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SNK Newsletter

DIRECT TAXES

Judicial pronouncements

CIT v. Common Effluent Treatment Plant (Thane Belapur) Association [2010] 5 taxmann 110 (Bom.)

Doctrine of Mutuality: Fact that an association satisfies norm of mutuality in respect of receipts of contributions from its members does not necessarily lead to conclusion that every activity of that association satisfies test of mutuality

An association may engage in activities which can be described as mutual and in other activities which are not mutual; in such a case, the principle of mutuality has to be confined to transactions with members possessing the essential character of mutuality; the two activities can in appropriate cases be separated and the profits derived from transactions which do not fulfill the requirements of mutuality can be brought to tax.

Vanita Vishram Trust v. CCIT (Bombay High Court)(Writ Petition No.366 of 2010)

S. 10(23C)(vi): Surplus does not mean trust ceases to be "solely for educational purposes and not for profit"

The assessee-trust was a public charitable trust engaged in education of women. In the earlier years, the assessee was granted exemption u/ss 11, 10(22) & 10(23C)(vi). The assessee's application for renewal of exemption u/s 10(23C)(vi) was rejected on the ground that (i) the objects permitted the non-educational object of constructing an ashram and (ii) the assessee had earned a surplus of over 12% from its activities and so was not existing "solely for educational purposes and not for profit". On a Writ Petition filed by the assessee, HELD allowing the Petition:

(i) The fact that the assessee has varied objects does not mean that it ceases to be solely engaged in educational purposes when the facts show that the assessee has not carried out any other object;

(ii) The fact that a surplus incidentally arises from the activities of the assessee does not disentitle an assessee of the benefit of s. 10(23C). The third proviso to s. 10(23C) which permits accumulation of surplus up to limits shows that the generation of surplus is per se not a disabling factor. The effect of Aditanar Educational Institution 224 ITR 310 (SC) is that the decisive or acid test is whether the object is to make a profit. In evaluating or appraising the issue, one should bear in mind the distinction between the corpus, the objects and the powers of the concerned entity;

(iii) The judgment in Queens' Educational Society 319 ITR 160 (Utt) that "the law is well settled that if the profit is proved by an educational society then that will be the income to the Society as the surplus amount remains in the account books of the society" is distinguishable on facts. The Court is not correct in holding as a principle of law that the benefit of the exemption can be denied on the ground that the assessee has only pursued its main object of providing education and not pursued the other objects for which the Trust was constituted because were the assessee to pursue other objects, it would clearly run afoul of s. 10(23C)(vi) and cease to exist solely for educational purposes. Pinegrove International Charitable Trust followed.

Judicial pronouncements

DIT (Exemption) v. Bagri Foundation (ITA No. 19/2010) [2010] 6 taxmann 10 (Delhi)

Donations out of 15% accumulation permitted under section 11(1)(a) are not to be restricted by Explanation to section 11(2)

Even after the insertion of the "Explanation" appended under section 11(2) w.e.f. 1-4-2003, if a trust donates its entire income for a year to another charitable trust, it would still be entitled to exemption under section 11(1)(a); it defies logic as to why such donations cannot be permitted out of 15 % accumulation permitted under section 11(1)(a) itself.

Rehoboth Mission v. DIT (Exemp) (ITA No. 352/Hyd/2010)

There is nothing in language of section 13(1)(b) to suggest that an institution of mixed objects is precluded from getting registration under section 12AA

Only a trust which is for religious purpose is excluded and debarred from registration under section 12AA; a trust whose object is charitable as well as religious is not debarred from registration.

DCIT v. Garden Silk Mills Ltd. (Appeal No. 140 of 1999)(Gujarat HC)

Capital or revenue receipt - forward foreign exchange contract – surplus on cancellation

Foreign exchange was acquired for discharging obligation on capital account of importing machine. Purpose was to freeze liability on capital account. Therefore surplus received on cancellation of forward contract of foreign exchange was a capital receipt not liable to tax.

CIT v. Ghanashyam Steel Work Ltd. (2010) 6 taxmann 4 (Guj.)

Expenses incurred for setting up of a new unit in expansion of an existing business are allowable as revenue expenses

Where the so called new unit set up by the assessee was merely an expansion of its existing business and was not setting up of a new business, the expenses incurred in that regard were allowable as revenue expenses.

DCIT v. Times Guaranty (ITA Nos.4917 & 4918/Mum/2008) (SB)

Unabsorbed depreciation of AYs 1997-98 to 2001-02 not eligible for relief granted by amended s. 32(2) in AY 2002-03

Till AY 1996-97 unabsorbed depreciation could be set off against income under any head. From AY 1997-98 to 2001-2002 unabsorbed depreciation could be set off only against business income. From AY 2002-2003 onwards unabsorbed depreciation could again be set off against income under any head of income. The question before the Special Bench was whether in AY 2003-04, the unabsorbed depreciation relating to AY 1997-1998 to 1999-2000 could be set off against non-business income. The assessee claimed that law prevailing in the year of set-off should apply and as in AY 2002-03 unabsorbed depreciation is permitted to be set-off against non-business income, that should apply to the earlier years' brought forward depreciation as well. HELD rejecting the claim:

