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SNK Newsletter

BUDGET 2009 - DATES TO NOTE

Type of Budget	Date
General Economic Survey	2nd July, 2009
Railway Budget	3rd July, 2009
Union Budget 2009-10	6th July, 2009

DIRECT TAXES

Judicial Pronouncements

CIT v. Raj Kumar (2009) 23 DTR (Del) 304

Applicability of provisions of Deemed dividend u/s. 2(22)(e) toTrade advances

Orders passed by the CIT(A) and the Tribunal clearly establish that the money received by the assessee from CEI Ltd. was in the nature of a trade advance. Counsel for the Revenue has not been able to demonstrate that the concurrent findings of fact arrived at both by the CIT(A) and the Tribunal are in any manner perverse. In view of the object of s. 2(22)(e), the word 'advance' has to be read in conjunction with the word 'loan'. Usually a loan involves positive act of lending coupled with acceptance of money as loan by the other side and there is an obligation of repayment. On the other hand, the term 'advance' in its widest meaning may or may not include lending. Word 'advance' if not found in the company of or in conjunction with the word 'loan' may or may not include the obligation of repayment. Applying the rule of 'noscitur a sociis', the word 'advance' which appears in the company of the word 'loan' could only mean such advance which carries with it an obligation of repayment. Thus, trade advance which is in the nature of money transacted to give effect to a commercial transaction does not fall within the ambit of the provisions of s. 2(22)(e).

CIT v. Foramer France (ITA NO. 49 OF 2005)(Uttarakhand HC)

Allowability of expenditure incurred by a French company in India during period of lull in its business in India

Merely for the reason that the non-resident assessee sent some letters and made some offer from Dubai to ONGC

does not amount to doing business in India; though `lull in business' does not mean that the assessee has ceased its business; but, when the assessee has neither permanent office, nor any other office in India, nor any contract was in execution during the relevant period, it cannot be said that the assessee was in business in India and as such, expenditure shown by it in India are not liable to be allowed, or set off.

Asstt. CIT v. Suman Construction (2009) 27 (II) ITCL 329 (Pune 'A'-Trib)

Remuneration to partner should be Authorised by Partnership deed but quantification not necessary

The assessing officer had noticed that the assessee had claimed salary to partners of Rs. 2,20,000. However, in his opinion as per the partnership deed filed along with the return in the past assessment year, there was no specification

of this salary payable to the partners. According to assessing officer, there was neither the quantification of the salary payable to the partners nor it was prescribed the manner in which such quantification would be done. By referring CBDT Circular No. 739, dated 25-3-1996 the assessing officer said that the provisions of payment of salary have been made clear and since there was no specified quantification therefore, assessee was not entitled for claim of deduction under section 40(b) of the Act regarding salary to partners.

It was held that by Finance Act, 1992 with effect from 1-4-1993 an insertion was made in section 40 vide clause (b) which prescribes that in the case of a firm assessable as such any payment of remuneration to any partners who is a working partner, if not authorized by the terms of the partnership deed shall not be entitled for deduction in computing the income chargeable under the head "Profits and gains of business or profession". This section also contains sub-clause (v) which prescribes that any payment of remuneration to any partner who is a working partner who is authorized by and is in accordance with the terms of the partnership deed, then the amount of such payment of partnership should not exceed the aggregate amount as prescribed in this sub-clause. Meaning thereby that section 40, clause (b), sub-clause (ii) and another sub-clause (v) prescribes that a deduction in the case of a firm can be allowed in respect of salary or remuneration to working partners if it is duly authorized by the terms of a partnership deed, however, to the extent of prescribed limit as has also been prescribed in the statute. Therefore, on plain reading of this section, it is understood that the section does not make it mandatory to quantify the amount of salary in one of the clauses of the partnership deed because of the main reason that the monetary limit or ceiling is otherwise prescribed in the statute itself.

The statute has used the term "authorize" and not used the term "quantify". On the other hand, the AO had made the disallowance mainly because of the reason that the amount of salary was not quantified in the clause of the partnership deed and in support he had relied upon CBDT Circular No. 739, dated 25-3-1996. Since the statute has used the term "authorize", therefore, the CBDT had no jurisdiction to substitute the term "authorize" by the term "quantify". While interpreting the clause of a statute there is no scope for importing into the statute some other words which are not there. Such an interpretation, if any, made by any of the authority would amount to an amendment in the statute which is a prerogative of the legislative body, i.e., Hon'ble Members of the Parliament. Even if there be a situation of casus omissus even then the defect can be cured only by a proper legislation and not by any interpretation. There appears no justification to deviate from the general principles of interpretation according to which the intention of the legislature is to be interpreted from the terms used or the words contained in a statute. It is not permissible to add words into a taxing provisions which are not there or exclude words which are there. So, the words contained in a provision must be given a natural meaning as commonly understood in legal parlance.

