composite agreement for rendering marketing and management services to its Indian associated enterprise (WNS India) for a specified fee. Pursuant to this agreement, the Assessee's employees visited WNS India for rendering such services, thereby constituting a service PE2 under the DTAA.

ii) During the financial year 2006-07, the Assessee received INR 52 crore as fees of which INR 68.15 crore was attributed to the Indian service PE on account of services rendered in India. This amount was declared as income in the tax return filed by the Assessee. However, the Assessing Officer (AO) sought to tax the entire income as FIS4 under the provisions of the DTAA. The Commissioner of Income Tax (Appeals) (CIT - A) reversed the AO's order resulting in the present appeal.

iii) The main grounds of the Revenue's appeal before the Tribunal were:

- The fees earned by the Assessee was taxable in India as FIS under Article 12 of the DTAA.
- Alternatively, balance ` 61.63 crore (i.e., fees earned for services rendered outside India) was subject to tax in India applying the 'force of attraction' rule enshrined in Article 7 of the DTAA.

iv) Similar issues were raised for earlier financial years and the Tribunal's ruling on the matter was validated by the decision of the Bombay High Court for the financial years

2002-03 and 2003-04. For the years in question, the Tribunal had held that the amounts could not be characterised and taxed as FIS and were instead in the nature of business profits.

v) The Revenue contended that the income from the provision of management and marketing services, even if such services were rendered outside India, should be attributed to the Assessee's Indian service PE. The Revenue Department mainly relied on the Assessee's composite agreement for rendering of services to WNS India in India as well as overseas. They argued that such services being similar in nature warranted the application of the 'force of attraction' rule and thus the entire fee was attributable to the Indian service PE.

vi) Relying on the judgment in the *Hindalco Industries Ltd. vs. ACIT 94 ITD 242*, the Revenue Department claimed that the entire amount was subject to tax in India. The counsel for Assessee in response argued that the Hindalco Industries case shall not apply in the present context given that the case dealt with the payment of a training fee and the sale of know-how. Further, while acknowledging the existence of the Assessee's service PE in India as per the DTAA, the Assessee's counsel contended that in the instant case the 'force of attraction' rule would apply in a situation when apart from carrying on business through the PE, the Assessee carried on business activity in India of a same or similar kind as those effected through the PE.

Decision

The Tribunal held in Assessees favour and observed as under:

i) On the issue of the nature of payment, the Tribunal followed its earlier ruling and held the payments to be in the nature of business profits, not FIS. Since there is no change in any legal or factual position in the Assessee's case the previous order should apply in later assessment years as well. Reliance was placed on the earlier Tribunal order which held that the DTAA shall apply to the present case since it is more beneficial to the Assessee vis-à-vis the Income-tax Act 1961. Comparing the twin provisions, the Tribunal held that in order for the fees to be characterised as FIS, the DTAA imposes a higher threshold requiring the services not only to be rendered, but to also simultaneously make available the technology in India. While management and marketing services are not technical in nature as defined in the Act, even assuming that such services are technical, the 'make available' criterion6 as prescribed in the DTAA is not satisfied in the present case.

ii) The Tribunal while rejecting the Revenue's contentions, analysed Article 7(1) of the DTAA which contains the 'force of attraction' rule and stated that two essential conditions must be satisfied while applying the principle viz. (i) the business activity carried on should be in the country where the PE is situated and (ii) the business activity carried on must be of the same or similar kind as those effected through the PE.

iii) In the present case since the management services rendered by the Assessee despite being of similar nature were rendered outside India i.e., and not in the country where the service PE was located, the amount could not be attributed to the Indian service PE and subjected to tax in India.

IX. Transfer Pricing – Payment of Royalty by Indian Subsidiary to parent company – Royalty paid by Samsung India to Samsung Korea justified as Samsung India is not a 'Contract Manufacturer'

Samsung India Electronics Private Limited vs ACIT 2013-TII-137-ITAT-DEL-TP – Assessment Year: 2007-08

Facts

i) The Assessee manufactured the goods in India using the technical know-how supplied by its ultimate parent, SEC Korea, and then sold these goods to its associated enterprises (AEs) as well as to independent third parties. For the provision of technical know-how, the Assessee paid royalty at the rate of 8% on export and domestic sales to SEC Korea.

ii) The Assessee also procured certain raw materials and fixed assets for production from its AEs. The Tax Authorities held that the Assessee was a 'contract manufacturer' with regard to its manufacturing activities for its AEs, and hence payment of royalty to SEC Korea was unjustified as it amounted to payment of royalty to itself. They further observed that the price of the intangibles may already be included in the price of the goods which was procured by the Assessee from its AEs and thus, no independent party would have made such payments and in fact this is a transfer of profits out of India in the garb of royalty.

iii) The Assessee appealed against the Tax Authorities' order before the Dispute Resolution Panel (DRP). The DRP upheld the order of the Tax Authority.

Decision

The Tribunal held in favour of the Assessee as follows:

i) The Tribunal, held that the Assessee was not a 'contract manufacturer' but a 'licensed manufacturer' for its AEs as: (i) there was no control by SEC Korea over the quantity of goods manufactured by the Assessee or the terms of sale; and (ii) there was no assurance that the entire production of the Assessee will be purchased by the AEs.

ii) The Tribunal made the following important observations.

a) The royalty was paid to SEC Korea for technical know-how without which the Assessee would be unable to carry out manufacturing activity and thus the Assessee did derive benefit from the technical know-how;

b) By accepting the arm's length value on the royalty paid to SEC Korea for sales to independent third parties, the Tax Authorities had implicitly accepted the benefit derived by the Assessee from the technical know-how;

c) For 'contract manufacturing' there must exist: (i) extensive instructions as regards nature, quantity and quality; and (ii) an assurance that the entire production will be purchased;

d) Bulk of the sales made by the Assessee was to independent third parties and not to AEs. Further, export sales to AEs were driven by open market conditions just as they were to unrelated parties and there was no assurance that the entire production of Assessee would be purchased. Also, Samsung India could sell to unrelated parties if their terms of sale were more beneficial to it. Thus, the Assessee was not a 'contract manufacturer' but was in fact a 'licensed manufacturer';

e) The fact that the Assessee had made certain sales to AEs would not deprive SEC Korea of its right to earn an arm's length return on these sales in return for the Research and Development (R&D) investments made by it;

f) The fact that the rates of royalty were approved by the Ministry of Commerce and that there was Reserve Bank of India (RBI) approval does not mean that the payment of royalty was on arm's length in light of the recent decision of the *Tribunal in Perot Systems TSI India Ltd . DCIT [2010] 130 TTJ 685 (Delhi – Trib)*

g) The Tax Authorities could not demonstrate that the price of intangibles was already included in the raw material procurement price and therefore, their contention that the additional payment for intangibles (i.e. royalty) should be disallowed is not justified.

X. Transfer Pricing – Interest free loans – Treatment of loan as a Quasi Capital Contribution

Micro Inks Ltd. vs. ACIT [2013] 36 taxmann.com 50 – Assessment Years 2002-03 to 2004-05

Facts:

i) Micro Inks Limited ('MIL') is engaged in the business of manufacturing and sale of printing inks and other intermediate and allied products. The assessee, through its wholly owned subsidiary, Micro Inks GmbH, Austria, set up a company by the name of Micro Inks Corporation Inc., ('MIC USA') in the USA. MIC USA was set up for carrying out manufacturing activities with ingredients, supplied by the assessee.

ii) The assessee had provided an interest-free loan amounting to USD 3,170,000 to its step-down subsidiary, MIC USA, during the AY 2002-03. An additional interest-free loan of USD 1,000,000 was provided in September 2003.

iii) During the course of the transfer pricing assessment proceedings the TPO proposed an adjustment on account of interest free loan provided by the assessee to its associated enterprise ('AE') and interest charge on outstanding receivables from the AE.

iv) The assessee contended that these loans were in the nature of quasi-capital contributions and they would not warrant any interest payment. The TPO rejected the assessee's stand and adopted the weighted average cost of funds of the assessee (11% as per the financial statements) as the arm's length interest rate and made an adjustment to this effect. The Commissioner of Income-tax (Appeals) ('CIT(A)') confirmed the TPO's addition on merits, but restricted the adjustment by proposing to apply international bank rates, i.e., either LIBOR or the American rate of interest

Decision

The Tribunal accepted the assessee's contention that the loan provided was in the nature of quasi-equity. The Tribunal made following important observations:

i) The Tribunal appreciated the fact that the assessee was unable to infuse capital in the AE due to regulatory restrictions (RBI approval in the instant case) and thus was forced to provide money in the form of a loan through EEFC account held abroad, for which no approval was required. Further, immediately after obtaining RBI approval, the loans had been converted into shares (except for an amount of USD 10,000). Also, the RBI approval for conversion of loan into equity had been sought from the date when remittance was made. Based on these facts, the Tribunal held that the loan provided by the assessee should be treated as quasi-capital contribution.

ii) The Tribunal differentiated the facts of the case from existing decisions in the case of *Perot Systems TSI India Ltd. DCIT [2010] 130 TTJ 685 (Delhi – Trib) and VVF Ltd vs. DCIT (2010 TII 4 ITAT MUM TP)*. In the case of Perot Systems, it had been observed that if the intention of assessee was to treat the loan as capital contribution, it could have originally infused the money in the form of equity as there was no restriction for the Company in doing so. Differentiating the facts from the current case, the Tribunal observed that unlike in the Perot case, the assessee in this case had regulatory restrictions in infusing money in the form of capital, on account of which the assessee was forced to provide a loan.

iii) Further, in the case of VVF Ltd., the argument of commercial expediency in advancing interest-free funds was derived on the basis of ownership and control of subsidiary being in the hands of the assessee. The Tribunal in the instant case considered such commercial expediency to be irrelevant as the impact of any such inter-relationship should be neutralised by arm's length treatment.

iv) The Tribunal observed that in MIL's case, the relationship on account of lending of money could not be considered in isolation from the commercial business considerations between the entities. The assessee had a significant proportion of its transactions with its AE in USA. The sustainability of the US entity was crucial to the assessee's business interests. Thus, it would be inappropriate to compare the relationship.

v) The Tribunal further observed that while a LIBOR-plus rate would be appropriate for a loan transaction which was undertaken for earning profits from lending money, a similar rate would not be appropriate in the current situation, because the money has been invested as a quasi-capital contribution for significant and decisive commercial considerations. The Tribunal held that the difference in the nature of the two transactions, i.e. lending of money and quasi-capital contribution, was so fundamental that application of LIBOR or any other bank rate would be inappropriate in the present case.

vi) The Tribunal rejected the Revenue's contention that the loan agreement originally did not have the provision of conversion of loan into equity. It was observed that as the assessee was unable to infuse capital due to lack of RBI approval, it would have been inappropriate to have such a conversion clause in absence of a formal approval.

vii) In view of the above, the Tribunal regarded the loan as a quasi-capital contribution.

XI. Transfer Pricing – Splitting of payment of composite royalty for manufacturing technology and use of brand / trademark – Disallowance of Advertisement, Marketing and Promotion (AMP) expenses

Maruti Suzuki India Limited vs ACIT 2013-TII-163-ITAT-DEL-TP – Assessment Year: 2005-06

Facts

i) The assessee, Maruti Suzuki India Limited (MSIL) is a licensed manufacturer engaged in the business of manufacturing of passenger cars in India.

ii) MSIL entered into a licence agreement with Suzuki Motor Corporation, Japan (SMC) for manufacture of specified models of cars using the licensed information and licensed trademark. Under the agreement, MSIL made composite royalty payments for the rights and licences granted by SMC.

iii) The TPO held that the royalty paid by MSIL was towards use of technology as well as towards use of trademark/brand name and divided the total royalty payments into royalty for use of technology and for use of trademark. For the purpose of splitting the royalty, the TPO took into consideration the research & development expenses and advertisement and marketing expenses incurred by SMC.

iv) The TPO determined the arm's length price of royalty, allegedly paid for use of brand name, as Nil on the pretext that Suzuki was a weak brand.

v) The TPO also made an adjustment in relation to the advertisement, marketing and sales promotion expenses incurred by MSIL, holding the same to have been incurred for promotion of brand owned by the AE. These adjustments were confirmed by the Dispute Resolution Panel (DRP).

Decision

The Tribunal held and observed as under:

i) SMC was not in a position to control MSIL in 1982, and as the same terms and conditions were in force during the relevant financial year, the licence agreements can be said to be at arm's length.

ii) The royalty was paid by MSIL to obtain licence to manufacture licensed products. Other rights such as right to use the technology, knowhow and trade mark were linked to the core right to manufacture and sell the licensed products.

iii) The Tribunal accepted the contention of MSIL that the licence agreement was a composite/in-severable agreement and relying upon the decision of the Supreme Court in the case of *Vodafone International Holdings B.V. vs. UOI (2012-TII-02-SC-INTL)*, the Tribunal held that it was not open for the revenue to split a composite agreement.

iv) The Tribunal also agreed with the assessee that entire manufacturing activity and business of MSIL was based and founded on the license agreement without which the business of the MSIL would cease to exist and the entire operations would come to a halt.

v) The decision to use the Suzuki brand name was taken by the assessee in order to advance its own commercial interest and Suzuki was a renowned international brand.

vi) The Tribunal accordingly deleted the adjustment made by the TPO on account of payment of royalty by MSIL to SMC. On the issue of the adjustment on account of AMP expenses, the Tribunal remanded the matter back to the TPO for adjudication in light of the decision of the Special Bench in the case of *LG Electronics India Limited vs. ACIT (2013-TII-15-ITAT-DEL-SB-TP).*

XII. India-USA DTAA – Dependent Agency PE – Indian company purchasing online advertising space from holding company not a PE of US Parent Co.

ITO vs Pubmatic India Pvt. Ltd. [2013] 36 taxmann.com 100 (Mumbai - Trib.) – Assessment Year : 2008-09

Facts

i) The Assessee, an Indian company, and its parent company are engaged in the business of providing services of internet advertising and marketing services. The Assessee caters to Indian customers whereas US Co caters solely to customers outside India and generally in the US.

ii) When Indian customers want to place their advertisements on Indian websites, they contact the Assessee which purchases online advertising space from the website owners and sells them directly to its Indian customers.

iii) In case of advertisements on foreign websites, the Assessee intimates US Co, which, in turn, purchases the advertisement space from foreign website owners and sells them to the Assessee at cost plus mark-up. The Assessee, in turn, sells them to its customers. A similar procedure, in reverse, is followed when foreign customers of US Co want to place advertisements on Indian websites.

iv) The Assessee made payments to US Co towards purchase of online advertising space. The Assessee considered the payments to be in the nature of business income which were not taxable in India in the absence of US Co's PE in India. Accordingly, no taxes were withheld on the payments to US Co.

v) The Tax Authority disallowed the payments in computing the taxable income of the Assessee on the basis that taxes were not withheld on such payments. On appeal, the First Appellate Authority deleted such disallowances and granted relief to the Assessee. The aggrieved Tax Authority appealed before the ITAT.