(i) The amendment made to s. 32(2) w.e.f AY 2002-03 is substantive. A substantive amendment is normally prospective in operation. S. 32(2) is a deeming provision which by legal fiction provides that the unabsorbed depreciation allowance u/s 32(1) is deemed to be depreciation allowance for the succeeding year(s). A deeming provision has to be strictly interpreted and cannot extend beyond the purpose for which it is intended. S. 32(1) deals with depreciation allowance for the current year and s. 32(2) uses the present tense to refer to allowance to which effect `cannot be' and `has not been' given. This indicates that s. 32(2) speaks of depreciation allowance u/s 32(1) for the current year starting from AY 2002-03. Brought forward unabsorbed depreciation of earlier years cannot be included within the scope of s. 32(2). If the intention of the legislature had been to allow such b/fd unabsorbed depreciation of earlier years at par with current depreciation for the year u/s 32(1), s. 32(2) would have used past or past prefect tense and not the present tense. Further, the unabsorbed depreciation for the period from AY 1997-1998 to 1999-2000 has been referred to as "unabsorbed depreciation allowance" and given a special name and cannot fall within s. 32(1) in AY 2002-03.

(ii) The substitution of s. 32(2) w.e.f AY 2002-03 is a limited repeal of the old s. 32(2) and its effect is that unabsorbed depreciation of the earlier period is allowable under the new provision but has to be dealt with in accordance with the old provision and is subject to the limitation of being eligible for set-off only against business income and for 8 years.

(iii) The argument that the department having taken a stand in Jai Ushin cannot argue to the contrary is not acceptable. Such limitation if placed on the revenue will also have to apply to assessees. Further, as a Special Bench is constituted to resolve conflict of opinion amongst different Benches it will be too harsh to stop the assessees or the Revenue from arguing the case in the way they like.

(iv) The principle that if two interpretations are possible then the view in favour of the assessee should be adopted cannot be applied in a loose manner so as to debar a superior authority from examining the legal validity of conflicting views expressed by lower authorities. This rule is applicable where the provision in question is such which is capable of two equally convincing interpretations and not otherwise.

CIT v. South Indian Bank Ltd. [2010] 5 taxmann 87 (Ker.)

When Banks claim deduction of bad debt written off in previous year by virtue of proviso to section 36(1)(vii), they are entitled to claim deduction of such bad debt only to extent it exceeds provision created and allowed as deduction under clause (viia)

The decision of the Division Bench of this Court in South Indian Bank Ltd. v. CIT [262 ITR 579] does not lay down the correct interpretation of the provisions of section 36(1)(vii)/(viia).

CIT v. Surinder Pal Anand (ITA No. 156 of 2010)(2010) 6 Taxmann 7

Where assessee files its return u/s 44AD, it is not under obligation to explain individual entry of cash deposit

Once under section 44AD exemption from maintaining of books of account has been provided and presumptive tax @ 8% of the gross receipt itself is the basis for determining the taxable income, the assessee is not under obligation to explain individual entry of cash deposit in the bank unless such entry has no nexus with the gross receipts.

Navin Jindal v. ACIT (Civil Appeal No. 634 of 2006) (Supreme Court)

Right to subscribe the additional shares arises on the date when the company decides to come out with the right offer

The right to subscribe for additional offer of shares/debentures on rights basis comes into existence when the company decides to come out with the rights offer. Prior to that, such right, though embedded in the original shareholding, remains inchoate. The same crystallizes only when the rights offer is announced by the company. The said right to subscribe for additional shares/debentures is a distinct, independent and separate right. Such right is capable of being transferred independently of the existing shareholding, on the strength of which such rights are offered. In order to determine the nature of the gains/loss on renunciation of right to subscribe for additional shares/debentures, the crucial date is the date on which such right to subscribe for additional shares/debentures comes into existence and the date of transfer/renunciation of such right. Computation is an integral part of chargeability under the Indian Income-tax Act. Based on the fact of the case, Supreme Court held that the loss incurred by the assessee on the renunciation of right to subscribe PCDs is a short term capital loss.

CIT v. Thiruvengadam Investments Private Limited (Appeal No. 1329 of 2009)(Madras HC)

Section 50C of the Income Tax Act not applicable in case the property held as business asset

The assessee was engaged in the business of property development and the activities of the assessee were treated as business. The assessee has obtained power of attorney from the owner of the property (primarily land) and the same was shown under the head "Current assets" and not under the head "Fixed assets" in the balance sheet. Such property was sold by the assessee for a consideration through a deed of conveyance. The assessee claimed a loss on the sale of such property in the return filed for the relevant assessment year. While registering sale deed, the Sub-Registrar took the guideline value which was much higher than the actual consideration for sale and levied stamp duty / registration charges on higher value. The Assessing Officer (AO) invoked section 50C of the Income Tax Act and held that the higher guideline value as fixed by the Sub-registrar for the purpose of levying stamp duty / registration charges should be taken as the sale consideration and computed the profit on the sale of the property accordingly. Aggrieved by the order of AO, the assessee filed an appeal before the Commissioner of Income Tax (Appeals) [CIT (A)] contending that the AO is not correct in invoking the provisions of section 50C of the Act since that section would apply only to the computation of income under the head capital gains and not for the computation of business income. CIT (A) agreed with the contention of the assessee. Aggrieved by the order of CIT (A), the Revenue filed an appeal before the ITAT. The ITAT held that the provisions of section 50C of the Act are not applicable when the income was treated as business income and on that ground dismissed the appeal. The revenue preferred an appeal before the High Court.

