



**THE INSTITUTE OF
Company Secretaries of India**
IN PURSUIT OF PROFESSIONAL EXCELLENCE
Statutory body under an Act of Parliament

DIRECT TAXES AND INDIRECT TAXES UPDATES

**APPLICABLE FOR DECEMBER 2012 EXAMINATION
FOR EXECUTIVE & PROFESSIONAL
PROGRAMME**

**Disclaimer-*

This document has been prepared purely for academics purposes only and it does not necessarily reflect the views of ICSI. Any person wishing to act on the basis of this Direct and Indirect Taxes Updates should do so only after cross checking with the original source.

ATTENTION STUDENTS!

Clarification about Applicability of the latest Finance Act and other changes for Company Secretaries December, 2012 Examination.

DIRECT TAXES

All students may note that for Direct Taxes, applicable Assessment year for December 2012 Examination shall be 2012-13 (Previous Year 2011-12). Thus, Students are advised to study Finance Act, 2011 for December 2012 Examination. Further as per the Syllabus, (Executive and Professional Programme) students are required to update themselves about all the Circulars, Clarifications, Notifications, etc. issued by the CBDT & Central Government, on or before six months prior to the date of the respective examinations.

Gift Tax Act has been excluded from the scope of the examination from June 1999 session onwards unless otherwise informed.

INDIRECT TAXES

Students appearing in the 'Tax Laws' (Indirect Tax Portion to the extent of topics covered in the syllabus, of 'Executive Programme') and Advanced Tax Laws and Practice (Professional Programme) respectively may take note of the following changes applicable for December 2012 Examination.

1. All changes made by the Finance Act, 2012.
2. All Circulars, Clarifications/Notifications issued by CBEC / Central Government effective six months prior to the date of examination.

Note:

Students of Executive Programme may specifically Note that Changes made in Service Tax by Finance Act, 2012 shall be applicable for December, 2012 Examinations.

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DIRECT TAX LAWS

(A) INCOME TAX (INCOME TAX ACT, 1961)

(1) Tax Rates:

(a) In case of **Individual or Hindu undivided family or association of persons or body of individuals or every artificial juridical person:**

Upto Rs. 1,80,000	<i>Nil</i>
Rs.1,80,001 to Rs. 5,00,000	10 % of the amount in excess of Rs.1,80,000
Rs. 5,00,001 to Rs. 8,00,000	Rs. 32,000 <i>plus</i> 20 per cent of the amount in excess of Rs.5,00,000
Rs. 8,00,001 and above	Rs. 92,000 <i>plus</i> 30 % of the amount in excess of Rs. 8,00,000

(b) In case of individual, **being a woman resident in India**, and **below the age of sixty years** at any time during the previous year:

Upto Rs. 1,90,000	<i>Nil</i>
Rs.1,90,001 to Rs. 5,00,000	10 % of the amount in excess of Rs.1,90,000
Rs. 5,00,001 to Rs. 8,00,000	Rs. 31,000 <i>plus</i> 20 per cent of the amount in excess of Rs.5,00,000
Rs. 8,00,001 and above	Rs. 91,000 <i>plus</i> 30 % of the amount in excess of Rs. 8,00,000

(c) In the case of **every individual**, being a **resident in India**, who is of the age of **sixty years or more** at any time during the previous year but not more than 80 years on the last day of the previous year:-

Upto Rs. 2,50,000	<i>Nil</i>
Rs.2,50,001 to Rs. 5,00,000	10 % of the amount in excess of Rs.2,50,000
Rs. 5,00,001 to Rs. 8,00,000	Rs.25,000 <i>plus</i> 20 per cent of the amount in excess of Rs.5,00,000
Rs. 8,00,001 and above	Rs.85,000 <i>plus</i> 30 % of the amount in excess of Rs.8,00,000.

(d) In the case of **every individual**, being a **resident in India**, who is of the age of **80 years or more** at any time during the previous year:-

Upto Rs. 5,00,000	<i>Nil</i>
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Rs. 5,00,001 to Rs. 8,00,000	20 % of the amount in excess of Rs.5,00,000
Rs. 8,00,001 and above	Rs.60,000 <i>plus</i> 30 % of the amount in excess of Rs.8,00,000.

(e) In the case of every **co-operative society**:

(1) where the total income does not exceed Rs. 10,000.	10 % of the total income;
(2) where the total income exceeds Rs.10,000 but does not exceed Rs. 20,000.	Rs. 1,000 <i>plus</i> 20% of the amount by which the total income exceeds Rs. 10,000;
(3) where the total income exceeds Rs. 20,000	Rs. 3,000 <i>plus</i> 30% of the amount by which the total income exceeds Rs. 20,000.

(e) **In the case of every firm**: On the whole of the total income @30%

(f) **In the case of every local authority**: On the whole of the total income @30%

(g) **In the case of a company**:

(i) In the case of a **domestic company** @30% of the total income.

(ii) In the case of a company **other than a domestic company**:

(i) on so much of the total income as consists of: (a) royalties received from Government or an Indian concern in pursuance of an agreement made by it with the Government or the Indian concern after the 31st day of March, 1961 but before the 1st day of April, 1976; or (b) fees for rendering technical services received from Government or an Indian concern in pursuance of an agreement made by it with the Government or the Indian concern after the 29th day of February, 1964 but before the 1st day of April, 1976, and where such agreement has, in either case, been approved 50 %; by the Central Government	50%
(ii) on the balance, if any, of the total income	40 %

Surcharge on income-tax

(i) in the case of every **domestic company** having a total income exceeding one crore rupees @5% of such income-tax;

(ii) in the case of every company other than a **domestic company** having a total income exceeding one crore rupees @ 2%

2. Definition of Charitable Purpose [Section 2(15)]

“Charitable Purpose” has been defined in section 2(15) which, among others, include “the advancement of any other object of general public utility”. However, “the advancement of any other object of general public utility” is not a charitable purpose, if it involves the carrying on of any activity in the nature of trade, commerce or business, or any activity of rendering any service in relation to any trade, commerce or business, for a cess or fee or any other consideration, irrespective of the nature of use or application, or retention, of the income from such activity and receipts from such activities is **ten lakh rupees or more** in the previous year.

Section 2(15) has been amended to enhance the current monetary limit in respect of receipts from such activities from **ten lakhs rupees to twenty-five lakhs rupees**.

3. Exemptions under section 10: Section 10 of the Income-tax Act excludes certain incomes from the ambit of total income. With the following amendments the scope of section 10 has further been extended.

(a) Perquisites/Allowances to Chairman/ Members of UPSC [Section 10(45)]

The existing provisions of the Income-tax Act provide for the taxation of any perquisites or allowances received by an employee under the head "Salaries" unless it is specifically exempt under the Act. Currently, specified perquisites of the Chief Election Commissioner or Election Commissioner and the judges of the Supreme Court are exempt from taxation consequent to the enabling provisions in the respective Acts governing their service conditions. Section 10 has been amended to extend similar benefit of exemption in respect of specific perquisites and allowances, which will be notified by the Central Government, received by both serving as well as retired Chairmen and Members of the Union Public Service Commission.

This amendment shall take effect retrospectively from 1st April, 2008 and will accordingly apply in relation to the assessment year 2008-09 and subsequent years."

(b) Specified income of notified body or authority or trust or board or commission [Section 10(46)]

A new clause has been inserted in section 10 of the Income-tax Act to provide exemption from income-tax to any specified income of a body, authority, board, trust or commission which is set up or constituted by a Central, State or Provincial Act or constituted by the Central Government or a State Government with the object of regulating or administering an activity for the benefit of the general public, provided-

- (i) it is not engaged in any commercial activity, and
- (ii) is notified by the Central Government in this behalf.

The nature and extent of income to be exempted will also be specified by the Central Government while notifying such entity.

A consequential amendment is made in section 139 of the Act to provide for filing of the return of income by such notified entity. These amendments are effective from 1st June 2011.

(c) Infrastructure Debt Fund

In order to augment long-term, low cost funds from abroad for the infrastructure sector, it is made to facilitate setting up of dedicated debt funds.

Section 10 of the Income-tax Act has been amended so as to provide enabling power to the Central Government to notify any infrastructure debt fund which is set up in accordance with the prescribed guidelines. Once notified, the income of such debt fund would be exempt from tax.

It will, however, be required to file a return of income. Section 115A of the Income-tax Act has also amended to provide that any interest received by a non-resident from such notified infrastructure debt fund shall be taxable at the rate of five per cent on the gross amount of such interest income.

A new section 194LB has also inserted to provide that tax shall be deducted at the rate of five per cent by such notified infrastructure debt fund on any interest paid by it to a non-resident.

These amendments are effective from 1st June 2011.

4. Weighted deductions under section 35:

(a) Weighted deduction for contribution made for approved scientific research programme

Under the existing provisions of section 35(2AA) of the Income-tax Act, weighted deduction to the extent of 175 per cent is allowed for any sum paid to a National Laboratory or a university or an Indian Institute of Technology (IIT) or a specified person for the purpose of an approved scientific research programme.

In order to encourage more contributions to such approved scientific research programmes, the weighted deduction is increased from 175 per cent to 200 per cent

(b) Investment linked deduction in respect of specified businesses

Under the existing provisions of section 35AD of the Income-tax Act, investment-linked tax incentive is provided by way of allowing hundred per cent deduction in respect of any expenditure of capital nature (other than on land, goodwill and financial instrument) incurred wholly and exclusively, for the purposes of the "specified business". Two new businesses are included in "specified business", under section 35AD(8)(c):

(a) developing and building a housing project under a scheme for affordable housing framed by the Central Government or a State Government, as the case may be, and notified by the Board in this behalf in accordance with the guidelines as may be prescribed; and

(b) production of fertiliser in India.

Under section 73A, any loss of a "specified business" (under section 35AD) is allowed set-off against profit and gains of any other "specified business". In order to remove any ambiguity in this regard in respect of the business of hotels and hospitals, the word "new" is removed from the definition of "specified business" in the case of hotels and hospitals under section 35AD(8)(c). With this, the loss of an assessee on account of a "specified business" claiming deduction under section 35AD will be allowed for set off against the profit of another "specified business" under section 73A, whether or not the latter is eligible for deduction under section 35AD. Therefore, an assessee who currently operates a hospital or a hotel would be able to set off the profits of such business against the losses, if any, of a new hospital or new hotel which begins to operate after 1st April, 2010 and which is eligible for deduction of expenditure under section 35AD.

5. Deduction under section 36 for Employers contribution towards Pension scheme is allowed:

In section 36 of the Income-tax Act, in sub-section (1), after clause (iv), the following shall be inserted with effect from the 1st day of April, 2012, namely: –

(iva) any sum paid by the assessee as an employer by way of contribution towards a pension scheme, as referred to in section 80CCD, on account of an employee to the extent it does not exceed ten per cent. of the salary of the employee in the previous year.

Explanation. – For the purposes of this clause, "salary" includes dearness allowance, if the terms of employment so provide, but excludes all other allowances and perquisites;

6. Deduction under Chapter VI-A:

(a) Tax benefits for New Pension System (NPS)

Section 80CCD of the Income-tax Act provides, inter alia, a deduction in respect of contributions made by an employee as well as an employer to the New Pension System (NPS) account on behalf of the employee. In view of the provisions of section 80CCE, the aggregate deduction under sections 80C, 80CCC and 80CCD cannot exceed one lakh rupees. The allowable deduction under section 80CCD includes both the employee's as well the employer's contribution to the NPS.

Section 80CCE is amended so as to provide that the contribution made by the Central Government or any other employer to a pension scheme under section 80CCD(2) shall be excluded from the limit of one lakh rupees provided under section 80CCE.

(b) Deduction for investment in long-term infrastructure bonds

Under the existing provisions of section 80CCF of the Income-tax Act, a sum of Rs. 20,000 (over and above the existing limit of Rs. 1 lakh available under section 80CCE for tax savings) is allowed as deduction in computing the total income of an individual or a Hindu undivided family if that sum is paid or deposited during the previous year relevant to the assessment year 2011-12 in long-term infrastructure bonds as notified by the Central Government.

Section 80CCF is amended to allow deduction on account of investment in notified long-term infrastructure bonds for the year 2011-12 (assessment year 2012-13) also.

(c) Extension of sunset clause for tax holiday for power sector

Under the existing provisions of section 80-IA(4)(iv) of the Income-tax Act, a deduction of profits and gains is allowed to an undertaking which, –

- (a) is set up for the generation and distribution of power if it begins to generate power at any time during the period beginning on 1st April, 1993 and ending on 31st March, 2011;
- (b) starts transmission or distribution by laying a network of new transmission or distribution lines at any time during the period beginning on 1st April, 1999 and ending on 31st March, 2011;
- (c) undertakes substantial renovation and modernisation of existing network of transmission or distribution lines at any time during the period beginning on 1st April, 2004 and ending on 31st March, 2011.

Section 80-IA(4)(iv) is amended to extend the terminal date for a further period of one year, i.e., upto 31st March, 2012.

(d) Sunset of tax holiday for certain undertakings engaged in commercial production of mineral oil

Under the existing provisions of section 80-IB(9) of the Income-Tax Act, a seven-year profit-linked deduction of hundred per cent is available to an undertaking, if it fulfils any of the following, namely:-

- (i) is located in North-Eastern Region and has begun or begins commercial production of mineral oil before 1st April, 1997;
- (ii) is located in any part of India and has begun or begins commercial production of mineral oil on or after 1st April, 1997;
- (iii) is engaged in refining of mineral oil and begins such refining on or after 1st October, 1998 but not later than 31st March, 2012;
- (iv) is engaged in commercial production of natural gas in blocks licensed under the VIII Round of bidding for award of exploration contracts (NELP-VIII) under the New Exploration Licencing Policy announced by the Government of India vide Resolution No. O-19018/22/95-ONG.DO.VL, dated 10th February, 1999 and begins commercial production of natural gas on or after 1st April, 2009;

(v) is engaged in commercial production of natural gas in blocks licensed under the IV Round of bidding for award of exploration contracts for Coal Bed Methane blocks and begins commercial production of natural gas on or after 1st April, 2009.

For the purposes of claiming this deduction, all blocks licensed under a single contract, which has been awarded under the New Exploration Licencing Policy announced by the Government of India vide Resolution No. O-19018/22/95-ONG.DO.VL dated 10th February, 1999 or in pursuance of any law for the time being in force or by the Central or a State Government in any other manner, is treated as a single “undertaking”.

Thus, an undertaking, which is located in any part of India and is engaged in commercial production of mineral oil, is eligible for the above-mentioned deduction, if it has begun or begins commercial production of mineral oil at any time after 1st April, 1997.

No sunset date has been provided for such business. It is amended that the aforesaid deduction available for commercial production of mineral oil will not be available for blocks licensed under a contract awarded after 31st March, 2011 under the New Exploration Licencing Policy announced by the Government of India vide Resolution No. O-19018/22/95-ONG.DO.VL, dated 10th February, 1999 or in pursuance of any law for the time being in force or by the Central or a State Government in any other manner.

This amendment will take effect from 1st April, 2012 and will, accordingly, apply in relation to the assessment year 2012-13 and subsequent years.

7. Taxation of certain foreign dividends at a reduced rate

Under the existing provisions of the Income-tax Act, dividend received from foreign companies is taxable in the hands of the resident shareholder at his applicable marginal rate of tax. Therefore, in case of Indian companies which receive foreign dividend, such dividend is taxable at the rate of thirty per cent plus applicable surcharge and cess.

A new section 115BBD is inserted to provide that where total income of an Indian company for the previous year relevant to the assessment year 2012-13 includes any income by way of dividends received from a foreign subsidiary company, then such dividends shall be taxable at the rate of fifteen per cent (plus applicable surcharge and cess) on the gross amount of dividends. No expenditure in respect of such dividends shall be allowed under the Act.

8. Minimum Alternate Tax

Under the existing provisions of section 115JB(1), a company is required to pay a minimum alternate tax (MAT) on its book profit, if the income-tax payable on the total income, as computed under the Act in respect of any previous year relevant to the assessment year commencing on or after 1st April, 2011, is less than the MAT. The amount of tax paid under the said section is allowed to be carried forward and set off against tax payable up to the tenth assessment year immediately succeeding the assessment year in which the tax credit becomes allowable under the provisions of section 115JAA. The rate of MAT is increased from 18% to 18.5% of such book profit.

9. Alternate Minimum Tax for Limited Liability Partnership (LLP)

The Limited Liability Partnership Act, 2008 (LLP) has come into effect in 2009. The LLP has features of both a body corporate as well as a traditional partnership. The Income-tax Act provides for the same taxation regime for a limited liability partnership as is applicable to a partnership firm. It also provides tax neutrality (subject to fulfilment of certain conditions) to conversion of a private limited company or an unlisted public company into an LLP.

An LLP being treated as a firm for taxation has the following tax advantages over a company under the Income-tax Act:-

- i) it is not subject to Minimum Alternate Tax;
- ii) it is not subject to Dividend Distribution Tax (DDT); and
- iii) it is not subject to surcharge.

In order to preserve the tax base vis-à-vis profit-linked deductions, a new Chapter XII-BA has been inserted in the Income-tax Act containing special provisions relating to certain limited liability partnerships.

Where the regular income-tax payable for a previous year by a limited liability partnership is less than the alternate minimum tax payable for such previous year, the adjusted total income shall be deemed to be the total income of such limited liability partnership and it shall be liable to pay income-tax on such total income @18.5%. For the purpose of the above,

- (i) "adjusted total income" shall be the total income before giving effect to this newly inserted Chapter XII-BA as increased by the deductions claimed under any section included in Chapter VI-A under the heading "C - Deductions in respect of certain incomes" and deduction claimed under section 10AA;
- (ii) "alternate minimum tax" shall be the amount of tax computed on adjusted total income at a rate of eighteen and one-half per cent; and
- (iii) "regular income-tax" shall be the income-tax payable for a previous year by a limited liability partnership on its total income in accordance with the provisions of the Act other than the provisions of this newly inserted Chapter XII-BA.

The credit for tax (tax credit) paid by a limited liability partnership under this newly inserted Chapter XII-BA shall be allowed to the extent of the excess of the alternate minimum tax paid over the regular income-tax. This tax credit shall be allowed to be carried forward up to the tenth assessment year immediately succeeding the assessment year for which such credit becomes allowable. It shall be allowed to be set off for an assessment year in which the regular income-tax exceeds the alternate minimum tax to the extent of the excess of the regular income-tax over the alternate minimum tax.

10. Rationalisation of Tax on Income distributed to unit holders

Under the existing provisions contained in section 115R(2) of the Income-tax Act, a Mutual Fund is liable to pay additional income-tax on the amount of income distributed to its unit holders.

Additional income-tax at a higher rate of 30 per cent shall be levied on income distributed by debt funds to a person other than an individual or HUF.

Section 115R(2) has been amended to provide that the Mutual Fund shall be liable to pay additional income-tax on such distributed income at the rate of -

- (a) 25 per cent if the recipient is an individual or HUF in case of distribution by a money market mutual fund or a liquid fund;
- (b) 30 per cent if the recipient is any other person in case of distribution by a money market mutual fund or a liquid fund;
- (c) 12.5 per cent. if the recipient is an individual or HUF in case of distribution by a debt fund other than a money market mutual fund or a liquid fund; and
- (d) 30 per cent if the recipient is any other person in case of distribution by debt fund other than a money market mutual fund or a liquid fund.

There will be no change in the rate of income-tax in case of distribution to any individual or HUF. Distribution of income by an equity-oriented fund shall continue to be exempt from tax.

This amendment is effective from 1st June, 2011.

11. Collection of information on requests received from tax authorities outside India:

Under the existing provisions of section 131(1) of the Income-tax Act, certain income-tax authorities have been conferred the same powers as are available to a Civil Court while trying a suit in respect of discovery and inspection, enforcing the attendance of any person, including any officer of a banking company and examining him on oath, compelling production of books of account and other documents and issuing commissions.