Decision

The Tribunal held in assessee's favour and observed as under:

i) Merely having a common director or a holding-subsidiary relationship does not constitute either company a PE of the other by itself. The DTAA also specifically states so.

ii) It could not be said that the Assessee was acting on behalf of US Co for the following reasons:

a) The similarity of business activity of the Assessee and US Co does not, by itself, indicate that the Assessee is acting or doing business on behalf of US Co.

b) Carrying out business with an associated enterprise cannot be regarded as acting on behalf of the associated enterprise.

c) The Assessee purchased the advertisement space from US Co for its Indian customers. It was not a transaction which was carried out on behalf of US Co.

d) US Co sold advertisement space purchased by it from website owners to the Assessee at cost plus mark-up. In turn, the Assessee 'sold' to its customers at a different price. The transactions were independent business transactions wherein the Assessee and US Co recovered respective margins from each other.

e) The arrangement was only regarding the business transaction between the Assessee and US Co in respect of purchase of space on website through each other.

f) The Assessee or US Co was not providing services or goods to the customers of the other party or dealing with the customers of the other party and, therefore, the activity between the Assessee and US Co were independent business activities.

g) The purchase of advertisement space from US Co was carried out on a principal-to-principal basis as it was the Assessee who bore the risks and rewards of the business and was answerable to its Indian customers.

h) When the transactions were claimed to have taken place at arms' length price then there was no question of the Assessee doing the business activity on behalf of its parent company.

iii) The Assessee cannot be considered as a DAPE of US Co because the assessee is not acting as an agent on behalf of US Co but the transactions between the two are independent business transactions.

iv) Purchase of advertisement space on a foreign website by the Assessee from US Co was a trading receipt or business income in the hands of US Co which would not be taxable in India under the DTAA in the absence of a PE. Since US Co did not have a PE in India, the Assessee was not liable to withhold taxes on the payments based on the Supreme Court ruling in the case of GE India Technology Centre [327 ITR 456]

CA. Hasmukh Kamdar

INDIRECT TAXES
Central Excise and Customs – Case Law Update

Unjust Enrichment

Daivesh N Shah & Company vs. Commissioner of ST Ahmedabad [2013 (294) ELT 101 (Tr.-Ahmd.)]

The assessee had received certain amounts in April 2006 for providing services and since the eligibility or otherwise for the year 2005-06 was in dispute, the appellant felt that it would be appropriate for them to discharge liability instead of taking risk of payment of interest and penalty, etc. They therefore made the payment of service tax in October 2006 under protest. Subsequently, the dispute regarding eligibility for exemption was settled in their favour and therefore they filed refund claim for the amount paid. The refund claim was rejected on the ground that the appellant have not been able to cross the hurdle of unjust enrichment. The assessee preferred this Appeal against the rejection of their refund claim.

It was submitted on behalf of the Appellant that they are following the cash method of accounting and therefore, as soon as the service tax payment was made it had to be booked in the expenditure account; further income-tax law also requires that the expenditure is to be booked in the year in which payment has been made. The payment was made under protest. Even though the service tax amount was not collected; service tax was paid by them since they had felt that in the event of issue being decided against them, they would be risking the liability to pay interest and penalty. The appellant had produced the Chartered Accountant's certificate that the amount had not been collected which has not been considered by the lower authorities.

It was contended on behalf of the Revenue that Chartered Accountant's certificate is not sufficient to show that there was no unjust enrichment. It has to be shown by the appellants that in the financial accounts, this amount was shown as recoverable and in the absence of any such showing, the presumption of the law is against the appellant and therefore, the decision taken by the lower authorities has to be upheld.

The Hon'ble Tribunal considered the submissions made by both the sides and observed as follows:

In this case the appellant has tried to ensure that the law is followed and is implemented properly. Therefore, as soon as the dispute arose they made the payment under protest.

Further, the Chartered Accountant's certificate clearly says that the incidence of the said service tax had not been passed on by them to any other person and it was not recovered from the clients.

On a specific query from the Bench learned Chartered Accountant submitted that the accounts in this case were not audited and therefore, the question of making specific remark in the accounts does not arise. The appellant is following cash method of accounting and the Chartered Accountant's certificate specifically states that incidence has not been passed on.

The Hon'ble Tribunal held that under the facts and circumstances of this case, the appellants have been able to show that there is no unjust enrichment. Therefore, the appeal was allowed with consequential relief to the appellants.

(Dictated and pronounced in the Court)

Remission of Excise duty

Pragna Dychem Pvt. Ltd. vs. Commissioner of Excise (Appeals) Surat [2013 (294) ELT 117 (Tr. Ahmd]

There was fire in the factory of the assessee and finished goods were destroyed. The assessee made an application of remission of duty of ` 1,82,582/- under Rule 21 of the Central Excise Rules 2002. The assessee had availed/ utilised input credit of ` 1,01,085/- in respect of inputs utilised in production of finished goods lost in fire. The application for remission was rejected on the ground that the appellant had made a claim to insurance company on the goods destroyed and the claim included the CENVAT Credit also. Since appellants received the CENVAT Credit amount from the insurance company, the appellant can be deemed to have utilised the amount of ` 1,01,085/- obtained from the insurance company for payment of duty on other final products. In the circumstances the situation is as if the CENVAT credit has not been reversed at all.

On behalf of the Appellant it was submitted that:

1. There is no provision in the Rules for the conclusion reached by the Commissioner in the impugned order. It was further submitted that according to Rule 3(5C) of CENVAT Credit Rules, the credit is required to be reversed if refund is granted. Nowhere in Rules, there is an indication or a requirement that the appellant should not get the CENVAT credit compensated from the insurance company.

2. Reliance was placed on the following decisions in support of the contention:

I. *M/s. Tata Advance Materials vs. Commr of Central Excise, Bengaluru –I reported in 2009 (241) E.L.T 92 (Tri-Bang.)*

II. *M/s. Tulsi Intermediated Pvt. Ltd. vs. Commr. of C.Ex & Customs, Vadodara reported in 2010 (251) E.L.T. 225 (Tri-Ahmd.)*

The Hon'ble Tribunal noted as follows.

i. The CENVAT Credit Rules requires the assessee to reverse the CENVAT Credit taken on the inputs contained in the finished products only and there is no specific provision to say that the amount should not have been claimed form the insurance company. In the absence of any specific provisions in the rules, the Commissioner has erred in observing that the company can be deemed to have utilised the amount from insurance company for payment of duty of other final products. When the goods are destroyed, the appellants would have lost the entire value of the goods which would include raw materials, used labour and overheads for manufacture etc.

ii. The CENVAT credit is available to the appellants, once the raw materials are used. In such a situation, if such CENVAT credit is required to be reversed and if appellant received compensation from the insurance company, it cannot be said to be unjust enrichment or cannot be said to amount to the utilisation of the amount for payment of duty of other final products. The loss of duty paid on the raw materials used has only been compensated by the insurance company on the basis of premium paid.

iii. In the absence of specific provisions in the statute, the Hon'ble Tribunal observed that they cannot go into the question of intention or the deemed situation to deprive the benefit.

iv. The two decisions cited by the Appellants are also applicable to the facts of the case.

In view of the above decisions, the appeal was allowed and the impugned order was set aside.

CA Janak Vaghani

INDIRECT TAXES
VAT Update

1) Amendment to VAT Audit Report Form 704

Government Notification No.VAT /AMD-2013/1B/Adm-8, DATED 23/08/2013

The government has issued above notification to amend vat audit report form 704. The new version of vat audit report form 704 is available on the web site of the sales tax department. All vat audit reports, from 23/08/2013, for any period, are required to be filed in this amended vat audit report form 704.

2) List of Cases selected for Issue Based Audit / Assessments

List of cases selected for assessments/ issue based audit for the period 2006-07, 2007008, 2009-10 and 2010-11 is published on the site on the vat department.

3) Administrative Instructions in respect of Assessment/Audit Plan for the Periods 2006-07 to 2010-11

Internal Circular No. 10A of 2013,dated 28/08/2013

The Commissioner of sales tax has issued above internal circular in which administrative instructions in respect of assessment/audit plan for the periods 2006-07 to 2010-11.

> Nothing in education is so astonishing as the amount of ignorance it accumulates in the form of inert facts.
>
> — *Henry Adams*

CA. Rajkamal Shah & CA. Naresh Sheth

INDIRECT TAXES
Service Tax – Statute update

The CBEC has issued one more circular (bearing No. 170/5/2013-ST, dtd. 8-8-2013) clarifying many of the issues arising out in the Voluntary Compliance Encouragement Scheme, 2013 under service tax. The circular is self-explanatory and does not require any elaboration. Being important to the tax professionals the same is reproduced hereinbelow. With this, it is hoped that the scheme which has so far received lukewarm response, will now receive adequate attention of the taxpaying community in view of allaying most of the fears and apprehension though still falling short of some of vital clarifications (like what does it mean 'substantially false declaration' for the purpose of issue of show cause notice).

Subject: The Service Tax Voluntary Compliance Encouragement Scheme - clarifications regarding. The Service Tax Voluntary Compliance Encouragement Scheme (VCES) has come into effect from 10-5-2013. Some of the issues raised with reference to the Scheme have been clarified by the Board vide circular No. 169/4/2013-ST, dated 13-5-2013. Subsequently, references have been received by the Board seeking further clarifications as regards the scope and applicability of the Scheme.

2. The issues have been examined and clarifications thereto are as follows:

S. No.	Issues	Clarification
1	Whether the communications, wherein department has sought information of roving nature from potential taxpayer regarding their business activities without seeking any documents from such person or calling for his presence, while quoting the authority of section 14 of the Central Excise Act, 1944, would attract the provisions of section 106 (2)(a)?	Attention is invited to clarification issued at S. No. 4 of the circular No. 169/4/2013-ST, dated 13-5-2013, as regards the scope of section 106(2)(a) of the Finance Act, 2013, wherein it has been clarified that the provision of section 106(2)(a)(iii) shall be attracted only in such cases where accounts, documents or other evidence are requisitioned by the authorized officer from the declarant under the authority of a statutory provision. A communication of the nature as mentioned in the previous column would not attract the provisions of section 106(2)(a) even though the authority of section 14 of the Central Excise Act may have been quoted therein.

2	An assessee has two units at two different locations, say Mumbai and Ahmedabad. Both are separately registered. The Mumbai unit has received a Show Cause Notice for non-payment of tax on a revenue stream but the Ahmedabad unit has not. Whether the Ahmedabad unit is eligible for VCES?	Two separate service tax registrations are two distinct assessees for the purposes of service tax levy. Therefore, eligibility for availing of the Scheme is to be determined accordingly. The unit that has not been issued a show cause notice shall be eligible to make a declaration under the Scheme.
3	Whether a declaration can be made under the Scheme in respect of CENVAT credit wrongly utilized for payment of service tax?	Any service tax that has been paid utilizing the irregular credit, amounts to non-payment of service tax. Therefore such service tax amount is covered under the definition of "tax dues".
4	Whether a party, against whom an inquiry, investigation or audit has been initiated after 1.3.2013 (the cutoff date) can make a declaration under the Scheme?	Yes. There is no bar from filing of declaration in such cases.
5	There was a default and a Show Cause Notice was issued for the period prior to the period covered by the Scheme, i.e. before Oct 2007. Whether declaration can be filed for default on the same issue for the subsequent period?	In the context of the Scheme, the relevant period is from Oct 2007 to Dec 2012. Therefore, the 2 nd proviso to section 106 (1) shall be attracted only in such cases where a show cause notice or order of determination has been issued for the period from Oct 2007 to Dec 2012. Accordingly, issuance of a show cause notice or order of determination for any period prior to Oct 2007, on an issue, would not make a person ineligible to make a declaration under the Scheme on the same issue for the period covered by the Scheme. Therefore, declaration can be made under VCES.
6	In a case where the assessee has been audited and an audit para has been issued, whether the assessee can declare liability on an issue which is not a part of the audit para, under the VCES 2013?	Yes, declarant can declare the "tax dues" concerning an issue which is not a part of the audit para .
7	Whether a person, who has paid service tax for a particular period but failed to file return, can take the benefit of VCES Scheme so as to avoid payment of penalty for non-filing of return?	Under VCES a declaration can be made only in respect of "tax dues". A case where no tax is pending, but return has not been filed, does not come under the ambit of the Scheme. However, Rule 7C of the Service Tax Rules provides for waiver of penalty in deserving cases where return has not been filed and, in such cases, the assessee may seek relief under rule 7C.

8	A person has made part payment of his 'tax dues' on any issue before the scheme was notified and makes the declaration under VCES for the remaining part of the tax dues. Will he be entitled to the benefit of non-payment of interest/penalty on the tax dues paid by him outside the VCES, i.e., (amount paid prior to VCES)?	No. The immunity from interest and penalty is only for "tax dues" declared under VCES. If any "tax dues" have been paid prior to the enactment of the scheme, any liability of interest or penalty thereon shall be adjudicated as per the provisions of Chapter V of the Finance Act, 1994 and paid accordingly.
9	Whether an assessee , who, during a part of the period covered by the Scheme, is in dispute on an issue with the department under an erstwhile provision of law, can declare his liability under the amended provisions, while continuing to litigate the outstanding liability under the erstwhile provision on the issue?	In terms of the second proviso to section 106 (1), where a notice or order of determination has been issued to a person in respect of any issue, no declaration shall be made by such person in respect of "tax dues" on the same issue for subsequent period. Therefore, if an issue is being litigated for a part of the period covered by the Scheme, i.e., Oct, 2007 to Dec 2012, no declaration can be filed under VCES in terms of the said proviso on the same issue for the subsequent period.
10	Whether upon filing a declaration a declarant realizes that the declaration filed by him was incorrect by mistake? Can he file an amended declaration?	The declarant is expected to declare his tax dues correctly. In case the mistake is discovered suo-moto by the declarant himself, he may approach the designated authority, who, after taking into account the overall facts of the case may allow amendments to be made in the declaration, provided that the amended declaration is furnished by declarant before the cut off date for filing of declaration, i.e., 31-12-2013.
11	What is the consequence if the designated authority does not issue an acknowledgement within seven working days of filing of declaration? Whether the declarant can start making payment of the tax dues even if acknowledgement is not issued?	Department would ensure that the acknowledgement is issued in seven working days from the date of filing of the declaration. It may however be noted that payment of tax dues under the Scheme is not linked to the issuance of an acknowledgement. The declarant can pay tax dues even before the acknowledgement is issued by the department.
12	Whether declarant will be given an opportunity to be heard and explain his cases before the rejection of a declaration under section 106(2) by the designated authority?	Yes. In terms of section 106 (2) of the Finance Act, 2013, the designated authority shall, by an order, and for reasons to be recorded in writing, reject a declaration if any inquiry/investigation or audit was pending against the declarant as on the cutoff date, i.e., 1-3-2013. An order under this section shall be passed following the principles of natural justice. To allay any apprehension of undue delays and uncertainty, it is clarified that the designated authority, if he has reasons to believe that the declaration is covered by section 106 (2), shall give a notice of intention to reject the declaration within