CIT v. National Institute of Aeronuautical Engg. Education Society (ITA No. 40 of 2006)(Uttarakhand HC)

Mere trade and commerce in education cannot be said to be a charitable purpose

Mere imparting education for primary purpose of earning profits cannot be said to be charitable activity as interpreted by the Supreme Court in MCD v. Children Book Trust [(1992) 3 SCC 390]

ACIT v. Hindustan Mint (ITAT 5 Member Special Bench) (ITA NO. 1537/DEL/07)

Sec. 80-IA relief has to be deducted before computing s. 80-HHC relief

In ACIT Vs Rogini Garments 108 ITD 49 the Special Bench at Chennai held that relief allowed u/s 80-IA had to be deducted from profits and gains of assessee's business on which relief u/s 80HHC of the Act is to be computed. Subsequently, the Madras High Court in SCM Creations 304 ITR 319 took a contrary view. The question whether Rogini Garments was impliedly overruled was referred to a five Member Special Bench which upheld the correctness of Rogini Garments and held:

(1) SCM Creations is not an authority on how s. 80-IA (9) is to be applied because the effect and

implementation of above provision was neither raised, nor examined nor decided by the Court. A decision is an authority for the proposition that it decides and not what can logically be deduced there from. A point not raised nor argued at the Bar cannot be said to be the ratio of the decision. Accordingly SCM Creation does not impinge upon the ratio of Rogini Garments.

(2) On merits, Rogini Garments was correctly decided and did not require reconsideration. The language of s. 80-IA (9)/80-IB (9A) was clear and unambiguous and was required to be given effect to. Deduction of profit and gains allowed u/s 80-IA/80-IB had to be deducted from profits and gains of assessee's business on which deduction u/s 80HHC had to be computed.

M/s Chicago Pneumatic Tool Company v. DDIT (2009-TIOL-330-ITAT-MUM)

Proviso to Sec 112 - long-term capital gains

Assessee, incorporated in the USA, transfers shares of Indian company to an Indian investment company. Deducts costs involved in the transfer like merchant banker fee and the cost of acquisition and claims application of 10% tax rate as per proviso to Sec 112. AO says proviso to Sec 112 is not applicable to non-resident and CIT (A) agrees with the AO.

Held that as per Second Proviso to Sec 48 where Long Term Capital Gain arises from transfer of shares or debentures of an Indian company to a non-resident, the benefit of indexed cost of acquisition and indexed cost of improvement cannot be allowed. But as per Proviso to Sec 112 where the tax payable in respect of transfer of a Long Term Capital asset being listed securities or units exceeds 10% of the amounts of capital gain then such excess shall be ignored.

The significance of the words 'before giving effect to the second proviso to Section 48' is manifested by the fact that the rate is to be determined by computing capital gain by adopting the cost of acquisition and cost of improvement or the indexed cost of acquisition and the cost of improvement as a case may be. Since, in the case of non-resident on transferring shares of an Indian company the second proviso to Section 48 is not applicable in as much as the benefit of indexation cannot be granted, the mandate of the proviso to Section 112 will simply be to the effect that the tax payable has to be computed and such tax in excess of 10% is to be ignored.

CIT v. N.R. Paper & Board Ltd. (2009) 24 DTR (Guj) 154

Search and seizure - Block assessment - Deduction under ss. 80-I and 80-IA

In view of amendment of s. 158BB by the Finance Act, 2007 retrospectively w.e.f. 1st July, 1995, Tribunal was justified in holding that assessee is eligible to deduction under ss. 80-I and 80-IA in respect of undisclosed income for the block period computed under s. 158BB. Questions whether the entire undisclosed income is relatable to the industrial undertaking, and the requirements of filing requisite audit report, may be raised at the time when the Tribunal adjusts its decision in accordance with the judgment of the Court.

Nirmal Fashions (P) Ltd. v. DCIT (2009) 23 DTR (Kol)(Trib) 386

Search and seizure - Scope and ambit of Presumption under s. 292C

Presumption under s. 292C is rebuttable. It cannot be applied mechanically ignoring the facts of the case and surrounding circumstances. Papers found during search from the bedroom of A, who was not doing any business but was a director of NFPL and his wife was a partner in NC, containing entries relating to NFPL and NC some of which tallied with books of account of NFPL and NC. 'S' a partner of NC in his statement under s. 132(4) also deposing that papers belonged to NFPL and NC. Such papers could be considered in relation to NFPL and NC notwithstanding the fact that same were seized from the residence of A.