A new sub-section (2) has been inserted under section 131 to facilitate prompt collection of information on requests received from tax authorities outside India in relation to an agreement for exchange of information under section 90 or section 90A of the Income-tax Act. The new sub-section provides that for the purpose of making an enquiry or investigation in respect of any person or class of persons in relation to an agreement referred to in section 90 or section 90A, it shall be competent for any income-tax authority, not below the rank of Assistant Commissioner of Income-tax, as notified by the Board in this behalf, to exercise the powers currently conferred on income-tax authorities referred to in section 131(1). The authority so notified by the Board shall be able to exercise the powers under section 131(1) notwithstanding that no proceedings with respect to such person or class of persons are pending before it or any other income-tax authority.

Section 131(3) has further been amended so as to empower the aforesaid authority, as notified by the Board, to impound and retain any books of account and other documents produced before it in any proceeding under the Act. Similar amendments have also been made in section 133 of the Income-tax Act.

These amendments are effective from 1st June, 2011.

12. Exemption to a class or classes of persons from furnishing a return of income:

Under the existing provisions contained in section 139(1) of the Income-tax Act, every person, if his total income during the previous year exceeds the maximum amount which is not chargeable to income-tax, is required to furnish a return of his income.

In the case of salaried tax payer, entire tax liability is discharged by the employer through deduction of tax at source. Complete details of such tax payers are also reported by the employer

through Tax Deduction at Source (TDS) statements. Therefore, in cases where there is no other source of income, filing of a return is a duplication of existing information.

In order to reduce the compliance burden on small tax payer, a sub-section (1C) has been inserted in section 139. This provision empowers the Central Government to exempt, by notification in the Official Gazette, any class or classes of persons from the requirement of furnishing a return of income, having regard to such conditions as may be specified in that notification.

Consequential amendments has also been made to the provisions of section 296 to provide that any notification issued under section 139(1C) shall be laid before Parliament. These amendments are effective from 1st June, 2011.

13. Notification for processing of returns in Centralised Processing Centres

Under the existing provisions of section 143(1B) of the Income-tax Act, the Central Government may, for the purpose of giving effect to the scheme made under section 143(1A), by notification in the Official Gazette, direct that any of the provisions of the Income-tax Act relating to processing of returns shall not apply or shall apply with such exceptions, modifications and adaptations as may be specified in that notification. However, no direction shall be issued after 31st March, 2011.

Section 143(1B) has been amended to extend the existing time limit for issue of notification to 31st March, 2012. This amendment is retrospectively effective from 1st April, 2011.

14. Extension of time limit for assessments in case of exchange of information

Section 153 of the Income-tax Act provides for the time limits for completion of assessments and reassessments. In Explanation 1 to section 153 of the Income-tax Act, certain periods specified therein are to be excluded while computing the period of limitation for completion of assessments and reassessments.

A new clause (viii) in Explanation 1 to section 153 has been inserted to exclude the time taken in obtaining information from the tax authorities in jurisdictions situated outside India, under an agreement referred to in section 90 or section 90A, from the statutory time limit prescribed for completion of assessment or reassessment.

This clause provides that the period commencing from the date on which a reference for exchange of information is made by an authority competent under an agreement referred to in section 90 or section 90A and ending with the date on which the information so requested is received by the Commissioner, or a period of six months, whichever is less, shall be excluded.

Similar amendments are made to section 153B of the Income-tax Act. These amendments are effective from 1st June, 2011.

15. Modification in the conditions for filing an application before the Settlement Commission

The existing provisions contained in the proviso to section 245C(1) allow an application to be made before the Settlement Commission if,—

- (i) the proceedings have been initiated against the applicant under section 153A or under section 153C as a result of search or a requisition of books of account, as the case may be, and the additional amount of income-tax payable on the income disclosed in the application exceeds fifty lakh rupees;
- (ii) in other cases, if the additional amount of income-tax payable on the income disclosed in the application exceeds ten lakh rupees.

A new clause (ia) has been inserted in the proviso to section 245C(1) to expand the criteria for filing an application for settlement by a tax payer in whose case proceedings have been initiated as a result of search or requisition of books of account.

This clause stipulates that an application can also be made, where the applicant –

- (a) is related to the person [referred to in (i) above] in whose case proceedings have been initiated as a result of search and who has filed an application; and
- (b) is a person in whose case proceedings have also been initiated as a result of search, the additional amount of income-tax payable on the income disclosed in his application exceeds ten lakh rupees.

As a consequence, a tax payer who is the subject matter of a search would be allowed to file an application for settlement if additional income-tax payable on the income disclosed in the application exceeds fifty lakh rupees. Entities related to such a tax payer, who are also the subject matter of search, would now be allowed to file an application for settlement, if additional income tax payable in their application exceeds ten lakh rupees. This amendment is effective from 1st June, 2011.

16. Power of the Settlement Commission to rectify its orders

The existing provisions of section 245D(4) of the Income-tax Act provide that the Settlement Commission may pass an order, as it thinks fit, on the matters covered by the applications received by it, after giving an opportunity of being heard to the applicant and to the Commissioner. Further, under section 245F (1), the Settlement Commission has been conferred all the powers which are vested in an income-tax authority under the Act. An income-tax authority has the power (under section 154) to amend any order passed by it for the purpose of rectifying any mistake apparent from the record.

A new sub-section (6B) in section 245D has been inserted so as to specifically provide that the Settlement Commission may, at any time within a period of six months from the date of its order, with a view to rectifying any mistake apparent from the record, amend any order passed by it under section 245D(4).

It is further provided that a rectification which has the effect of modifying the liability of the applicant shall not be made unless the Settlement Commission has given notice to the applicant and the Commissioner of its intention to do so and has allowed the applicant and the Commissioner an opportunity of being heard.

17. Omission of the requirement of quoting of Document Identification Number

Under the existing provisions contained in section 282B of the Income-tax Act, every income-tax authority shall, on or after the 1st day of July, 2011, allot a computer-generated Document Identification Number in respect of every notice, order, letter or any correspondence issued by him to any other income-tax authority or assessee or any other person and such number shall be quoted thereon.

Considering the practical difficulties due to non-availability of requisite infrastructure on an all India basis the aforesaid section has been omitted. This amendment will take effect retrospectively from 1st April, 2011.

18. Reporting of activities of liaison offices

Foreign companies or firms or associations of individuals operate in India through a branch or a liaison office after approval by Reserve Bank of India. The branch constitutes a permanent establishment of the foreign entity and is, therefore, required to file a return of income along with requisite details. A non-resident does not file a return of income with regard to its liaison office on the ground that no business activity is allowed to be carried out in India.

A new section 285 is, therefore, inserted in the Income-tax Act mandating the filing of annual information, within sixty days from the end of the financial year, in the prescribed form and providing prescribed details by non-residents as regards their liaison offices. This amendment will take effect from 1st June, 2011.

19. Recognition to Provident Funds - Extension of time limit for obtaining exemption from Employees Provident Fund Organisation (EPFO)

Rule 4 in Part A of the Fourth Schedule to the Income-tax Act provides for conditions which are required to be satisfied by a Provident Fund for receiving or retaining recognition under the Income-tax Act. One of the requirements of rule 4 [clause (ea)] is that the establishment shall obtain exemption under section 17 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (EPF & MP Act).

Rule 3 in Part A of the Fourth Schedule provides that the Chief Commissioner or the Commissioner of Income-tax may accord recognition to any provident fund which, in his opinion, satisfies the conditions specified under the said rule 4 and the conditions which the Board may specify by rules.

The first proviso to sub-rule (1) of rule 3, inter alia, specifies that in a case where recognition has been accorded to any provident fund on or before 31st March, 2006, and such provident fund does not satisfy the conditions set out in clause (ea) of rule 4 on or before 31st December, 2010 and any other conditions which the Board may specify by rules in this behalf, the recognition to such fund shall be withdrawn. In order to provide further time to the Employees' Provident Fund Organization (EPFO) to process the applications made by establishments seeking exemption under section 17 of the EPF & MP Act, the aforesaid proviso has been amended so as to extend the time limit from 31st December, 2010 to 31st March, 2012. This amendment will take effect retrospectively from 1st January, 2011.

20. Transfer Pricing

STUDY X: BASIC CONCEPTS OF INTERNATIONAL TAXATION

Note: Student of Professional Programme shall note that the portion relating to Transfer pricing shall be replaced with the following matter:

1. Introduction

In the present age of globalization, diversification and expansion, most of the companies are working under the umbrella of group engaged in diversified fields/sectors leading to large number of transactions between related parties.

Related Party transaction means the transaction between/among the parties which are associated by reason of common control, common ownership or other common interest.

The mechanism for accounting, the pricing for these related transactions is called Transfer Pricing.

Transfer Price refers to the price of goods/services which is used in accounting for transfer of goods or services from one responsibility centre to another or from one company to another associated company. Transfer price affect the revenue of transferring division and the cost of receiving division. As a result, the profitability, return on investment and managerial performance evaluation of both divisions are also affected.

This may be understood well by the following example

1. Arihant & Companies is a group of Companies engaged in diversified business. One of its units i.e. Unit X is engaged in manufacturing of automotive batteries. Another Unit Y is engaged in manufacturing of Industrial Trucks. Unit X is supplying automotive batteries to Unit Y. In such cases transfer price mechanism is used to account for the transfer of automotive batteries.
2. XYZ Co. is expert in providing electrical and electronic services. It is engaged in providing support to its associated company as well as it is engaged in outsourcing contract. If XYZ Co. provides some services to its associated company, the transaction should be accounted at price calculated using transfer price mechanism.

2. Importance of Transfer Pricing

Transfer pricing mechanism is very important for following reasons:

1. *Helpful in correct pricing of Product/Services* - An effective transfer pricing mechanism helps an organization in correctly pricing its product and services. Since in any organization, transaction between associated parties occurs frequently, it is necessary to value all transaction correctly so that the final product/ services may be priced correctly.
2. *Helpful in Performance Evaluation* - For the performance evaluation of any entity, it is necessary that all economic transactions are accounted. Calculation of correct transfer price is necessary for accounting of inter related transaction between two Associated enterprises.

3. *Helpful in complying Statutory Legislations* : Since related party transaction have a direct bearing on the profitability or cost of a company, the effective transfer pricing mechanism is very necessary. For example, if the related party transactions are measured at less value, one unit may incur loss and other unit may earn undue profit. This will result in income tax imbalances at both parties end. Similarly, wrong transfer pricing may lead to wrong payment of excise duty, custom duty / sales tax (if applicable) as well.

3. Transfer Pricing Provisions in India

Increasing participation of multi-national groups in economic activities in India has given rise to new and complex issues emerging from transactions entered into between two or more enterprises belonging to the same group. Hence, there was a need to introduce a uniform and internationally accepted mechanism of determining reasonable, fair and equitable profits and taxes in India. Accordingly, the Finance Act, 2001 introduced law of transfer pricing in India through Sections 92 to 92F of the Income Tax Act, 1961 which guides computation of the transfer price and suggests detailed documentation procedures. Year 2012 brought a big change in transfer pricing regulations in India whereby government extended the applicability of transfer pricing regulations to specified domestic transactions which are enumerated in Section 92BA. This would help in curbing the practice of transferring profit from a taxable domestic zone to tax free domestic zone.

As stated earlier, the fundamental of transfer pricing provision is that transfer price should represent the arm's length price of goods transferred and services rendered from one unit to another unit.

4. What is Arm's Length Price?

In general arm's length price means fair price of goods transferred or services rendered. In other words, the transfer price should represent the price which could be charged from an independent party in uncontrolled conditions. Arm's length price calculation is very important for a company. In case the transfer price is not at arm's length, it may have following consequences

- A. Wrong performance evaluation
- B. Wrong pricing of final product (In case where the goods/services are used in the manufacturing of final product)
- C. Non compliances of applicable laws and thus attraction of penalty provisions.

The same may be explained with the following examples

Company X and Company Y is working under the common umbrella of Mohan & Company. Company X manufactures a product which is raw material for Company Y.

Case	Criteria	Effect on Company X	Effect on Company Y
1	Company X charges price more than the Arm's length price from Company Y	The revenue of company X will increase.	The total cost of company Y will increase. This will result into wrong pricing of its product which may further lead to uncompetitiveness of its product

2	Company X charges price less than the Arm's length price from Company Y	The revenue of company X will decrease. The parent company may close the company X treating it as loss making entity.	The total cost of company Y will decrease. Therefore, the company Y may charge lower price which may lead to loss at an entity level.
3	Company X charges Arm's Length price from Company Y	The revenue of company X will be representing true and fair view of its operation.	Company Y will be paying the price as equivalent to market price of Company X product and its cost will be correct. On the basis of the cost arrived after considering the arm's length price of company X product, company Y will be able to take correct price decision.

“The concept of associated enterprises and International transaction are very important for applying the transfer pricing provisions. Section 92A and Section 92B deals with these two important concepts of chapter X of Income Tax Act, 1961.”

5. Associated Enterprises (AE)

Associated Enterprises has been defined in Section 92A of the Act. It prescribes that “associated enterprise”, in relation to another enterprise, means an enterprise –

- (a) Which participates, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise; or
- (b) In respect of which one or more persons who participate, directly or indirectly, or through one or more intermediaries, in its management or control or capital, are the same persons who participate, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise.

Thus, from above definition we may understand that

The basic criterion to determine an AE is the participation in management, control or capital (ownership) of one enterprise by another enterprise whereby the participation may be direct or indirect or through one or more intermediaries, control may be direct or indirect.

Deemed Associated Enterprises

As per Section 92(2), two enterprises shall be deemed to be associated enterprises if, at any time during the previous year, –

- (a) one enterprise holds, directly or indirectly, shares carrying not less than twenty-six per cent of the voting power in the other enterprise; or
- (b) any person or enterprise holds, directly or indirectly, shares carrying not less than twenty-six per cent of the voting power in each of such enterprises; or
- (c) a loan advanced by one enterprise to the other enterprise constitutes not less than fifty-one per cent of the book value of the total assets of the other enterprise; or

- (d) one enterprise guarantees not less than ten per cent of the total borrowings of the other enterprise; or
- (e) more than half of the board of directors or members of the governing board, or one or more executive directors or executive members of the governing board of one enterprise, are appointed by the other enterprise; or
- (f) more than half of the directors or members of the governing board, or one or more of the executive directors or members of the governing board, of each of the two enterprises are appointed by the same person or persons; or
- (g) the manufacture or processing of goods or articles or business carried out by one enterprise is wholly dependent on the use of know-how, patents, copyrights, trade-marks, licences, franchises or any other business or commercial rights of similar nature, or any data, documentation, drawing or specification relating to any patent, invention, model, design, secret formula or process, of which the other enterprise is the owner or in respect of which the other enterprise has exclusive rights; or
- (h) ninety per cent or more of the raw materials and consumables required for the manufacture or processing of goods or articles carried out by one enterprise, are supplied by the other enterprise, or by persons specified by the other enterprise, and the prices and other conditions relating to the supply are influenced by such other enterprise; or
- (i) the goods or articles manufactured or processed by one enterprise, are sold to the other enterprise or to persons specified by the other enterprise, and the prices and other conditions relating thereto are influenced by such other enterprise; or
- (j) where one enterprise is controlled by an individual, the other enterprise is also controlled by such individual or his relative or jointly by such individual and relative of such individual; or
- (k) where one enterprise is controlled by a Hindu undivided family, the other enterprise is controlled by a member of such Hindu undivided family or by a relative of a member of such Hindu undivided family or jointly by such member and his relative; or
- (l) where one enterprise is a firm, association of persons or body of individuals, the other enterprise holds not less than ten per cent interest in such firm, association of persons or body of individuals; or
- (m) there exists between the two enterprises, any relationship of mutual interest, as may be prescribed

In Summary, two enterprises will be deemed as Associated Enterprises if

<i>Quantum of Interest</i>	<i>Criteria applied for Associated Enterprises</i>
26% or more	Shareholding with voting power – either direct or indirect
51% or more	Advancement of loan by one entity to other constituting certain percentage of the book value of the total assets of the other entity

51% or more	Based on the board of directors appointed by the governing board of the entity in the other
90% or more	Based on the quantum of supply of raw materials and consumables by one entity to the other
10% or more	Total Borrowing Guarantee by one enterprise for other
10% or more	Interest by a firm or association of Person (AOP) or by a body of Individual (BOI) in other firm AOP or firm or BOI

6. Meaning of International Transaction

International Transaction have been defined vide Section 92B of Income Tax Act. It provides that "International Transaction" means a transaction between two or more associated enterprises, either or both of whom are non-residents, in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or lending or borrowing money, or any other transaction having a bearing on the profits, income, losses or assets of such enterprises, and shall include a mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises.

Deemed International Transaction

As per Section 92B(2) of Income Tax Act, A transaction entered into by an enterprise with a person other than an associated enterprise shall, for the purposes of sub-section (1), be deemed to be a transaction entered into between two associated enterprises, if there exists a prior agreement in relation to the relevant transaction between such other person and the associated enterprise, or the terms of the relevant transaction are determined in substance between such other person and the associated enterprise.

7. Transfer Pricing - Methods

Section 92C of Income Tax Act defines the methods which are to be used in determination of Arm's Length prices for International Transaction and specified domestic transaction. The arm's length price in relation to an international transaction/specified domestic transaction shall be determined by any of the following methods, being the most appropriate method, having regard to the nature of transaction or class of transaction or class of associated persons or functions performed by such persons or such other relevant factors as the Board may prescribe, namely :-

- (A) Comparable Uncontrolled Price Method (CUP)
- (B) Resale Price Method (RPM)
- (C) Cost Plus Method (CPM)
- (D) Profit Split Method (PSM)
- (E) Transactional Net Margin Method (TNMM)
- (F) Such other method as may be prescribed by the Board.

Various transfer pricing methods which are prescribed by Income Tax Act, 1961 are as under:

(A) Comparable Uncontrolled Price Method

Comparable Uncontrolled Price (“CUP”) method compares the price charged for property or services transferred in a controlled transaction to the price charged for property or services transferred in a comparable uncontrolled transaction in comparable circumstances.

An Uncontrolled price is the price agreed between the unrelated parties for the transfer of goods or services. If this uncontrolled price is comparable with the price charged for transfer of goods or services between the Associated Enterprises, then that price is Comparable Uncontrolled Price (CUP). This is the most direct method for the determination of the Arms’ length price.

Methods of CUP

CUP can be either

- (a) Internal CUP or
- (b) External CUP

Internal CUP is available, when the tax payer enters into a similar transaction with unrelated parties, as is done with a related party as well. This is considered a very good comparable, as the functions performed, processes involved, risks undertaken and assets employed are all easily comparable – more so, on “an apple to apple basis”.

The external CUP is available if a transaction between two independent enterprises takes place under comparable conditions involving comparable goods or services. For example an independent enterprise buys or sells a similar product, in similar quantities under similar term from / to another independent enterprise in a similar market will be termed as external CUP.

Applicability of the CUP Method

Comparable Uncontrolled Price method is treated as most reliable method of transfer pricing calculation but it is not easy to find the controllable price method easily. The CUP is believed to be the most reliable / best method, if one could identify and map it. CUP method can be applied without any difficulty in following circumstances.

- (1) Interest payment on a loan
- (2) Royalty payment
- (3) Software development where products are often licensed to a third party
- (4) Price charged for homogeneous items like traded goods

(B) Resale Price Method

Rule 10B (1) (b) of Income Tax Rules, 1962 prescribes Resale Price method by which,

- A. The price at which property purchased or services obtained by the enterprise from an associated enterprise is resold or are provided to an unrelated enterprise is identified;
- B. Such resale price is reduced by the amount of a normal gross profit margin accruing to the enterprise or to an unrelated enterprise from the purchase and resale of the same or similar property or from obtaining and providing the same or similar services, in a comparable uncontrolled transaction, or a number of such transactions;

- C. The price so arrived at is further reduced by the expenses incurred by the enterprise in connection with the purchase of property or obtaining of services;
- D. The price so arrived at is adjusted to take into account the functional and other differences, including differences in accounting practices, if any, between the international transaction* and the comparable uncontrolled transactions, or between the enterprises entering into such transactions, which could materially affect the amount of gross profit margin in the open market;
- E. The adjusted price arrived at under sub-clause (iv) is taken to be an arms length price in respect of the purchase of the property or obtaining of the services by the enterprise from the associated enterprise.