		30 days of the date of filing of the declaration stating the reasons for the intention to reject the declaration. For declarations already filed, the said period of 30 days would apply from the date of this circular. The declarant shall be given an opportunity to be heard before any order is passed by the designated authority.
13	What is the appeal mechanism against the order of the designated authority whereby he rejects the declaration under section 106(2) of the Finance Act, 2013?	The Scheme does not have a statutory provision for filing of appeal against the order for rejection of declaration under section 106 (2) by the designated authority.
14	A declarant pays a certain amount under the Scheme and subsequently his declaration is rejected. Would the amount so paid by him be adjusted against his liability that may be determined by the department?	The amount so paid can be adjusted against the liability that is determined by the department.
15	Section 111 prescribes that where the Commissioner of Central Excise has reasons to believe that the declaration made by the declarant was 'substantially false', he may serve a notice on the declarant in respect of such declaration. However, what constitutes a 'substantially false' declaration has not been specified.	The Commissioner would, in the overall facts of the case, taking into account the reasons he has to believe, take a judicious view as to whether a declaration is 'substantially false'. It is not feasible to define the term "substantially false" in precise terms. The proceeding under section 111 would be initiated in accordance with the principles of natural justice. To illustrate, a declarant has declared his "tax dues" as ` 25 lakh. However, Commissioner has specific information that declaration has been made only for part liability, and the actual "tax dues" are ` 50 lakh. This declaration would fall in the category of "substantially false". This example is only illustrative.
16	What is the consequence if a declarant fails to pay atleast 50% of declared amount of tax dues by the 31 st Dec 2013?	One of the conditions of the Scheme [section 107 (3)] is that the declarant shall pay atleast an amount equal to 50% of the declared tax dues under the Scheme, on or before the 31.12.2013. Therefore, if the declarant fails to pay atleast 50% of the declared tax dues by 31st Dec, 2013, he would not be eligible to avail of the benefit of the scheme.
17	Whether the CENVAT credit is admissible on the inputs/input services used for provision of output service in respect of which declaration has been made under VCES for payment of any tax liability outside the VCES?	The VCES Rules 2013 prescribe that CENVAT credit cannot be utilized for payment of "tax dues" under the Scheme. Accordingly the "tax dues" under the Scheme shall be paid in cash. The admissibility of CENVAT credit on any inputs and input services used for provision of output service in respect of which declaration has been made shall continue to be governed by the provisions of the Cenvat Credit Rules, 2004.

18	(a) Whether the tax dues amount paid under VCES would be eligible as CENVAT credit to the recipient of service under a supplementary invoice? (b) Whether cenvat credit would be admissible to the person who pays tax dues under VCES as service recipient under reverse charge mechanism?	Rule 6(2) of the Service Tax Voluntary Compliance Encouragement Rules, 2013, prescribes that CENVAT credit cannot be utilised for payment of "tax dues" under the Scheme. Except this condition, all issues relating to admissibility of CENVAT credit are to be determined in terms of the provisions of the CENVAT Credit Rules. As regards admissibility of CENVAT credit in situations covered under parts (a) and (b), attention is invited to Rules 9(1)(bb) and 9(1)(e) respectively of the CENVAT Credit Rules.
19	In terms of section 106 (2)(b), if a declaration made by a person against whom an audit has been initiated and where such audit is pending, then the designated authority shall by an order and for reasons to be recorded in writing, reject such declaration. As the audit process may involve several stages, it may be indicated as to what event would constitute,- (i) Initiation of audit; and (ii) Culmination of audit.	Initiation of audit: For the purposes of VCES, the date of the visit of auditors to the unit of the taxpayer would be taken as the date of initiation of audit. A register is maintained of all visits for audit purposes. Culmination of audit: The audit process may culminate in any of the following manner.- (i) Closure of audit file if no discrepancy is found in audit; (ii) Closure of audit para by the Monitoring Committee Meeting (MCM); (iii) Approval of audit para by MCM and payment of amount involved therein by the party in terms of the provisions of the Finance Act, 1994; (iv) Approval of audit para by MCM, and issuance of SCN, if party does not agree to the para so raised. The audit culminates at a point when the audit paras raised are settled in any manner as stated above. The pendency of audit as on 1-3-2013 means an audit that has been initiated before 1-3-2013 but has not culminated as on 1-3-2013.

3. Trade Notice/Public Notice may be issued to the field formations and tax-payers.

Please acknowledge receipt of this Circular.

Hindi version follows.

(S. Jayaprahasam)

Technical Officer, TRU

F. No. B1/19/2013-TRU (Pt)

Extension of due date for filing of service tax returns for the half year ended on 31st March, 2013

Due to difficulties faced by assessee's in uploading the service tax returns by using off line utilities, the due date for submission of service tax return (ST-3) for the half year ended on 31-3-2013 is extended from 31st August 2013 to 10th September 2013.

(Order No. 4/2013 – Service Tax dated 30th August, 2013)

CA. Bharat Shemlani

INDIRECT TAXES
Service Tax – Case Law Update

1. Services

Restaurant and Accommodation Service

1.1 Kerala Classified Hotels and Resorts Association vs. UOI 2013 (31) STR 257 (Ker.)

The High Court in this case held that, service tax on serving of food or beverages, including alcoholic beverages, was beyond the legislative competence of Parliament as transaction were covered by Entry 54 of List II of Seventh Schedule of Constitution of India, and within exclusive competence of State Legislature. Under deeming provision of Article 366(29A)(f) of the Constitution of India, incidence of tax was on supply of any goods by way of or as part of any service and when food or alcoholic beverages were supplied as part of any service, such transfer was deemed to be sale.

It is further held that, service tax on hotel, inn, guest house, club or camp-site by whatever named called, for providing accommodation for continuous period of less than three months trenched on legislative function of State. It is tax on services on which State Legislature had enacted Kerala Tax on Luxuries Act by exercising their legislative power under Entry 62 of List II of Constitution of India, hence Government of India cannot impose any service tax on it in exercise of its residuary power of Entry 97 of List I of Constitution of India.

Management, Maintenance or Repair Service

1.2 Roller Centre vs. CCE, Ahmedabad 2013 (31) STR 293 (Tri.-Ahmd.)

The Tribunal in this case held that, issue regarding service tax levy on construction of road during the period between 16-6-2005 and 26-7-2009 under Management, maintenance or repair service is covered by section 97 of FA, 2012 and therefore, order demanding tax is unsustainable and required to be set aside.

Business Auxiliary Service

1.3 Dnyaneshwar Trust vs. CCE. Mumbai 2013 (31) STR 328 (Tri.-Mum.)

The appellant in this case undertook activity of harvesting sugarcane and its transportation to sugar factory from the fields of farmers and claimed exemption under Notification No. 13/2003-ST. The Tribunal held that, activity is in relation to sale of sugarcane by farmers and purchase of sugarcane by the sugar factory and service provided of a commission agent and therefore the appellant is entitled for the benefit of Notification No. 13/2003-ST.

1.4 Ideal Road Builders Pvt. Ltd. vs. CST, Mumbai 2013 (31) STR 350 (Tri.-Mum.)

The appellant in this case, constructed highways and collected toll charges from road users. For financing the project special purpose vehicle was formed as a result of agreement between NHAI or State Authority and Concessionaire under BOOT arrangement. The Tribunal held that, CBEC Circular No. 152/3/2012-ST dated 22-2-2011 clarified that contractor authorised to collect toll charges and service tax is not leviable thereon. Further, construction of roads, specifically excluded from Commercial or Industrial Construction service and Work Contract service and Repair and Maintenance of road is exempted from service tax retrospectively. Therefore, service tax is not leviable on toll collection charges under Business Auxiliary Service.

Also refer to decision of *CC & CE, Guntur vs. Swarna Tollway (P) Ltd. 2013 (31) STR 419 (AP)*

1.5 CST, Delhi vs. Intertoll ICS CE Cons O & MP Ltd. 2013 (31) STR 477 (Tri.-Del.)

The Tribunal in this case held that services rendered to NHAI is not liable to service tax under BAS as NHAI is not a business or commercial concern engaged in business activity.

Tour Operator Service

1.6 Shail Shikhar Associates vs. CCE. Meerut-I 2013 (31) STR 433 (Tri.-Del.)

In this case, the appellant has taken Ropeway belonging to Municipality on licence for continuous running between two fixed points during working hours to transport tourists who choose to use the ropeway for their journey and come on their own volition. The Tribunal held that, Tourists only availed facility of ropeway provided by assessee and they were neither beneficiary nor dependent on assessee for planning, scheduling, organising or arranging their journey. Also movement of trolley with aid of power from one fixed point to another could not be said to be a mode of transport. It was more in nature of entertainment and fun industry. Hence, assessee had not acted as tour operator within the meaning of section 65(115) of FA, 1994.

Port Service

1.7 J. M. Baxi & Company vs. CST (Adj.) Mumbai-I 2013 (31) STR 453 (Tri.-Mum.)

The appellant in this case claimed that handling of export cargo excluded from scope of Cargo Handling Service and Port Service therefore, not liable to service tax. The Tribunal held that, Cargo Handling Service excludes handling of export cargo hence, the same not to come within purview of Port Service. Matter remanded for verification.

Mandap Keeper Service

1.8 Rambagh Palace Hotels Pvt. Ltd. vs. 2013 (31) STR 480 (Tri.-Del.)

The department in this case sought to include renting charges of rooms booked for marriage, conference and meeting under composite contract. The Tribunal held that, activity of giving hotel rooms for organising function in hotel entirely different from Mandap Keeper activity and Mandap Keeper definition nowhere covers temporary occupation of hotel rooms for boarding, temporary residence, hence the order holding inclusion of impugned rent in value of services rendered is unsustainable.

2. Interest/Penalties/Others

2.1 Director of Mines and Geology vs. CCE (Appeals-II), Bengaluru 2013 (31) STR 275 (Kar.)

The High Court in this case held that in case of appeals to Commissioner (Appeals), condonation of delay cannot exceed three months in addition to three months for filing of appeal. As express provision has been made for period of limitation and condonation of delay, it overrides the Limitation Act, 1963 which is general law. Hence, even if there is sufficient cause for condition of delay beyond additional three months, delay cannot be condoned.

It is further held that, in case of appeals to Tribunal, in absence of provision of condonation of delay, section 5 of Limitation Act, 1963 is applicable.

2.2 CCE, Ludhiana vs. City Cables 2013 (31) STR 279 (P&H)

The High Court in this case held that, an assessee is required to be informed to avail the benefit of second proviso to section 78 providing for reduced penalty if paid within 30 days of the order, so that he can deposit 25% of the penalty amount. In the present case, adjudicating authority has not given such an option but since the amount of duty was already paid even before issue of SCN, the direction to deposit 25% of the penalty amount in terms of second proviso to section 78 is fair, reasonable and meets the ends of justice.

2.3 Chowgule & Co. (Salt) Pvt. Ltd. vs. CCE, Rajkot 2013 (31) STR 334 (Tri.-Ahmd.)

In this case, the appellant claimed refund claim of service tax paid on Stevedoring and Documentation charges. The department rejected refund claim on the ground that, stevedoring and documentation charges have not been specified in the Notification No. 17/2009-ST and service of stevedoring fall under the category of Cargo Handling Service and not under Port Service and service tax under Cargo Handling Service is exempt in respect of export cargo. The Tribunal in this case held that, while sanctioning the refund claim, what is to be examined is whether service tax has been paid under the category of services which is notified under the notification or not. Port service is one of the services notified under Notification No. 17/2009-ST and since service tax has been paid under category of port service, denial of refund cannot be sustained.

2.4 Ambience Construction India Ltd. vs. CST, Hyderabad 2013 (31) STR 343 (Tri.-Bang.)

The appellant in this case claimed refund of service tax paid under mistake of law on renting to immovable property to hotel, which is non-taxable. It is pleaded that, refund to be allowed without limitation. The Tribunal held that, such plea is not acceptable as contrary to dictum repeatedly laid down by Supreme Court. The limitation provided under section 11B of CEA, 1944 is applicable even to refund of service tax paid under mistake of law.

2.5 Delhi Chartered Accountants Society (Regd.) vs. UOI 2013 (31) STR 429 (Del.)

The High Court in this case held that, CBEC Circular dated 8-5-2012 clarifying that, rate of service tax on invoices issued prior to 1-4-2012 when rate of tax increased from 10% to 12% but payment received after 1-4-2012 to be paid at 12% is in violation of Rule 4 of POTR, 2011.

2.6 Glyph International Ltd vs. CCE&ST, Noida 2013 (31) STR 430 (Tri.-LB.)

The Larger Bench in this case held that, in respect of appeal relating to refund and rebate of taxes, no fees is payable under section 86(6) of FA, 1994.

2.7 Karnavati Club Ltd. vs. CST, Ahmedabad 2013 (31) STR 445 (Tri.-Ahmd.)

The appellant in this case claimed refund of service tax paid under protest under Mandap Keeper Services for rendering Health and Fitness service to members upon insistence of lower authorities. The Tribunal held that, there was categorical conclusion that members not to be seen separately as client or customers and mandap or club one and the same. Since demand set aside at SCN stage incidence of tax liability not passed to members. It is also held that, service rendered to self cannot be equated with services rendered to client or customer. Since, provision of section 12B of CEA, 1944 are not applicable the question of producing evidence supporting non-passing of service tax liability not required.

3. CENVAT Credit

3.1 CCE, Ahmedabad vs. Krishna Communication 2013 (31) STR 285 (Tri.-Ahmd.)

In this case, department sough to reverse proportionate credit on amounts written as bad debts alleging wrongful availment of credit as service tax not received on the impugned amounts. The Tribunal observed that, eligibility of availment of credit by service provider and discharge of service tax liability by service provider is undisputed and also services were utilised for providing output services. It is held that, department trying to co-relate input service to output service which is against the settled law that, one to one correlation in availment of credit on input services to output service is not possible. The reasoning given by First Appellate Authority that, availment is not wrongful and rule 14 of CCR, 2004 does not envisage recovery of credit where service tax recovery is pending or written off as bad debts, is correct and in accordance with law held by Higher Judicial Forum.

3.2 VST Industries Ltd. vs. CC, CE&ST (Appeal-II), Hyderabad 2013 (31) STR 357 (Tri.-Bang.)

The Tribunal in this case allowed CENVAT credit of service tax paid on advice to farmers to grow good quality of tobacco as the cost of such services were included by assessee in the cost of production of cigarettes and not recovered from farmers.

3.3 Global Digital Color Lab vs. CCE, Jaipur 2013 (31) STR 382 (Tri.-Del.)

The appellant in this case availed CENVAT credit of CVD paid on machines imported prior to date of issue of registration certificate. The lower authorities denied credit on the ground that, credit entries in CENVAT credit register not to be earlier than date of granting registration. The Tribunal held that, the department failed to point out provision providing that credit cannot be taken on machine procured prior to date of issue of Registration certificate.