Hon'ble High Court has held that it is not in dispute that the activity of the assessee is of property promoter. As the property in the hands of the assessee was treated as business asset and not as capital asset, there is no question of invoking the provisions of section 50C of the Act. Section 50C of the Act pertains to determining the full value of the capital asset. The appeal of the revenue was, therefore, dismissed.

CIT v. Goel Builders (ITA No. 127 of 2005) (Allahabad HC)

Assessment of rental income: For purpose of assessment under head "profit and gains of business or profession", it shall be necessary that property acquired and used is for commercial purpose under business activity

Where the investment made by the assessee while constructing the commercial complex seems to be a business investment, the rental income earned from the building as a natural consequence shall be business income.

ACIT v. Vodafone Essar Gujarat Limited [2010] 38 SOT 51 (Ahd)

Telecommunication services providers may choose its initial year for claiming tax benefit under Section 80-IA of the Act

The Tribunal held that the telecommunication service provider has an option to choose its initial year of claiming tax holiday as per the amended Section 80-IA of the Income-tax Act, 1961 with effect from Assessment Year 2000-01 even though it had started providing telecommunication services before the amendment came into force.

Anil Kumar Kothari v. UOI [2010] 5 taxmann 95 (Gauhati)

Section 127 mandates that assessee must be given a reasonable opportunity of being heard while exercising power to transfer cases.

Where the assessee was not provided with any opportunity of being heard in the matter, the reasons assigned in the order which was "administrative convenience and for co-ordinating effective investigation" also could not be said to be the reasons as envisaged in Section 127(1).

Rajhans Builders v. DCIT (ITA Nos. 3172 & 3288/Ahd/2009)

Without rejecting books of account regularly maintained, addition cannot be made only on basis of DVO's report

If books of account are found to be correct and complete in all respect and no defect is pointed out therein and cost of construction of building is recorded therein, then the addition on account of difference in cost of construction cannot be made even if a report is obtained within the meaning of section 142A from the DVO.

Pirojsha Godrej Foundation v. ADIT (ITAT Mumbai) (ITA No. 1976/Mum/08)

Even s. 143(1)(a) cannot be re-opened u/s 147 without proper "reasons to believe"

The assessee, a charitable trust claimed exemption u/s 10(23C)(vi). The return was processed u/s 143(1)(a). No assessment order u/s 143(3) was passed. Subsequently, the AO issued a notice u/s 147 on the ground that as the assessee had not invested a sum of Rs. 1.02 crores in investments u/s 11(5), the said sum of Rs. 1.02 crores was chargeable to tax. The reopening was upheld by the CIT(A). On appeal by the assessee, HELD allowing the appeal:

(i) The recorded reason that the violation of s. 11(5) r.w.s. 13(1)(d) by the assessee led the amount of Rs. 1.02 crores to be included in the assessee's total income is clearly contrary to the legal position that while the assessee may lose exemption u/s 10(23C) for not adhering to the conditions of s. 11(5), this does not result in the said amount being chargeable to tax in the hands of the assessee. The fact that the amount was not invested in the prescribed manner does not mean that it can be assessed as income;

(ii) The reasons are required to be self explanatory and read as recorded by the AO. No substitution, addition or deletion is permissible. No inference can be allowed to be drawn on the basis of reasons not recorded. It is for the AO to disclose and open his mind through the recorded reasons. The reasons must have a live link with formation of belief. (Hindustan Lever 268 ITR 332 (Bom) & Kelvinator 320 ITR 561 (SC) followed);

(iii) The fact that only an Intimation was passed u/s 143(1)(a) is irrelevant because what is material is whether the AO had proper "reasons to believe" that income had escaped assessment. In the absence of proper "reasons", the reopening is invalid (Prashant S. Joshi vs. ITO (Bom) followed; Rajesh Jhaveri 291 ITR 500 (SC) referred).

CIT v. Poonam Rani (ITA No. 406/2009) (Delhi)

A low rate of gross profit, in absence of any material pointing towards falsehood of accounts books, cannot by itself be a ground to reject account books under section 145(3)

If the rate of gross profit declared by the assessee in a particular period is lower as compared to the gross profit declared by him in the preceding year, that may alert the Assessing Officer and serve as a warning to him, to look into the accounts more carefully and to look for some material which could lead to the conclusion that the accounts maintained by the assessee were not correct.

3i Infotech Ltd. v. ACIT [2010] 5 taxmann 108 (Bom.)

If assessee has made a full and true disclosure of all material facts for his assessment, action of re-opening assessment beyond a period of four years would stand barred

Where the revenue has failed to establish before the Court that there was a failure on the part of the assessee to disclose fully and truly all the material facts necessary for the assessment, the exercise of the power to re-open the assessment beyond a period of four years of the end of the relevant assessment year would fail to fulfill the statutory condition precedent to a valid exercise of the power to re-open an assessment beyond a period of four years.