Example

1. A sold a machine to B (Associated enterprise) and in turn B sold the same machinery to C (an independent party) at sale margin of 30% for Rs 2,10,000 but without making any additional expenses and change. Here Arm's length price would be calculated as

Sales price to B = 2, 10,000
 Gross Margin = 10,000 * 30% = 63,000
 Transfer price = 1, 47,000

2. A sold a machine to B (Associated enterprise) and in turn B sold the same machinery to C (an independent party) at sale margin of 30% for Rs 4,00,000 but B has incurred 4000 in sending the machine to C. Here Arm's length price would be calculated as

Sales price to B = 4, 00,000
 Gross Margin = 4,00,000*30%=1, 20,000
 Balance = 2, 80,000

Less : Expenses incurred by B = 4,000

Arm's length price= 2,76,000

(C) Cost Plus Method

Rule 10B (1) (c) of Income tax Rules, 1962 prescribes Cost Plus Method, by which,

- (i) The direct and indirect costs of production incurred by the enterprise in respect of property transferred or services provided to an associated enterprise, are determined;
- (ii) The amount of a normal gross profit mark-up to such costs (computed according to the same accounting norms) arising from the transfer or provision of the same or similar property or services by the enterprise, or by an unrelated enterprise, in a comparable uncontrolled transaction, or a number of such transactions, is determined;
- (iii) The normal gross profit mark-up so determined is adjusted to take into account the functional and other differences, if any, between the international transaction and the comparable uncontrolled transactions, or between the enterprises entering into such transactions, which could materially affect such profit mark-up in the open market;
- (iv) The costs referred to in sub-clause (i) are increased by the adjusted profit mark-up arrived at under sub-clause (iii);

- (v) The sum so arrived at is taken to be an arm's length price in relation to the supply of the property or provision of services by the enterprise.

Under the Cost Plus Method, an arm's-length price equals the controlled party's cost of producing the tangible property plus an appropriate gross profit mark-up, defined as the ratio of gross profit to cost of goods sold (excluding operating expenses) for a comparable uncontrolled transaction.

The formulas for the transfer price in inter company transactions of products are as follows:

TP = COGS x (1 + mark-up), where:

- TP = Transfer Price of a product sold between a manufacturing company and a related company;
- COGS = Cost of goods sold of the manufacturing company
- Cost plus mark-up = gross profit mark-up defined as the ratio of gross profit to cost of goods sold

Gross profit is defined as sales minus cost of goods sold.

As an example, let us assume that the COGS in a transaction between two associated enterprises is Rs. 5,000. Assume that an arm's length gross profit mark-up that Associated Enterprise 1 should earn is 50%. The resulting transfer price between Associated Enterprise 1 and Associated Enterprise 2 is Rs. 7,500 [i.e. Rs. 5,000 x (1 + 0.50)].

In this method, calculation of cost of goods sold and gross margin are the most important factor.

(D) Profit Split Method

Rule 10B (1) (d) of Income tax Rules, 1962 prescribes Profit Split Method, which may be applicable mainly in international transactions* involving transfer of unique intangibles or in multiple international transactions which are so interrelated that they cannot be evaluated separately for the purpose of determining the arm's length price of any one transaction, by which:

- (i) The combined net profit of the associated enterprises arising from the international transaction in which they are engaged, is determined;
- (ii) The relative contribution made by each of the associated enterprises to the earning of such combined net profit, is then evaluated on the basis of the functions performed, assets employed or to be employed and risks assumed by each enterprise and on the basis of reliable external market data which indicates how such contribution would be evaluated by unrelated enterprises performing comparable functions in similar circumstances;
- (iii) The combined net profit is then split amongst the enterprises in proportion to their relative contributions, as computed above;
- (iv) The profit thus apportioned to the assessee is taken into account to arrive at an arm's length price in relation to the international transaction.

However, the combined net profit as determined in sub-clause (i) may, in the first instance, be partially allocated to each enterprise so as to provide it with a basic return appropriate for the type of international transaction in which it is engaged, with reference to market returns achieved for similar types of transactions by independent enterprises, and thereafter, the residual net profit

remaining after such allocation may be split amongst the enterprises in proportion to their relative contribution in the manner specified under sub-clauses (ii) and (iii), and in such a case the aggregate of the net profit allocated to the enterprise in the first instance together with the residual net profit apportioned to that enterprise on the basis of its relative contribution shall be taken to be the net profit arising to that enterprise from the international transaction.

Two step Approach of Profit Split Method

Step 1: Allocation of sufficient profit to each enterprise to provide a basic compensation for routine contributions. This basic compensation does not include a return for possible valuable intangible assets owned by the associated enterprises. The basic compensation is determined based on the returns earned by comparable independent enterprises for comparable transactions or, more frequently, functions.

Step 2: Allocation of residual profit (i.e. profit remaining after step 1) between the associated enterprises based on the facts and circumstances. If the residual profit is attributable to intangible property, then the allocation of this profit should be based on the relative value of each enterprise's contributions of intangible property.

Example on the Profit Split Method (Residual Analysis Approach)

Company A is an Indian Company and deals in telecommunication products. It has developed a Microprocessor and it holds the patent for manufacturing of the microprocessor. Company B which is an overseas subsidiary of Company A is engaged in manufacturing of Mobile equipment at Australia. Company A supply the microprocessor to company B for using it in Mobile equipment and company B in turn after manufacturing the mobile sends the mobile to company "A" in India. Company A sells all the mobile in India.

Both companies contribute to the success of the mobile equipment through their design of the microprocessor and the equipment. As the nature of the products is very advanced and unique, the group is unable to locate any comparable with similar intangible assets. Therefore, neither the traditional methods i.e. CUP Method, RSP Method nor the TNMM is appropriate in this case.

Nevertheless, the group is able to obtain reliable data on hand phone contract manufacturers and equipment wholesalers without unique intangible property in the telecommunication industry. The manufacturers earn a mark-up of 10% while the wholesalers derive a 25% margin on sales.

Company A's and Company B's respective share of profit is determined in 2 steps using the profit split method (residual analysis approach).

Step 1 - Determining the basic return

The simplified accounts of Company A and Company B are shown below:

	<i>Company B</i> <i>(Rs. in Lakhs)</i>	<i>Company A</i> <i>(Rs. in Lakhs)</i>
Sales	100	125
Cost of Goods Sold	(60)	(100)
Gross Margin	40	25
Sales, General & Administration Expenses	(5)	(15)
Operating Margin	35	10

The total operating profit for the group is Rs. 45 Lakhs.

Company B

<i>Particulars</i>	<i>Amount (Rs. in Lakhs)</i>
Cost of goods sold	60
Margin @10%	6
Transfer price based on Comparable (without considering Intangibles)	66

Company A

<i>Particulars</i>	<i>Amount (Rs. in Lakhs)</i>
Sales to third party customers	125
Resale margin of wholesalers comparables (without intangibles) @25%	31.25
Gross Margin	31.25

	Company B (Rs. in Lakhs)	Company A (Rs. in Lakhs)
Sales	66	
Cost of Goods Sold	(60)	
Gross Margin	6	31.25
Sales, General & Admin Expenses	(5)	(15)
Routine operating margin	1	16.25

The total operating margin of the group is Rs. 17.25 Lakhs.

Step 2 : Dividing the residual profit

The residual profit of the group is = Rs. 45 Lakhs - Rs. 17.25 Lakhs= Rs. 27.75 Lakhs

On further study of the two companies, two particular expense items, R&D expenses and marketing expenses, are identified as the key intangibles critical to the success of the mobile equipment. The R&D expenses and marketing expenses incurred by each company are:

Company A 12 Lakhs (80%)

Company B 3 Lakhs (20%)

Assuming that the R&D and marketing expenses are equally significant in contributing to the residual profits, based on the proportionate expenses incurred:

Company A's share of residual profit (80% x 27.75)

= Rs. 22.20 Lakhs

Company B's share of residual profit (20% x 27.75)
= Rs. 5.55 Lakhs

Therefore, the adjusted operating profit of

Company A is = Rs. 22.20 L + Rs. 16.25 L = Rs. 38.45 Lakhs

Company B is = Rs. 5.55 + Rs. 1 = Rs. 6.55 Lakhs.

The adjusted tax accounts are as follows:

	<i>Company B</i> (Rs. in Lakhs)	<i>Company A</i> (Rs. in Lakhs)
Sales	71.55	125
Cost of Goods Sold	(60)	(71.55)
Gross Margin	11.55	53.45
Sales, General & Admin Expenses	(5)	(15)
Operating Margin	6.55	38.45

Hence, the transfer price determined using the profit split method (residual analysis approach) should be Rs. 71.55 Lakhs

(E) Transactional Net Margin Method (TNMM)

Rule 10B (1) (e) of Income Tax Rules, 1962 prescribes, Transactional net margin method, by which,

- (i) The net profit margin realized by the enterprise from an international transaction entered into with an associated enterprise is computed in relation to costs incurred or sales effected or assets employed or to be employed by the enterprise or having regard to any other relevant base;
- (ii) The net profit margin realized by the enterprise or by an unrelated enterprise from a comparable uncontrolled transaction or a number of such transactions is computed having regard to the same base;
- (iii) The net profit margin referred to in (ii) arising in comparable uncontrolled transactions is adjusted to take into account the differences, if any, between the international transaction and the comparable uncontrolled transactions, or between the enterprises entering into such transactions, which could materially affect the amount of net profit margin in the open market;
- (iv) the net profit margin realized by the enterprise and referred to in (i) is established to be the same as the net profit margin referred to in (iii);
- (v) The net profit margin thus established is then taken into account to arrive at an arms length price in relation to the international transaction.

Example

Nikhil & Co is an India manufacturer of dishwashers. All Nikhil & Co's dishwashers are sold to an overseas associated enterprise, Company G, and bears Company G's brand. Company G, a household electrical appliances brand name, sells only dishwashers manufactured by Nikhil & Co.

The CUP method is not applied in this case because no reliable adjustments can be made to account for differences with similar products in the market. After the appropriate functional analysis, Nikhil & Co was able to identify an Indian manufacturer of home electrical appliances, Company H, as a suitable comparable company. However, Company H performs warranty functions for its independent wholesalers, whereas Nikhil & Co does not. Company H realizes a net mark up (i.e. operating margin) of 10%.

As the costs pertaining to the warranty functions cannot be separately identified in Company H's accounts and no reliable adjustments can be made to account for the difference in the functions, it may be more reliable to examine the net margins in this case. The transfer price for Nikhil & Co's sale of dishwashers to Company G is computed using the TNMM as follows:

Nikhil & Co's cost of goods sold	Rs. 5,000
Nikhil & Co's operating expenses	Rs. 1,500
Total costs	Rs. 6,500
Add : Net mark up @ 10% (10% x 6,500)	Rs. 650
Transfer price based on TNMM	Rs. 7,150

Selection of Transfer Pricing Method

Rule 10C of the Indian Income Tax Rules, 1962 states that:

In selecting a most appropriate method, the following factors shall be taken into account namely,

- (a) The nature and class of the international transaction.*
- (b) The class or classes of Associated Enterprises entering into the transaction and the functions performed by them taking into account assets employed or to be employed and risks assumed by such enterprises.
- (c) The availability, coverage and reliability of data necessary for application of the method.
- (d) The degree of comparability existing between the international transaction and the uncontrolled transaction and between the enterprises entering into such transactions.
- (e) The extent to which reliable and accurate adjustments can be made to account for differences, if any, between the international transaction and the comparable uncontrolled transactions or between the enterprises entering into such transactions.
- (f) The nature, extent and reliability of assumptions required to be made in the application of a method.

The starting point to select the most appropriate method is the functional analysis which is necessary regardless of what transfer pricing method is selected. Each method may require a deeper analysis focusing on aspects relating to various methods. The functional analysis helps to:

- Identify and understand the intra-group transactions;

- Have a basis for comparability;
- Determine any necessary adjustments to the comparables;
- Check the accuracy of the method selected; and
- Over time, to consider adaptation of the policy if the functions, risks or assets have been modified.

Functional analysis also forms part of the documentation. The major components of a functional analysis are:

1. *Identification of Functions Performed* : for the purpose of determining comparability, functions of the entities play an important role.
2. *Identification of Risk Undertaken* : A risk-bearing party should have a chance of higher earnings than a non-risk bearing party, and will incur the expenses and perhaps related loss if and when risk materializes.
3. *Identification of Assets used or contributed* : The functional analysis must identify and distinguish tangible assets and intangible assets as this is very important for functional analysis.

The functional analysis provides answers to identify which functions risks and assets are attributable to the various related parties. In some cases one company may perform one function but the cost thereof is incurred/ paid by the other party to the transaction. The functional analysis could emphasize that situation. The functional analysis includes reference to the industry specifics, the contractual terms of the transaction, the economics circumstances and the business strategies. A checklist with columns for each related party and if needed for the comparable parties could be used to summarize the functional analysis and give a quick idea of which party performs each relevant function, uses what assets and bears which risk. But this short-cut overview should not be used by tax auditors to count the number of enumerated functions, risks and assets in order to determine the arm's length compensation. It should be used to consider the relative importance of each function, risk and asset. Once the functional analysis is performed and the functionality of the entity as regards the transactions subject to review (or the entity as a whole) has been completed, it can be determined what transfer pricing method is most suitable to determine the arm's length price for the transactions under the review (or the operating margin for the entity under review).

There is no universally accepted method or model which describes the technique for choosing a transfer pricing method. Traditionally comparable Uncontrolled Pricing Method, Profit Split Method, Resale Price Methods are being used in transfer pricing. Other method as TNMM may also be used after the functional analysis and global practices analysis.

8. Reference to Transfer Pricing Officer

Section 92CA of Income Tax Act deals with Reference to Transfer Pricing Officer by assessing officer.

It provides that Assessing Officer with prior approval of Commissioner may refer the computation of Arm's Length Price in an International Transaction* to transfer pricing officer if he considers it necessary or expedient to do so. On reference by Assessing officer, Transfer Pricing Officer (TPO) shall serve a notice to the Assessee requiring him to produce the evidence in support of computation made by him of Arm's Length Price in relation to an International transaction

Who is Transfer Pricing Officer (TPO)

For the purpose of Section 92CA "Transfer Pricing Officer" means a Joint Commissioner or Deputy Commissioner or Assistant Commissioner authorized by the Board to perform all or any of the functions of an Assessing Officer specified in sections 92C and 92D in respect of any person or class of persons.

Determination of Arm's Length Price by Transfer Pricing Officer

Transfer Pricing Officer after hearing the evidences, information or documents as produced by assessee and after considering such evidence as he may require on any specified points and after taking into account all relevant materials which he has gathered, shall, by order in writing, determine the arm's length price in relation to the international transaction/specified transaction and send a copy of his order to the Assessing Officer and to the assessee. On receipt of the order from Transfer Pricing officer, the Assessing Officer shall proceed to compute the total income of the assessee in conformity with the arm's length price as determined by the Transfer Pricing Officer.

Rectification of Arm's Length Price Order by Transfer Pricing Officer

If any mistake is observed which is apparent from record, the Transfer Pricing Officer may amend any order passed by him and the provisions of Section 154 w.r.t. rectification of mistake shall apply accordingly. Where any amendment is made by the Transfer Pricing Officer, he shall send a copy of his order to the Assessing Officer who shall thereafter proceed to amend the order of assessment in conformity with such order of the Transfer Pricing Officer.

Powers of Transfer Pricing Officer

1. *Power to call evidences/Information from Assessee*

As per Section 92CA(2), the Transfer Pricing Officer may issue a notice to the Assessee and ask him to furnish records, evidences, information in support of the computation of Arm's Length Price relating to the International Transaction.

2. *Power to amend the Order made in regard to computation of Arm length price for the transaction referred to him*

As stated earlier, if any mistake is observed which is apparent from record, the Transfer Pricing Officer may amend any order passed by him and the provisions of section 154 w.r.t. rectification of mistake shall apply accordingly

3. *Power to proceed into the cases not referred to him*

As per amendment made by Finance Act, 2011 the jurisdiction of the Transfer Pricing Officer shall extend to the determination of the Arm's Length Price (ALP) in respect of other international transactions* which are noticed by him subsequently, in the course of proceedings before him. These international transactions would be in addition to the international transactions referred to the TPO by the Assessing Officer

4. *Power to exercise all of the following powers specified in Sections 131(1) (a) to 131(1) (d) or 133(6) or 133A of Income Tax Act:*

Power u/s 131(1) (a) to 131(1) (d)

TPO have the same powers as are vested in a Court under the Code of Civil Procedure, 1908 (5 of 1908), when trying a suit in respect of the following matters, namely: –

- (a) discovery and inspection;
- (b) enforcing the attendance of any person, including any officer of a banking company and examining him on oath;
- (c) compelling the production of books of account and other documents; and
- (d) Issuing commissions.

Power u/s 133(6)

Under Section 133(6), TPO may require any person, including a banking company or any officer thereof, to furnish information in relation to such points or matters, or to furnish statements of accounts and affairs verified in the manner specified by him giving information in relation to such points or matters as his opinion will be useful for, or relevant to, any enquiry or proceeding under this Act.

Power u/s 133A - Power of Survey

Finance Act, 2011 has made an amendment which provides for the power of Survey to TPO through introduction of Section 133A. In course of the proceedings, a TPO may carry out the survey as per section 133A of Income Tax Act.

9. Transfer Pricing - Documentation

The legal framework for maintenance of information and documentation by a taxpayer is provided in Section 92D of Income Tax Act, 1961 which lays down that every person who enters into an international transaction* with an associated enterprise shall maintain prescribed information and documents. The various types of information and documents to be maintained in respect of an international transaction, the associated enterprise and the transfer pricing method used are prescribed in Rule 10D of the Income Tax Rules, as under:

- (a) A description of the ownership structure of the enterprise and details of shares or other ownership interest held therein by other enterprises;
- (b) A profile of the multinational group of which the assessee enterprises i.e. taxpayer is a part and the name, address, legal status and country of tax residence of each of the enterprises comprised in the group with whom international transactions have been made by the taxpayer and the ownership linkages among them;
- (c) A broad description of the business of the taxpayer and the industry in which it operates and the business of the associated enterprises;
- (d) The nature, terms and prices of international transaction entered into with each associated enterprise, details of property transferred or services provided and the quantum and the value of each such transaction or class of such transaction;
- (e) A description of the functions performed, risks assumed and assets employed or to be employed by the taxpayer and by the associated enterprise involved in the international transaction;

- (f) A record of the economic and market analysis, forecasts, budgets or any other financial estimates prepared by the taxpayer for its business as a whole or separately for each division or product which may have a bearing on the international transaction entered into by the taxpayer;
- (g) A record of uncontrolled transactions taken into account for analysing their comparability with the international transaction entered into, including a record of the nature, terms and conditions relating to any uncontrolled transaction with third parties which may be relevant to the pricing of the international transactions;
- (h) A record of the analysis performed to evaluate comparability of uncontrolled transactions with the relevant international transaction*;
- (i) A description of the methods considered for determining the arm's length price in relation to each international transaction or class of transaction, the method selected as the most appropriate method along with explanations as to why such method was so selected, and how such method was applied in each case;
- (j) A record of the actual working carried out for determining the arm's length price, including details of the comparable data and financial information used in applying the most appropriate method and adjustments, if any, which were made to account for differences between the international transaction and the comparable uncontrolled transactions or between the enterprises entering into such transaction;
- (k) The assumptions, policies and price negotiations if any which have critically affected the determination of the arm's length price;
- (l) Details of the adjustments, if any made to the transfer price to align it with arm's length price determined under these rules and consequent adjustment made to the total income for tax purposes;
- (m) Any other information, data or document, including information or data relating to the associated enterprise, which may be relevant for determination of the arm's length price.