3.4 Emcon Technologies India Pvt. Ltd. vs. CCE, Bengaluru2013 (31) STR 441 (Tri.-Bang.)

The Tribunal in this case allowed CENVAT credit of service tax paid on Rent-a-cab service used for transportation of employees between the factory and prefixed points away from it and on Air Travel Agents services availed to enable the company executive to undertake air travel for business purpose.

3.5 Bharat Petroleum Corporation Ltd. vs. CCE, Mumbai-II 2013 (31) STR 455 (Tri.-Mumbai)

The Tribunal in this case held that, telephones installed at the residence of the officials which are integrally connected with the business of the manufacture of final product of the appellant and the same is covered under rule 2(1) of CCR, 2004.

3.6 CCE, Surat-II vs. Astik Dyestuff P. Ltd. 2013 (31) STR 459 (Tri.-Ahmd.)

The Tribunal after following Gujarat High Court decision in Cadila Healthcare case 2013 (30) STR 3 (Guj.) held that, service of commission agent is not being analogous to activities mentioned in definition of Input Service and not covered by expression activities relating to business.

3.7 Pepsico India Holdings Pvt. Ltd. vs. CCE, Bengaluru 2013 (31) STR 499 (Tri.-Bang.)

In this case department denied CENVAT credit of service tax paid on architectural services for putting in place rain water harvesting system. The Tribunal held that, as the appellant is manufacturer of sweetened carbonated beverages and aerated water, water is an important input and therefore, the putting up rain water harvesting system is integrally connected to harnessing water.

Janak C. Pandya, *Company Secretary*

CORPORATE LAWS
Company Law Update

Case Law No. 1

(2013) 179 Comp Cas 421 (SC) – In the Supreme Court of India – Bhagwati Developers P. Ltd vs. Peerless General Finance Investment Co. Ltd. And Another

The provisions of SCRA is applicable to an unlisted public company and that term marketable is equated with the word "saleable" and being bought and sold in the market and that marketability is to be attached with the meaning of free transferability of a shares.

Brief facts

This application is made by Bhagwati Developers P. Ltd. (Applicant or Bhagwati) against the Calcutta High Court Judgment which has confirmed the order of the Company Law Board, Eastern Region ('CLB").

Applicant was approached by one Mr. Tuhin Kanti Ghose (TK) for a loan. The said loan was for purchasing 3,550 equity shares of Peerless Peerless General Finance Investment Co Ltd. and another (Respondent or R1). Applicant had given a loan to TK. A formal agreement to that effect was entered into, between both of them. Subsequently TK agreed to transfer the sharers of R1 in favour of applicant as repayment of loan. TK also agreed to give all dividend and bonus shares in favour of applicant. While execution of transfer, even though TK had handed over the original shares to applicant, the execution of transfer deed was not proper. Applicant had made several requests to TK for re-execution of the fresh transfer deed and also to send him all dividend and bonus received from R1. However TK had not re-executed the fresh transfer deed. During these periods, R1 had twice announced allotment of bonus shares. TK, being a registered shareholder received all bonus shares. Thus, at the end TK owned 14,120 equity shares of R1.

Applicant had then filed a civil suit in the court and had obtained an interim order of injunction restraining TK from claiming any right, title or interest on said shares. Subsequently, both the parties made out of court settlement and applicant had agreed to pay additional consideration to TK and in turn, TK had agreed to give back shares to the applicant. This comprehensive settlement was part of the decree passed by the court.

Applicant then lodged a request for the transfer of shares in his favour with R1. The R1 *vide* its letter rejected the transfer application citing that the said transfer was in violation of the provisions of Securities Contracts (Regulation) Act, 1956 (SCRA). As per R1, the contract for sale of shares was not a spot delivery contract and there were some other deficiencies in the transfer deed. Applicant, after correcting all defects in the transfer deed, re-lodged the application, which was rejected again. Again, R1 has rejected and aggrieved by this, applicant has filed the petition under section 111 of the Companies Act, 1956 ("Act") before the CLB.

CLB, has rejected the petition and cited the regulations 13 and 16 of SCRA and observed as follows;

a. The said transfer of shares is illegal.

b. Shares of a public company which are not registered in the stock exchange also come under the purview of section s13, 16 & 17 of the SCRA.

c. Since consideration for shares, which as per the applicant was made only to buy peace and having been paid the same much after the date on which the sale of shares had taken place, it does not fall within the "spot delivery contract" as defined under section 2(i) of SCRA.

The applicant then preferred an appeal before the High Court, contending that the shares of R1, being an unlisted company does not come under SCRA provisions. Further, the sale of shares between TK and itself is in kind of spot delivery and CLB on both the count has been erroneous. High Court has upheld the CLB's order. High Court has also agreed to the CLB's observation on applicability of SCRA to an unlisted public company and that part consideration was made much after the original transfer as TK was entitled for retaining dividends and bonus shares even after the original transfer agreement took place.

The present appeal is for challenging the above High Court Judgment.

Judgment and reasoning

Court has rejected the application and upheld the High Court and CLB order.

Court has analysed the provisions of sections 13, 16 and 17 of SCRA.

Court has agreed that SCRA is applicable to an unlisted public company. Court has also considered the submission from the applicant as to the term "marketability" and that the said transactions does not fall under the definition of SCRA as securities are not marketable. In its submission, the judgments of the Bombay High court in *Dahiben Umedbhai Patel vs. Norman James Hamilton [1985] 57 Comp Cas 700* and in *Brooke Bond India Ltd vs. U.B. Ltd [1994] 79 Comp Cas 346 (Bom)* are quoted. Applicant also quoted that Calcutta High Court's judgment in *B.K. Holdings P. Ltd vs. Prem Chand Jute Mills [1983] 53 Comp Cas 367* are contrary to Bombay High Court's Judgments but he was of the view that Bombay High Court's judgment is based on sound reasoning. Court has analysed the definition of the word "securities" under section 2(i) and interpretation of word "Marketable". As SCRA does not define the word, dictionary meaning of the word "marketable" is taken from Black's Law Dictionary as well as from Oxford English Dictionary. The court has views that the term marketable is equated with the word "saleable" and being bought and sold in the market. It was also of the view that even listed shares are also not purchased or sold and that does not mean they are not marketable. Court has views that marketability is to be attached with "free transferability". The division bench of Calcutta High Court in *East Indian Produce Ltd. vs. Naresh Acharya Bhaduri [1988] 64 Comp Cas 259* also observed the above interpretation. Court has also looked at Bombay High Court case in Dahiben Umedbhai Patel case, which was related to a transfer of shares of a private company and not of a public company. Further, in Brooke bond case, it has relied on the Dahiben case, even though it was related to a private company and disagreed with the Calcutta High Court's judgment in East Indian Produce Ltd. Court has relied on its judgment in *Naresh K. Aggarwala and Co vs. Canbank Financial Services Ltd [2010] 6 SCC 178*. In said judgments, the term 'securities' under section 2(h)(i) and notification under section 16(2) has viewed that the definition does not make any distinction between listed securities and unlisted securities.

On spot delivery of shares, Court has noted that said contract is not a spot delivery. Court noted that original contract was for delivery of 3,550 equity shares. Subsequent agreement for comprehensive decree mentioned about the additional payment of ` 10 lakhs and that TK is also entitled for dividend and bonus shares till that date. In SCRA definition under section 2(i), the word 'spot delivery contract' means actual delivery of securities and payment thereof on the same day or on the next day. Court observed that there are two agreements between TK and the applicant. In first agreement, it has agreed to transfer 3,550 equity shares for repayment of loan. The subsequent agreement which formed part of the compromise decree, sale of shares took place at a later date by which applicant had paid additional amount as well as allowed TK to retain dividend up to certain period. Thus, as per Court, the views of CLB as well as High Court are correct that the said contract is not a contract for spot delivery.

Case Law No. 2

[2013] 179 Comp Cas 390 (SC) – In the Supreme Court of India – Integrated Finance Co. Ltd vs. Reserve Bank of India, etc.

By virtue of non obstante clause in section 45Q, Chapter III of the RBI Act, 1934 will prevail over sections 391-393 of the Act. Chapter IIIB is a self-contained code and being a later enactment clearly prevails upon the provisions of the Companies Act, 1956.

Brief case

These appeals arise out of S.L.P. (Civil) directed against the judgment of Division bench of Madras High Court. The Integrated Finance Co. Ltd ("Applicant") is a non-banking finance company ("NBFC") engaged in the business of hire-purchase and leasing. It is a listed company having wide network. Initially, the said Applicant Company was profitable and had been declaring dividends also. Subsequently, 1997 onwards, RBI has issued various circulars regulating the activities of NBFC and imposing certain conditions on such companies. As per RBI direction, NBFCs which do not comply with the aforesaid directions and circulars were directed to stop accepting deposits and also to repay the deposits. Based on the inspection of the applicant company, RBI had found various irregularities.

After inspection, RBI had directed the company not to accept further deposits and also imposed certain other conditions. Due to the RBI's direction, applicant had started facing financial problems and to overcome these problems, it had proposed a scheme of arrangement ("Scheme") with its creditors who are the deposit holders as well as bond holders. As per the said Scheme, applicant had agreed to repay deposits up to ` 20,000/- as and when they get matured. Further, dues of the other deposit holder and bond will be converted into secured convertible debenture with 6% interest. Before expiry of one year, the said debenture will be converted into equity shares based on SEBI valuation norms.

The company petition under section 391 of the Companies Act, 1956 ("Act") for seeking approval of the above Scheme was presented before the High Court. After completing all process and formalities, the petition was heard for final disposal. The depositors' association and several other depositors had filed their objection and raised several contentions. RBI had also filed its objection. The single judge overruling the entire objection had approved the Scheme. The above order was challenged before the division bench. The division bench has set aside the order of the single judge.

The applicant has submitted that the Scheme was approved by the deposit holders and bond holders which is more than the requirement under the Act for its approval. It also submitted that it has complied with all statutory requirements relating to the said Scheme. There is no such procedural requirement observed by single judge or division bench. The only issue is whether (1) the non obstante clause in section 45Q of the RBI Act, 1934 prohibits the High Court from sanctioning any scheme for the deposit holders of NBFC (2) And whether applicant has failed to disclose RBI letter before the company judge. The submission in favour of approval was made including various court judgments, where minority has objected to the scheme. The judgments in *J.K. (Bombay) P. Ltd vs. New Kaiser-I-Hind Spinning and Weaving Co. Ltd.* and Administrator of the specified undertaking of the *Unit Trust of India vs. Garware Polyster Ltd.* are referred. The applicant has summarised the provisions of RBI Act and Companies Act and submitted that both acts operate in different fields and both the Acts are to be read together harmoniously and there is no inconsistency between the two and that the legislature did not intend to exclude the application of sections 391-394 of the Act for NBFC.

Judgment and reasoning

Court has upheld the judgment of division bench on rejecting the petition for Scheme. Court has observed that the submission of the applicant that the provisions of section 45 of the RBI Act is not a bar to a scheme under sections 391-394 of the Act is not acceptable. It has also noted that the observation of the division bench, which has stated that by virtue of non obstante clause in section 45Q, Chapter III of the RBI Act, 1934 will prevail over sections 391-393 of the Act. Court has referred to various judgments including judgments in *Miheer H. Mafatlal v. Mafatlal Industries Ltd.* It also observed that Court does not act as a rubber stamp and has to consider that such scheme does not violate any provisions of law. Court has also noted that the objects and reasons of inserting Chapter IIIB into the RBI Act, 1934 in 1997 and after considering the same it has opined that Chapter IIIB is a self-contained code. Court observed that Chapter IIIB, inserted in 1963 being a later enactment clearly prevails upon the provisions of the Act.

Court has also noted that the applicant has not disclosed the material facts with regards to RBI Notice sent under section 45MB(1), which has pointed out various discrepancies and non-compliances and violations in the business of the applicant and that RBI has the power to prohibit the NBFC from accepting any deposits. Thus, court has observed that the non-disclosures of material information, which could have major influence and impact on decision as to approval of scheme is non-compliance of requirement of section 391(1) read with section 393(1) of the Act.

CA. Mayur Nayak, CA. Natwar Thakrar &
CA. Pankaj Bhuta

OTHER LAWS
FEMA Update

In this article, we have discussed recent changes in FEMA through RBI circulars and Press Notes:

A. RBI CIRCULARS

1. Risk Management and Inter-bank Dealings

RBI is clarified that if an FII wishes to enter into a hedge contract for the exposure relating to that part of the securities held by it against which it has issued any PN/ODI, it must have a mandate from the PN/ODI holder for the purpose. Further, while AD Category bank is expected to verify such mandates, in cases where this is rendered difficult, they may obtain a declaration from the FII regarding the nature/structure of the PN/ODI establishing the need for a hedge operation and that such operations are being undertaken against specific mandates obtained from their clients.

[A.P. (DIR Series) Circular No. 18 dated 1st August, 2013]

2. Non-Resident Deposits – Comprehensive Single Return (NRD-CSR): Submission under XBRL

Presently, NRD-CSR software package is being used by the banks for submission of detailed monthly data on Non-Resident Deposits to the Reserve Bank. RBI has now decided to switch-over to the XBRL-based NRD-CSR reporting from October 2013.

[A.P. (DIR Series) Circular No. 19 dated 7th August, 2013]

3. Foreign Exchange Management Act, 1999 (FEMA)

Foreign Exchange (Compounding Proceedings) Rules, 2000 (the Rules) - Compounding of Contraventions under FEMA, 1999:

The application for compounding of contraventions of FEMA, 1999 are returned along with the application fees of ₹ 5,000/- for reasons such as submissions without obtaining proper approvals or permission from the concerned authorities.

In order to expedite the refund of compounding fees in such cases, RBI has decided to credit the same to the applicant's account through NEFT. RBI has instructed the applicants to furnish their mandate and details of their bank account along with the application in the prescribed format and other documents required to be submitted.

Further, applications for compounding relating to Foreign Direct Investment, External

Commercial Borrowings, Overseas Direct Investment and Branch Office / Liaison Office have also been modified to include the details of income-tax PAN and the activity as per NIC codes – 1987. RBI has also stated that the application will be treated as incomplete without these details.

[A.P. (DIR Series) Circular No. 20 dated 12th August, 2013]

(This will speed up the process of refund receivable by the applicants, thus making the process more efficient)

4. Exim Bank's Line of Credit of USD 28.60 million to the Republic of Zimbabwe

The Credit Agreement under the LOC is effective from July 25, 2013 and the date of execution of Agreement is June 21, 2013.

[A.P. (DIR Series) Circular No. 21 dated 12th August, 2013]

5. Exim Bank's Line of Credit of USD 300 million to the Government of the Federal Democratic Republic of Ethiopia

The Credit Agreement under the LOC is effective from July 15, 2013 and the date of execution of Agreement is June 13, 2013.