Computation of undisclosed income for assessment u/s. 153A

AO presuming the papers seized during search from the bedroom of, A', director of NFPL and his wife being partner in NC, were the P&L ale and balance sheet of actual business carried on by NFPL and NC part of which is recorded in the books. Inconsistencies pointed out by counsel for the assessee not reconciled by Departmental Representative. In some of the years the closing stock in the assessee's books of account is higher than the closing stock in the seized

document of the relevant period. In the seized document, no opening stock was forthcoming without which profits could not be determined. There is no basis for presumption of AO that opening stock is already considered in the purchases. GP rate worked out by AO is 96 5 per cent which is impossible. No unrecorded stock or other asset was found during search either from the premises of A or NFPL or NC. No significant asset or ostensible expenditure outside the books was found- Additions made by the AO on the basis of loose papers found during search by making certain presumptions which are found to be inconsistent or contrary to other evidence on record cannot be upheld. Fact that 'S' partner of NC had admitted undisclosed income of Rs. 3 crores was of no avail as he declared the same on behalf of W group which has 10 assessees and AO had not made addition on the basis of statement of 'A' but on the basis of loose papers found during search.

Utkal Investments Ltd. v. ADIT (Int'l Taxation)(ITA NO. 2891/Mum/2005)

A resident can be treated as agent of non- resident if he receives income directly or indirectly from or through the person of India

Any person from or through whom the non-resident is in receipt of any income directly or indirectly can be treated as an agent of the non-resident; the sole requirement of section 163(1)(c) is that only the non-resident should receive income directly or indirectly from or through the person of India.

J.C. Bansal, Chief Engineer, Kanoria Sugar & General Mfg. Co. Ltd. v. TRO (2009) 122 TTJ (Ind) 872

TDS - Assessee in default - Tax duly paid by payee

Tax on the amount received under licence having been paid by the licensor payee and evidence of the same having been furnished before CIT(A), CIT (A) was justified in holding that tax could not be recovered once again from the assessee.

TDS u/s. 194-I - Composite licence agreement leasing out entire factory building along with plant and machinery etc.

Assessee obtaining on licence entire factory building along with plant and machinery and residential quarters against minimum guaranteed amount and rest depending on production. Assessee also entitled to sub-let the whole or part of the factory building or plant and machinery. The agreement in question is therefore, composite agreement. Details of gross block of fixed assets on 31st March, 2003 shows that the total gross value of land, building and plant and machinery was Rs. 9,35,08,298 out of which, the value of plant and machinery is Rs. 6,94,04,216. Thus, the value of land and building, furniture, fittings, including factory building was substantial. This is a case of creation of interest in rented property and falls within the definition of 'rent' prescribed in Expln (i) to s. 194-I. Fact that the words 'plant and machinery' have been included in the definition of rent in s. 194-I after the amendment w.e.f. 13th July, 2006 is of no avail to the assessee. This is so in view of Circular No. 715, dt. 8th Aug., 1995. Assessee is liable to deduct tax at source from payments made to licensor. Merely because the name of agreement is given as licence agreement is not enough to thwart the provisions of s. 194-I.

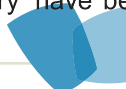
Interest under s. 201(1A) - Date upto which payable

As per s. 201(1A), the interest could be levied on the amount of such taxes from the date on which such tax was deductible to the date on which such tax is actually paid. Since the assessee filed all the relevant papers to show that taxes have been paid on time by recipient of rent therefore, interest under s. 201(1A) could not be charged. However, neither the AO nor the CIT(A) has given any finding as to when the taxes have been paid by recipient of rent therefore, it would be appropriate to restore the matter to the AO to verify the dates of payments before charging or calculating any interest in the matter.

Adarshveer P. Jain v. ACIT (MA Nos. 230 & 231/Mum/09)

Jurisdiction of Tribunal under section 254 of IT Act, 1961

The issues considered and decided on merit after due application of mind by the Tribunal do not constitute obvious, glaring, patent and self-evidence mistake of facts or law within the meaning of the provisions of section 254(2); the Tribunal is not competent to recall its previous order and re-write the same again and reverse the earlier decision taken on merit.



DCIT v. Indian Petrochemicals Corp. Ltd. (ITA No. 3936/Ahd./2002)

Imposition of penalty under section 271(1)(c) of IT Act, 1961 on account of disallowances

The issue about difference of interpretation cannot become subject matter of penalty when assessee has furnished all the details along with return and disallowance of a claim/proposition in the given facts and circumstances is not exigible under section 271(1)(c).

Sanjay S. Agarwal v. ACIT (ITA NO. 440/Agr./2005)

Validity of levy of penalty under section 271F of IT Act, 1961

Where the assessee had not been able to show, much less, prove, any reasonable cause(s) for not furnishing the return of income within the prescribed time i.e., by the end of the relevant assessment year, the levy of penalty for such default was not saved by section 273B; as such, the said default could only be considered as a conscious disregard of one's statutory obligations.