Rule 10D also prescribes that the above information is to be supported by authentic documents which may include the following:

- (a) Official publications, reports, studies and data bases of the government of the country of residence of the associated enterprise or of any other country;
- (b) Reports of market research studies carried out and technical publications of institutions of national or international repute;
- (c) Publications relating to prices including stock exchange and commodity market quotations;
- (d) Published accounts and financial statements relating to the business of the associated enterprises;
- (e) Agreements and contracts entered into with associated enterprises or with unrelated enterprises in respect of transaction similar to the international transactions;
- (f) Letters and other correspondence documenting terms negotiated between the taxpayer and associated enterprise;

- (g) Documents normally issued in connection with various transaction under the accounting practices followed.

Burden or Proof

It is noteworthy that the information and documentation requirements referred to above are linked to the burden of proof laid on the taxpayer to prove that the transfer price adopted is in accordance with the arm's length principle. One of the conditions to be fulfilled for discharging this burden by the taxpayer is maintenance of prescribed information and documents in respect of an international transaction entered into with a associated enterprise. A default in maintaining information and documents in accordance with the rules is one of the conditions which may trigger a transfer pricing audit under Section 92C(3). Any default in respect of the documentation requirement may also attract penalty of a sum equal to two percent of the value of the international transaction (Sec 271AA).

Submission of Documents with the Tax Authorities

There is no reference in the provisions included either in the Income Tax Act or the Income Tax Rules about any requirement to submit the prescribed information and documents at the stage of initial compliance in the form of submission of report under Section 92E. All that Section 92E requires is that the concerned taxpayer shall obtain a Report from an Accountant in the prescribed form (Form 3CEB) and submit the Report by the specified date.

Form 3CEB contains a certificate from the Accountant that in his opinion proper information and documents as prescribed have been maintained by the taxpayer. Rule 10D requires that the information and document maintained should be contemporaneous as far as possible and should exist latest by the specified date for filing the report under Section 92E. Section 92D also provides that information and documentation may be requisitioned by the Assessing Officer or the Appellate Commissioner on a notice of thirty days which period may be extended by another period of 30 days.

Non Applicability of Documentation Requirement

Although the law has prescribed no monetary limit in respect of international transaction covered by the transfer pricing requirements, an exception is provided in para 2 of Rule 10D in respect of the maintenance of information and document requirement in respect of international transactions not exceeding Rs. 100 Lakhs . It is provided that the above requirement will not apply to such transactions. However, the concerned taxpayer may be required to substantiate on the basis of available material that the income arising from the international transaction is computed in accordance with the arm's length rule.

Retention Period of Documents kept under Rule 10D

The prescribed information and documents are required to be maintained for a period of six years from the end of the relevant Assessment years thus the information and documents are required to be maintained for a period of eight years. Rule 10D absolves a taxpayer entering into an international transaction which continues to have effect over more than one year from maintaining separate set of documents for each year. However separate documents are required for each year if there is any significant change in the terms and conditions of the international transaction which have a bearing on the transfer price.

10. Transfer Pricing – Penalty for Contravention

Contravention of Transfer Pricing provisions as contained in Chapter X of the Income tax Act, 1961 may invite hefty penalties. The details of penalties under different sections of Income tax Act, 1961 are as follows:-

A. Penalty for concealment of income or for furnishing inaccurate particulars of such income under Section 271(1)(c)

If the Assessing Officer or Commissioner (Appeals) or the Commissioner in the course of any proceedings under this Act, is satisfied that any person has concealed the particulars of his income or furnished inaccurate particulars of such income, he may direct that such person shall pay by way of penalty in addition to tax, if any, payable by him, a sum which shall not be less than, but which shall not exceed three times, the amount of tax sought to be evaded by reason of the concealment of particulars of his income or the furnishing of inaccurate particulars of such income.

Explanation 7 to Section 271(1)(c) - Where in the case of an assessee who has entered into an international transaction defined in section 92B, any amount is added or disallowed in computing the total income under sub-section (4) of section 92C, then, the amount so added or disallowed shall, for the purposes of clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed or inaccurate particulars have been furnished, unless the assessee proves to the satisfaction of the Assessing Officer or the Commissioner (Appeals) or the Commissioner that the price charged or paid in such transaction was computed in accordance with the provisions contained in section 92C and in the manner prescribed under that Section, in good faith and with due diligence.

B. Penalty for failure to furnish information or document - Section 271G

As per Section 271G of Income Tax Act, If any person who has entered into an international transaction fails to furnish any such information or document as required by sub-section (3) of section 92D, the Assessing Officer or the Commissioner (Appeals) may direct that such person shall pay, by way of penalty, a sum equal to two per cent of the value of the international transaction for each such failure.

C. Penalty for failure to keep and maintain information and document in respect of International transaction - Section 271AA

Without prejudice to the provisions of Section 271 or Section 271BA, if any person in respect of an International transaction Fails to keep and maintain any such information and document as required by sub-section (1) or sub-section (2) of Section 92D,

The Assessing Officer or Commissioner (Appeals) may direct that such person shall pay, by way of penalty, a sum equal to two per cent of the value of each international transaction entered into by such person.

D. Penalty for failure to furnish report under Section 92E- Section 271BA

If any person fails to furnish a report from an accountant as required by Section 92E, the Assessing Officer may direct that such person shall pay, by way of penalty, a sum of one hundred thousand rupees.

E. Penalty for failure to answer questions, sign statements, furnish information, returns or statements etc. - Section 272A

If any person, –

- (a) being legally bound to state the truth of any matter touching the subject of his assessment, refuses to answer any question put to him by an income-tax authority in the exercise of its powers under this Act; or
- (b) refuses to sign any statement made by him in the course of any proceedings under this Act, which an income-tax authority may legally require him to sign; or
- (c) to whom a summons is issued under sub-section (1) of Section 131 either to attend to give evidence or produce books of account or other documents at a certain place and time omits to attend or produce books of account or documents at the place or time, he shall pay, by way of penalty, a sum of ten thousand rupees for each such default or failure.

INDIRECT TAXES

(A) SERVICE TAX

Study XI and XII may be substituted with the following:

STUDY XI

SERVICE TAX - BACKGROUND, ADMINISTRATIVE AND PROCEDURAL ASPECTS

The Service Tax was introduced on the recommendation of Dr. Raja Chelliah Committee on tax reforms. Initially it was imposed at a uniform rate of 5% in the Union Budget for 1994-95 on 3 services. In a journey of about 17 years, it has seen various changes. Finance Act, 2012 has Changing Service Tax on all services except on services mentioned made remarkable changes in Service Tax legislation whereby changing services on the basis of Positive list of Taxable services has been replaced with a negative list. Now all services except as notified in Negative list or exemption list are subject to applicability of service tax.

LEARNING OBJECTIVES

At the end of this chapter, the students will acquire the knowledge and practical applicability of the following under service tax regime.

- Background
- Constitutional Validity
- Limbs of Service Tax Laws
- Administrative Mechanism
- Taxability of Services : Negative List of Services
- Some Important Definitions under Finance Act,1994
- Rate of Service Tax
- Computation of Tax

11.1 Background

As the economy grows and develops, the contribution of the services sector becomes more substantial. Hence, tax on services becomes substantial revenue for the Government. Although Service Tax is a concept of the modern era where developed economies as well as developing economies find over 70% of their gross economic output coming from the service sector. Service Tax was there in vogue even in the Mauryan period in India. Ms. Romila Thaper in her "Asoka and the Decline of the Mauryas", at page 72 (London 196, paperback edition, 1997, by Oxford) points out that services of weapon and implement makers were required to be provided to the state for a certain number of days in a year. This was a form of service tax in that period. But in the modern context, because of the increasing contribution of the service sector to the GDP of an economy, the importance of service tax is growing. As under the WTO agreements governments are required to reduce customs tariffs, governments are considering increase in service taxes revenues as a compensatory revenue generation mechanism. In terms of economics, tax on services is an indirect tax.

This is because the burden of service tax can be passed on to the customer i.e., the recipient of the service. The service provider may also bear the burden of the tax by not charging the service tax separately in the invoice.

The Tax Reforms Committee headed by Dr. Raja J Chelliah recognized the revenue potential of the service sector and recommended imposition of service tax on selected services. Consequently the service tax was imposed at a uniform rate of 5% in the Union Budget for 1994-95 on 3 services. Finance Act, 2012 has made remarkable changes in service tax legislation whereby the concept of Positive list of Taxable Services has been replaced with a negative list. A negative list of services implies two things; firstly, a list of services which are not be subject to service tax; secondly, other than services mentioned in the negative list or exempted list, all other services became taxable which fall within the definition of services. This is in contrast to the present method of taxation that has detailed description for each taxable service and all other unspecified services are not liable to tax.

11.2 Constitutional Validity

As per article 246 of the constitution of India law can be enacted by parliament or the state legislature, if such power is given by the constitution of India.

Article 265 of the Constitution lays down that no tax shall be levied or collected except by the authority of law. Schedule VII divides this subject into three categories –

- (a) Union list (only Central Government has power of legislation)*
- (b) State list (only State Government has power of legislation)*
- (c) Concurrent list (both Central and State Government can pass legislation).*

Entry 97 of the union list is the residuary entry and empowers the central government to levy tax on any matter not enumerated in state list or the concurrent list.

In 1994, the service tax was levied by the central government under the power granted by the entry 97 of the union list.

Thereafter in 2003 the government has passed the constitution (88th Amendment Act, 2003) which provides for the levy of service tax by the centre through the insertion of article 268A to the constitution. In addition to article 268A, entry 92C has been inserted in the union list to make the enactment relating to service tax a subject matter of union list.

Students may note that entry No.92C has not yet been made effective by the parliament and service tax is still governed by the entry 97 of the union list.

Test Your Knowledge

When service tax was first introduced in the year 1994, it was levied on a uniform basis.

- True
- False

Correct Answer: True

In the year 1994, when service tax was first introduced, it was first levied on a uniform basis at the rate of 5% of the value of taxable services.

11.3 Limbs of Service Tax Laws

Certain provisions of the Central Excise Act, 1944 also apply to Service Tax. The various limbs of the Service Tax Law are:

1. The provisions of the Finance Act, 1994 as amended by successive Finance Acts;
2. Service Tax Rules, 1994, as amended from time to time;
3. Service Tax (Advance Ruling), Rules 2003;
4. The CENVAT Credit Rules, 2004;
5. Authority for Advance Rulings (Central Excise, Customs and service tax) procedure Regulations, 2005;
6. Service Tax (Registration of Special category of persons) Rules, 2005;
7. Service Tax (Determination of Value) Rules, 2006;
8. Service Tax (Provisional Attachment of Property) Rules, 2008;
9. Service Tax(Publication of Names) Rules, 2008;
10. Service Tax Return Preparer Scheme, 2009;
11. Point of Taxation Rules, 2011;
12. Indirect Tax Ombudsman Guidelines, 2011;
13. Service Tax (Settlement of Cases) Rules, 2012;
14. Service Tax (Compounding of Offences) Rules, 2012;
15. Service Tax (Removal of Difficulty) Order, 2012;
16. Place of Provision of services Rules, 2012.

Further, the provisions of services tax are also amended by Notifications by the Government; Circulars on service tax issued by the CBEC; and Trade Notices issued by jurisdictional Commissionerates of Central Excise on service tax matters;

11.4 Administrative Mechanism

Service tax being an indirect tax is being administered by the Central Board of Excise and Customs (CBEC) which is under the control of the department of revenue, ministry of finance. CBEC administers the service tax through the central excise department. A separate cell called the service tax cell, under each commissionerate of central excise has been created for the purpose.

11.5 Taxability of Service Tax

Service Tax is levied vide Finance Act, 1994. The Finance Act, 1994 applies all over India except the state of Jammu & Kashmir.

Service tax is levied on taxable services. The levy of service tax dealt in section 66 (charging section), which provides that service tax is levied at a specific rate on the value of taxable services referred to in section 65(105) of the Act. However, with the insertion of a proviso in section 66, the provisions of this section will cease to apply with effect from July 1, 2012.

Moreover, with effect from 1st July 2012, a new charging Section 66B has been inserted by the Finance Act 2012. Section 66B provides that there shall be levied a service tax at the rate of twelve per cent on the value of all services, except the services specified in the negative list, provided or agreed to be provided in the taxable territory by a person to another and collected in the prescribed manner.

“Service” means any activity, carried out by a person for another for consideration and includes a declared service but shall not include

- (a) any activity that constitutes merely
 - (i) a transfer of title of goods or immovable property by way of sale, gift or in any other manner; or
 - (ii) such transfer, delivery or supply of any goods which is deemed to be a sale, within the meaning of clause (29A) of article 366 of the Constitution; or
 - (iii) a transaction only in money or actionable claim.
- (b) any service provided by an employee to an employer in the course of the employment.
- (c) fees payable to a court or a tribunal set up under a law for the time being in force.

However, these provisions shall not apply to

- (A) the functions performed by the Members of Parliament, Members of State Legislative, Members of Panchayats, Members of Municipalities and Members of other local authorities who receive any consideration in performing the functions of that office as such member; or
- (B) the duties performed by any person who holds any post in pursuance of the provisions of the Constitution in that capacity; or
- (C) the duties performed by any person as a Chairperson or a Member or a Director in a body established by the Central Government or State Governments or local authority and who is not deemed as an employee before the commencement of this section.

For the purposes of this clause, transaction in money shall not include any activity relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged.

For the purposes of this Chapter, –

- (a) an unincorporated association or a body of persons, as the case may be, and a member thereof shall be treated as distinct persons;
- (b) an establishment of a person in the taxable territory and any of his other establishment in a non-taxable territory shall be treated as establishments of distinct persons.

A person carrying on a business through a branch or agency or representational office in any territory shall be treated as having an establishment in that territory.

For clear understanding of the new service tax regime the understanding of negative list, declared services, Mega exemptions and place of provision of supply rules is required.

11.5 (a) Declared Services

Section 66E has been newly inserted which specify that the nine specific activities or transactions are declared to be covered as 'service'. Such activities includes:-

- (a) renting of immovable property
- (b) construction of a complex.*
- (c) temporary transfer or permitting the use or enjoyment of any intellectual property right
- (d) development, design, programming, customisation, adaptation, upgradation, enhancement, implementation of information technology software
- (e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act
- (f) transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods
- (g) activities in relation to delivery of goods on hire purchase or any system of payment by instalments
- (h) service portion in the execution of a works contract
- (i) service portion in an activity wherein goods, being food or any other article of human consumption or any drink (whether or not intoxicating) is supplied in any manner as a part of the activity

11.5 (b) Negative List of Services

A Negative List approach to taxation of services has been introduced vide new sections, namely, 66B, 66C, 66D, 66E and 66F in Chapter V of the Finance Act. The services specified in the 'Negative List' (section 66D) will remain outside the tax net. All other services, except those specifically exempted by the exercise of powers under section 93(1) of the Finance Act, 1994, would thus be chargeable to service tax. Negative list approach to taxation of services is effective from July 1, 2012.

Section 66D has been newly inserted which specify the following list of services under the negative list: -

- (a) services by Government or a local authority excluding the following services to the extent they are not covered elsewhere -
 - (i) services by the Department of Posts by way of speed post, express parcel post, life insurance and agency services provided to a person other than Government.
 - (ii) services in relation to an aircraft or a vessel, inside or outside the precincts of a port or an airport.
 - (iii) transport of goods or passengers.
 - (iv) support services, other than services covered under clauses (i) to (iii) above, provided to business entities.

- (b) services by the Reserve Bank of India.
- (c) services by a foreign diplomatic mission located in India.
- (d) services relating to agriculture or agricultural produce by way of –
 - (i) agricultural operations directly related to production of any agricultural produce including cultivation, harvesting, threshing, plant protection or seed testing.
 - (ii) supply of farm labour.
 - (iii) processes carried out at an agricultural farm including tending, pruning, cutting, harvesting, drying, cleaning, trimming, sun drying, fumigating, curing, sorting, grading, cooling or bulk packaging and such like operations which do not alter the essential characteristics of agricultural produce but make it only marketable for the primary market.
 - (iv) renting or leasing of agro machinery or vacant land with or without a structure incidental to its use.
 - (v) loading, unloading, packing, storage or warehousing of agricultural produce.
 - (vi) agricultural extension services.
 - (vii) services by any Agricultural Produce Marketing Committee or Board or services provided by a commission agent for sale or purchase of agricultural produce.
- (e) trading of goods.
- (f) any process amounting to manufacture or production of goods.
- (g) selling of space or time slots for advertisements other than advertisements broadcast by radio or television.
- (h) service by way of access to a road or a bridge on payment of toll charges.
- (i) betting, gambling or lottery.
- (j) admission to entertainment events or access to amusement facilities.
- (k) transmission or distribution of electricity by an electricity transmission or distribution utility.
- (l) services by way of –
 - (i) pre-school education and education up to higher secondary school or equivalent.
 - (ii) education as a part of a curriculum for obtaining a qualification recognised by any law for the time being in force.
 - (iii) education as a part of an approved vocational education course.
- (m) services by way of renting of residential dwelling for use as residence.
- (n) services by way of –
 - (i) extending deposits, loans or advances in so far as the consideration is represented by way of interest or discount ;

- (ii) inter se sale or purchase of foreign currency amongst banks or authorised dealers of foreign exchange or amongst banks and such dealers.
- (o) service of transportation of passengers, with or without accompanied belongings, by
 - (i) a stage carriage
 - (ii) railways in a class other than –
 - (A) first class or
 - (B) an airconditioned coach
 - (iii) metro, monorail or tramway
 - (iv) inland waterways
 - (v) public transport, other than predominantly for tourism purpose, in a vessel between places located in India and
 - (vi) metered cabs, radio taxis or auto rickshaws
- (p) services by way of transportation of goods –
 - (i) by road except the services of –
 - (A) a goods transportation agency; or
 - (B) a courier agency
 - (ii) by an aircraft or a vessel from a place outside India up to the customs station of clearance in India or
 - (iii) by inland waterways
- (q) funeral, burial, crematorium or mortuary services including transportation of the deceased.