Hindustan Petroleum Corporation Ltd. v. DCIT [2010] 5 taxmann 111 (Bom.)

Assessment beyond a period of four years can not be re-opened where there is full and true disclosure of all material facts by assessee

No action can be taken under the section 147 after the expiry of four years from the end of the relevant assessment year unless the income chargeable to tax has escaped assessment by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that assessment year.

Hindalco Industries v. DCIT (ITA No. 3667/Mum/2005)

Despite TDS u/s 195, payer is liable as "agent" u/s 163. However, if payee is assessed, payer cannot be assessed as "representative assessee"

The assessee purchased shares of an Indian company from Alcan Inc, Canada. Alcan filed an application u/s 197 (1) for issue of a TDS certificate on the basis that the capital gains was Rs. 317.71 crores and tax at 10% was chargeable. The AO issued a certificate directing the assessee to withhold Rs. 40 crores on a provisional basis subject to regular assessment. The assessee complied with the same. During the pendency of the assessment proceedings against Alcan, the AO issued an order u/s 163 treating the assessee as Agent of Alcan in respect of the capital gains. Thereafter, on 15.3.2004, the AO passed an order assessing the capital gains in the hands of the assessee as agent of Alcan in which the rate of tax was taken at 20%. On 16.3.2004, an assessment order was passed in the case of Alcan itself assessing the capital gains in its hands at the rate of 20%. Alcan's appeal was allowed by the Tribunal (Alcan Inc vs. DDIT 110 ITD 15 (Mum)) and the rate of tax was held to be 10%. The assessee filed an appeal on the point that (a) as it had deducted tax u/s 195, it could not be treated as an "agent" u/s 163; (b) As more than 2 years had passed after the remittance, the assessee could not be treated as an "agent" as it was not in the position to exercise its rights u/s 162(1) and retain funds and (c) as the department had assessed Alcan, the assessee could not be assessed as representative assessee. HELD:

(a) The contention that the assessee having duly deducted tax u/s 195 cannot be treated as an Agent of Alcan u/s 163 is not acceptable because s. 163 is merely intended to ensure that a person can be regarded as a representative assessee if certain conditions are fulfilled. The s. 163 order does not fasten liability on the representative assessee. Therefore, the fact that the Agent has deducted tax u/s 195 is not a bar to treat him as an Agent u/s 163;

(b) The contention that there has been a delay in initiating proceedings u/s 163 which has resulted in prejudice to the Agent is also not acceptable as the law does not contemplate any time limit for initiating proceedings u/s 163. The proceedings for assessing income of the principal were also not barred by time;

(c) However, while the department has the option u/s 166 to assess either the non-resident principal or the representative assessee, once the choice is made and the income is brought to tax in the hands of the principal, the same income cannot be again assessed in the hands of a representative assessee (Saipem UK 298 ITR (AT) 113 (Mum) followed). Consequently, the assessment order on the assessee had to be annulled.

ACIT v. GTL Ltd (ITAT Mumbai)(M.A. No. 746/Mum/2009)

Retrospective amendment after passing order does not lead to "apparent mistake"

Following HCL Comnet 305 ITR 409 (SC), the Tribunal took the view vide order dated 17.3.2009 that provision for bad debts debited to the P&L A/c could not be added to the "book profits" u/s 115JA. To supercede HCL Comnet, clause (g) was inserted in the Explanation to s. 115JA by the F. A. 2009 w.r.e.f 1.4.1998. The amendment received the assent of the President on 19.8.2009, after the order of the Tribunal was passed. The department filed a MA contending that in view of the said retrospective amendment, there was a "mistake apparent from the record". HELD dismissing the application:

As per the law laid down in Sudhir Mehta 265 ITR 548 (Bom), where an order is passed as per the prevailing law, a retrospective amendment which comes into force after the date of the passing of the order does not show any mistake in the order.

Inventaa Chemical Ltd. v. ACIT (ITA No. 328/Hyd/2006)

Every loss of revenue as a consequence of an order of Assessing Officer, cannot be treated as a prejudicial to the interests of the revenue

When an ITO adopted one of the courses permissible in law and it has resulted in loss of revenue or where two views are possible and ITO has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue unless the view taken by the ITO is unsustainable in law.

Chempure v. ITO (ITA Nos. 451 to 453/Mum/2006)

Human probability/tendency of non-cooperation by parties after business transaction is over, is required to be considered while deciding bona fide aspect of assessee in penalty matter under section 271(1)(c)

When transactions with a particular party are over that party may not be ready to co-operate in giving information which are exactly asked by the Assessing Officer from the assessee, under these circumstances, the revenue authorities have ample powers under the Act to issue summons to the party and if they are not exercising such powers, the assessee cannot be blamed for concealing particulars and/or furnishing inaccurate particulars of income.