[A.P. (DIR Series) Circular No. 22 dated 12th August, 2013]

6. Overseas Direct Investments

Currently, the total overseas direct investment (ODI) of an Indian Party in all its Joint Ventures (JVs) and / or Wholly Owned Subsidiaries (WOSs) abroad engaged in any *bona fide* business activity should not exceed 400 per cent of the net worth of the Indian Party as on the date of the last audited balance sheet under the Automatic Route.

RBI has henceforth decided:

a) To reduce the existing limit of 400 per cent of the net worth of the Indian Party to 100 per cent of its net worth as on the date of the last audited balance sheet under the Automatic Route;

b) To reduce the existing limit of 400 per cent of the net worth of the Indian company, investing in the overseas unincorporated entities in the energy and natural resources sectors, under the automatic route, to 100 per cent of the net worth of the Indian company investing in the overseas unincorporated entities in the energy and natural resources sectors, as on the date of last audited balance sheet; and

c) Any ODI in excess of 100% of the net worth would be considered under the Approval Route by the Reserve Bank of India.

In respect of the Navaratna Public Sector Undertakings (PSUs), ONGC Videsh Limited (OVL) and Oil India Ltd. (OIL), the extant provision for investing in overseas unincorporated entities and the overseas incorporated entities in the oil sector (i.e., for exploration and drilling for oil and natural gas, etc.), which are duly approved by the Government of India, without any limits under the automatic route, would not be affected by the above.

[A.P. (DIR Series) Circular No. 23 dated 14th August, 2013]

(The above limits have been rationalized with an expectation of alleviating the depreciating rupee and also to taper the foreign exchange outflows)

7. Liberalised Remittance Scheme for Resident Individuals- Reduction of limit from USD 200,000 to USD 75,000

RBI has now decided to reduce the existing limit of USD 200,000 per financial year to USD

75,000 per financial year (April - March) with immediate effect, under the scheme, for any permitted current or capital account transaction or a combination of both.

Further, the following changes / clarifications in regard to the remittances under LRS have also been effected:

i. The scheme can no longer be used for acquisition of immovable property, directly or indirectly, outside India. Therefore, AD Category-I banks may henceforth not allow any remittances under the LRS Scheme for acquisition of immovable property outside India.

ii. The scheme cannot be used for making remittances for any prohibited or illegal activities such as margin trading, lottery etc., as hitherto.

iii. Resident individuals have now been allowed to set up Joint Ventures (JV) / Wholly Owned Subsidiaries (WOS) outside India for *bona fide* business activities outside India within the limit of USD 75,000 with effect from August 5, 2013 and subject to the terms and conditions stipulated in Foreign Exchange Management (Transfer or Issue of any Foreign Security) (Amendment) Regulations, 2013.

Further, the limit for gift in Rupees by Resident Individuals to NRI close relatives and loans in Rupees by resident individuals to NRI close relatives also stands accordingly modified to USD 75,000 per financial year.

[A.P. (DIR Series) Circular No. 24 dated 14th August, 2013]

(A notable restriction imposed *vide* this circular is prohibition on purchase of immovable property. This move will certainly help in bringing down the demand for US dollar purchases in the domestic currency market and thus might help in stabilising the rupee)

8. Foreign Exchange Management (Transfer or issue of any Foreign Security) (Amendment) Regulations, 2013

The RBI *vide* Notification No. 263/RB-2013 amending Notification No. 120 Foreign Exchange Management (Transfer or Issue of any Foreign Security) (Amendment) Regulations, 2013 has notified directions issued *vide* AP (Dir) Series Circular No. 24 dated 14th August, 2013.

Now a resident individual (single or in association with another resident individual or with an 'Indian Party') can make overseas direct investment in the equity shares and compulsorily convertible preference shares of a Joint Venture (JV) or Wholly owned Subsidiary (WOS) outside India subject to satisfaction of the following criteria:

A. Overseas Direct Investments by Resident Individuals

1) Resident individual is prohibited from making direct investment in a JV or WOS abroad which is engaged in the real estate business or banking business or in the business of financial services activity.

2) The JV or WOS abroad has to be engaged in *bona fide* business activity.

3) Resident individual is prohibited from making direct investment in a JV / WOS [set up or acquired abroad individually or in association with other resident individual and /or with an Indian party] located in the countries identified by the Financial Action Task Force (FATF) as "non co-operative countries and territories" as available on FATF website www.fatf-gafi.org or as notified by the Reserve Bank.

4) The resident individual is not on the Reserve Bank's Exporters Caution List or List of defaulters to the banking system or under investigation by any investigation / enforcement agency or regulatory body.

5) At the time of investments, the permissible ceiling would be within the overall ceiling prescribed for the resident individual under Liberalised Remittance Scheme as prescribed by the Reserve Bank from time to time. [Explanation: The investment made out of the balances held in EEFC / RFC account shall also be restricted to the limit prescribed under LRS.]

6) The JV or WOS, to be acquired / set up by a resident individual under this Schedule, would have to be an operating entity only and no step down subsidiary would be allowed to be acquired or set up by the JV or WOS.

7) For the purpose of making investment under this Schedule, the valuation would be as per Regulation 6(6)(a) of this Notification.

8) The financial commitment by a resident individual to / on behalf of the JV or WOS, other than the overseas direct investments as defined under Foreign Exchange Management (Transfer or Issue of Any Foreign Security) (Amendment) Regulations, 2004 is prohibited.

B. Post Investment Changes

Any alteration in shareholding pattern of the JV or WOS would have to be reported to the designated AD within 30 days including reporting in the Annual Performance Report as required to be submitted in terms of Foreign Exchange Management (Transfer or Issue of Any Foreign Security) (Amendment) Regulations, 2004.

C. Disinvestment by Resident Individuals

1) A resident individual, who has acquired / set up a JV or WOS under the provisions of this Schedule, can disinvest (partially or fully) by way of transfer / sale or by way of liquidation / merger of the JV or WOS.

2) Disinvestment by a resident individual would be allowed after one year from the date of making first remittance for setting up or acquiring the JV or WOS abroad.

3) The disinvestment proceeds would have to be repatriated to India immediately and in any case not later than 60 days from the date of disinvestment and the same would have to be reported to the designated AD.

4) No write off would be allowed in case of disinvestments by the resident individuals.

D. Reporting Requirements

1) The resident individual, making overseas direct investments under the provisions of this Schedule, would have to submit Part I of the Form ODI, duly completed, to the designated authorised dealer, within 30 days of making the remittance.

2) The investment, as made by a resident individual, would be reported by the designated authorised dealer to the Reserve Bank in Form ODI Part I and II within 30 days of making the remittance. The obligations as required in terms of Foreign Exchange Management (Transfer or Issue of Any Foreign Security) (Amendment) Regulations, 2004 would also apply to the resident individuals who have set up or acquired a JV or WOS under the provisions of this Schedule.

3) The disinvestment by the resident individual would have to be reported by the designated AD to the Reserve Bank in Form ODI Part IV within 30 days of receipt of disinvestment proceeds."

(Notification No. FEMA.263/RB-2013 dated August 5, 2013)

9. Import of Gold by Nominated Banks /Agencies/Entities (Revised)

RBI *vide* A.P. (DIR Series) Circular No. 24 dated 14th August, 2013 dated July 22, 2013 had imposed certain restrictions on the import of various forms of gold by nominated banks/ nominated agencies/ premier or star trading houses/SEZ units/EoUs which have been permitted to import gold for use in the domestic sector. The same has been revised by RBI as follows:

a) Import of gold in the form of coins and medallions would now be prohibited.

b) It would be incumbent on all nominated banks/nominated agencies and other entities to ensure that at least one fifth, i.e., 20%, of every lot of import of gold imported to the country is exclusively made available for the purpose of exports and the balance for domestic use. This would be monitored by customs authorities, and will be implemented port-wise only.

c) Supply of gold in any form to the domestic users other than against full payment upfront would not be permitted.

d) The nominated banks/agencies/refineries and other entities would have to ensure that there is no front loading of imports, particularly in the first and second lots of imports. Such imports would be linked to normal quantities of gold supplied to the exporters by the nominated banks/ agencies and cannot exceed the highest quantity supplied during any one year out of last three years. The quantity thus arrived at, however, cannot be imported in one or two lots only. As a thumb rule, imports of more than maximum of two months of requirements of the exporters in a lot would be considered unusual.

   In case of nominated banks not having a previous record of having supplied gold to the exporters they would need to seek prior approval from RBI before placing orders for import of gold for the first lot under the 20/80 scheme.

e) The 20/80 principle would also apply for the henceforth import of gold in any form/purity including gold dore, whereby 20 per cent of the gold imported shall be provided to the exporters. This would be administered and monitored at the refinery level for each consignment at the time of such imports. This would also be monitored by the customs authorities. The refinery can make available for domestic use only to the entities engaged in jewellery business/bullion dealers and to the banks authorised to administer the Gold Deposit Scheme against full upfront payment and sale of gold against any other form of payment would not be permitted. Further, the import of gold dore would be permitted only against a licence issued by DGFT.

f) Any authorisation such as Advance Authorisation/Duty Free Import Authorisation (DFIA) would have to be utilised for import of gold meant for export purposes only and no diversion for domestic use would be permitted.

Entities/units in the SEZ and EoUs, Premier and Star trading houses would be permitted to import gold exclusively for the purpose of exports only.

[A.P. (DIR Series) Circular No. 25 dated 14th August, 2013]

10. Deferred Payment Protocols between Government of India and erstwhile USSR

The Rupee value of the Special Currency Basket was indicated as ` 80.972091 effective from June 25, 2013 a further revision has taken place on August 06, 2013 and accordingly, the Rupee value of the Special Currency Basket has been fixed at ` 83.45023 with effect from August 12, 2013.

[A.P. (DIR Series) Circular No. 26 dated 14th August, 2013]

11. Exim Bank's Line of Credit of USD 41.60 million to the Government of the Union of Comoros

The Credit Agreement under the LOC is effective from July 23, 2013 and the date of execution of Agreement is February 22, 2013.

[A.P. (DIR Series) Circular No. 27 dated 16th August, 2013]

12. Foreign Investments in Asset Reconstruction Companies (ARC)

Earlier, Foreign Direct Investment (FDI) up to 49% in the equity capital of Asset Reconstruction Companies (ARCs) was permitted subject to certain conditions. However, investment by Foreign Institutional Investors (FIIs) in the equity capital of ARCs was not permitted and general permission was granted to Foreign Institutional Investors (FIIs) to invest in Security Receipts (SRs) up to 49 per cent of each tranche of scheme of Security Receipts subject to condition that investment of a single FII in each tranche of scheme of SRs cannot exceed 10 per cent of the issue.

RBI has now decided as under:

i. The ceiling for FDI in ARCs would be increased from 49% to 74% subject to the condition that no sponsor may hold more than 50% of the shareholding in an ARC either by way of FDI or by routing through an FII. The foreign investment in ARCs would need to comply with the FDI policy in terms of entry route conditionality and sectoral caps.

ii. The foreign investment limit of 74% in ARC would be a combined limit of FDI and FII. Hence, the prohibition on investment by FII in ARCs would be removed. The total shareholding of an individual FII cannot exceed 10% of the total paid-up capital.

iii. The limit of FII investment in SRs can be enhanced from 49% to 74% of the paid up value of each tranche of scheme of Security Receipts issued by the Asset Reconstruction Companies. Further, the individual limit of 10% for investment of a single FII in each tranche of SRs issued by ARCs can be dispensed with. Such investment has to be within the FII limit on corporate bonds prescribed from time to time, and sectoral caps under the extant FDI Regulations should be complied with.

[A.P. (DIR Series) Circular No. 28 dated 19th August, 2013]

(This move is aimed at bringing in more foreign expertise in the segment.)

13. Investments by Non-resident Indians (NRIs) under Portfolio Investment Scheme (PIS) Liberalisation of Policy

NRIs can invest under PIS on repatriation and/or non-repatriation basis in shares and convertible debentures of listed Indian companies on a recognised stock exchange in India through a registered stock broker. Further, NRIs may purchase and sell shares/convertible debentures under the PIS through a branch designated by an Authorised Dealer for the purpose and duly approved by the Reserve Bank of India.

As a measure of further liberalisation, RBI has decided to –

i. allot Unique Code number only to Link office of the AD Category - I bank; and

ii. dispense with the allotment of Unique Code number to each branch designated by that AD Category - I bank administering the Scheme. Accordingly, henceforth in accordance with the policy approved by the Board, AD Category - I bank would be free to permit its branches to administer the Portfolio Investment Scheme for NRIs subject to the following:

a) the AD Category - I bank while granting permission to NRI for investment under PIS would allow them to operate the scheme as per the terms and conditions;

b) the designated link office would continue to report on a daily basis PIS transactions undertaken on behalf of NRIs for their entire bank to the Reserve Bank under the Online Report Filing System (ORFS) in form LEC (NRI) as per present practice in vogue web site;

c) the AD Category - I bank would provide to the Reserve Bank the complete contact details of such link office in advance before commencing operations;

d) the AD Category - I bank would sensitise the branches administering the Scheme to ensure that NRIs are not allowed to invest in any Indian company which is engaged or proposes to engage in the business of chit fund, Nidhi company, agricultural or plantation activities, real estate business (does not include development of townships, construction of residential / commercial premises, roads or bridges, educational institutions, recreational facilities, city and regional level infrastructure, townships), construction of farm houses, manufacturing of cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes and trading in Transferable Development Rights (TDRs) and in sectors/ activities as specified in terms of Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000, as amended from time to time; and

e) ensure compliance with instructions issued through A.D. (M.A. Series) Circulars, EC.CO.FID circulars annexed as Annex-Band the regulatory requirements under FEMA, 1999.

[A.P. (DIR Series) Circular No. 29 dated 20th August, 2013]

B. DIPP PRESS NOTES/ CLARIFICATIONS

1. Review of the policy on Foreign Direct Investment in the Multi Brand Retail Trading Sector – Amendment of paragraphs 6.2.16.5 (iii), (iv) and (vi) of Circular 1 of 2013 – Consolidated FDI policy

Paragraph 6.2.16.5(iii) of Circular 1 of 2013 – Consolidated FDI policy includes clarification regarding investment in 'backend infrastructure' relating to foreign direct investment in the Multi Brand Retail Trading.

This press note notifies that at least 50% of total FDI brought in the first tranche of US $ 100 million, shall be invested in 'backend infrastructure'. It has also clarified that subsequent investment in the backend infrastructure would be made by the MBRT retailer as needed, depending upon its business requirements.

Paragraph 6.2.16.5(iv) of Circular 1 of 2013 – Consolidated FDI policy includes clarification regarding procurement from relating to foreign direct investment in the Multi Brand Retail Trading.