11.5 (c) List of Exemptions under Mega Notification

The Central Governments vide its notification No 25/2012 has exempts the following taxable services from the whole of the service tax leviable thereon under section 66B of the said Act, namely:-

1. Services provided to the United Nations or a specified international organization.
2. Health care services by a clinical establishment, an authorized medical practitioner or para-medics.
3. Services by a veterinary clinic in relation to health care of animals or birds.
4. Services by an entity registered under section 12AA of the Income tax Act, 1961 (43 of 1961) by way of charitable activities.
5. Services by a person by way of-
 - (a) renting of precincts of a religious place meant for general public; or
 - (b) conduct of any religious ceremony.
6. Services provided by-
 - a. an arbitral tribunal to -
 - i. any person other than a business entity; or

- ii. a business entity with a turnover up to rupees ten lakh in the preceding financial year.
 - b. an individual as an advocate or a partnership firm of advocates by way of legal services to,-
 - (i) an advocate or partnership firm of advocates providing legal services ;
 - (ii) any person other than a business entity; or
 - (iii) a business entity with a turnover up to rupees ten lakh in the preceding financial year; or
 - c. a person represented on an arbitral tribunal to an arbitral tribunal.
7. Services by way of technical testing or analysis of newly developed drugs, including vaccines and herbal remedies, on human participants by a clinical research organisation approved to conduct clinical trials by the Drug Controller General of India.
 8. Services by way of training or coaching in recreational activities relating to arts, culture or sports.
 9. Services provided to or by an educational institution in respect of education exempted from service tax, by way of,-
 - (a) auxiliary educational services; or
 - (b) renting of immovable property.
 10. Services provided to a recognised sports body by-
 - (a) an individual as a player, referee, umpire, coach or team manager for participation in a sporting event organized by a recognized sports body;
 - (b) another recognised sports body.
 11. Services by way of sponsorship of sporting events organised,-
 - (a) by a national sports federation, or its affiliated federations, where the participating teams or individuals represent any district, state or zone;
 - (b) by Association of Indian Universities, Inter-University Sports Board, School Games Federation of India, All India Sports Council for the Deaf, Paralympic Committee of India or Special Olympics Bharat;
 - (c) by Central Civil Services Cultural and Sports Board;
 - (d) as part of national games, by Indian Olympic Association; or
 - (e) under Panchayat Yuva Kreedha Aur Khel Abhiyaan (PYKKA) Scheme.
 12. Services provided to the Government, a local authority or a governmental authority by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of-
 - (a) a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession;

- (b) a historical monument, archaeological site or remains of national importance, archaeological excavation, or antiquity specified under the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958);
 - (c) a structure meant predominantly for use as (i) an educational, (ii) a clinical, or (iii) an art or cultural establishment;
 - (d) canal, dam or other irrigation works;
 - (e) pipeline, conduit or plant for (i) water supply (ii) water treatment, or (iii) sewerage treatment or disposal; or
 - (f) a residential complex predominantly meant for self-use or the use of their employees or other persons specified in the Explanation 1 to clause 44 of section 65 B of the said Act.
13. Services provided by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of,-
- (a) a road, bridge, tunnel, or terminal for road transportation for use by general public;
 - (b) a civil structure or any other original works pertaining to a scheme under Jawaharlal Nehru National Urban Renewal Mission or Rajiv Awaas Yojana;
 - (c) a building owned by an entity registered under section 12 AA of the Income tax Act, 1961(43 of 1961) and meant predominantly for religious use by general public;
 - (d) a pollution control or effluent treatment plant, except located as a part of a factory; or
 - (e) a structure meant for funeral, burial or cremation of deceased.
14. Services by way of construction, erection, commissioning, or installation of original works pertaining to,-
- (a) an airport, port or railways, including monorail or metro;
 - (b) a single residential unit otherwise than as a part of a residential complex;
 - (c) low- cost houses up to a carpet area of 60 square metres per house in a housing project approved by competent authority empowered under the 'Scheme of Affordable Housing in Partnership' framed by the Ministry of Housing and Urban Poverty Alleviation, Government of India;
 - (d) post- harvest storage infrastructure for agricultural produce including a cold storages for such purposes; or
 - (e) mechanised food grain handling system, machinery or equipment for units processing agricultural produce as food stuff excluding alcoholic beverages.
15. Temporary transfer or permitting the use or enjoyment of a copyright covered under clauses (a) or (b) of sub-section (1) of section 13 of the Indian Copyright Act, 1957 (14

- of 1957), relating to original literary, dramatic, musical, artistic works or cinematograph films.
16. Services by a performing artist in folk or classical art forms of (i) music, or (ii) dance, or (iii) theatre, excluding services provided by such artist as a brand ambassador.
 17. Services by way of collecting or providing news by an independent journalist, Press Trust of India or United News of India.
 18. Services by way of renting of a hotel, inn, guest house, club, campsite or other commercial places meant for residential or lodging purposes, having declared tariff of a unit of accommodation below rupees one thousand per day or equivalent.
 19. Services provided in relation to serving of food or beverages by a restaurant, eating joint or a mess, other than those having (i) the facility of air-conditioning or central air-heating in any part of the establishment, at any time during the year, and (ii) a licence to serve alcoholic beverages.
 20. Services by way of transportation by rail or a vessel from one place in India to another of the following goods -
 - (a) petroleum and petroleum products falling under Chapter heading 2710 and 2711 of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986);
 - (b) relief materials meant for victims of natural or man-made disasters, calamities, accidents or mishap;
 - (c) defence or military equipments;
 - (d) postal mail or mail bags;
 - (e) household effects;
 - (f) newspaper or magazines registered with the Registrar of Newspapers;
 - (g) railway equipments or materials;
 - (h) agricultural produce;
 - (i) foodstuff including flours, tea, coffee, jaggery, sugar, milk products, salt and edible oil, excluding alcoholic beverages; or
 - (j) chemical fertilizer and oilcakes.
 21. Services provided by a goods transport agency by way of transportation of -
 - (a) fruits, vegetables, eggs, milk, food grains or pulses in a goods carriage;
 - (b) goods where gross amount charged for the transportation of goods on a consignment transported in a single goods carriage does not exceed one thousand five hundred rupees; or
 - (c) goods, where gross amount charged for transportation of all such goods for a single consignee in the goods carriage does not exceed rupees seven hundred fifty.
 22. Services by way of giving on hire -

- (a) to a state transport undertaking, a motor vehicle meant to carry more than twelve passengers; or
 - (b) to a goods transport agency, a means of transportation of goods.
23. Transport of passengers, with or without accompanied belongings, by -
- (a) air, embarking from or terminating in an airport located in the state of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, or Tripura or at Bagdogra located in West Bengal;
 - (b) a contract carriage for the transportation of passengers, excluding tourism, conducted tour, charter or hire; or
 - (c) ropeway, cable car or aerial tramway.
24. Services by way of vehicle parking to general public excluding leasing of space to an entity for providing such parking facility.
25. Services provided to Government, a local authority or a governmental authority by way of -
- (a) carrying out any activity in relation to any function ordinarily entrusted to a municipality in relation to water supply, public health, sanitation conservancy, solid waste management or slum improvement and upgradation; or
 - (b) repair or maintenance of a vessel or an aircraft.
26. Services of general insurance business provided under following schemes-
- (a) Hut Insurance Scheme;
 - (b) Cattle Insurance under Swarnajaynti Gram Swarozgar Yojna (earlier known as Integrated Rural Development Programme);
 - (c) Scheme for Insurance of Tribals;
 - (d) Janata Personal Accident Policy and Gramin Accident Policy;
 - (e) Group Personal Accident Policy for Self-Employed Women;
 - (f) Agricultural Pumpset and Failed Well Insurance;
 - (g) premia collected on export credit insurance;
 - (h) Weather Based Crop Insurance Scheme or the Modified National Agricultural Insurance Scheme, approved by the Government of India and implemented by the Ministry of Agriculture;
 - (i) Jan Arogya Bima Policy;
 - (j) National Agricultural Insurance Scheme (Rashtriya Krishi Bima Yojana);
 - (k) Pilot Scheme on Seed Crop Insurance;
 - (l) Central Sector Scheme on Cattle Insurance;
 - (m) Universal Health Insurance Scheme;

- (n) Rashtriya Swasthya Bima Yojana; or
 - (o) Coconut Palm Insurance Scheme.
27. Services provided by an incubatee up to a total turnover of fifty lakh rupees in a financial year subject to the following conditions, namely:-
- (a) the total turnover had not exceeded fifty lakh rupees during the preceding financial year; and
 - (b) a period of three years has not been elapsed from the date of entering into an agreement as an incubatee.
28. Service by an unincorporated body or a non- profit entity registered under any law for the time being in force, to its own members by way of reimbursement of charges or share of contribution -
- (a) as a trade union;
 - (b) for the provision of carrying out any activity which is exempt from the levy of service tax; or
 - (c) up to an amount of five thousand rupees per month per member for sourcing of goods or services from a third person for the common use of its members in a housing society or a residential complex;
29. Services by the following persons in respective capacities -
- (a) sub-broker or an authorised person to a stock broker;
 - (b) authorised person to a member of a commodity exchange;
 - (c) mutual fund agent to a mutual fund or asset management company;
 - (d) distributor to a mutual fund or asset management company;
 - (e) selling or marketing agent of lottery tickets to a distributor or a selling agent;
 - (f) selling agent or a distributor of SIM cards or recharge coupon vouchers;
 - (g) business facilitator or a business correspondent to a banking company or an insurance company, in a rural area; or
 - (h) sub-contractor providing services by way of works contract to another contractor providing works contract services which are exempt;
30. Carrying out an intermediate production process as job work in relation to -
- (a) agriculture, printing or textile processing;
 - (b) cut and polished diamonds and gemstones; or plain and studded jewellery of gold and other precious metals, falling under Chapter 71 of the Central Excise Tariff Act ,1985 (5 of 1986);
 - (c) any goods on which appropriate duty is payable by the principal manufacturer; or

- (d) processes of electroplating, zinc plating, anodizing, heat treatment, powder coating, painting including spray painting or auto black, during the course of manufacture of parts of cycles or sewing machines upto an aggregate value of taxable service of the specified processes of one hundred and fifty lakh rupees in a financial year subject to the condition that such aggregate value had not exceeded one hundred and fifty lakh rupees during the preceding financial year;
31. Services by an organiser to any person in respect of a business exhibition held outside India;
32. Services by way of making telephone calls from -
- (a) departmentally run public telephone;
 - (b) guaranteed public telephone operating only for local calls; or
 - (c) free telephone at airport and hospital where no bills are being issued.
33. Services by way of slaughtering of bovine animals.
34. Services received from a provider of service located in a non- taxable territory by -
- (a) Government, a local authority, a governmental authority or an individual in relation to any purpose other than commerce, industry or any other business or profession;
 - (b) an entity registered under section 12AA of the Income tax Act, 1961 (43 of 1961) for the purposes of providing charitable activities; or
 - (c) a person located in a non-taxable territory.
35. Services of public libraries by way of lending of books, publications or any other knowledge- enhancing content or material.
36. Services by Employees' State Insurance Corporation to persons governed under the Employees' Insurance Act, 1948 (34 of 1948).
37. Services by way of transfer of a going concern, as a whole or an independent part thereof.
38. Services by way of public conveniences such as provision of facilities of bathroom, washrooms, lavatories, urinal or toilets.
39. Services by a governmental authority by way of any activity in relation to any function entrusted to a municipality under article 243W of the Constitution.

Test Your Knowledge

Service Tax is applicable on Selected services as notified in Finance act,1994

- True
- False

Correct Answer : False

Vide Finance Act, 2012 service tax is applicable on all services except as notified in Negative list or exemption list.

11.5 (d) Place of Provision of Services Rules

The charging section 66B specifies that service tax is leviable on services not mentioned in the negative list and provided in taxable territory. The words “provided or agreed to be provided in “taxable territory” makes it important to identify the jurisdiction of where the service is provided.

For this purpose, the Central Government authorized to notify the place of provision of service therefore, Place of Provision of Supply Rules, 2012 are formulated, which determines the place where the services are provided or deemed to be provided. Its taxability will be determined based on the location of its provision. The “Place of Provision of Services Rules, 2012’ has replaced the ‘Export of Services Rules, 2005 and Taxation of Services (Provided from outside India and received in India) Rules, 2006.

These rules are primarily meant for persons who deal in cross border services. They will also be equally applicable for those who have operations with suppliers or customers in the state of Jammu and Kashmir.

Additionally service providers operating within India from multiple locations, without having centralized registration will find them useful in determining the precise taxable jurisdiction applicable to their operations. The rules will be equally relevant for determining services that are wholly consumed within a SEZ to avail the outright exemption.

These rules provide a backdrop in the eventual roll out of a nation-wide GST and other related issues that may arise in the taxation of inter-state services.

What is Taxable Territory ?

Taxable territory has been defined in sub-section 52 of section 65B. It means the territory to which the provisions of Chapter V of the Finance Act, 1994 apply i.e. whole of India excluding the state of Jammu and Kashmir.

Place of provision

As per the Place of Provisions of Service Rules, 2012 place of provision of a service shall be the location of the receipt of service. However, in case the location of the service receiver is not available in the ordinary course of business, the place of provision shall be the location of the provider of service.

Significance of Location of service provider and service receiver

Service tax is required to be paid by the provider of a service, except where he is located outside the taxable territory and the place of provision of service is in the taxable territory. Where the provider of a service is located outside the taxable territory, the person liable to pay service tax is the receiver of the service in the taxable territory, unless of course, the service is otherwise exempted. Therefore, the identification of location of service provider and service receiver is very much essential.

The location of a service provider or receiver (as the case may be) is to be determined by applying the following steps sequentially:

- A. where the service provider or receiver has obtained only one registration, whether centralized or otherwise, the premises for which such registration has been obtained;
- B. where the service provider or receiver is not covered by A above:
 - i. the location of his business establishment; or
 - ii. where services are provided or received at a place other than the business establishment i.e. a fixed establishment elsewhere, the location of such establishment;
 - iii/ where services are provided or received at more than one establishment, whether business or fixed, the establishment most directly concerned with the provision or use of the service; and
 - iv. in the absence of such places, the usual place of residence of the service provider or receiver.

Steps to determine the Taxability of service under Negative List Regime

1. Check whether the activity falls within the definition of service and declared services.
2. if it is service then, check whether the service provided is excluded either by the negative list or is otherwise exempted.
3. If it is so covered, then check out the applicability of place of provision of services rules.

11.6 Computation of Service Tax

Rate of Service Tax

The rate of service tax is itself mentioned in the charging section. As per the new charging section 66B service tax is leviable @12% on the value of all services. Further, education cess of 2% plus secondary and higher education cess of 1% is levied.

Computation of Tax

If a person renders a taxable service of the value of ` 500, the service tax @12% will be ` 60. The education cess and Secondary & Higher education cess @3% on ` 60 will be ` 1.80. The total tax will be ` 61.80.

Value of Taxable Services

Where the gross amount charged by a service provider is inclusive of service tax payable, the value of taxable service shall be such amount as with the addition of tax payable, is equal to the gross amount charged. Service tax is levied on services provided within the territory of India including territorial waters of India extending upto 12 nautical miles (under International Sea Act). And hence services provided beyond the territorial waters of India are not liable to service tax as the provisions of the service tax have not been extended to such areas so far.

***STUDY XII: LEVY, COLLECTION AND PAYMENT OF SERVICE TAX
ALONG WITH CENVAT CREDIT RULES***

This chapter may be replaced with the following:

LEARNING OBJECTIVES

This chapter covers the entire procedural as well substantive provisions relating to levy, collection and payment of service tax and relevant CENVAT Credit Rules 2004. It also covers the registration aspects, filing aspects including e-filing, appeal matters including appeal before Appellate Tribunal. The new regime of service tax i.e. levy of service tax on negative list approach have been discussed in the last chapter.

This chapter covers the following topics:

- Charge of Service tax
- Reverse Charge
- Basis of charge and Due Date for payment of service tax
- Point of Taxation Rules, 2011
- Registration
- Service Tax Registration of Special Category of Persons
- Records to be maintained
- Adjustment of Service Tax
- E-filing of Service Tax Returns
- Returns under Service Tax
- Recovery of Service Tax
- Provisional attachment pending adjudication
- Amount collected representing as service tax must be paid to Government
- Interest on delayed payment of service tax u/s 75
- Doctrine of unjust enrichment
- Penalties
- Waiver or reduction of penalty
- Advance Ruling
- CENVAT Credit Rules, 2004
- Abatement in Service Tax
- Appeals
- Appeals to Commissioner (Appeals)
- Appeals to Tribunal
- Role of Practicing Company Secretary
- Service Tax on Practicing Company Secretary

12.1 Charge of Service Tax

Section 66B -There shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve per cent on the value of all services, other than those services specified in the

negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed.

12.2 Reverse Charge

As per Section 68, every person providing taxable services i.e. provider of output service is liable to pay service tax. But in special cases service receiver is liable to pay service tax. This is also known as reverse charge. Under this charge service receiver has to register himself under service tax. Further service receiver cannot claim general exemption limit of 10 Lakhs rupees and he is liable to pay service tax even on small amount.

Now after applicability of new service tax regime, new services which is very common like advocate, Hiring vehicle for passenger has been added under reverse charge. Under the new Service Tax regime, in few cases liability to pay service tax have been entrusted both on service recipient and service provider. Below is the list of Services covered under Reverse charge mechanism along with the share of service provider and service recipient share on which they are required to pay service Tax.

<i>Sl.No.</i>	<i>Description of a Service</i>	<i>Percentage of service tax payable by the person providing service</i>	<i>Percentage of service tax payable by the person receiving the service</i>
1	Services provided or agreed to be provided by an insurance agent to any person carrying on insurance business	Nil	100%
2	Services provided or agreed to be provided by a goods transport agency in respect of transportation of goods by road	Nil	100%
3	Services provided or agreed to be provided by way of sponsorship	Nil	100%
4	Services provided or agreed to be provided by an arbitral tribunal	Nil	100%
5	Services provided or agreed to be provided by individual advocate	Nil	100%
6	Services provided or agreed to be provided by way of support service by Government or local authority	Nil	100%
7	(a) In respect of services provided or agreed to be provided by way of renting or hiring any motor vehicle designed to carry passenger on abated value.	Nil	100%
	(b) In respect of services provided or agreed to be provided by way of renting or hiring any motor vehicle designed to carry passenger on non abated value.	60%	40 %
8.	Services provided or agreed to be provided by way of supply of manpower for any purpose	25%	75 %

9.	Services provided or agreed to be provided by way of works contract	50%	50%
10	Any taxable services provided or agreed to be provided by any person who is located in a non-taxable territory and received by any person located in the taxable territory (IMPORT OF SERVICES)	Nil	100%

12.3 Basis of Service Tax and Due Date for Payment of Service Tax

With effect from 1st April 2011, Finance Act, 2011 introduced Point of Taxation (POT) Rules, 2011. These rules laid down the provisions relating to payment of service tax on accrual basis instead of receipt basis and specify the relevant date for determining rate of service tax.

CBEC issued a circular MF(DR) DO F.NO. 334/3/2011-TRU dated 28-02-2011 clarifying that the time of provision of service will be earliest of the following dates : (a) Date on which service is provided or to be provided (ii) Date of invoice (iii) Date of Payment.

W.e.f. 1-04-2011 Rule 6(1) of the Service Tax Rules, 1994 has been amended,, which provides that the service tax is to be paid to the credit of the Central Government by the 5th of the month immediately following the calendar month in which service is deemed to have been provided as per POT Rules made in this regard. However, where the assessee is an individual or proprietary firm or partnership firm, the service tax shall be paid to the credit of the Central Government by the 5th of the month immediately following the quarter in which service is deemed to have been provided as per POT Rules made in this regard. Where payment is made through internet banking, such e-payment can be made by 6th of the month.

In case of individuals and partnership firms whose aggregate value of taxable services provided from one or more premises is fifty lakh rupees or less in the previous financial year, the service provider shall have option to pay the service tax on receipt basis by the due dates upto the taxable services of ` 50 lacs.

POT Rules, 2011 make provisions in respect of date when a service shall be “deemed to be provided”.

31st March will be the due date of payment for the month of March or for the quarter ending March.

The assessee, who has paid service tax of rupees 10 lakh or above in the preceding financial year or has already paid service tax of rupees 10 lakh in the current financial year, shall be liable to pay service tax electronically.

Further, notwithstanding the time of receipt of payment towards the value of services, no service tax is payable for the part or whole of the value of services, which is attributable to services provided during the period when such services were not taxable.

Rule 6(2) prescribes that the assessee shall deposit the service tax liable to be paid by him with the bank designated by the Central Board of Excise and Customs in Form TR-6 or in any other manner prescribed by the Central Board of Excise & Customs.

Date of deposit of cheque will be treated as date of payment subject to realization of the cheque.

12.4 Point of Taxation (POT) Rules, 2011

1. Point of taxation means the point in time when a service shall be deemed to have been provided. This Point of time will determine rate of service tax and due date of payment of service tax.

As per rule 2A "Date of payment" shall be the earlier of the dates on which the payment is entered in the books of accounts or is credited to the bank account of the person liable to pay tax:

Provided that –

(A) the date of payment shall be the date of credit in the bank account when –

- (i) there is a change in effective rate of tax or when a service is taxed for the first time during the period between such entry in books of accounts and its credit in the bank account; and
- (ii) the credit in the bank account is after four working days from the date when there is change in effective rate of tax or a service is taxed for the first time; and
- (iii) the payment is made by way of an instrument which is credited to a bank account,

(B) if any rule requires determination of the time or date of payment received, the expression "date of payment" shall be construed to mean such date on which the payment is received".

As per Rule 3 point of taxation shall be (a) the time when the invoice for service provided or to be provided is issued.(b) in case where payment is received before the issue of invoice then the time when such payment is received and (c) where advance is received by the service provider the time of receipt of such advance.

Rule 4A of the Service Tax Rules, 1994, provides that every person providing taxable service shall issue invoice within 30 days of completion of service or receipt of service whichever is earlier. Further proviso to Rule 3 of POT Rules, provides that where the invoice is not issued within 30 days of completion of service than the point of taxation shall the date of completion of such service.