Judicial Pronouncements - International Taxation

Sri Ramachandra Educational And Health Trust (SREHT), In Re (2009) 24 DTR (AAR) 1

DTAA between India and USA - Fees for technical services vis-a-vis payment for teaching services

Applicant running medical institutions in India entered into an agreement with HMI, a medical institution in USA, for transfer of knowledge and experience in the field of medical sciences. However, the activity and payments due under the aforesaid agreement is not clear from the facts on record. It is not known whether the workshops and seminars conducted from time to time are connected to a particular course of study run by the medical college of the applicant and whether they are meant to benefit the students. These activities can be regarded as teaching as contemplated in para 5(c) of art. 12 only if there is participation of the faculty from HMI and some of the participants who benefit by it are pursuing medical courses in the applicant's institutions and the seminar/workshop is substantially connected with the course of studies. Tuition fee paid in respect of

scholars sent to pursue some courses is clearly covered by example 10 of the MOU to the DTAA and it falls under para 5(c) of art. 12 and hence excluded from the purview of 'fees for technical services'. Payment made for teleconferencing and e-learning would also qualify for exclusion under para 5 (c). If the fee paid includes consideration for intellectual property, if any, made available to the applicant, the same is not covered by art. 12.5(c). Since the applicant makes lumpsum payment for various services rendered by HMI, it cannot be said what amount relates to which particular service. Thus, it cannot be held that the applicant is not at all liable to deduct any tax at source in respect of the payments made to HMI. Applicant is advised to make an application to the AO in terms of s. 195(2) for determination of appropriate proportion of such payment which would be chargeable to tax and to deduct tax accordingly.

DDI v. Sun Chemicals BV (2009) 313 ITR (AT) 68 (Mumbai)

Benefit of DTAA not available in respect of sum payable for any "default or omission", but DTAA does not include default or omission with regard to determination of total income

Non-resident com-pany purchasing and selling shares with associated enterprises but disclosing arm's length price only for sale and not for purchase transactions. The main ground for the Assessing Officer denying the assessee the benefit of the DTAA was that the DTAA provides that "tax" for the benefit of the DTAA shall not include any amount which is payable in respect of any "default or omission in relation to the taxes to which the convention applies", and that the assessee made defaults firstly, by not disclosing the purchase transactions effected with associate concerns in Form No. 3CEB and secondly by not disclosing the arm's length price in respect of purchase transactions with associate enterprises which resulted in contravention of the provisions of section 92C of the Act. The "defaults or omissions" envisaged by article 3(d) are restricted to those related to tax and cannot be extended to defaults or omissions qua provisions relating to deter-mination of the total income of the assessee including determination of the arm's length price under Chapter X. The default or omission relating

to the provisions of sections 92 to 92F of the Act is not covered by the default or omission mentioned in article 3(d) of the Double Taxation Avoidance Agree-ment and therefore the denial of benefit of the Double Taxation Avoid-ance Agreement was not justified.

UCB India (P.) Ltd. v. ACIT (2009) 30 SOT 95 (MUM.)

Section 92C, read with section 92D, of the Income-tax Act, 1961 and rule 10D of the Income-tax Rules, 1962 - Transfer pricing - Computation of arm's length price

It was observed that

(i) Section 92C read with rule 10B(l)(e) deals with Transactional Net Margin Method (TNMM) and it re-fers to only net profit margin real-ized by an enterprise from an in-ternational transaction or a class of such transaction, but not opera-tional margins of enterprises as a whole.

(ii) Comparable Uncontrolled Price (CUP) method is most direct method for determining arm's length price and under this method, price at which controlled transac-tion is carried out is com-pared to price obtained in compa-rable uncontrolled transaction.

(iii) Arm's length price (ALP) cannot be determined on preponderance of probabilities or based on objec-tives sought to be achieved in an enactment or in a policy guideline of Government.

(iv) Documentation and other data have to be made available for comparability before an addition is made.

Assessee, an Indian company, was subsidiary of a Belgium based com-pany. It was engaged in business of manufacture and distribution of phar-maceuticals products in three main therapeutic segments of allergy and asthama, central nervous system and internal medicines. Assessee mar-keted its formulation in domestic mar-ket as well as in overseas markets such as Sri Lanka, Bangladesh and Nepal. It had entered into international transactions of import of raw material with its Associated Enterprise (AE). Main items of import were 'Piracetam' and 'Mesna' which are Active Pharma-ceutical Ingredient (API). Assessee adopted Transactional Net Margin Method for determination of arm's length price in connection with its in-ternational transaction related to im-port of said raw materials from its as-sociated enterprises. In order to apply transactional net margin method, as-sessee identified other companies engaged in similar business activity and thereafter compared its profit mar-gins with those of identified companies and drew a conclusion that its interna-tional transac-tions were at arm's length, as its margins were in excess of or comparable with such identified entities. Assessing Officer, however, referred matter to TPO who deter-mined arm's length price for import of active ingredients 'Piracetam' and 'Mesna' by applying CUP method as provided in rule 10B(l)(a).