ITO v. Parikh Investment & Development P. Ltd. (ITA No. 4760/Mum/2009)

Making a wrong claim is not at par with concealment or giving of inaccurate information, which may call for levy of penalty under section 271(1)(c)

In order to apply the provisions of section 271(1)(c), there has to be concealment of particulars of the income of the assessee; the assessee must have furnished inaccurate particulars of his income.

Gujarat State Financial Services Ltd. v. ACIT (ITA Nos. 2078/Ahd/2006 & 2526/Ahd/2006)

Penalty proceedings: Mere submitting a claim which is incorrect in law would not amount to giving inaccurate particulars of income of assessee, but if claim besides being incorrect in law is malafide, Explanation 1 to section 271(1)(c) comes into play and work to disadvantage of assessee.

If the assessee makes a claim which is not only incorrect in law but is also wholly without any basis and the explanation furnished by him for making such a claim is not found to be bonafide, it would be difficult to say that he would still not be liable to penalty under section 271(1)(c).

CIT *v.* Backbone Enterprises [2010] 6 taxmann 3 (Guj.)

When assessee commits default under a bona fide belief which is rectified by filing a revised return, it cannot be held liable for penalty under section 271(1)(c)

Where the assessee had bona fide made a claim for deduction under section 80-IA which came to be rectified by filing a revised return withdrawing the claim, there was no concealment or furnishing of inaccurate particulars of income on the part of the assessee.

CWT v. Parminder Singh (WTA Nos. 31 to 36 of 2009)(P & H HC)

After acquisition and vesting of all rights of a land in State, mere speculative right to receive compensation/enhanced compensation is not and cannot possibly be treated as an asset under section 2(ea) of the Wealth-tax Act.

As soon as the land of the assessee is requisitioned and stood vested in the State, he does not remain its owner and the mere inchoate right to receive the enhanced compensation cannot possibly be treated as assets and included in his wealth subsequently.

Judicial Pronouncements - International Taxation

SPAHI Projects Pvt. Ltd., In re (AAR No. 802 of 2009)

AAR on tax liability of a South African Company for receiving commission for services rendered abroad to applicant-Indian company

The business profits made up of the commission paid by the applicant to the South African Company for the services rendered as a commission agent in South Africa cannot be brought within the net of income-tax in India by invoking the exception contemplated by the second part of Article 7.1 of the DTAA between India & South Africa.

Maruti Suzuki India v. ACIT (Delhi High Court)

Transfer Pricing Law for user of foreign trademarks & advertisement expenditure laid down

The assessee manufactured cars using the brand name "Maruti". It entered into an agreement with Suzuki, Japan, pursuant to which it began manufacturing cars using the brand name "Suzuki". The TPO issued a show-cause notice in which he alleged that the substitution of the brand name "Maruti" for the name "Suzuki" meant that the assessee had sold the "Maruti" brand to Suzuki. On that basis, he determined the "arms length" sale proceeds at Rs. 4,420 crores. The assessee filed a writ in which the TPO was allowed to pass an order subject to the outcome of the Petition. In the order, the TPO abandoned the theory of "sale" to Suzuki but instead held (without giving the assessee a show-cause notice in this behalf) that as the assessee was using the trademark "Maruti-Suzuki", the "Suzuki" trademark had "piggybacked" on the "Maruti" trademark without payment of any compensation by Suzuki to the assessee. He alleged that "Maruti" was a "super-brand" while "Suzuki" was a "weak-brand". He held that the assessee was not liable to pay Suzuki for the trademark "Suzuki" but instead Suzuki was liable to pay the assessee for "piggybacking" on the trademark "Maruti". He also held that the advertisement expenses incurred by the assessee had gone to benefit Suzuki. He accordingly directed that an adjustment of Rs. 206 crores be made in the hands of the assessee. HELD remanding the matter to the TPO:

(i) While the onus is on the assessee to satisfy the AO/TPO that the arm's length price computed by it is in consonance with s.92, the AO/TPO can reject the price computed by the assessee only if he finds that the data used by the assessee is unreliable, incorrect or inappropriate or he finds evidence, which discredits the data used and/or the methodology applied by the assessee;

(ii) The TPO/AO is obliged to give the assessee an opportunity to produce evidence in support of the arm's length price and before making adjustments, he is obliged to convey to the assessee the grounds on which the adjustment is proposed to be made and give the assessee an opportunity to controvert the grounds on which the adjustment is proposed;

(iii) Re user of trademark by the domestic entity on discretionary / mandatory basis: If a domestic Associate Enterprise uses a foreign trademark, no payment to the foreign entity on account of such user is necessary in case the user of the trademark is discretionary. However, the "income" arising from such transaction is required to be determined at arm's length price;

(iv) If a domestic Associate Enterprise is mandatorily required to use the foreign trademark on its products, the foreign entity should make payment to the domestic entity on account of the benefit the foreign entity derives in the form of marketing intangibles from such mandatory use of the trademark. Even where payment is made by the foreign entity, the arm's length price in respect of the international transaction needs to be determined taking into consideration all the rights obtained and obligations incurred by the parties under the international transaction including the value of marketing intangibles obtained by the foreign entity on account of compulsory use of its trademark by the domestic entity. Suitable adjustments in this regards will have to be made considering the individual profiles of these entities and other facts and circumstances justifying such adjustments.