Amendment is made in the said paragraph whereby it is clarified that at least 30% of the value of procurement of manufactured/ processed products purchased shall be sourced from Indian 'small industries' which have a total investment in plant and machinery not exceeding US $ 2 million. The same was US $

1 million previously. It is also clarified that the 'small industry' status would be reckoned only at the time of first engagement with the retailer and such industry shall continue to qualify as a 'small industry' for this purpose even if it outgrows the said investment of US$ 2 million during its course of its relationship with the said retailer. Further, sourcing from agricultural co – operatives and farmers co-operatives would also be considered in this category.

Paragraph 6.2.16.5 (vi) of Circular 1 of 2013 – Consolidated FDI policy specifies details regarding retail sales outlets relating to foreign direct investment in the Multi Brand Retail Trading.

This press note notifies that States/ Union Territories not having cities with population of more than 10 lakh as per 2011 Census, retail sales outlets may be set up in the cities of their choice, preferably the largest city and may also cover an area of 10 kms around the municipal/ urban agglomeration limits of such cities. The locations of such outlets will be restricted to conforming areas, as per the Master/ Zonal plans of the concerned cities and provision will be made for requisite facilities such as transport connectivity and parking.

[Press Note No.5 (2013 Series) dated 22nd August 2013]

2. Review of the policy on Foreign Direct Investment (FDI) – Caps and routes in various sectors:

The Government of India has reviewed the Foreign Direct Investment caps and/ or routes in various sectors as contained in para 6.2 of 'Circular 1 of 2013 – Consolidated FDI Policy. The revised position is given as under:

Particulars	***Present Position***	***Revised Position***
Tea sector including tea plantations	Compulsory disinvestment of 26% equity of the company in favour of an Indian partner/ Indian public within a period of 5 years.	This clause has been deleted.
Petroleum and Natural Gas: Petroleum refining by the Public Sector Undertakings, without any disinvestment or dilution of domestic equity in the existing PSUs	Entry was allowed through government route	Entry is now allowed through automatic route
Defence	Entry was allowed through government route. (FDI CAP 26%)	Up to 26% Government. Above 26% to Cabinet Committee on Security (CCS) on case to case basis, which ensure access to modern and 'state of art' technology in the country.
Courier Services	Entry was allowed through government route	Entry is now allowed through automatic route.

Telecom Services	Entry was allowed through automatic route up to 49% and beyond 49% up to 74% through government route.	Entry is now allowed through automatic route up to 49% & above 49% up to 100% is allowed through Government route. FDI up to 100%
Test Marketing	According to para 6.2.16.3, entry was allowed through government route.	Para 6.2.16.3 is now deleted.
Single Brand Product retail Trading	• Entry was allowed through government route. • Application seeking permission of the Government for FDI in retail trade of single brand products is required to be made to the Secretariat for Industrial Assistance (SIA).	• Entry up to 49% is allowed through automatic route and above 49% through government route. • Now, application seeking permission of the Government for FDI exceeding 49% in retail trade of single brand products is required to be made to the Secretariat for Industrial Assistance (SIA).
Asset Reconstruction Company (ARC)	Entry was allowed through government route. (FDI Cap: 74% of paid-up capital of ARC FDI-FII)	Entry is now allowed up to 49% through automatic route and above 49% through Government route. (FDI Cap: 100% of paid up capital of ARC FDI-FII)
Commodity Exchanges	Entry was under Government route	Entry is now allowed under Automatic Route
Credit Information Company	Entry was under Government route. (FDI Cap 49%)	Entry is now allowed by Automatic Route (FDI Cap 74%)
Infrastructure Company in Security Market	Entry was under Government route.	Entry is now allowed by Automatic Route
Power Exchanges	Entry was under Government route.	Entry is now allowed by Automatic Route

[Press Note No.6 (2013 Series) dated 22nd August 2013]

(FDI limits for various sectors have been liberalised at one go to help accelerate growth of our sluggish economy)


Ajay Singh & Suchitra Kamble, *Advocates*

BEST OF THE REST

1. Chargeability of instrument – 'Bond' or 'agreement' – Document cannot be treated as mere agreement – Petitioner being obliged to pay money to respondent, instrument clearly fell under definition of bond – Construing instrument as agreement not requiring additional stamp duty, improper. Stamp Act, 1899, Ss. 3, 2(5)

The petitioner is the defendant in the suit filed by the respondent for recovery of a sum of ` 15,38,500/- along with future interest. During recording of evidence the respondent sought to mark the document stated to have been executed by the petitioner in favour of the respondent. The Petitioner filed Interim Application to determine the true nature of the document in question and not to admit the same till the same is properly stamped and impounded. It was pleaded by the Petitioner that the document in question is either a partnership deed or a surety bond and that in either case, it is not admissible in evidence for the reason that if it is a partnership deed, the same is not signed by the petitioner and if it is a surety bond, it is not sufficiently stamped. The respondent filed a counter affidavit pleading that the document in question is only an agreement or in alternative, it can be considered as only a loan receipt. The court below accepted the plea of the respondent and held that the document in question can be considered as an agreement and not as a bond, which does not require deficit stamp duty.

The High Court held that the document cannot be treated as a mere agreement and it falls under the definition of bond in Section 2(5)(b) of the Indian Stamp Act, 1899 which reads as :

"Section 2(5) "Bond": "Bond" includes – (a) ……… (b) any instrument attested by a witness and not payable to order or bearer, whereby a person obliges himself to pay money to another; and (c) ……."

As the petitioner allegedly obliged to pay money to the respondent, the instrument clearly falls under the definition of bond. The lower Court has, therefore, committed a jurisdictional error in misconstruing the instrument as an agreement not requiring additional stamp duty. The High Court directed the lower Court to treat the document as bond. The petition was allowed.

Nareddi Mohan Reddy vs. Siripuram Mallaiah AIR 2013 Andhra Pradesh 91

2. Rectification of instrument – Only parties to instrument can claim undue influence : Specific Relief Act, 1963, S. 26

The contesting parties before the court were the son and the daughter of Late B. P. Sandy who decided to transfer/settle his two houses in favour of his youngest son and daughter. Therefore, the father of the parties executed two registered settlement deeds transferring House No. 23 in the name of his daughter and House No. 22 in the name of his son. It is allegedly by the appellant that the father of the parties had only at a later point of time realised that the House No. 23 which was given to the daughter, ought to have been given to him and House No. 22 to the daughter. Thus, the parties to give effect to the real intention of their father decided to exchange the properties given to them, and in furtherance thereof, executed a Agreement Deed to exchange the same. Since the said agreement had not been given effect to by the respondent No. 1, the appellant filed Suit for issuance of direction to the defendant/respondent No. 1, to execute a Deed of Rectification and further to restrain her from interference with the appellant's possession of the suit property. During the pendency of this suit, Shri B. P. Sandy and the appellant executed a Rectification Deed by which property No. 23 was given to the appellant. The respondent No. 1/defendant filed suit before the same court for declaration that the earlier agreement, an unregistered document, was null and void, being a forged document, and that she has under undue influence put her signature on the blank non-judicial stamp papers. The trial court decided both the suits and decreed the suit filed by the appellant and dismissed the suit filed by the respondent No. 1. Aggrieved by the same the respondent No. 1 filed an appeal before the District Judge, however, it was subsequently transferred to the High Court and High Court has allowed both the appeals filed by the respondent No. 1.

The Hon'ble Supreme Court observed that section 26 of the Specific Relief Act, 1963 provides for rectification of instruments, where through fraud or a mutual mistake of the parties, an instrument in writing does not express the real intention, then the parties may apply for rectification. However, clause 4 thereof, provides that such a relief cannot be granted by the court, unless it is specifically claimed. In *Subhadra & Ors. vs. Thankam, AIR 2010 SC 3031*, the Court while deciding upon whether the agreement suffers from any ambiguity and whether rectification is needed, held that when the description of the entire property has been given and in the face of the matters being beyond ambiguity, the question of rectification in terms of Section 26 of the Act would, thus, not arise. The provisions of Section 26 of the Act would be attracted in limited cases only where the ingredients stated in the Section are satisfied. The relief of rectification can be claimed where it is through fraud or a mutual mistake of the parties that real intention of the parties is not expressed in relation to an instrument. Thus, Section 26 of the Act has a limited application, and is applicable only where it is pleaded and proved that through fraud or mutual mistake of the parties, the real intention of the parties is not expressed in relation to an instrument. Such rectification is permissible only by the parties to the instrument and by none else.

Section 16 of the Contract Act provides that a Contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to obtain an unfair advantage over the other. If there are facts on the record to justify the inference of undue influence, the omission to make an allegation of undue influence specifically, is not fatal to the plaintiff being entitled to relief on that ground; all that the Court has to see is that there is no surprise to the defendant. In *Hari Singh vs. Kanhaiya Lal, AIR 1999 SC 3325*, it was held that mere lack of details in the pleadings cannot be ground to reject a case for the reason that it can be supplemented through evidence by the parities. In *State of Bihar & Ors. vs. Radha Krishna Singh & Ors. AIR 1983 SC 684*, the Court held that admissibility of a document is one thing and its probative value quite another – these two aspects cannot be combined. A document may be admissible and yet may not carry any conviction and weight of its probative value may be nil. The probative value of documents which, however ancient they may be, do not disclose sources of their information or have not achieved sufficient notoriety is precious little. Reiterating the above proposition in *Madan Mohan Singh & Ors. vs. Rajni Kant & Anr., AIR 2010 SC 2933*, Court held that a document may be admissible, but as to whether the entry contained therein has any probative value may still be required to be examined in the facts and circumstances of a particular case.

The first appellate Court lost sight of the fact that the party who propounds the document will have to prove it. It was the plaintiff who had come to Court alleging that the first defendant had executed an agreement of sale in his favour. The defendant having denied it, the burden was on the plaintiff to prove that the defendant had executed the agreement and not on the defendant to prove the negative. The Trial Court held that was a document executed by her voluntarily and by free will and hence it was binding on her and it was not permissible for her to say that it was a forged document.

The Trial Court had also taken note of a letter written by the father of the parties to respondent No. 1 in which it was stated that he had given her house No. 23. However the said letter was simply brushed aside by the court without giving any reason whatsoever.

In view of the law referred even though the document may be admissible, still its contents have to be proved and in the instant case, as the appellant did not examine either the attesting witnesses of the document, nor proved its contents, no fault can be found with the judgment. Section 26 of the Act provides for rectification of a document if the parties feel that they have committed any mistake. Also it was only the father of the parties who could have sought rectification of the deed. Mere rectification by parties herein does not take the case within the ambit of Section 26 of the Act. Taking note of the statutory provisions of Section 16 of the Contract Act and the parameters laid down by the Court for application of doctrine on undue influence, the High Court had reached a correct conclusion. Thus the document of Memorandum of Agreement cannot be read as an "agreement to exchange". It can be read only as a rectification deed, which could have been done only by the settler and not by the contesting parties. Thus the matter was dismissed.

Joseph John Peter Sandy vs. Veronica Thomas Rajkumar and Anr. AIR 2013 Supreme Court 2028.

3. Disposal of public asset – Without ascertaining its market value in fair and transparent manner – Permissibility – Not ascertaining market value of property by fair and transparent manner, held improper – No sanction obtained from Govt. – Disposal of property in violation of R. 3 of 1975 Rules, not proper : Constitution of India, Article 14

The issue involved in writ petitions was whether a public asset can be disposed of without ascertaining its market value in a fair and transparent manner. The Town Improvement Trust, Jabalpur prepared a scheme namely Scheme No. 13, Civil Centre, Jabalpur which later on was transferred to Jabalpur Development Authority. In the said scheme, an area was reserved for construction of cafeteria on the ground floor and the library on the first floor. The area situate adjoining the area earmarked for cafeteria, has been earmarked for children park and for a water body and is in existence. The Jabalpur Development Authority constructed a building with two halls on the aforesaid land for the purpose of establishment of cafeteria, under an agreement, two halls in the building were allotted for running the cafeteria on licence, without issuing any notice inviting tender. Thereafter the licence was renewed in favour of a partnership firm comprising three persons including respondent No. 2 for running the cafeteria for a period of 5 yrs. The said licence was renewable with enhancement of licence fee. During the currency of the licence, the licencee expressed its willingness to take the open terrace on rent and therefore the aforesaid terrace was allotted on licence for a period of three years on 01.01.1995. The Housing and Environment Department, Government of Madhya Pradesh by order directed the Chief Executive Officer of the Authority to cancel the licence, as the same was granted without inviting any tenders. The Authority was further directed to invite tenders and to allot the same to the highest bidder on licence. In compliance of the aforesaid order, the Authority issued notice of eviction to initiated against the licencee. The licencee thereafter submitted a representation that it is willing to pay entire arrears of rent and shall withdraw the writ petition if the licence is renewed. In order to resolve the dispute, instructions were sought from the State Government by the Authority. Thereupon, the State Government instructed the Authority to decide the issue pertaining to renewal of the agreement at its level keeping in view the interest of the authority and the litigation which was pending before the High Court.

The Hon'ble Court observed that the Authority has been constituted for making better provisions for preparation and development of plans and to ensure town planning. The property in question is the property of the public, which has to be dealt with in a fair, transparent and rational manner. In the instant case, admittedly, no attempt was made by the Authority to ascertain the market value either by holding public auction or by inviting tenders. The market value of the property in question could have been ascertained by the Authority only by making its intention known to public to dispose of the property by lease, in accordance with the modes well known to law for disposal of the public property namely either by inviting tenders or by holding auction. The valuation reports could not have formed the basis to ascertain the market value of the property for the simple reason that potentiality of the property in question has not been taken into consideration while preparation of the valuation reports. Similarly, the guidelines issued by the Collector could not furnish a reasonable basis for ascertaining the market value of the property for the reason that the guidelines are prepared by the collector only for the purpose of payment of stamp duty. Therefore, the action of the Authority in not ascertaining the market value of the property by a fair and transparent manner cannot be approved.

Further, the property in question belongs to the State Government which on constitution of the authority vested in it. Rule 3 of 1975 Rules provides that no Government land vested in or managed by the Authority shall be transferred except with the general or special sanction of the State Government given in that behalf. The Authority while dealing with property of the State

Government which has vested in it, acts like an agent of the State Government. There are two limitations imposed by law which control the discretion of the authority in granting largess, firstly with regard to the terms on which largess may be granted and other in regard to the persons who may be recipients of such largess. Therefore, under Rule 3 of the 1975 Rules, the Authority is required to take an approval from the State Government with regard to the manner of disposal of the land as well as the value on which it proposed to be transferred, as the Authority is the custodian of the property of the Government. In the instant case, the Authority is the custodian of the property of the Government. In the instant case, the Authority has not obtained the sanction as required under Rule 3 of the Rules. Thus, the property has been transferred in violation of Rule 3 of the 1975 Rules. The Authority was directed to issue a notice inviting tender for disposal of the property in question on lease. The writ petition was disposed of.