It was held that since assessee while adopting TNMM method had com-pared its operating profits as a whole" with overall operating profits of other com-parable companies, without any adjustment, that would not satisfy re-quire-ments of evaluating an interna-tional transaction under TNMM, for purpose of arriving at arm's length price. However, CUP method adopted by TPO could also not be considered as most appropriate method because (i) TPO had not carried out any Func-tional, Asset and Risk (FAR) analysis on comparable companies supplying said goods; (ii) there was huge differ-ence in purchase price at which other companies purchased piracetam and mesna than that at which assessee purchased said products; and (iii) he had not examined comparability of companies supplying said products so as to bring out factors which would be helpful in determining comparability. In view of above facts, it could be said that CUP method adopted by TPO suffered from various deficiencies and infirmities and specifically lacked infor-mation and data on comparables. Un-der these circumstances, issue was to be remanded to file of TPO for deter-mination of arm's length price relating to transaction in question afresh.

Schefenacker Motherson Ltd v. ITO (ITA No.4459/DEL/07)

Differences in the assets utilized with tested party– Adjustment in TNMM

The Tribunal has held that cash profit on sales “CP/Sales” or cash profit on total cost excluding depreciation “CP/TCdep” can be adopted as an appro-priate profit level indicator (PLI) under Transactional Net Margin Method (TNMM), to adjust for material differ-ences in the assets utilized between tested party and comparable compa-nies and thereby enable better compa-rability analysis.

Circular No. 04/2009, Dated 29-6-2009

CBDT on Remittance to Non-Residents u/s. 195

1. Section 195 of the Income-tax Act, 1961 mandates deduction of income tax from payments made or credit given to non-residents at the rates in force. The Reserve Bank of India has also mandated that except in the case of certain personal remittances which have been specifically exempted, no remittance shall be made to a non-resident unless a no objection certificate has been obtained from the Income Tax Department. This was modified to allow such remittances without insisting on a no objection certificate from the Income Tax Department, if the person making the remittance furnishes an undertaking (addressed to the Assessing Officer) accompanied by a certificate from an Accountant in a specified format. The certificate and undertaking are to be submitted (in duplicate) to the Reserve Bank of India / authorised dealers who in turn are required to forward a copy to the Assessing Officer concerned. The purpose of the undertaking and the certificate is to collect taxes at the stage when the remittance is made as it may not be possible to recover the tax at a later stage from non-residents.

2. There has been a substantial increase in foreign remittances, making the manual handling and tracking of certificates difficult. To monitor and track transactions in a timely manner, section 195 was amended vide Finance Act, 2008 to allow CBDT to prescribe rules for electronic filing of the undertaking. The format of the undertaking (Form 15CA) which is to be filed electronically and the format of the certificate of the Accountant (Form 15CB) have been notified vide Rule 37BB of the Income-tax Rules, 1962.

3. The revised procedure for furnishing information regarding remittances being made to non-residents **w.e.f. 1st July, 2009** is as follows:-

   (i) The person making the payment (remitter) will obtain a certificate from an accountant (other than employee) in Form 15CB.

   (ii) The remitter will then access the website to electronically upload the remittance details to the Department in Form 15CA (undertaking). The information to be furnished in Form 15CA is to be filled using the information contained in Form 15CB (certificate).

   (ii) The remitter will then take a print out of this filled up Form 15CA (which will bear an acknowledgement number generated by the system) and sign it. Form 15CA (undertaking) can be signed by the person authorised to sign the return of income of the remitter or a person so authorised by him in writing.

   (iv) The duly signed Form 15CA (undertaking) and Form 15CB (certificate), will be submitted in duplicate to the Reserve Bank of India / authorized dealer. The Reserve Bank of India / authorized dealer will in turn forward a copy the certificate and undertaking to the Assessing Officer concerned.

   (v) A remitter who has obtained a certificate from the Assessing Officer regarding the rate at or amount on which the tax is to be deducted is not required to obtain a certificate from the Accountant in Form 15CB. However, he is required to furnish information in Form 15CA (undertaking) and submit it along with a copy of the certificate from the Assessing Officer as per the procedure mentioned from Sl.No.(i) to (iv) above.

4. The Directorate General of Income-tax (Systems) shall specify the procedures, formats and standards for running of the scheme as well as instructions for filling up Forms 15CA and 15CB. These forms shall be available for upload and printout at www.tin-nsdl.com.

5. The Reserve Bank of India is being requested to circulate the revised procedure among all authorised dealers.

Instruction No. 4/2009, dated 30-6-2009

Clarification regarding deduction under section 80-IB(10) in respect of undertakings developing building and housing projects

1. Under sub-section (10) of section 80-IB an undertaking developing and building housing projects is allowed a deduction of 100% of its profits derived from such projects if it commenced the project on or after 1.10.1998 and completes the construction within four years from the financial year in which the housing project is approved by the local authority.

2. Clarifications have been sought by various CCsIT on the issue whether the deduction u/s 80-IB(10) would be available on a year to year basis where an assessee is showing profit on partial completion or if it would be available only in the year of completion of the project u/s 80-IB(10).