(v) Re advertisement expenditure incurred for the trademark: The expenditure incurred by a domestic Associate Enterprise on advertising of its products using a foreign trademark does not require any payment or compensation by the owner of the foreign trademark/logo to the domestic entity on account of use of the foreign trademark/logo in the advertising undertaken by it, so long as the expenses incurred by the domestic entity do not exceed the expenses which a similarly situated and comparable independent domestic entity would have incurred.

(vi) If the expenses incurred by the domestic Associate Enterprise are more than what a comparable independent domestic entity would have incurred, the foreign entity needs to suitably compensate the domestic entity in respect of the advantage obtained by it in the form of brand building and increased awareness of its brand in the domestic market. The said "arms length price" should be determined by taking into consideration all the rights obtained and obligations incurred by the two entities, including the advantage obtained by the foreign entity.

(vii) In determining whether the advertisement expenses incurred by the domestic Associate Enterprise on advertising the brand trademark/logo of the foreign entity are more than what an independent domestic entity would have incurred, the TPO has to identify appropriate comparables and make suitable adjustments considering the individual profiles of these entities and other facts and circumstances justifying such adjustments.

Rio Tinto Technical Services v. DCIT (ITAT Delhi)(ITA Nos.3399 /Del/2002)

PE Profits not taxable as FTS u/s 9 (1)(vii)

The assessee, an Australian company, set up a permanent establishment (PE) in India to render technical services for evaluation of coal deposits and conducting feasibility studies for transportation of iron ore. The AO accepted that the income was business profits under Article 7 of the DTAA but held that as no rate of tax was prescribed in the DTAA and the nature of the income was "fees for technical services", the income was assessable u/ss 115A & 44D. This was upheld by the CIT (A).

On appeal it was held that the assessee was not rendering simple technical or consultancy services but was rendering specific activities through the PE. Accordingly, Article 12 of the DTAA was not applicable. Income attributable to a PE is assessable under Article 7 of the DTAA. Under Article 7 (2), the PE is deemed to be a wholly independent enterprise and under Article 7(3) deduction in accordance with the subject to the law relating to the tax in India is allowable. Since Article 7 of the DTAA comes into play, s. 9(1)(vii) is not applicable. Since Article 7 (2) of the DTAA specifies that the PE in India is to be treated as a wholly independent enterprise in India, ss. 44D and 115A will not apply in so far as they relate to foreign companies.

Cartier Shipping v. DDIT (ITAT Mumbai)(ITA No. 3036/Mum/07)

Despite cessation of PE, gains on transfer of PE asset taxable under Act and DTAA

The assessee, a Mauritian tax resident, owned a jack-up rig used for drilling of mineral oil. The rig was given on charter basis to an Indian company which in turn leased it to ONGC for operations in Indian territorial waters. On 24.4.1997, the assessee entered into an agreement with Foramer SA, France, to sell the jack-up rig. On 15.9.1997, the surveyors boarded the rig and coordinated its move from Bombay High to the hand-over location outside India. On 19.9.1997, the assessee issued a bill of sale in favour of the purchaser. On 30.9.1997, the assessee obtained a port-clearance certificate and started moving the rig. The rig was handed over outside India to the buyer on 6.10.1997. The charter agreement was terminated on 3.10.1997. The assessee informed the AO of the termination of the charter and that it had discontinued business operations in India and moved the rig outside territorial waters though it did not mention the fact of sale of the rig. The AO reopened the assessment u/s 147 and took the view that as depreciation had been allowed on the rig, the difference between the sale consideration and WDV (Rs. 102 crores) was a short-term capital gain. This was confirmed by the CIT(A). In appeal to the Tribunal, the assessee argued that since sale of the rig had taken place on 6.10.1997 outside India, it had no tax implications in India and that the reopening was invalid. HELD dismissing the appeal:

(i) The argument that as the sale of the rig took place outside India and was not taxable in India, the assessee was under no obligation to disclose the fact of sale is not acceptable. The law requires even details of exempt income to be disclosed in the return. As the assessee was taxable in India in respect of its PE, it was under an obligation to share all the facts relevant to the PE – whether in respect of business profits or other head of income. The question whether the gains were taxable or not could be determined only after examination of relevant facts which the assessee was duty bound to share. As there was a failure to disclose material facts, the reopening was valid;

(ii) On merits, under the Act, when a non-resident has operations in India through a presence in India, such presence is to be treated as a "permanent establishment" ("PE") in India. The PE is to be treated as hypothetically independent of the non-resident . The assets of the PE are also to be recognized as such and the profit or gains on sale of assets of the PE have to be treated as profits of the PE. The gains or losses on sale of PE assets have to be treated as "accruing or arising in India" irrespective of whether the assets were sold in India or outside India. The income can also be deemed to have accrued or arisen in India u/s 9(1)(i) as the rig was part of a "business connection" and "an asset or source of income" in India (principles laid down in Hyundai Heavy Industries 291 ITR 482 followed);

(iii) Under Article 13(2) of the DTAA, gains on alienation of moveable assets of the PE (or the PE itself) are taxable in the country in which such PE is located;

(iv) The argument that the gains on transfer of PE/PE assets are taxable only if the PE exists is not acceptable because then the provision for taxability of gains on PE/ PE assets in the source country will be rendered redundant. The provisions can also then be avoided by simply deferring the transfer till the closure of the PE. This will lead to absurdity (Van Oord Dredging 105 ITD 97 referred to – PE's business profits can be taxed even if received after closure of the PE);

(v) On facts, the argument that the sale of the rig took place on 6.10.1997 outside India and after termination of the charter is not correct because the record shows that the rig was first sold and as a consequence the charter was terminated and the rig was moved to international waters for delivery to the buyer. It was not a case where the business came to an end, the rig was moved to international waters and then, by an unconnected event, the rig was sold.