Neetu Tejkumar Bhagat & Anr. vs. Jabalpur Development Authority & Ors. AIR 2013 Madhya Pradesh 100

4. Release deeds – Stamp duty payable – Determination – Important differentiating factor between documents covered by Article 46A on one hand and Article 46B on other, is element of benami.: Stamp Act, 1899, Sch. I-A Articles 46B, 46A – Benami Transactions (Prohibition) Act, 1988, S. 2(a)

One Sri Shafiuddin Babu Khan was owner of very large extent of property at Hyderabad. Through two sale deeds, he sold two bifurcated plots of the same land in favour of Respondents. Through another sale deeds he sold further third plot of the same land to the same party. The sale deeds were registered in the office of the Sub-Registrar. Eleven shareholders, who figured as co-purchasers in the sale deeds, executed separate release deeds in favour of the respondent stating that they figured as benami in the sale deeds and they intend to relinquish their rights, if any, in favour of the respondent.

In each of the documents, they indicated the value at ` 1,00,000/- and paid the stamp duty of ` 3,000/- apart from registration fee. They invoked Article 46B to Schedule I-A of the Indian Stamp Act, 1899. The 2nd petitioner entertained a doubt as to the adequacy of stamp duty and registration charges paid on the documents. Exercising powers under Article 47A to Schedule I-A of the Act, he referred the matter to the 1st petitioner. The 1st petitioner issued notices to the respondent and the executants of the documents, expressing the view that the stamp duty is payable under Article 46A and requiring them to explain. The respondent and its shareholders submitted explanation stating that the entire consideration for the sale transaction was paid by the respondent alone and since 11 shareholders figured as benami, it is only Article 46B that gets attracted.

The High Court held that an important differentiating factor between the documents covered by Article 46B on the other, is the element of benami. As is evident from the definition of ‘benami transaction’ under the Benami Transactions (Prohibition) Act, 1988, transaction, assumes that character in case the consideration for the sale was paid by a person, other than the one who figured as purchaser. In a given case, the party, who figured as the purchaser may not have paid anything and the entire consideration is paid by a stranger. There may also be instances where more persons than one figure as purchasers and only one or few of them have paid the consideration and others did not pay any amount at all. Even in the second category of cases, the transaction is prone to be treated as benami to the extent they relate to the persons, who figure as purchasers, but did not pay the consideration. The case on hand falls into that category, if the relevant facts are proved. The High Court further held that it was represented before the 1st petitioner, in reply to a notice that the entire sale consideration was paid by the respondent and that 11 persons, who executed the release deeds, did not share the burden at all. As long as that plea stood not contradicted, the transaction, to the extent of those persons, is invariably benami in nature. The fact is sufficient to attract Article 46B.

The Collector under S. 47A of Indian Stamp Act, 1899 and District Registrar (R & S) Department, Hyderabad and Anr. vs M/s. Asrani Inns & Resorts (P) Limited, Rep. by its Director Sachin, J. Joshi, Secunderabad AIR 2013 Andhra Pradesh 101

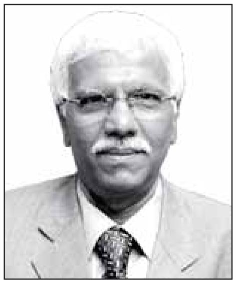
5. Powers of Executing Court – Objection against attachment of property – Agreement to sell suit property produced by relative of judgment debtor, was not genuine, but collusive in nature and brought into existence to defeat fruits of decree obtained by decree-holder – Executing Court would have power to determine validity of agreement. : Civil P. C., 1908, O. 21, R. 58(2), S. 47

Respondent No. 1 filed two different suits for recovery of amount based on the different promissory notes and obtained attachment before judgment, later the suits were decreed. Respondent No. 1 filed Execution Proceedings (E.P.) seeking sale of three items of the Execution Proceedings Schedule property. In both EPs, the property was one and the same. The case of the petitioner was that he purchased item No. 3 of the E.P. Schedule property in both the EPs from the respondent No. 3 for a sale consideration under an agreement of sale and paid the earnest money. Therefore, the petitioner filed claim petitions. The Respondent No. 1 filed suit to defeat the fruits of the decrees and later Respondent Nos. 2 and 3 were set ex parte.

In the instant case, the Hon'ble High Court held that property was attached before judgment in suit for recovery. When execution proceedings were initiated, suit for specific performance of agreement to sell subject property was filed by judgment-debtor's relative. A shadow was cast upon genuinity of agreement of sale and it was under a cloud. Unless and until the agreement of sale was held to be a genuine one, question of attaching any value to sale deed did not arise, and as such no importance could be attached either to agreement of sale or sale deed. If there is sufficient proof that agreement of sale was executed in ordinary course prior to date of attachment and in pursuance of such genuine transaction if sale deed is executed subsequent to date of attachment, then only attachment does not prevail over pre-existing contract of sale.

Since the agreement of sale was not genuine, but collusive in nature and it was brought into existence to defeat fruits of decree obtained by decree-holder, it was held that ownership of property and/or right, title or interest therein may necessarily involve determination of validity or otherwise of agreement of sale, as done by executing Court. Executing Court had power to determine validity of agreement of sale. The appeals were dismissed.

Punumacha Ashok Raju vs. Indukuri Venkata Gopala Krishnam Raju & Ors. AIR 2013 Andhra Pradesh 103



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TAX ARTICLES FOR YOUR REFERENCE

Articles published in Taxman, Current Tax Report (CTR), The Tax Referencer (TTR), Sales Tax Review (S. T. Review), Income Tax Review (I. T. Review), The Bombay Chartered Accountant Journal (BCAJ), The Chartered Accountant (CAJ), The Chamber's Journal (C J), All India Federation of Tax Practitioners Journal (AIFTPJ), Sebi And Corporate Laws (S & Co Laws), Company Case, Economic Times and Times of India for the period June to July 2013 has been arranged and indexed topic-wise.

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CA. Rajaram Ajgaonkar

ECONOMY AND FINANCE

DIFFICULT TIMES

The month of August brought substantial anxiety to the Indian Economy. After a bad July, August brought further concerns, uncertainties and anxieties to the Government as well as the people of India. The economic climate continued to deteriorate, especially on the back of sustained fall of the Rupee against the US Dollar and many other major currencies of the world. The fall was very quick and sharp and on a number of days the Rupee lost more than one per cent of its value. The overall depreciation for the month was about 10%. The Reserve Bank of India (RBI) tried to control the fall of the currency by intervention in the foreign exchange market. The Government tried to pacify the market by making positive announcements and giving assurances about the stability of the economy and foreign exchange policies. However, the exodus of foreign currency continued due to unwinding of positions in debt and equity markets by foreign investors. The demand of foreign exchange from the Indian importers remained strong and the supply could not match with the demand, thereby depressing the Indian Rupee. It touched its all time low of ` 69.18/- per US Dollar towards the end of the month, before bouncing back a bit in the last couple of days of the month. Though the Government is trying to portray that the worst is over, many economists and foreign exchange experts are not sure and many of them believe that the weakness of the Indian currency will persist for at least some more time and the worst may yet come.

The weakness of the Indian currency, which has emerged in the recent months, has suddenly taken the centre stage of the Indian economy. Though the last straw on the camel's back for the emergence of the problem was the fear of the end of quantitative easing by the US FED, the primary reason of the persistent fall was the structural imbalance in the Indian economy. Over the last few years, money from foreign investors kept on pouring into India as foreign direct investment or portfolio investment and that gave a comfort to the Indian Government to liberalise the foreign exchange user as well as imports, which were expected to give impetus to the economic growth in the country. It opened the Indian economy to foreign suppliers and the Indian consumption story became bigger and louder. India, like many other developing countries, welcomes the foreign funds not only in the equity markets but also in the debt markets. Due to the continuing inflow of the foreign exchange, the Rupee remained reasonably strong though India was continuously clocking inflation at an average of about 10%, against the US inflation rate of about 2%. To give a boost to the sagging US economy, the US FED devised Quantitative Easing programme in late 2008, whereby it kept on buying billions of dollars worth US treasury from the market, month after month, thereby pumping in Dollar supply in that economy. As at that time the economic prospects of the US were not looking great, the investors invested a part of this liquidity in the developing economies, including India, which were clocking better growth rate then and wherein greater opportunities to grow wealth were visible. Over the last few months, the US economy has started performing better and its short term prospects are perceived to be even better. The yield of the US treasury has increased and its returns have once again become attractive for the risk averse investors. The recent talk of the ending of quantitative easing has created a vacuum of liquidity; and so better opportunity for funds in the US economy. Therefore the fund flow, which was hitherto diverted to developing economies, has started to turn back to the US. This reversal is creating drain of foreign exchange resources to many developing countries. Many countries in Asia, South America and Africa have faced sudden outflows of foreign exchange, thereby causing pressure on their domestic currencies and many of them have depreciated between 5% to 20%, over the last six months.

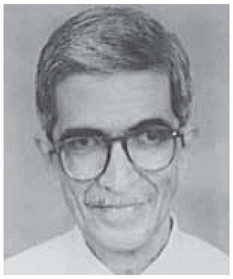
Unfortunately, the Indian Rupee has been one of the worst hit currencies due to the current global phenomenon in the developing economies and the RBI is not able to control the outflow of foreign exchange. This situation has glaringly brought to surface the continued imbalance in Indian foreign trade. The trade deficit of India has been growing for various reasons over the last few years. The pressure on the precious foreign exchange reserves has increased due to hike in the international prices of petroleum products, which is the single most nonflexible import which India needs to sustain its economic activity. Increase in non essential consumption based imports was aided by the availability of foreign exchange to the country due to foreign investment. The capital inflow was used more for consumption than for investment. The opening up of the economy for the foreign investment and consumption of foreign goods can support the economic growth to a certain extent; but in crucial times it can make an economy critical.

The current problem of sudden heavy depreciation of the Indian currency has not developed abruptly but it has partially resulted from the complacency of the Government towards the trade deficit and as well as budgetary deficit. It is a financial crisis resulting from long term use of short term funds. Over the last few years, in spite of great promises in the budget, the Government is not able to sustain its promise to control the budgetary deficit due to inadequate control on developmental as well as non developmental expenses. Though there has been a huge cry resulting in promises for a reduction in the subsidies, they have been reintroduced through new avatars and for new causes. NREGA was introduced a few years back to give employment to the unemployed in the country and it has caused pressure on the budgetary deficit. Added to it are subsidies for people below the poverty line, which though may be desirable, have caused a drain on the national resources beyond the planned numbers. The Government is not able to reduce the subsidies on fertilisers and farm inputs due to political pressure. The subsidies on petroleum products are bruising the nationalised petroleum product distribution companies as well as on the resources of the Government. Added to that is the impact of the recently passed Food Security Bill, which will assure food at a very subsidized rate for poor people in the country. It will cause a further burden of about one lakh crores on the Government spending and will create difficulty in controlling the budgetary deficit. Though the Finance Ministry is optimistic about keeping the deficit within the budgeted limit; the businesses, industry and specially the foreign investors do not seem convinced about the same. There is a danger of downgrading, which can be a serious threat for the economy of India.

The present political scenario is not very conducive for bold economic steps which are required for the revival of the economy. The coalition Government at the centre is standing up with the support of a number of parties, which have different ideologies and political objectives to achieve. The country has to face Parliamentary elections in the next 12 months. The ruling coalition as well the opposition are all focused on pleasing the voters than to be concerned about the economic state of affairs and prospects of the country for the time being. This lack of focus and political will does not auger well for the progress of Indian economy. In the current scenario, reforms may not take speed and they will probably have to wait till the new Government comes into power after about 9 months. Till such time, the policies of the past may continue, which will keep the economy moving at a slow pace. Over the last several quarters, the growth rate of the Indian economy has been moving downwards and its quarter on quarter growth has been reduced to 4.4% for the quarter ended 31st June, 2013, which is the lowest in the last four years. The growth rate is likely to worsen in the quarter ending September 2013 and things may not be better immediately thereafter. Though there are various opinions and estimates of growth rate for the fiscal year 2013-14, starting from 5.5% to 4%, it will not be surprising if the growth rate turns out to be just at 4% for the current fiscal year. Though this may sound pessimistic, the negative momentum faced in the country is not easy to arrest and the economy may take some more time for recovery. The silver lining is the possible increase of export realisation due to the free fall of the Rupee against the US dollar. It has made the Indian Rupee cheap, which can give advantage to exports. A number of Indian manufactured goods, the export of which was hitherto not competitive in international market, have suddenly becoming competitive and that can help Indian exports to perk up.

The Indian economic scene remains uncertain and therefore the investment climate remains hesitant. Though the valuations of many stocks are looking cheap, it is believed that the markets can go down by 10-15%. Therefore, there is no urgency of buying stocks. Gold has appreciated substantially purely on the back of the falling Indian Rupee and if the Rupee depreciates further, it can get more expensive. Gold is not a preferred investment avenue as of now but it can simply operate as an hedge against the falling Indian currency. The rates of the immovable properties across the country seem to be blinking now. They have started coming down due to the slowdown in the economy, unemployment and high interest rates. It is likely that the property market will lose further steam as there may be a supply pressure without a corresponding demand. High interest rates are likely to make holding the stock by the developers, uneconomical. It is likely that the property prices may come down in near future and they may remain flat for a few more years to come. Property investment is no more as lucrative as it was and investors should stay away from this sector as of now.

The only reasonable opportunity for the investor as of today lies in investing in fixed deposits and debentures. The short term interest rates have hardened and they may remain so for some more time, probably even till the end of the current fiscal year. The debenture yields are volatile but that will not affect the medium to long-term investors, as the volatility will get adjusted over a period. Liquid schemes of mutual funds offer good opportunities to investors for deploying their short-term liquidity as they are currently giving a yield of about 10%, which is very attractive. Fixed maturity plans of mutual fund schemes for a horizon of one to three years give good opportunity to investors to lock their funds for long-term at a good rate of return with a tax benefit. Investors may take advantage of such schemes based on their liquidity position. Times are uncertain and safety is valuable. Investors are advised to remain cautious and not to get carried away with eye catching advertisements and promotions. It is time to remain steady on one's investment plan and not to get carried away by a mirage.



V. H. Patil, *Advocate*

YOUR QUESTIONS & OUR ANSWERS

Facts & Query:

Q.1 *What shall be the taxable implications in case of a non-depreciable capital asset, which has been damaged or destroyed within the meaning of Section 45(1A) and against which no insurance claim has been received either in money or in the form of any asset i.e.:*

- *Whether loss would be eligible for being set-off or being carried forward?OR*
- *Would it be treated as a dead asset with no taxable treatment?*

Ans. As a general rule, when a business asset is destroyed by fire or by an accident, the loss of such an asset can be claimed as business loss if it is stock-in-trade and as capital loss if it is a fixed asset. To this general rule S.45(1A), provides an exception that if any insurance claim is received in respect of such destroyed asset such receipt will be taxable. In the case of the querist as no insurance claim money is received, there is no question of the application of sec. 45(1A) and as such under general rule of taxation, the loss is of capital asset, can be claimed as capital loss could be claimed as set off and also for carry forward of the loss under a head income from capital gain.