3. The above issue has been considered by the Board and it is clarified as under:-

   (a) The deduction can be claimed on a year to year basis where the assessee is showing profit from partial completion of the project in every year.

   (b) In case it is late, found that the condition of completing the project within the specified time limit of 4 years as started in section 80-IB(10) has not been satisfied, the deduction granted to the assessee in the earlier years is should be withdrawn.

4. The above Instruction will override earlier clarififcation on this issue contained in Member(R)'s D.O. letter No. 58/Misc./2008/ CIT(IT&CT) dated 29.04.2008 and Member (IT)'s D.O. letter No. 279/Misc./46/ 08-ITJ dated 2.5.2008.

5. This may kindly be brought to the notice to the notice of the all Assessing Officers in your charge.

Press Release No. BSC/BY/GN-154/09 (New Delhi dated 30th June 2009)

New TDS Rules related to mentioning of Unique Transaction Number (UTN) in ITR for A.Y. 2009-10 kept in abeyance

The Central Board of Direct Taxes

have further decided that the Notification No. 31 of 2009 dated 25.3.2009 amending or substituting Rules 30, 31, 31A and 31AA of the Income Tax Rules, 1962 shall be kept in abeyance for the time being.

Taxpayers filing their income tax returns for assessment year (AY) 2009-10, or any other earlier AY, may continue to file their returns without mentioning the Unique Transaction Number (UTN) as required under the said Notification. The filing of such returns shall be treated as valid and in compliance to the requirements under section 139 of the Income Tax Act, 1961.

Further, the date from which the Notification No. 31 / 2009 shall become applicable on tax deducted at source (TDS) or tax collected at source (TCS) and deposited during the current financial year shall be notified by the Central Board of Direct Taxes subsequently.

All deductors / collectors of TDS / TCS may continue to deposit their TDS / TCS and file their quarterly TDS / TCS returns as per procedure existing prior to issuance of Notification No.31 / 2009 dated 25.3.2009.

INDIRECT TAXES

Judicial Pronouncements

Ahmednagar Merchants Co-operative Bank Ltd. v. CCE (Appeal No. ST/141/08 & E/7/4/2008)

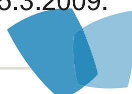
Availment of Cenvat Credit

Service tax credit cannot be taken when service tax has not been shown to have been paid by service provider; once it is found that Cenvat credit was irregularly availed by the assessee and by implication to that extent the service tax on the output service was short paid, it has to be recovered under Rule 14 of the Cenvat Credit Rules, 2004.

Maa Shard A Wine Traders v. UOI & Ors. 224 CTR (MP)(FB) 143

Taxable service - Packaging activity - Manufacture vis-a-vis bottling of liquor

Definition of 'packaging activity' in s. 65 (76b) of Finance Act, 1994 expressly excludes any packaging activity that amounts to manufacture within the meaning of cl. (f) of s. 2 of Central Excise Act, 1944. Inclusive definition of "manufacture" under s. 2(f) has a very wide connotation. Term manufacture" has to be construed in a natural and plain manner and would delude any process incidental or ancillary to the completion of a manufactured product. It includes all processes which amount to manufacture whether or not the final product is an excisable product. This is clarified in Circular F-No. MS 1/2006-CX.4, dt. 27th Oct., 2008. Further, the definition of "manufacture" in s. 2(14) of M.P. Excise Act, 1915 is also an inclusive definition which covers every process whether incidental or artificial by which an intoxicant is produced or prepared. It is mandatory for a distiller to supply country liquor in sealed



bottles and not otherwise. Therefore, packaging and bottling of liquor comes within the ambit and sweep of "manufacture" under cl. (f) of s. 2 of Central Excise Act, 1944 and is not exigible to service-tax in view of the exclusionary facet of the definition of 'packaging activity' in s. 65(76b) of Finance Act, 1994.

Interpretation of statutes - Contextual meaning of Definition clause

A definition is not to be read in isolation and has to be read in the context of phrase which it defines as the function of a definition is to give precision and certainty to the word or phrase which would otherwise be vague and uncertain.

Circulars / Notifications

Circular No. 113/7/2009-ST, dated 23-4-2009

Circular on Criteria and Manual for Scrutiny of Service Tax Return (ST-3)

The Working Group on Central Excise and Service Tax re-engineering, constituted by the Board has prepared a Return Scrutiny Manual for Service Tax (RSMST). The said manual has been approved by the Board.

2. The self-assessment facility requires a strong compliance verification system which in turn necessitates an effective return scrutiny mechanism. The RSMST proposes to bifurcate the scrutiny into two parts, preliminary scrutiny and detailed scrutiny. While the preliminary scrutiny would cover all the returns and could be done even online, detailed scrutiny would cover selected returns, identified on the basis of risk parameters, developed from the information furnished in the returns submitted by the taxpayers.