DCIT v. Indo American Jewellery (ITA No. 6194/Mum/2008)

Assessee's TP study cannot be rejected lightly, "comparables" have to be comparable on all parameters, no incentive to shift profits offshore if tax rates there are higher

The assessee, engaged in the business of manufacture and export of plain and studded jewellery of gold, platinum etc, entered into international transactions with four AEs. The assessee adopted the Transactional Net Margin Method ("TNNM") and argued that the transactions were at arms' length on the basis that its operating profit margin was 3.56% on sales and 3.70% on cost whereas that of the comparables was 3.27% of sales and at 3.82% on cost. The TPO rejected the method on the basis that the allocation of expenses on the basis of turnover was not correct and it ought to have done on other parameters. The TPO held that as the average operating profit margin on cost of comparable companies engaged in the business of manufacturing jewellery came to 7.25%, that had to be adopted as the arms length operating margin. The CIT (A) deleted the addition. On appeal by the department, HELD dismissing the appeal:

(i) The external comparables selected by the assessee were from a public data base and the assessee has followed a detailed search process and made an analysis considering the various factors of selecting the external comparables as required under Transfer Pricing Regulations and Guidelines. Therefore, the transfer pricing study of the assessee and ALP determined on the basis of such study simply cannot be rejected without any cogent reasons. Unless proper method is followed, comparables are chosen and selected after doing a proper FAR study as well as adjustments are made to the extent possible it is unfair to summarily reject the transfer pricing analysis made by the assessee;

(ii) The comparables selected by the TPO were not comparable with the assessee because they were either (a) situated in Seepz and got various benefits not available to others and could earn higher profit margins, (b) the turnover was predominantly domestic, (c) the total turnover was either much higher or lower than that of the assessee;

(iii) The fact that the AEs earned meager profit or incurred losses as compared to the profit of the assessee showed that there was no transfer of profit by the assessee out side India;

(iv) Since the tax rates were higher in USA compared with those of India, therefore, there would be no incentive to transfer profits to higher tax chargeable regions especially when the assessee enjoyed deduction u/s. 80HHC.

ADIT (Int'l Taxation) v. Bureau Veritas (2010) 39 DTR (Mumbai)(Trib) 145

Reimbursement for Fees for technical services to Head Office - Agreement with France

Assessee a company incorporated in the Republic of France had a branch office in India. Assessee made a provision for reimbursement of technical expenses payable to the head office. Such reimbursement of expenses is not on account of any specific technical services having been "made available" in the sense in which the expression is employed in the tax treaties. Technical services are treated as having been made available' when recipient of such technical services is enabled to perform such services without recourse to the service provider. Amount reimbursed cannot therefore be brought to tax in the hands of the assessee under art. 13 of the Indo-French tax treaty. Amount cannot also be taxed in the hands of the assessee under art. 7 as it is not an income "attributable to PE".

Sun Microsystems India (P) Ltd. v. ITO (2010) 39 DTR (Bang)(Trib) 69

Fees for technical services - Agreement between India and Singapore

Assessee entered into an agreement for availing logistic services from SM Ltd., a Singaporean company. There is no evidence on record to show that the said company made available technical knowledge, experience and skill to the assessee when it rendered logistic services. Revenue has not examined any employee of the assessee to show that it could have utilized the experience gained by itself. Hence, the payment made by the assessee to SM Ltd. is not liable to be taxed under the head 'Fees for technical services' under art. 12(4) of the DTAA. Since SM Ltd. is not having any PE in India, the payments are also not taxable as business income under art. 7. Further, services were provided offshore and there are no facts on record to establish that SM Ltd. provided such services in India. Thus, income of SM Ltd. is not taxable in India and consequently, assessee was not required to deduct tax at source under s. 195.

Diamond Dye Chem Ltd. v. DCIT [2010-TII-ITAT-MUM-TP]

Appropriate FAR analysis crucial in selection and application of the Most Appropriate Method. Suitable 'volume discount' adjustments are appropriate to account for substantial differences in volume of exports to Associated Enterprises and third parties

The Tribunal upheld the use of Cost Plus Method (CPM) as the Most Appropriate Method (MAM) for determining the arm's length price of the international transaction of export of goods to its Associated Enterprise (AE), in addition to permitting 'volume discount' adjustments to take into account substantial difference in volume of goods exported to AEs and third parties.