As such it will not be treated as dead assets.

Q.2 *The assessee individual is owner of two immovable properties – a commercial property and a residential house property. He sells his commercial property and claims deduction on capital gains u/s. 54F by purchasing another residential property within the prescribed time limit. However, within a period of 1 year from the date of the transfer of the commercial property, the assessee sold the first mentioned residential property (other than the new one) and purchased another residential property to claim benefit of deduction u/s. 54. Whether, the benefit of deduction claimed u/s. 54F would be required to be reversed?*

Ans. There is nothing under the I.T. Act, to prevent an assessee from claiming benefit at one and a same time, benefit of investment, both under S.54 and S. 54F, particularly if properties one is a residential house and the other a commercial property. On the sale of house property one may claim benefit under s.54 and in case of the other commercial property under sec. 54F, provided both are used as residential properties. In the case of the querist as he is fulfilling the conditions of both under S. 54 and S. 54F he can claim the benefit under both these sections and he need not revise his claim under S.54.

Q.3 *Whether non – compete fees paid to any person allowed as revenue expenditure u/s. 37?*

Ans. Generally a non compete fees paid in lump sum, is on capital account and as such not allowed as business expenditure. However if such agreement is for a short duration or it could be terminated at will it could be allowed as on revenue account. It depends on the facts of each case as to whether it is on capital account or on revenue account.

Q.4 *ABC P. Ltd. engaged in the business of construction, has incurred loss in trading in currency derivatives on a recognised stock exchange in Asstt. Year 2012-13. The company has earned profit in delivery based share transaction in Asstt. year: 2013-14. The company wishes to know whether the loss in currency derivatives will be eligible for set off against the share trading profit.*

Ans. As a rule any loss in any business is allowed to be set off and also to carry forward such loss. However to this general rule, a loss in speculation business is an exception and any loss suffered in speculation business can be set-off only against profits of another speculation business and not against any other income.

Now speculation transaction has been defined in S. 43(5) as under:

> 43(5) "speculative transaction" means a transaction in which a contract for the purchase or sale of any commodity, including stocks and shares, is periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity or scrips

Now to this rule certain exceptions are provided and one of them is dealing in rate difference, in a recognised stock Exchange. It is not treated as speculative business. In the case of the querist he is a member of a recognised Stock Exchange and as such the loss suffered in this business at dealing in difference can be claimed as ordinary business loss and can be set-off and carried forward, as in the case of ordinary business loss.

CA Ninad Karpe

SABSE BADA RUPAIYA!

Bollywood loves the Rupee!

How else do you explain the slew of films on the Rupee? In 1955, P. L. Santoshi made a movie titled “Sabse Bada Rupaiya”. The famous actor Mehmood produced a movie of the same name in 1976 and crooned an iconic song with the same title. In 2005, the Abhishek Bachchan starrer, “Bluffmaster” regurgitated this same song in its title track.

In 2013, if someone produces a movie with the same title, it will sink when released. Just like the sinking of Rupee.

With the Rupee in a free fall, people start getting nostalgic, reminding us of the times when they travelled abroad with the Rupee at an amazingly low rate, compared to the rate prevailing today. My niece recently got a baby boy and I joked to her that she better start saving dollars today for the kid’s future education in the US, as the exchange rate will probably reach ` 1000 to a dollar, by the time the kid is eligible to go to college.

The good news is that we are still better off than many countries. Look at Zimbabwe – a millionaire in Zimbabwean dollars means nothing, a billionaire will just about survive and a trillionaire manages to get along in life. We still have a long way to go!

So, what should be your strategy as a tax professional?

It’s simple – just start raising your memos in dollar terms. If your client refuses to pay dollars, ask him to pay in gold.

Hitesh R. Shah & Hinesh R. Doshi, *Hon. Jt. Secretaries*

THE CHAMBER NEWS

Important events and happenings that took place between 8th August, 2013 and 8th September, 2013 are being reported as under:

I. Admission of New Members

1) The following are the new members, who were admitted in the Managing Council Meeting held on 12th August, 2013.

Life Membership

1	Ms. G. Pari	CA	Chennai
2	Ms. Sekhri Isha Ajay (Transfer from Ord. to Life)	CA	Mumbai

Ordinary Membership

1	Shri Chothani Nimesh Kamlesh	CA	Mumbai
2	Ms. Sisodia Manju	Advocate	Mumbai
3	Shri Shah Pradip Rasiklal	CA	Ahmedabad
4	Ms. Vyas Nupur Omprakash	CA	Mumbai
5	Shri Malesha Dilkhush Motilal	CA	Mumbai
6	Shri Chheda Sanjay Visanji	CA	Mumbai
7	Shri Parikh Amol Manan	CA	Ahmedabad
8	Shri Pai Gautam Dilip	CA	Ahmedabad
9	Shri Rai Indruj Ravinder	Advocate	Mumbai
10	Shri Chokshi Manish Rajendra	CA	Mumbai
11	Shri Nahar Gajendra	ITP	Mumbai
12	Shri Jain Deepak Ramesh	CA	Mumbai
13	Shri Dedhia Ashwin Shevantilal	CA	Mumbai
14	Shri Srinivasan Ramanujam	CA	Bengaluru
15	Shri Nayak Krishna Prasad	CA	Bengaluru

Student Membership

1	Mr. Natwar Singh	CA Final

II. Past Programmes

Details of programmes conducted by the Chamber are given below:

Sr. No.	Committee / Programme Name	Date / Subject	Speakers
1	**Allied Laws Committee:** Full Day Seminar at Andheri	17th August, 2013 E-Filing Issues under Various Acts	• CS Kaushik Jhaveri • CA Avinash Rawani • CA Vijay Kewalramani • CA Pranav Kapadia • CA Parag Mehta
2	**Direct Taxes Committee:** 3rd Intensive Study Group (Direct Tax)	8th August, 2013 Recent Important Decisions under Direct Taxes	• CA Ashok Mehta • CA Sanjay Chokshi
	Direct Tax Updates Series Lecture Meeting on Immovable Properties	23rd August, 2013 Recent Developments (Including Sections 2(1A), 2(14), 43CA, 56(2) (VIIB) and 194-IA)	• CA Pradip Kapasi
3	**Indirect Taxes Committee :** Study Circle Meeting	22nd August, 2013: Recent Judgment under Service Tax	Chairman : Mr. Prasad Paranjpe, Advocate Group Leader : CA Rajiv Luthia
	Study Course on Service Tax for Beginners – 2013	21st, 24th, 26th, 27th, 28th, 30th 31st August and 3rd September, 2013 7 sessions of 3 hours	• CA A. R. Krishnan • CA S. S. Gupta • CA Sunil Gabhawalla • CA Bharat Shemlani • CA Naresh Sheth • CA Jinit Shah • CA Rajiv Luthia • Shri M. H. Patil, Advocate
5	**International Taxation Committee:** (Jointly with BCAS) Advanced FEMA Conference	31st August, 2013 FEMA Related issues	• CA Dilip J. Thakkar • Mr. C. D. Srinivasan, Chief General Manager & Senior RBI Officials • CA Anup P. Shah • CA Hitesh Gajaria

	Intensive Study Group on International Taxation	3rd September, 2013 Evaluating Outbound and Overseas Structures	• CA Shreyas Shah • CA Kartik Badiani
6	**Study Circle & Study Group Committee:** Study Group Meeting	19th August, 2013: Recent Decision under Direct Taxes	• Shri K. Gopal, Advocate • Shri Madhur Aggarwal Advocate
	Study Circle on International Taxation	4th September, 2013 Treaty Entitlement	• CA Ganesh Rajgopalan
	Study Circle Meeting	5th September, 2013 Practical aspect of new requirement of e-filing of tax audit & other reports	• CA Avinash Rawani

III. Future Programmes

Future programmes of the Chamber are as follows:

Sr. No.	Programme Name/ Committee/Venue	Day / Subject	Speakers
1	**Allied Laws Committee:** Lecture Meeting at IMC	22nd October, 2013 Provisions of Stamp Duty Including for Business Restructuring	CA Anup Shah
2	**Corporate Members Committee:** (Jointly with IMC) A training workshop at IMC	11th October, 2013 & 12th October, 2013 Making of CFO	Mr. Y. M. Deosthalee*, Mr. Paresh Mehta, Mr. Ashish Chauhan, Mr. B. R. Jaju*, CA Amrish Shah, CA Rajeev Pai*, Senior Executive-Reliance Industries*, Mr. Bharat Vasani*, Mr. Adesh Gupta*, CA M. M. Chitale*, Mr. Sudhir Valia and Eminent Faculties (* Subject to Confirmation)
3	**Direct Taxes Committee & International Taxation Committee:** Domestic Transfer Pricing Conference	19th October, 2013	The Conference will be addressed by Senior Eminent Faculties
4	**Information Technology Committee:** Info Tech Update Series Workshop at IMC	17th October, 2013 Google – Not Just a Search Engine (Effective use of Google in your workspace)	CA Sanjay Chheda CA Samir Kapadia

Sr. No.	Programme Name/ Committee/Venue	Day / Subject	Speakers
5	**Indirect Taxes Committee :** Study Circle Meeting at IMC	16th September, 2013: Applicability of VAT and Service Tax on Deemed Sales	Chairman : CA Bharat Shemlani Group Leader : CA Ankit Chande
	2nd Residential Refresher Course on Service Tax	3rd January, 2014 to 5th January, 2014	Detailed Programme would be announced in the next Bulletin

II. Forthcoming Journal by Journal Committee

The Chamber's Journal for the month of October, 2013 will cover topic on "Domestic Transfer Pricing".

III. www.ctconline.org – Rich knowledge contact is just a click away!

The Chamber has revamped its website and has started uploading the content that it generates through various activities. In addition, The Chamber's Journal is also available online. Journal section has not only latest issues but has archive of issues from April 2002 onwards.

The 'Download' section of Chamber's website carries discussion papers & power point presentations of Study Circles, Study Groups, Lecture Meetings as well as Seminars & Conferences.

IV. New Email ID of The Chamber of Tax Consultants and Office Bearers

i) Members are requested to note that email ID of the Chamber has been changed and new email ID is given below:

office@ctconline.org

ii) In addition to above, following additional email IDs of Office Bearers have also been created for better communication:

1. President : president@ctconline.org
2. Vice President : vp@ctconline.org
3. Hon. Secretaries : hon.secretary@ctconline.org
4. Hon. Treasurer : treasurer@ctconline.org

V. Publications for sale:

A) **International Taxation – A Compendium**

Four hardbound volumes set containing approx. 4000 pages.

B) **Study Material – 7th Residential Conference on International Taxation, 2013 held from 20th June, 2013 to 23rd June, 2013 at Bengaluru.**

(For Enrolment and further details of all the future events, please refer to the September, 2013 issue of CITC News or visit the website www.ctconline.org)

ALLIED LAWS COMMITTEE

Full day Seminar on E-Filing Issues under Various Acts held on 17th August, 2013 at Andheri

CA Yatin Desai, President, welcoming the delegates. Seen from L to R : CA Ashok Sharma, Chairman CA Avinash Rawani, Faculty and CA Ashok Manghnani, Convenor

CA Ashok Sharma, Chairman, welcoming the delegates. Seen from L to R : CA Yatin Desai, President CA Avinash Rawani, Faculty and CA Ashok Manghnani, Convenor.

Faculties

CA Avinash Rawani

CS Kaushik Jhaveri

CA Vijay Kewalramani

CA Pranav Kapadia

CA Parag Mehta

Section of delegates

DIRECT TAXES COMMITTEE

Direct Tax Update Series Lecture Meeting on Immovable Properties – Recent Developments held on 23rd August, 2013 at IMC

CA Pradip Kapasi, Past President, addressing the delegates. Seen from L to R : Shri Ajay Singh, Chairman, CA Yatin Desai, President, CA Dinesh Poddar, Convenor.

Section of members

INDIRECT TAXES COMMITTEE

Study Course on Service Tax for Beginners – 2013 held on 21st, 24th, 26th, 27th, 28th, 30th, 31st August, 2013 & 3rd September, 2013 at Dadar

CA Yatin Desai, President inaugurating the Study Course by lighting the lamp. Seen from L to R : CA A. R. Krishnan, Faculty, CA Pranav Kapadia, Vice Chairman, CA Paras Savla, Vice President, CA Ashok Sharma, Chairman, Allied Laws Committee.

CA Ashit Shah, Chairman welcoming the delegates. Seen from L to R : CA Jayesh Gogari, Course Co-ordinator, CA A. R. Krishnan, Faculty, CA Yatin Desai, President, CA Pranav Kapadia, Vice Chairman.

Faculties

CA A. R. Krishnan

CA S. S. Gupta

CA Sunil Gabhawalla

CA Bharat Shemlani

CA Naresh Sheth

CA Jinit Shah

CA Rajiv Luthia

Shri M.H. Patil, Advocate

Indirect Taxes Study Circle Meeting held on 22nd August, 2013 on the subject "Recent Judgment under Service Tax"

CA Rajiv Luthia addressing the members. Seen from L to R : CA Aalok Mehta, Convenor, Mr. Prasad Paranjpe, Advocate, Chairman of the session, CA Hitesh Shah, Hon. Jt. Secretary, CA Pranav Kapadia, Vice Chairman, CA Narendra Soni, Convenor.

STUDY CIRCLE & STUDY GROUP COMMITTEE

Study Circle on International Taxation meeting held on 4th September, 2013 on the subject "Treaty Entitlement"

CA Ganesh Rajgopalan addressing the members. Seen from L to R : CA Haresh Kenia, Chairman, CA Yatin Desai, President, Ms. Varsha Galvankar, Convenor.

Study Group Meeting held on 19th August, 2013 on the subject "Recent Decision under Direct Tax"

Shri K. Gopal, Advocate addressing the members. Seen from L to R : CA Dinesh Shah, Convenor, Madhur Aggarwal, Advocate, Faculty, CA Yatin Desai, President, CA Haresh Kenia, Chairman, CA Dilip Sanghvi, Vice Chairman.

THE CHAMBER'S JOURNAL
Posted at the Mumbai Patrika Channel
Sorting Office, Mumbai 400 001.
Date of Posting: 15th & 16th September 2013
No. MA/MR/South-365/2013-15
R.N.I. No. MAHENG/2012/47041
Date of Publishing 12th of Every Month

Printed and Published by Shri. Kishor D. Vanjara on behalf of The Chamber of Tax Consultants, 3 Rewa Chambers, Ground Floor, 31, New Marine Lines, Mumbai - 400 020 and Printed at Finesse Graphics & Prints Pvt. Ltd., 309 Parvati Industrial Premises, Sun Mill Compound, Lower Parel (W), Mumbai - 400 013. Tel: 4036 4600 and published at The Chamber of Tax Consultants, 3, Rewa Chambers, Ground Floor, 31, New Marine Lines, Mumbai - 400 020.