3. The preliminary scrutiny has been designed to check completeness of the information provided, timeliness, arithmetic accuracy etc. The detailed scrutiny will ensure correctness of classification, exemption availed, valuation, availment of CENVAT credit etc.

4. At the outset it is important for the field formation to understand the difference between audit and scrutiny of return. The role of the officer carrying out scrutiny of return would be limited to validating the correctness of the assessment made in the return filed by the taxpayer. The result of such validation should be communicated to audit or anti-evasion section as required for taking further action. The salient features of the manual are that it prescribes guidelines for,-

- Conducting preliminary scrutiny of returns including details of checks to be conducted and action to be taken and a format to record the findings.
- Selection of returns for detailed scrutiny. It contains details of risk parameters alongwith check list for analysis of the same.
- Seeking information from the taxpayers after the returns are selected for detailed scrutiny.
- Conducting detailed scrutiny of returns and an observation sheet for recording the findings of such scrutiny.
- Action to be taken after on the findings of detailed scrutiny of returns.

4.1 The manual also contains a chapter on automated scrutiny of return under the ACES project. However, till the time automated scrutiny module is made operational, field formations should resort to manual scrutiny as per the instructions contained in the RSMST. Since manually it would not be possible to carry out the scrutiny of all the returns filed, the existing instructions (as mentioned below) regarding the number of returns to be scrutinized during the financial year would continue; for the time being, till ACES module becomes operational, -

(a) The first half yearly returns filed in the financial year by all taxpayers making tax-payment (cash+credit) over Rs. 50 lakh (either during the previous financial year or during the current year must be scrutinized.

(b) 50% of the first half yearly returns filed in the financial year by all taxpayers making tax-payment (cash+credit) between Rs. 25 lakh to Rs. 50 lakh (either during the previous financial year or during the current year must be scrutinized.

(c) After completing the scrutiny of the first two categories, 5% of the balance returns should be scrutinized, depending upon the time and manpower availment.

5. All existing instructions regarding scrutiny of returns that are contrary to those mentioned in this circular stand withdrawn.

6. The contents of this circular may be suitably brought to the notice of the field formation. In case any difficulty is faced in implementing these instructions, the same may be brought to the notice of the undersigned.

7. Receipt of this Circular may please be acknowledged.

FEMA/RBI

RBI/2008-09/494/DNBS.PD/ CC.No. 142 / 03.05.002 /2008-09, dtd. June 9, 2009

NBFCs - Treatment of Deferred Tax Assets/Deferred Tax Liabilities for Computation of Capital

Accounting for taxes on income- Accounting Standard 22- Treatment of deferred tax assets (DTA) and deferred tax liabilities (DTL) for computation of capital

NBFCs were advised vide DNBS (PD) C.C. No. 124/ 03.05.002/2008-09 dated July 31, 2008 that in terms of Accounting Standard 22, the tax effects of timing differences are included in the tax expense in the statement of profit and loss as deferred tax assets (DTA) (subject to the consideration of prudence) or as deferred tax liabilities (DTL) in the balance sheet.

Further that the balance in DTL account will not be eligible for inclusion in Tier I or Tier II capital for capital adequacy purpose and that DTA being an intangible asset, should be deducted from Tier I Capital.

2. In this connection it is further clarified that

a) DTL created by debit to opening balance of Revenue Reserves or to Profit and Loss Account for the current year should be included under 'others' of "Other Liabilities and Provisions."

b) DTA created by credit to opening balance of Revenue Reserves or to Profit and Loss account for the current year should be included under item 'others' of "Other Assets."

c) Intangible assets and losses in the current period and those brought forward from previous periods should be deducted from Tier I capital.

d) DTA computed as under should be deducted from Tier I capital:

(i) DTA associated with accumulated losses; and

(ii) The DTA (excluding DTA associated with accumulated losses) net of DTL. Where the DTL is in excess of the DTA (excluding DTA associated with accumulated losses), the excess shall neither be adjusted against item (i) nor added to Tier I capital."

3. NBFCs shall comply with all instructions as above and also contained in the circular dated July 31, 2008 in this regard meticulously.

A.P. (DIR Series) Circular No.70 dtd. June 30, 2009

Export of Goods and Software – Realisation and Repatriation of export Proceeds – Liberalisation

Attention of Authorised Dealer Category-I (AD Category-I) banks is invited to A.P.(DIR Series) Circular No.50 dated June 5, 2008, enhancing the period of realisation and repatriation to India of the amount representing the full export value of goods or software exported, from six months to twelve months from the date of export, subject to review after one year.

2. The issue has since been reviewed and it has been decided in consultation with Government of India to extend the above relaxation for a further period of one year i.e. up to June 30, 2010, subject to review.

3. The provisions in regard to period of realisation and repatriation to India of the full export value of goods or software exported by a unit situated in Special Economic Zone (SEZ) as well as exports made to warehouses established outside India remains unchanged.