Examples:

S. No.	Date of Completion of service	Date of Invoice	Date on which payment is received	Point of taxation	Remarks
1	April 10, 2011	April 20, 2011	April 30, 2011	April 20, 2011	Invoice is issued within 30 days and before payment
2	April 10, 2011	May 26, 2011	April 30, 2011	April 10, 2011	Invoice not issued within 30 days and payment

					received after completion of service
3	April 10, 2011	April 20, 2011	April 15, 2011	April 15, 2011	Invoice is issued within 30 days and payment received before issue of invoice
4	April 10, 2011	May 26, 2011	April 5, 2011 (Part) and April 25, 2011 (remaining)	April 5, 2011 and April 10, 2011 for remaining	Advance received in part before completion of service and invoice not issued within 30 days of completion of service.

2. Point of Taxation in case of specified services or persons

The point of taxation in respect of the persons required to pay tax as recipients of service under the rules made in this regard in respect of services notified under sub-section (2) of section 68 of the Act, shall be the date on which payment is made.

Provided that, where the payment is not made within a period of six months of the date of invoice, the point of taxation shall be determined as if this rule does not exist.

Provided further that in case of “associated enterprises”, where the person providing the service is located outside India, the point of taxation shall be the date of debit in the books of account of the person receiving the service or date of making the payment whichever is earlier.

3. Point of taxation where service is taxed first time

Where a service is taxed for the first time, then,—

- (a) no tax shall be payable to the extent the invoice has been issued and the payment received against such invoice before such service became taxable;
- (b) no tax shall be payable if the payment has been received before the service becomes taxable and invoice has been issued within fourteen days of the date when the service is taxed for the first time.

4. Determination of point of taxation in other cases

Where the point of taxation cannot be determined as per these rules as the date of invoice or the date of payment or both are not available, the Central Excise officer, may, require the concerned person to produce such accounts, documents or other evidence as he may deem necessary and after taking into account such material and the effective rate of tax prevalent at different points of time, shall, by an order in writing, after giving an opportunity of being heard, determine the point of taxation to the best of his judgment.”.

5. Continuous supply of service

“Continuous supply of service” means any service provided or agreed to be provided continuously or on recurrent basis, under a contract, for a period for a period exceeding three months with the obligation for payment periodically or from time to time. Further, Central Government may notify provision of a particular service to be considered as continuous supply of service.

Telecommunication service and Works contract services have been notified as continuous supply of service irrespective of period for which they are provided or to be provided vide Notification No. 28/2011.

In case of continuous supply of service, the point of taxation shall be the date of completion of the events as specified in the contract or time when invoice for the service provided or to be provided is issued or the date on which payment received whichever is earlier. Where any advance is received by the service provider the point of taxation shall be date of receipt of each such advance.

Test Your Knowledge

Where payment for service tax is made through internet banking, such e-payment can be made by the _____ of the month, immediately following the quarter in which the payments are received.

- (a) 5th
- (b) 6th
- (c) 8th
- (d) 10th

Correct answer: (b)

12.5 Registration

Section 69 of the Finance Act, read with Rule 4 of the Service Tax Rules make provisions relating to registration. It is mandatory for every person liable to pay service tax to get registered with Superintendent of Central Excise. A person providing a taxable service is liable to pay service tax in terms of Section 68.

12.5.1 Who Shall Apply?

An application for registration to the Superintendent of Central Excise can be made in form (ST-1). This is to be made within a period of thirty days from the date on which the service tax is leviable.

ST-1 Form shall be accompanied by the following documents:

- Permanent Account number (PAN);
- An affidavit declaring the commencement of the services;
- Copy of passport/ration card etc., showing proof of residence;

- Passport size photograph of the assessee in case of an individual. In case of partnership firm, copy of partnership deed duly certified to be true copy along with registration certificate in case the firm is registered;
- In case of corporate assessee, copy of memorandum, articles of association duly certified to be true copy by the director.

12.5.2 Single Registration for Multiple Services

In case the taxable services are provided from more than one premises/ offices, the assessee can opt for registration for only one premises if there is a system of centralised billing/centralised accounting with permission from Department. Where an assessee is providing more than one taxable service, he can obtain registration by making a single application mentioning all the taxable services provided by him.

Where an assessee seeks to obtain single registration for more than one premises, he has to apply before the Chief Commissioner/Commissioner of Central Excise if all the offices are falling under the jurisdiction of one Chief Commissioner/ Commissioner or before the Director General of Service Tax (DGST) if his offices are falling under the jurisdiction of more than one chief commissioners. Registration application before the DGST shall be submitting through the jurisdictional office of the Assistant/Deputy Commissioner of Central Excise.

12.5.3 Issue of Registration Certificate

The Superintendent of Central excise is bound to grant a certificate of registration in Form ST-2 within 7 days of the date of receipt of the application. This certificate shall indicate the details of all the taxable services provided by the service provider. In case of transfer of business by the assessee to another person, the transferee is required to obtain a fresh Certificate of Registration.

12.5.4 Surrender of Certificate of Registration

The registered assessee who ceases to provide the taxable services for which he had been registered shall surrender his Certificate of Registration to the concerned Superintendent of Central Excise. There may also be a partial surrender where some of the services rendered by the assessee are discontinued. In such case, he shall intimate it to the concerned Superintendent of Central Excise to get it endorsed on the registration certificate.

Test Your Knowledge

Any provider of taxable service whose aggregate value of taxable service in a financial year exceeds _____ shall make an application for registration to the jurisdictional Superintendent of Central Excise.

- (a) ` 3,00,000
- (b) ` 5,00,000
- (c) ` 7,00,000
- (d) ` 9,00,000

Correct answer: (d)

12.6 Service Tax Registration of Special Category of Persons

Service Tax (Registration of Special Category of Persons) Rules, 2005 have come into effect on 16th day of June, 2005.

Registration

Registration under these rules can be obtained by an input service distributor by making an application to the jurisdictional Superintendent of Central Excise in such form as specified by the Board within a period of thirty days of the commencement of business or the 16th day of June, 2005, whichever is later.

Any provider of taxable service whose aggregate value of taxable service in a financial year exceeds nine lakh rupees shall make an application to the jurisdictional Superintendent of Central Excise in the prescribed form for registration within a period of thirty days of exceeding the aggregate value of taxable service of nine lakh rupees.

12.6.1 Furnishing of Return

The input service distributor shall furnish a return to the jurisdictional Superintendent of Central Excise in such form and at such intervals as prescribed under Rule 9(10) of CENVAT Credit Rules, 2004. The CENVAT Credit Rules prescribe half yearly returns to be submitted by month end from the close of the half year.

The term, "aggregate value of taxable service" means the sum total of first consecutive payments received during a financial year towards the gross amount, as prescribed under Section 67 of the Act, charged by the service provider towards taxable services but does not include payments received towards such gross amount which are exempt from the whole of service tax leviable thereon under Section 66 of the Act under any notification other than Notification No. 6/2005-Service Tax, dated the 1st March, 2005 [G.S.R. 140(E), dated the 1st March, 2005].

The term, "input service distributor" shall have the meaning assigned to it in Clause (m) of Rule 2 of the CENVAT Credit Rules, 2004.

12.8 Records to be maintained

Every assessee is required to furnish to the Superintendent of Central Excise at the time of filing his return for the first time, a list of all accounts maintained by him in relation to service tax including memoranda received from his branch offices. All types of records including computerized data as maintained by an assessee as per various laws in force from time to time shall be acceptable.

Rule 5(1) of the Service Tax Rules, 1994 makes acceptable the records (including computerized data) as maintained by an assessee in accordance with the various laws in force. Further, every assessee is required to furnish to the Superintendent of Central Excise at the time of filing his return for the first time a list of all accounts maintained by the assessee in relation to service tax including memoranda received in branch offices [Rule 5(2)].

12.9 Adjustment of Service Tax

Where an assessee has paid to the credit of Central Government any amount in excess of the amount required to be paid towards service tax liability for a month or quarter, the assessee

may adjust such excess amount paid by him against his service tax liability for the succeeding month or quarter.

The adjustment of excess amount paid, shall be subject to the condition that the excess amount paid is on account of reasons not involving interpretation of law, taxability, valuation or applicability of any exemption notification.

12.10 Returns under Service Tax

Rule 7 of the Service Tax Rules, 1994 return under Service Tax is required to be filed by every assessee on half yearly basis in Form ST-3 or Form ST-3A, as the case may be, along with a copy of the Form TR-6, in triplicate for the months covered in the half-yearly return.

Every assessee shall submit the half yearly return by the 25th of the month following the particular half-year.

12.10.1 E-Filing of Service Tax Returns

The Government allowed filing of service tax return electronically from April 2003 on only ten select classes or group of service tax providers on optional basis, now from January 2004 it is extended to all the taxable services. This facility is available on the website <http://servicetaxefiling.nic.in>. Assessee having a 15-digit Service Tax Payers (STP) code can avail of the facility of electronic filing of their return. Now, vide Notification No. 43/2011 dt. 25th August 2011, every Assessee shall submit a half yearly return electronically. The assessee is thereupon provided a unique user name and password. The assessee gets a computer-generated acknowledgement for evidence of having filed the return.

With effect from 1st October, 2011, every assessee is required to file half yearly return electronically.

12.10.2 Revision of Returns

As per Rule 7B, an assessee may submit a revised return, in Form ST-3, in triplicate, to correct a mistake or omission, within a period of ninety days from the date of submission of the return under rule 7

Similar facility is also there for returns to be filed by assessee under CENVAT Credit Rules, 2004 [Rule 9(11) of CENVAT Credit Rules].

12.10.3 Penalty for late Filing of Return

If return of service tax is not filed within the prescribed period penalty is leviable under section 77(2) which can be upto ₹10,000.

Section 70(1) with effect from 11.5.2007 provides for late fee also. Accordingly late fee is payable as follows: (Rule 7C of Service Tax Rules, 1994). If late fee is paid then no penalty shall be leviable.

Delay upto 15 days	₹ 500/-
Delay upto 30 days	₹ 1,000/-
Delay beyond 30 days	₹ 1,000 + ₹ 100/- per day subject to a maximum of ₹ 20,000/-

12.11 Recovery of Service Tax

Central Excise Officers have been empowered to demand duty, impose penalty and confiscate offending goods. They can also sanction refund claims. They are 'adjudicating authorities'. These are 'quasi juridical authorities'.

Central Excise Officers have been empowered to adjudicate in following:

- Demand of service tax and its recovery – Section 73.
- Rectification of mistake by amending its own order – Section 74.
- Imposition of penalty – Section 83A inserted w.e.f. 13 May 2005.
- Refund of service tax – Section 11B of Central Excise Act made applicable to Service Tax.

12.11.1 Recovery of service tax not levied or paid or short levied or short paid or erroneously refunded section 73(1)

(A) Time Limit for Issue of show cause notice

Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the Central Excise Officer may, within 18 months from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

Provided that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of –

- (a) fraud; or
- (b) collusion; or
- (c) wilful mis-statement; or
- (d) suppression of facts; or
- (e) contravention of any of the provisions of this Chapter or of the rules made there under with intent to evade payment of service tax, by the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words "eighteen months", the words "five years" had been substituted.

(B) Relevant date for issue of show cause notice

Relevant date for calculating limit of eighteen months/five year for issue of show cause notice is as follows [Section 73(6)]:

- (i) In the case of taxable service in respect of which service tax has not been levied or paid or has been short levied or short paid – (a) Where a periodic return is to be filed, the date on which such return was filed. (b) Where no return was filed, the last date on which the return should have been filed under Service Tax Rules. (c) In any other case, the date on which service tax is to be paid under provisions of Finance Act, 1994 or Service Tax Rules, 1994.
- (ii) In case where service tax is provisionally assessed, the date of adjustment of service tax after final assessment thereof.

- (iii) In case any sum relating to service tax, has been erroneously refunded, the date of such refund.

(C) Payment before receipt of show cause notice

Assessee may pay such tax on the basis of own ascertainment or on the basis of tax ascertained by Central Excise Officer, before issue of show cause notice. After payment of tax, assessee should inform the Central Excise Officer in writing about such payment, and then the central excise officer shall not issue any show cause notice under Section 73(1) in respect of service tax so paid [Section 73(3)].

However, even after such payment, show cause notice for further amount can be issued within eighteen months from the date on which the assessee had informed the Central Excise Officer about payment of service tax by him [proviso to Section 73(3)].

Even after payment of tax by assessee, demand can be raised within five years in case of suppression of facts, fraud, collusion, willful misstatement or contravention of any provision with intent to evade service tax [Section 73(4)].

No show cause notice shall be issued where the person chargeable to tax pay the service tax along with interest and penalty equal to 1% per month for the period during which default continues maximum to 25% of the tax amount where during the course of audit , investigation or verification it is found that any service tax has not been levied or paid or has been short-paid or erroneously refunded.

12.12 Provisional Attachment Pending Adjudication

Finance Act, 2006 has added a provision for provisional attachment of property of a person to whom show cause notice has been serviced under Sections 73 or 73A, if the Central Excise Officer is of the opinion that it is necessary to do so, to protect interests of revenue. He can do so only with previous approval of Commissioner of Central Excise [Section 73C(1) inserted w.e.f. 18.4.2006].

The provision seems to be harsh and may lead to harassment of assesseees, though some safeguards have been kept.

The attachment can be done only in a manner prescribed by rules and only with previous written approval of Commissioner.

The attachment will cease to have effect after six months from date of order of attachment [Section 73C(2)]. This period can be extended with written permission of Chief Commissioner of Central Excise, but total period of extension cannot be for more than two years.

12.13 Amount Collected Representing as Service Tax must be paid to Government

If a person liable to pay service tax collects from recipient of taxable service, an amount representing as service tax, in excess of service tax assessed or determined and paid on any taxable service, the excess amount must be deposited forthwith with Government [Section 73A(1) inserted w.e.f. 18.4.2006].

If a person collects from any person an amount representing it as service tax when not required to be collected, he shall forthwith deposit the amount so collected to Government [Section 73A(2) inserted w.e.f. 18.4.2006].

Thus, the provision applies even in cases where person collects an amount representing it as 'service tax', though the amount was not 'required' to be collected 'Required' means 'required' under any law.

12.14 Interest on Delayed Payment of Service Tax under Section 75

Every person, liable to pay the tax in accordance with the provisions of section 68 or rules made thereunder, who fails to credit the tax or any part thereof to the account of the Central Government within the period prescribed, shall pay simple interest at such rate not below 10% and not exceeding 36% p.a.

However where the service provider whose taxable services does not exceed `60 lakhs during any of the financial years covered by the notice or during the last financial year the rate of interest shall be reduced by 3% p.a

12.15 Doctrine of Unjust Enrichment

Since service tax is indirect tax, it is recoverable from customer. If you recover the amount from customer and again claim refund, you will get double benefit. Hence, provision of 'unjust enrichment' has been made in the law.

As per the doctrine of unjust enrichment, refund will be granted to assessee only if assessee had not passed on the tax burden to your customer/client. It will be presumed that assessee has passed on the burden of service tax. Thus, assessee will have to prove that he has not passed on the burden to your customer. If he is unable to prove it, refund will be paid to 'Consumer Welfare Fund' and not to assessee, as provided in Section 12C of Central Excise Act.

If assessee has shown the amount of service tax separately in invoice (which assessee is legally required to do), it will be difficult for assessee to establish that he has not passed on the tax burden to the client/customer.

Refund of service tax is governed by provisions of Section 11B of Central Excise Act - confirmed in *International Security Organisation v. CCE 2002 (CEGAT)*.

If application for refund is rejected by AC/DC, appeal can be filed with Commissioner (Appeals).

12.16 Penalties

Various penalties have been provided under the Act. The penalties can be imposed by Central Excise Officers. There is no provision for prosecution under the Act.

(A) Penalty for failure to pay service tax [Section 76]

Any person who fails to pay service tax, shall pay, in addition to such tax and the interest on that tax amount in accordance with the provisions of section 75, a penalty which shall not be less than;

- one hundred rupees for every day during which such failure continues;or
- at the rate of one per cent. of such tax, per month, whichever is higher, starting with the first day after the due date till the date of actual payment of the outstanding amount of service tax.

Provided that the total amount of the penalty payable in terms of this section shall not exceed 50% of the service tax payable.

Illustration

X, an assessee, fails to pay service tax of ` 10 lakhs payable by 5th March. X pays the amount on 15th March. The default has continued for 10 days. The penalty payable by X is computed as follows:-

- 1% of the amount of default for 10 days = $1 \times 10,00,000 \times 10/31 = `3,225.80$ or
- Penalty calculated @ ` 100 per day for 10 days = `1,000

Penalty liable to be paid is ` 3,226.00.

(B) Penalty for contravention of rules and provisions of act for which no penalty is specified elsewhere [Section 77]

- (a) Any person who is liable to pay service tax, or required to take registration, fails to take registration shall be liable to pay a penalty which may extend to;
- ten thousand rupees or
 - two hundred rupees for every day during which such failure continues, whichever is higher, starting with the first day after the due date, till the date of actual compliance.
- (b) Any person who fails to keep, maintain or retain books of account and other documents shall be liable to a penalty which may extend to ten thousand rupees.
- (c) Any person who fails to –
- (i) furnish information called by an
 - (ii) produce documents called for by a Central Excise Officer
 - (iii) appear before the Central Excise Officer, when issued with a summon for appearance to give evidence or to produce a document in an inquiry, shall be liable to a penalty which may extend to;
 - ten thousand rupees or
 - two hundred rupees for every day during which such failure continues, whichever is higher, starting with the first day after the due date, till the date of actual compliance.
- (d) Any person who is required to pay tax electronically, through internet banking, fails to pay the tax electronically, shall be liable to a penalty which may extend to ten thousand rupees.
- (e) Any person who issues invoice with incorrect or incomplete details or fails to account for an invoice in his books of account, shall be liable to a penalty which may extend to ten thousand rupees.
- (2) Any person, who contravenes any of the provisions or any rules for which no penalty is separately provided, shall be liable to a penalty which may extend to Ten thousand rupees

(C) Penalty for suppressing value of taxable service [Section 78]

Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by reason of

- (a) fraud; or
- (b) collusion; or
- (c) wilful mis-statement; or
- (d) suppression of facts; or
- (e) contravention of any of the provisions or of the rules with intent to evade payment of service tax the person shall be liable to pay service tax or erroneous refund, and also be liable to pay a penalty, in addition to such service tax and interest which shall equal to the amount of service tax so not levied or short-paid or erroneously refunded.

However the amount of penalty shall be reduced to:

- (a) 50% where true and complete details of the transactions are available in the specified records.
- (b) 25% where true and complete details of the transactions are available in the specified records and the amount of service tax, interest and penalty has been paid within 30 days.

In case of service providers whose taxable value of service tax does not exceed ` 60 lakhs, the period of 30 days shall be extended to 90 days.

12.17 Waiver or Reduction of Penalty

As per Section 80, penalty under Sections 76, 77 or first proviso to section 78(1) can be waived if assessee proves that he had reasonable cause for the failure.

In *CCE v. Milan Tent Palace* 2001 (CEGAT), it was held that penalty is not mandatory and can be waived or reduced in deserving cases.

Who can impose penalty

Section 83A (inserted w.e.f. 13.5.2005) empowers Central Excise Officer to adjudicate penalty within such powers as may be conferred by CBEC, by issuing a notification.

12.18 Advance Ruling

“Advance ruling” means the determination, by the Authority, of a question of law or fact specified in the application regarding the liability to pay service tax in relation to a service proposed to be provided, by the applicant.

“applicant” means –

- (i) (a) a non-resident setting up a joint venture in India in collaboration with a non-resident or a resident; or
- (b) a resident setting up a joint venture in India in collaboration with a non-resident; or

- (c) a wholly owned subsidiary Indian company, of which the holding company is a foreign company, who or which, as the case may be, proposes to undertake any business activity in India.
- (ii) a joint venture in India.
- (iii) a resident falling within any such class or category of persons, as the Central Government may, by notification in the Official Gazette, specify in this behalf.

An applicant desirous of obtaining an advance ruling under this Chapter may make an application in such form and in such manner as may be prescribed, stating the question on which the advance ruling is sought.