4. AD Category - I banks may bring the contents of this circular to the notice of their constituents and customers concerned.

5. The Directions contained in this circular have been issued under sections 10(4) and 11(1) of the Foreign Exchange Management Act (FEMA), 1999 (42 of 1999) and are without prejudice to permissions / approvals, if any, required under any other law

A.P. (DIR Series) Circular No.71 dtd. June 30, 2009

External Commercial Borrowings (ECB) Policy

Attention of Authorized Dealer Category - I (AD Category - I) banks is invited to the A.P. (DIR Series) Circular No. 46 dated January 2, 2009 relating to External Commercial Borrowings (ECB).

2. On a review, it has been decided to modify some aspects of the ECB policy as indicated below:

(i) ECB for Integrated Township

As per the extant policy, corporates, engaged in the development of integrated township, as defined in Press Note 3 (2002 Series) dated January 04, 2002, issued by DIPP, Ministry of

Commerce & Industry, Government of India are permitted to avail of ECB, under the Approval route, until June 2009. On a review of the prevailing conditions, it has been decided to extend the permission up to December 31, 2009, under the Approval route. All other terms and conditions, stipulated in the A.P. (DIR Series) circular referred to above, remain unchanged.

(ii) ECB for NBFC sector

As per the current ECB norms, Non-Banking Finance Companies (NBFCs), which are exclusively involved in financing of the infrastructure sector, are permitted to avail of ECBs from multilateral / regional financial institutions and Government owned development financial institutions for on-lending to the borrowers in the infrastructure sector under the Approval route, subject, inter-alia, to the condition that the direct lending portfolio of these lenders vis-à-vis their total ECB lending to NBFCs, at any point of time, should not be less than 3:1. It has now been decided to dispense with this condition with effect from July 1, 2009. The proposals will, however, continue to be examined by the Reserve Bank under the Approval route, as hitherto.

(iii) ECB for Development of Special Economic Zone

As per the extant guidelines, ECB is permissible for the Infrastructure sector, which is defined as (i) power, (ii) telecommunication, (iii) railways, (iv) road including bridges, (v) sea port and airport, (vi) industrial parks, (vii) urban infrastructure (water supply, sanitation and sewage projects) and (viii) mining, refining and exploration. Further, units in the Special Economic Zone (SEZ) are also permitted to access ECBs for their own requirements. However, ECB is not permissible for the development of SEZ. It has now been decided to allow SEZ developers also to avail of ECB under the Approval route for providing infrastructure facilities, as defined in the ECB policy, within the SEZ. However, ECB shall not be permissible for development of integrated township and commercial real estate within the SEZ.

(iv) Corporates under Investigation

Currently, the ECB policy is not explicit about accessing of ECB by the corporates, which have violated the extant ECB policy and are under investigation by the Reserve Bank and / or Directorate of Enforcement. It is clarified that corporates, which have violated the extant ECB policy and are under investigation by Reserve Bank and / or by Directorate of Enforcement, will not be allowed to access the Automatic route for ECB. Any request by such corporates for ECB will be examined under the Approval route.

3. The modifications to the ECB guidelines will come into force with immediate effect. All other aspects of the ECB policy, such as USD 500 million limit per company per financial year under the Automatic route, eligible borrower, recognised lender, end-use, all-in-cost ceiling, average maturity period, prepayment, refinancing of existing ECB and reporting arrangements remain unchanged.

4. Necessary amendments to the Notification No.FEMA.3/2000-RB dated May 3, 2000, viz. Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations, 2000 are being issued separately.

5. AD Category - I banks may bring the contents of this circular to the notice of their constituents and customers concerned.

6. The Directions contained in this circular have been issued under sections 10(4) and 11(1) of the Foreign Exchange Management Act (FEMA), 1999 (42 of 1999) and are without prejudice to permissions / approvals, if any, required under any other law.

Due Dates of key compliances pertaining to the month of July 2009:

Date	Compliance
5th July	*Payment of Service Tax & Excise duty for June*
6th July	*Payment of Excise duty paid electronically through internet banking*
7th July	*TDS/TCS Payment for June*
10th July	*Excise Return ER1 / ER2 /ER6*
15th July	*PF Contribution for June, Excise payment by SSI*
15th July	*TDS/TCS return of first quarter*
21st July	*ESIC Payment for June*
31st July	*Return of income for A.Y. 2009-10 for assessees whose accounts are not required to be audited.*

The information contained in this newsletter is of a general nature and it is not intended to address specific facts, merits and circumstances of any individual or entity. We have tried to provide accurate and timely information in a condensed form however, no one should act upon the information presented herein, before seeking detailed professional advice and thorough examination of specific facts and merits of the case while formulating business decisions. This newsletter is prepared exclusively for the information of clients, staff, professional colleagues and friends of SNK.