The question on which the advance ruling is sought shall be in respect of,-

- (a) classification of any service as a taxable service under Chapter V;
- (b) the valuation of taxable services for charging service tax;
- (c) the principles to be adopted for the purposes of determination of value of the taxable service under the provisions of Chapter V;
- (d) applicability of notifications issued under Chapter V;
- (e) admissibility of credit of service tax;
- (f) determination of the liability to pay service tax on a taxable service under the provisions of Chapter V.

The application shall be made in quadruplicate and be accompanied by a fee of two thousand five hundred rupees.

An applicant may withdraw an application within thirty days from the date of the application.

The authority is required to give its ruling within 90 days of the receipt of valid application.

An application may be rejected by the prescribed authority if the question or subject matter of ruling sought in the application is such which is already pending before any assessing officer, Tribunal and court of law or such question already stands decided by any court or bench of Tribunal.

The advance ruling pronounced by the Authority shall be binding only-

- (a) on the applicant who had sought it;
- (b) on the Commissioner of Central Excise, and the Central Excise authorities subordinate to him, in respect of the applicant.

The advance ruling shall be binding unless there is a change in law or facts on the basis of which the advance ruling has been pronounced.

No proceeding before, or pronouncement of advance ruling by, the Authority shall be invalid on the ground merely of the existence of any vacancy or defect in the constitution of the Authority.

Test Your Knowledge

What is the fee for application for advance ruling ?

- (a) ` 500
- (b) ` 1,000
- (c) ` 1,500
- (d) ` 2,500

Correct answer : d

12.19 CENVAT Credit Rules, 2004

The Finance Ministry has issued CENVAT Credit Rules following the budget decisions to extend credit of input taxes across goods and services from 10.09.2004. The Finance Act, 2004 has amended section 94 to provide that Central Government is empowered to make rules relating to inter-sectoral credit of service tax and excise duty. The move will facilitate integration of tax on goods and services (GST). The New CENVAT Credit Rules contain Rules for goods and services. Rules cover inputs, capital goods and services. The burden of proof regarding the admissibility of CENVAT Credit is on the manufacturer or service provider who is availing credit. A new levy of education and higher secondary education cess has been imposed subject to CENVAT Credit and it shall be used only for the payment of such additional charge on output services/products. It is clear that the Central Government is trying to widen the tax bracket to include those services which till now is not brought under the tax provision. Earlier a threshold limit of four lakhs exemption is provided to the service provider and that limit was increased to ` 8 lakhs but from 1-04-2008 the exemption limit was increased to `10 lakhs. Cenvat credit of inputs and input services is not available if final product/output service is exempt from excise duty/service tax. In case of manufacturer manufacturing both exempt and dutiable goods (or service provider providing taxable as well as exempt services), it may happen that same inputs/input services are used partly for manufacture of dutiable goods/taxable services and partly for exempted goods/services.

In such cases, the manufacturer/service provider has following three options (w.e.f. 1.4.2011) –

- (1) Maintain separate account for inventory receipt, inputs and input services used for exempted goods/exempted output services and used for dutiable final products or for the provision of taxable output services.- (Rule 6(2) of Cenvat Credit Rules).
- (2) Don't Maintain Separate Account
 - (a) Pay amount equal to 6% of value of exempted goods (if he is 'manufacturer') and/or 6% of value of exempted services (if he is service provider) if he does not maintain separate inventory and records - Rule 6(3)(i);
 - (b) Pay an amount as determined in Sub-Rule (3A);
 - (c) Maintain separate accounts for inputs and pay 'amount' as determined under Rule 6(3A) in respect of input services.

"Input Services"

Rule 2(l)(ii) of Cenvat Credit Rules, which defines 'input service' is amended w.e.f. 1.4.2011 as follows. "Input service" means any service –

- (i) used by a provider of output service for providing an output service; or
- (ii) used by a manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products upto the place of removal, and

Includes

services used in relation to modernisation, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs, accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, security, business exhibition, legal services, inward transportation of inputs or capital goods and outward transportation upto the place of removal;

but excludes services,-

- (A) service portion in the execution of a works contract and construction services including service listed under clause (b) of section 66E of the Finance Act (hereinafter referred as specified services) in so far as they are used for –
 - (a) construction or execution of a works contract of a building or a civil structure or part thereof; or
 - (b) laying of foundation or making of structures for support of capital goods, except for the provision of one or more of the specified services; or
- (B) services provided by way of renting of a motor vehicle in so far as they relate to a motor vehicle which is not a capital goods; or
- (BA) service of general insurance business, servicing, repair and maintenance, in so far as they relate to a
- (C) such as those provided in relation to outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, membership of a club, health and fitness centre, life insurance, health insurance and travel benefits extended to employees on vacation such as Leave or Home Travel Concession, when such services are used primarily for personal use or consumption of any employee.

Provisions of Cenvat Credit Rules relating to Service tax

1. For a service provider the use of inputs and capital goods must be direct and they must be used for providing output service. Otherwise Cenvat Credit is not available on them.
2. Motor vehicles registered in the name of the service provider will be treated as capital goods for specified services such as outdoor catering, rent a cab, cargo handling, goods transport agency, tour operator & courier agencies.
3. Cenvat credit on service tax can be taken only when both service tax and service charge has been paid.

4. Service provider is not eligible take credit on special CVD paid on imported goods.
5. Service tax paid on input services by Input service distributor can be distributed among its constituent units.
6. In the budget 2008 service provider is allowed to transfer credit on inputs and capital goods to its other offices. For that registration under Central Excise is necessary.
7. A service provider has to reverse the Cenvat credit when he removes the inputs or capital goods as such.
But no reversal is necessary if such inputs or capital goods are taken out for providing output service.
8. Cenvat credit on service tax can be taken on the strength of documents such as challan, Bill or invoice.
9. If the service provider uses inputs or input services both for exempted and taxable services, he should take credit proportionately by maintaining separate accounts. Otherwise he has to pay 5% on exempted services also.

12.20 Abatement in Service Tax

Abatement in Service Tax is a major relief to certain kinds of services which are chargeable to service tax. Finance Act 1994 provides that for determining value of service tax on which service tax is to be charges, abatement in value determination is allowed.

Abatement under service tax laws mean that for certain services, a specified percentage of discount is allowed from the gross amount collected for rendering the services subject to the conditions that CENVAT Credit has not been availed by the service provider.

Notification No. 26/2012- ST dated 20/06/2012 provides the list of services on which abatement is allowed. It also provides for the percentage on which service tax is payable under the scheme of abatement. The concept of abatement may be understood with the help of example

As per notification no. 26/2012, railways is require to charge service tax only on 30% value of the Taxable services. Thereby by virtue of this provision, if railways receive an amount of ` 50 Lakhs against the services, it needs to pay service tax only on ` 15 Lakhs i.e. 30% value of ` 50 Lakhs.

12.21 Appeals

Appeal can be filed against adjudication order as per following provisions.

If adjudication order is passed by authority lower than Commissioner of Central Excise, first appeal will be with Commissioner (Appeals) under Section 85(1) within three months from date of receipt of order made before the 28th May 2012 (the date Finance Bill receives the assent of the president) of adjudicating authority. Further, the appeal shall be presented within two months from the date of receipt of order made on and after 28th May 2012.

Second and final appeal is with Appellate Tribunal (known as - Customs, Excise and Service Tax Appellate Tribunal - CESTAT) under Section 86(1). Appeal is required to be filed within three months of the date of receipt of the order.

If adjudication order is passed by Commissioner, appeal is to be filed to CESTAT under Section 86(1) within four months from the date on which the order sought to be appealed against is received. The adjudicating order of Commissioner may be in respect of following – (a) Original adjudication of demand under Section 73, (b) Imposition of penalty under Section 83A.

12.21.1 Appeals to the Commissioner of Central Excise (Appeals) [Section 85]

- Any person aggrieved by any decision or order passed by an adjudicating authority subordinate to the Commissioner of Central Excise may appeal to the Commissioner of Central Excise (Appeals).
- Every appeal shall be in the prescribed form and shall be verified in the prescribed manner.
- An appeal shall be presented within three months from date of receipt of order made before the 28th May 2012 (the date Finance Bill receives the assent of the president) of adjudicating authority. Further, the appeal shall be presented within two months from the date of receipt of order made on and after 28th May 2012.

Condonation of delay

- The Commissioner of Central Excise (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of three months, allow it to be presented within a further period of three months if the order made before 28th May 2012. If order made on and after 28th May 2012 then the delay may be condoned for a further period of one month.
- The Commissioner of Central Excise (Appeals) shall hear and determine the appeals and, pass such orders as he thinks fit and such orders may include an order enhancing the service tax, interest or penalty

Principle of Natural Justice

- an order enhancing the service tax, interest or penalty shall not be made unless the person affected thereby has been given a reasonable opportunity of showing cause against such enhancement.

12.21.2 Appeal to Tribunal (Section 86)

Any assessee aggrieved by an order passed by a Commissioner of Central Excise under section 73 or section 83A, or an order passed by a Commissioner of Central Excise (Appeals) under section 85, may appeal to the Appellate Tribunal against such order.

The Committee of Chief Commissioners of Central Excise may, if it objects to any order passed by the Commissioner of Central Excise under section 73 or section 83A or section 84, or by the Commissioner of Central Excise (Appeals) under section 85 direct the Commissioner of Central Excise to appeal to the Appellate Tribunal against the order.

Every appeal shall be filed within four months of the date on which the order sought to be appealed against is received by the assessee, the Committee of Chief Commissioners.

The Commissioner of Central Excise or any Central Excise Officer subordinate to him or the assessee, notwithstanding that he may not have appealed against such order within forty-

five days of the receipt of the notice, file a memorandum of cross-objections, verified in the prescribed manner.

The Appellate Tribunal may admit an appeal or permit the filing of a memorandum of cross-objections after the expiry of the relevant period if it is satisfied that there was sufficient cause for not presenting it within that period.

Every application made before the Appellate Tribunal,

- (a) in an appeal for grant of stay or for rectification of mistake or for any other purpose; or
- (b) for restoration of an appeal or an application, shall be accompanied by a fee of five hundred rupees.

Provided that no such fee shall be payable in the case of an application filed by the Commissioner of Central Excise or Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise.

12.21.3 Further Appeals

Further appeals against order of Tribunal (CESTAT) lies with Supreme Court only in matters of valuation and classification. If there is substantial question of law (other than classification and valuation), appeal has to be filed with High Court.

12.22 Role of Practicing Company Secretary

The educational background, knowledge, training and exposure that a Company Secretary has, makes him a versatile professional capable of rendering a wide range of services to companies of all sizes, other commercial and industrial organizations, small scale units, firms etc.

A Practicing Company Secretary can render several services under the Service Tax such as;

- open a Certified Facilitation Centre under ACES project of CBEC by making an application to ICSI;
- registration with tax authorities;
- advising on applicability, rate and payment of service tax;
- filing of returns with the authorities;
- claiming exemption;
- advising on various procedural matters relating to service tax.

12.23 Service Tax on Practicing Company Secretary

Regarding taxable services provided by Company Secretaries in Practice, the following is the position of the law:

As per Section 2(2) of Company Secretaries Act, 1980 a member of the Institute shall be deemed "to be in practice" when, individually or in partnership with one or more members of the Institute in practice or in partnership with members of such other recognized professions as may be prescribed, he, in consideration of remuneration received or to be received:

- (a) engages himself in the practice of the profession of Company Secretaries to, or in relation to, any company; or
- (b) offers to perform or performs services in relation to the promotion, forming, incorporation, amalgamation, reconstruction, reorganization or winding up of companies; or
- (c) offers to perform or performs such services as may be performed by –
 - (i) an authorised representative of a company with respect to filing, registering, presenting, attesting or verifying any documents (including forms, applications and returns) by or on behalf of the company,
 - (ii) a share transfer agent,
 - (iii) an issue house,
 - (iv) a share and stock broker,
 - (v) a secretarial auditor or consultant,
 - (vi) an adviser to a company on management, including any legal or procedural matter falling under the Capital Issues (Control) Act, 1947 (29 of 1947), the Industries (Development and Regulation) Act, 1951 (65 of 1951), the Companies Act, the Securities Contracts (Regulation) Act, 1956 (42 of 1956), any of the rules or bye-laws made by a recognized stock exchange, the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969), the Foreign Exchange Regulation Act, 1973 (46 of 1973), or under any other law for the time being in force.
 - (vii) issuing certificates on behalf of, or for the purposes of, a company; or
- (d) holds himself out to the public as a Company Secretary in practice; or
- (e) renders professional services or assistance with respect to matters of principle or detail relating to the practice of the profession of Company Secretaries; or
- (f) renders such other services as, in the opinion of the Council, are or may be rendered by a Company Secretary in practice;

and the words “to be in practice” with their grammatical variations and cognate expressions, shall be construed accordingly.”

The government has issued a Notification in 2006 exempting the taxable services provided or to be provided by a company secretary in his professional capacity to a client, relating to representing the client before any statutory authority in the cause of proceedings initiated under any law for the time being in force, by way of issue of notice. The text of Notification is reproduced below:

GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(Department of Revenue)

Notification No. 25/2006-Service Tax

New Delhi, dated the 13th July, 2006

G.S.R.418(E) – In exercise of the powers conferred by Sub-section (1) of Section 93 of the Finance Act 1994 (32 of 1994) hereinafter referred to as the Finance Act), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable services falling under sub-clauses (s), (t) and (u) of clause (105) of Section 65 of the Finance Act, provided or to be provided by a practicing chartered accountant, a practicing cost accountant and a practicing Company Secretary respectively, in his professional capacity, to a client, relating to representing the client before any statutory authority in the course of proceedings initiated under any law for the time being in force, by way of issue of notice, from the whole of service tax leviable thereon under Section 66 of the said Finance Act.

(R. Sriram)

Deputy Secretary to the Government of India

The above notification rescinded by issue of Notification No. 32/2011 dt. 25/04/2011 as a result of which all services provided by practicing company secretaries are taxable.

ST : Chartered Accountants/Company Secretaries/Cost & Accountants - Exemption from service tax on taxable services provided by
Practising Chartered Accountant, etc., - Rescission of
Notification No. 25/2006-ST, dated 13-7-2006

NOTIFICATION NO. 32/2011 - SERVICE TAX, DATED 25-4-2011

In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1944 (32 of 1994), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby rescinds the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 25/2006 - Service Tax, dated the 13th July, 2006, published in the Gazzete of India, Extraordinary, Part II, Section 3, Sub-section (i) vide number G.S.R. 418(E), dated the 13th July, 2006, except as respects things done or omitted to be done before such rescission.

2. This notification shall come into force on the 1st day of May, 2011.

B. CENTRAL EXCISE (CENTRAL EXCISE ACT, 1944)

1. Procedure for fixation of value under section 4:

Definition of "Inter Connected Undertakings"

"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.

Explanation I.-- For the purposes of this clause, two bodies corporate shall be deemed to be under the same management,--

- (i) if one such body corporate exercises control over the other or both are under the control of the same group or any of the constituents of the same group; or
- (ii) if the managing director or manager of one such body corporate is the managing director or manager of the other; or
- (iii) if one such body corporate holds not less than one-fourth of the equity shares in the other or controls the composition of not less than one-fourth of the total membership of the Board of directors of the other; or
- (iv) if one or more directors of one such body corporate constitute, or at any time within a period of six months immediately preceding the day when the question arises as to whether such bodies corporate are under the same management, constituted (whether independently or together with relatives of such directors or employees of the first mentioned body corporate) one-fourth of the directors of the other; or
- (v) if the same individual or individuals belonging to a group, while holding (whether by themselves or together with their relatives) not less than one-fourth of the equity shares in one such body corporate also hold (whether by themselves or together with their relatives) not less than one-fourth of the equity shares in the other; or
- (vi) if the same body corporate or bodies corporate belonging to a group, holding, whether independently or along with its or their subsidiary or subsidiaries, not less than one-fourth of the equity shares in one body corporate, also hold not less than one-fourth of the equity shares in the other; or
- (vii) if not less than one-fourth of the total voting power in relation to each of the two bodies corporate is exercised or controlled by the same individual (whether independently or together with his relatives) or the same body corporate (whether independently or together with its subsidiaries); or
- (viii) if not less than one-fourth of the total voting power in relation to each of the two bodies corporate is exercised or controlled by the same individuals belonging to a group or by the same bodies corporate belonging to a group, or jointly by such individual or individuals and one or more of such bodies corporate; or

(ix) if the directors of one such body corporate are accustomed to act in accordance with the directions or instructions of one or more of the directors of the other, or if the directors of both the bodies corporate are accustomed to act in accordance with the directions or instructions of an individual, whether belonging to a group or not.

Explanation II. – If a group exercises control over a body corporate, that body corporate and every other body corporate, which is a constituent of, or controlled by, the group shall be deemed to be under the same management.

Explanation III. – If two or more bodies corporate under the same management hold, in the aggregate, not less than one-fourth equity share capital in any other body corporate, such other body corporate shall be deemed to be under the same management as the first mentioned bodies corporate.

Explanation IV. – In determining whether or not two or more bodies corporate are under the same management, the shares held by financial institutions in such bodies corporate shall not be taken into account.

Illustration

Undertaking B is inter-connected with undertaking A and undertaking C is inter-connected with undertaking B. Undertaking C is inter-connected with undertaking A; if undertaking D is inter-connected with undertaking C, undertaking D will be inter-connected with undertaking B and consequently with undertaking A; and so on.

Explanation V- For the purposes of this clause, "group" means a group of two or more individuals, associations of individuals, firms, trusts, trustees or bodies corporate (excluding financial institutions), or any combination thereof, which exercises, or is established to be in a position to exercise, control, directly or indirectly, over anybody corporate, firm or trust; or associated persons.

Explanation VI- For the purposes of this clause,

(I) a group of persons who are able, directly or indirectly, to control the policy of a body corporate, firm or trust, without having a controlling interest in that body corporate, firm or trust, shall also be deemed to be in a position to exercise control over it;

(II) "associated persons" –

(a) in relation to a director of a body corporate, means –

(i) a relative of such director, and includes a firm in which such director or his relative is a partner;

(ii) any trust of which any such director or his relative is a trustee;

(iii) any company of which such director, whether independently or together with his relatives, constitutes one-fourth of its Board of directors;

(iv) any other body corporate, at any general meeting of which not less than one-fourth of the total number of directors of such other body corporate are appointed or controlled by the director of the first mentioned body corporate or his relative, whether acting singly or jointly;

(b) in relation to the partner of a firm, means a relative of such partner and includes any other partner of such firm; and

(c) in relation to the trustee of a trust, means any other trustee of such trust;
(III) where any person is an associated person in relation to another, the latter shall also be deemed to be an associated person in relation to the former;

2. Recovery of duties not levied or not paid or short levied or short paid or erroneously refunded (Section 11A)

Section 11A is being amended to exclude the period of stay in computing the period of one year or five years, as the case may be, for issuance of show cause notice where service of notice is stayed by an order of a court or tribunal.

3. Penalty for short levy or non-levy of duty in certain cases (Section 11AC)

Section 11AC provides for reduced penalty if the duty along with interest is paid within a 30 days of the communication of the order. It is being amended to make available the benefit of reduced penalty only if the reduced penalty is also paid within the specified period of thirty days.

4. Power of Arrest, stop, search etc.

Insert the following provisions pertains to powers and duties of officers:

a) *Power of search and seizure (Section 12F):*

Where the Joint commissioner of Central Excise or Additional Commissioner of Central Excise or such other Central Excise Officer as may be notified by the Board has reasons to believe that any goods liable to confiscation or any documents or books or things which in his opinion shall be useful for or relevant to any proceedings under this Act, are secreted in any place, he may authorise in writing any Central Excise Officer to search and seize or may himself search and seize such documents or books or things.

The provisions of the Code of Criminal Procedure, 1973 relating to search and seizure shall, so far as may be, apply to search and seizure under this section subject to the modification that subsection (5) of section 165 of the said Code shall have effect as if for the word "Magistrate", wherever it occurs, the words "Commissioner of Central Excise" were substituted.

b) *Power to Arrest (Section 13):*

(1) If an officer of Central Excise empowered in this behalf by general or special order of the Commissioner of Central Excise has reason to believe that any person has committed an offence punishable under this Act, he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest.

(2) Every person arrested under sub-section (1) for an offence shall, without unnecessary delay, be taken to a Magistrate.

(3) Where an officer of Central Excise has arrested any person under sub-section (1), for any offence (other than an offence punishable for a term of imprisonment of three years or more under section 9), he shall, for the purpose of releasing such person on bail or otherwise, have the same powers and be subject to the same provisions as the officer-in-charge of a police station has, and is subject to, under the Code of Criminal Procedure, 1973.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, all offences under this Act (except an offence punishable for a term of imprisonment of three years or more under section 9) shall be liable.

(5) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, all offences punishable for a term of imprisonment of three years or more under section 9 shall be cognizable.

c) *Bail for offence punishable for a term of imprisonment of three years or more under section 9 not to be granted without hearing public prosecutor (Section 13A)*

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, no person

Accused of an offence punishable for a term of imprisonment of three years or more under section 9 shall be released on bail or on his own bond unless –

(i) the public prosecutor has been given an opportunity to oppose the application for such release; and

(ii) where the public prosecutor opposes the application, the Magistrate is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail:

Provided that a person who is under the age of eighteen years or is a woman or is sick or infirm, may be released on bail if the Magistrate so directs.

(2) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, no police officer shall, save as otherwise provided under this Act, investigate into an offence under this Act unless specifically authorised by the Central Government by a general or special order, and subject to such conditions as may be specified in the order.

d) *Searches and arrests how to be made (Section 18)*

All searches under this Act or the rules made there under and all arrests under this Act shall, save as otherwise provided under this Act, be carried out in accordance with the provisions of the Code of Criminal Procedure, 1973, relating respectively to searches and arrests under that Code.

C. CENVAT CREDIT RULES, 2004

(1) Amendments in Definitions

(a) Capital goods means:

(A) the following goods, namely:

(i) all goods falling under Chapter 82, Chapter 84, Chapter 85, Chapter 90, heading No. 68.04 and sub-heading No. 6805.10 of the First Schedule to the Excise Tariff Act;

(ii) pollution control equipment;

(iii) components, spares and accessories of the goods specified at (i) and (ii) above;

(iv) moulds and dies, jigs and fixtures;

(v) refractories and refractory materials;

- (vi) tubes and pipes and fittings thereof; and
- (vii) storage tank; and
- (viii) motor vehicles other than those falling under tariff headings 8702, 8703, 8704, 8711 and their chassis, but including dumpers and tippers used –
 - (1) in the factory of the manufacturer of the final products, but does not include any equipment or appliance used in an office; or
 - (1A) outside the factory of the manufacturer of the final products for generation of electricity for captive use within the factory or
 - (2) for providing output service;
- (B) motor vehicle designed for transportation of goods including their chassis registered in the name of the service provider, when used for-
 - (i) providing an output service of renting of such motor vehicle; or
 - (ii) transportation of inputs and capital goods used for providing an output service; or
 - (iii) providing an output service of courier agency”
- (C) motor vehicle designed to carry passengers including their chassis, registered in the name of the provider of service, when used for providing output service of-
 - (i) transportation of passengers; or
 - (ii) renting of such motor vehicle; or
 - (iii) imparting motor driving skills”
- (D) components, spares and accessories of motor vehicles which are capital goods for the assessee;

(b) The definition of “Exempted Services”

Exempted service means a-

- (1) taxable service which is exempt from the whole of the service tax leviable thereon; or
- (2) service, on which no service tax is leviable under section 66B of the Finance Act; or
- (3) taxable service whose part of value is exempted on the condition that no credit of inputs and input services, used for providing such taxable service, shall be taken; but shall not include a service which is exported in terms of rule 6A of the Service Tax Rules, 1994.’

(c) Definition of Input

For sub clause (B), the following sub-clause shall be substituted, namely:-

Any goods used for -

- (a) construction or execution of works contract of a building or a civil structure or a part thereof; or
- (b) laying of foundation or making of structures for support of capital goods, except for the provision of service portion in the execution of a works contract or construction service as listed under clause (b) of section 66E of the Act;

(d) Definition of Input Services

Input Service means any service,

- used by a provider of output service for providing an output service; or

- used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products upto the place of removal,
and includes services used in relation to setting up, modernization, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs, activities relating to business, such as accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, and security, inward transportation of inputs or capital goods and outward transportation upto the place of removal but excludes
- (A) service portion in the execution of a works contract and construction services including service listed under clause (b) of section 66E of the Finance Act (hereinafter referred as specified services) in so far as they are used for -
 - (a) construction or execution of works thereof; or contract of a building or a civil structure or a part
 - (b) laying of foundation or making of structures for support of capital goods, except for the provision of one or more of the specified services; or;
- (B) services provided by way of renting of a motor vehicle in so far as they relate to a motor vehicle which is not a capital goods or
- (BA) service of a general insurance business, servicing, repair and maintenance, in so far as they relate to a motor vehicle which is not a capital goods, except when used by -
 - (a) a manufacturer of a motor vehicle in respect of a motor vehicle manufactures by such person; or
 - (b) an insurance company in respect of a motor vehicle insured or reinsured by such person or.
- (C) such as those provided in relation to outdoor catering, beauty treatment, health and fitness centre, life insurance, health insurance and travel benefits extended to employees on vacation such as Leave or Home Travel Concession, when such services are used primarily for personal or consumption of any employee.

(e) Definition of Output Services

Output service means any service provided by a provider of service located in the taxable territory but shall not include a service,-

- (1) specified in section 66D of the Finance Act; or
- (2) where the whole of service tax is liable to be paid by the recipient of service.

2. Cenvat Credit (Rule 3)

(a) Rule 3(1): Duties/taxes in respect of which Cenvat credit is allowed:

- (i) for the words, “provider of taxable service”, wherever they occur, the word “provider of output service” shall be substituted-
- (ii) The Cenvat credit of Basic Excise duty is allowed. However, the cenvat credit of such duty shall not be allowed to be taken when paid on any goods in respect of which the benefit of exemption

under Notification No.1/2011CE dated 1st March 2011 is availed; or specified in serial numbers 67 and 128 in respect of which the benefit of an exemption under Notification No.12/2012 dated 17th March 2012 is availed;.

(iii)

<i>For Each Quarter</i>	<i>At the rate</i>
First year	10%
Second year	8%
Third year	5%
Fourth and fifth year	1%

The Cenvat credit shall also be available in respect of Service tax leviable under section 66B of the Finance Act.

(b) Rule 3(4): Application and Quantum of Cenvat credit available

An explanation has been inserted by which the Cenvat credit can not be used for payment of service tax in respect of services where the person liable to pay tax is the services recipient.

(c) Rule 3(5): Reversal of Cenvat Credit where Input and capital goods are removed

The provisions relating to reversal of Cenvat credit on the capital goods after used in the factory are deleted and substituted for/ under Rule 3(5A).

(d) Rule 3(5A): Prior to amendment, this rule specify for reversal of Cenvat credit taken on capital goods which are cleared as waste or scrap:

But now, if the capital goods, on which CENVAT credit has been taken, are removed after being used, whether as capital goods or as scrap or waste, the manufacturer or provider of output services shall pay an amount equal to the CENVAT Credit taken on the said capital goods reduced by the percentage points calculated by straight line method as specified below for each quarter of a year or part thereof from the date of taking the CEVAT Credit, namely:-

(a) for computers and computer peripherals :

(b) for capital goods, other than computers and computer peripherals @ 2.5% for each quarter.

Provided that if the amount so calculated is less than the amount equal to the duty leviable on transaction value, the amount to be paid shall be equal to the duty leviable on transaction value.

3. Conditions for Allowing CENVAT Credit (Rule 4)

(a) Rule 4(1): the following proviso has been inserted ;

Provided further that the CENVAT credit in respect of inputs may be taken by the provider of output service when the inputs are delivered to such provider, subject to maintenance of documentary evidence of delivery and location of the inputs.¶

(b) Rule 4(2): the following proviso has been inserted:

Provided also that the CENVAT credit in respect of capital goods may be taken by the provider of output service when the capital goods are delivered to such provider, subject to maintenance of documentary evidence of delivery and location of the capital goods.

4. Refund of Cenvat Credit (Rule 5):

The rule 5 shall be substituted with the following amended Rule:

- (1) A manufacturer who clears a final product or an intermediate product for export without payment of duty under bond or letter of undertaking, or a service provider who provides an output service which is exported without payment of service tax, shall be allowed refund of CENVAT credit as determined by the following formula subject to procedure, safeguards, conditions and limitations, as may be specified by the Board by notification in the Official Gazette:

$$\text{Refund amount} = \frac{\text{Export turnover of goods} + \text{export of goods}}{\text{Total turnover}} \times \text{Net Cenvat credit}$$

Where,-

(A) Refund amount means the maximum refund that is admissible;

(B) Net CENVAT credit means total CENVAT credit availed on inputs and input services by the manufacturer or the output service provider reduced by the amount reversed in terms of sub-rule (5C) of rule 3, during the relevant period;

(C) Export turnover of goods means the value of final products and intermediate products cleared during the relevant period and exported without payment of Central Excise duty under bond or letter of undertaking;

(D) Export turnover of services means the value of the export service calculated in the following manner, namely:-

Export turnover of services = payments received during the relevant period for export services + export services whose provision has been completed for which payment had been received in advance in any period prior to the relevant period – advances received for export services for which the provision of service has not been completed during the relevant period;

(E) Total turnover means sum total of the value of -

(a) all excisable goods cleared during the relevant period including exempted goods, dutiable goods and excisable goods exported;

(b) export turnover of services determined in terms of clause (D) of sub-rule (1) above and the value of all other services, during the relevant period; and

(c) all inputs removed as such under sub-rule (5) of rule 3 against an invoice, during the period for which the claim is filed.

- (2) This rule shall apply to exports made on or after the 1st April, 2012:

Provided that the refund may be claimed under this rule, as existing, prior to the commencement of the CENVAT Credit (Third Amendment) Rules, 2012, within a period of one year from such commencement:

Provided further that no refund of credit shall be allowed if the manufacturer or provider of output service avails of drawback allowed under the Customs and Central Excise Duties and Service Tax Drawback Rules, 1995, or claims rebate of duty under the Central Excise

Rules, 2002, in respect of such duty; or claims rebate of service tax under the Export of Services Rules, 2005 in respect of such tax.

Explanation 1 - For the purposes of this rule,-

- (1) export service means a service which is provided as per the provisions of Export of Services Rules, 2005, whether the payment is received or not;
- (2) relevant period means the period for which the claim is filed.

Explanation 2 -For the purposes of this rule, the value of services, shall be determined in the same manner as the value for the purposes of sub-rule (3) and (3A) of rule 6 is determined.

5. Refund of CENVAT credit to service providers providing services taxed on reverse charge basis: (Rule 5B)

After rule 5A, the above rule shall be inserted, namely:-

A provider of service providing services notified under sub-section (2) of section 68 of the Finance Act and being unable to utilise the CENVAT credit availed on inputs and input services for payment of service tax on such output services, shall be allowed refund of such unutilised CENVAT credit subject to procedure, safeguards, conditions and limitations, as may be specified by the Board by notification in the Official Gazette.

6. Obligation of a manufacturer or producer of final products and a provider of Output services (Rule 6)

- (i) in the marginal heading, for the words “ provider of taxable service” the words, “ provider of output service” shall be substituted;
- (ii) in sub-rule (3), after the second proviso, the following proviso shall be inserted, namely:-
“Provided that in case of transportation of goods or passengers by rail the amount required to be paid under clause (i) shall be an amount equal to 2 per cent of value of the exempted services.”
- (iii) in sub-rule (3A), in clauses (a), (b), (c) and (h), for the words “taxable” wherever they occur, the words, “output” shall be substituted;
- (iv) in sub-rule 3(B), for the words, brackets, letters and figures “providing taxable service specified in sub-clause (zm) of clause (105) of section 65 of the Finance Act” the words, “engaged in providing services by way of extending deposits, loans or advances” shall be substituted;
- (v) in sub-rule 3(D), for the Explanation I, the following Explanation shall be substituted, namely:-

“Explanation I. - “Value” for the purpose of sub-rules (3) and (3A),—

- (a) shall have the same meaning as assigned to it under section 67 of the Finance Act, read with rules made thereunder or, as the case may be, the value determined under section 3, 4 or 4A of the Excise Act, read with rules made thereunder;
- (b) in the case of a taxable service, when the option available under sub-rules (7),(7A),(7B) or (7C) of rule 6 of the Service Tax Rules, 1994, has been availed, shall be the value on which the rate of service tax under section 66B of the Finance Act, read with an exemption notification, if any, relating to such rate, when applied for

calculation of service tax results in the same amount of tax as calculated under the option availed; or

- (c) in case of trading, shall be the difference between the sale price and the cost of goods sold (determined as per the generally accepted accounting principles without including the expenses incurred towards their purchase) or ten per cent of the cost of goods sold, whichever is more.
- (d) in case of trading of securities, shall be the difference between the sale price and the purchase price of the securities traded or one per cent of the purchase price of the securities traded, whichever is more.
- (e) shall not include the value of services by way of extending deposits, loans or advances in so far as the consideration is represented by way of interest or discount;”

(vi) after sub-rule (6A), the following sub-rules (7) & (8) shall be inserted, namely:-

The provisions of sub-rules (1), (2), (3) and (4) shall not be applicable in case the taxable services are provided, without payment of service tax, to a unit in a Special Economic Zone or to a developer of a Special Economic Zone for their authorised operations or when a service is exported,

For the purpose of this rule, a service provided or agreed to be provided shall not be an exempted service when:-

- (a) the service satisfies the conditions specified under rule 6A of the Service Tax Rules, 1994 and the payment for the service is to be received in convertible foreign currency; and
- (b) such payment has not been received for a period of six months or such extended period as maybe allowed from time-to-time by the Reserve Bank of India, from the date of provision.”

7. Manner of distribution of credit by input service distributor:

The input service distributor may distribute the CENVAT credit in respect of the service tax paid on the input service to its manufacturing units or units providing output service, subject to the following conditions, namely: –

- (a) the credit distributed against a document referred to in rule 9 does not exceed the amount of service tax paid thereon;
- (b) credit of service tax attributable to service used in a unit exclusively engaged in manufacture of exempted goods or providing of exempted services shall not be distributed;
- (c) credit of service tax attributable to service used wholly in a unit shall be distributed only to that unit; and

(d) credit of service tax attributable to service used in more than one unit shall be distributed prorata on the basis of the turnover of the concerned unit to the sum total of the turnover of all the units to which the service relates.

Explanation 1.- For the purposes of this rule, —unitll includes the premises of a provider of output service and the premises of a manufacturer including the factory, whether registered or otherwise.

Explanation 2.- For the purposes of this rule, the total turnover shall be determined in the same manner as determined under rule 5.

D. CUSTOM DUTY (CUSTOMS ACT, 1962)

1. Recovery of duties in certain cases (Section 28AAA):

(1) Where an instrument issued to a person has been obtained by him by means of —

- (a) collusion; or
- (b) wilful misstatement; or
- (c) suppression of facts,

for the purposes of this Act or the Foreign Trade (Development and Regulation) Act, 1992, by such person or his agent or employee and such instrument is utilised under the provisions of this Act or the rules made or notifications issued thereunder, by a person other than the person to whom the instrument was issued, the duty relatable to such utilisation of instrument shall be deemed never to have been exempted or debited and such duty shall be recovered from the person to whom the said instrument was issued:

Provided that the action relating to recovery of duty under this section against the person to whom the instrument was issued shall be without prejudice to an action against the importer under section 28.

Explanation 1.— For the purposes of this sub-section, "instrument" means any scrip or authorisation or licence or certificate or such other document, by whatever name called, issued under the Foreign Trade (Development and Regulation) Act, 1992, with respect to a reward or incentive scheme or duty exemption scheme or duty remission scheme or such other scheme bestowing financial or fiscal benefits, which may be utilised under the provisions of this Act or the rules made or notifications issued thereunder.

Explanation 2.—The provisions of this sub-section shall apply to any utilisation of instrument so obtained by the person referred to in this sub-section on or after the date on which the Finance Bill, 2012 receives the assent of the President, whether or not such instrument is issued to him prior to the date of the assent.

(2) Where the duty becomes recoverable in accordance with the provisions of sub-section (1), the person from whom such duty is to be recovered, shall, in addition to such duty, be liable to pay interest at the rate fixed by the Central Government under section 28 AA and the amount of such interest shall be calculated for the period beginning from the date of utilisation of the instrument till the date of recovery of such duty.

(3) For the purposes of recovery under sub-section (2), the proper officer shall serve notice on the person to whom the instrument was issued requiring him to show cause, within a period of thirty days from the date of receipt of the notice, as to why the amount specified in the notice (excluding the interest) should not be recovered from him, and after giving that person an opportunity of being heard, and after considering the representation, if any, made by such person, determine the amount of duty or interest or both to be recovered from such person, not being in excess of the amount specified in the notice, and pass order to recover the amount of duty or interest or both and the person to whom the instrument was issued shall repay the amount so specified in the notice within a period of thirty days from the date of receipt of the said order, along with the interest due on such amount, whether or not the amount of interest is specified separately.

(4) Where an order determining the duty has been passed under section 28, no order to recover that duty shall be passed under this section.

(5) Where the person referred to in sub-section (3) fails to repay the amount within the period of thirty days specified therein, it shall be recovered in the manner laid down in sub-section (1) of section 142.

2. Bail not to be granted in certain cases without hearing public prosecutor Section 104A

A new section 104A has been inserted as follows:

Notwithstanding anything contained in the Code of Criminal Procedure, 1973, no person accused of an offence punishable for a term of imprisonment of three years or more under section 135 shall be released on bail or on his own bond unless—

(i) The public prosecutor has been given an opportunity to oppose the application for such release; and

(ii) where the public prosecutor opposes the application, the Magistrate is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail: Provided that a person who is under the age of eighteen years or is a woman or is sick or infirm, may be released on bail if the Magistrate so directs.

(2) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, no police officer shall, save as otherwise provided under this Act, investigate into an offence under this Act unless specifically authorized by the Central Government by a general or special order, and subject to such conditions as may be specified in the order."

3. Offences to be tried summarily in certain cases

Notwithstanding anything contained in the Code of Criminal Procedure, 1973, an offence under this Chapter (other than the offence punishable for a term of imprisonment of three years or more under section 135) may be tried summarily by a Magistrate." (Section 138)

4. Special provisions exempting additional duty of customs on import of foreign-going vessels into India

For the period starting 17th March, 2012, full exemption from additional duty has been provided to “foreign-going vessels” imported into India but on the fulfillment of certain conditions viz that a Bill of entry shall be filed for the vessel when it converts into a “coastal” vessel and additional duty would be payable on the following basis:

- (i) if the licence obtained for coastal trade at the time of conversion is a general one i.e. without specified period of validity, duty would be payable as if there were no exemption;
- (ii) if the licence for coastal trade is for a specified period , and

- (a) import is by the owner of the vessel or his agent, then 1/120th part of the aggregate duty would be payable on the vessel for each month (or part thereof) of stay in India as a coastal vessel; or
- (b) if the import is against a lease agreement/ contract, then duty shall be payable on the lease value of the contract.

Illustration I: If a vessel imported by a Shipping Line ABC Company as a foreign-going vessel converts into a coastal vessel for 6 months and the value of the vessel declared by the importer is Rs. 2 crore, the duty payable would be calculated in the following manner:

$$(2 \times 0.0618) \times 6/120 = ₹ 61,800, \text{ where the rate of duty is } 6.18\%$$

Illustration II: If a vessel is imported by an Indian corporate on lease basis for use after import on payment of a total rental of Rs. 50 lakh for a period of 3 months, the duty payable would be calculated in the following manner:

$$50 \times 0.618 = ₹ 3.09 \text{ lakh, where the rate of duty is } 6.18\%$$