Circulars / Notifications

D.O. No. FTS-799468/2010- MEMBER (R) Dated June 18, 2010

Internal Guideline to Income Tax Dept in respect of Form 26AS

You may be aware that the Tax Credit Statement (in Form 26AS) in respect of each PAN holder is being compiled by the Income Tax Department on real time basis. Such statements are available for online view to the PAN holder, to enable him/her to take timely corrective steps in case of missing gaps. It is thus considered desirable to increase the awareness about the same among all sections of society.

2. The object is to give the taxpayer feedback regarding the tax credits as reported by the tax deductors/collector s besides showing taxes deposited by way of self assessment tax, advance tax etc. The tax credit reflected in such statement may increase or decrease in case the deductor revises the information/ updates the information or files the TDS returns after finalization of Form 26AS (Tax Credit Statement). The procedure for creation of this Tax Credit Statement is in accordance with section 203 AA of the I.T. Act, 1961 or the second proviso to sub section (5) of section 206C of the LT. Act, 1961.

3. The credits reflected in this statement are available in our system for giving tax credit at the time of processing of returns. Therefore, it is critical that these statements actually reach the taxpayer so that corrections, if any, are done before the return is filed, i.e. before July, 2010, and the tax credit available to them is known to them is complete, correct and upto date.

4. In case of missing entries or unmatched entries, the taxpayers may be advised to contact their deductor and ascertain whether the deductor has either

i) erred in quoting the correct PAN or not quoted the PAN; or

ii) not filed the TDS return; or

iii) has not paid the required TDS to Government account.

4.1 In such a case, the taxpayer may approach the deductor and persuade the deductor to rectify the deficiencies. Kindly note that since the tax statement will be the basis for giving tax credits, hence, absence of tax credit will bind the Officer to adhere to the tax credit available.

5. From the current financial year onwards you can also view your tax credits by undertaking a one-time registration. Detailed procedure for registration is available at www.incometaxindia.gov.in and www.tin-nsdl.com

6. Statements in 26AS have been sent to about 50 lakh taxpayers through emails obtained from different sources wherein corresponding PANs were mapped. Statements are being sent in a password protected pdf file.

7. The objective of this communication is to:

i) Apprise you of the above facility especially in the light of issues of matching of TDS entries while processing the returns; and

ii) Request you to give adequate publicity to this attempt of the department.

8. As a senior officer of the department, it is hoped that under your leadership and guidance, the scheme would find adequate publicity and acceptability amongst taxpayer in your jurisdiction.

9. In case you have personally not availed of the above facility, you could:

i) Register for the above utility which is password protected and is transmitted through secured and safe algorithm; The procedure for registration is mentioned in detail at www.tin-nsdl.com;

ii) Encourage officers/ officials working in your charge to register for the same:

iii) You may also consider sending us authenticated PAN-email mapping of officers so that such statements are sent to them.

CBDT Press Release No. 402/92/2006-MC (27 of 2010), dated 2-6-2010

New Changes in TDS Rules

The Central Board of Direct Taxes (CBDT) have amended the Rules relating to TDS provisions date and mode of payment of tax deducted at source (TDS), TDS certificate and filing of ‘statement of TDS’ (TDS return) vide Notification No. 41/2010; SO No. 1261 (E) dated 31.05.2010. The amended rules will apply only in respect of tax deducted on or after 1st day of April 2010.

Forms for TDS certificate have been revised to include the receipt number of the TDS return filed by the deductor. Now the Tax-deduction Account Number (TAN) of the deductor, Permanent Account Number (PAN) of the deductee, and Receipt number of TDS return filed by the deductor will form the unique identification for allowing tax credit claimed by the taxpayer in his income-tax return.

Government Authorities (Pay and Accounts Officer or Treasury Officer or Cheque Drawing and Disbursing Officer) responsible for crediting tax deducted at source to the credit of the Central Government by book-entry are now required to electronically file a monthly statement in a new Form No. 24G containing details of credit of TDS to the agency authorised by the Director General of Income-tax (Systems).

Due date for furnishing TDS return for the last quarter of the financial year has been modified to 15th May (from earlier 15th June).

INDIRECT TAXES

Judicial Pronouncements

CCE v. Lubi Electronics [2009 (245) E.L.T. 551 (Tri. - Ahmd.)]

Delayed availment of Cenvat Credit

It was held that there is no provision for denying credit because of delay nor there is any time limit for taking credit in the CENVAT Credit Rules and therefore, the stand taken by the Revenue that credit has to be taken within a reasonable period has no basis. Even the supplementary instructions issued by the Board also do not prescribe any time limit for the purpose – credit allowed.

Circular No. 11 (F. No. 465/6/2010-Cus.V) Dated June 3, 2010

Determination of assessable value of imported goods that are warehoused

1. The prevalence of divergent practices in field formations with respect to the determination of assessable value of imported goods that are warehoused under Section 58/59 of the Customs Act, 1962 and sold before being cleared for home consumption has been brought to the notice of the Board. While one view is that the sale of imported goods after warehousing does not affect the valuation of imported goods, the other view is that the price at which the original importer has sold the goods, before a Bill of Entry for home consumption is filed, should be taken as the assessable value of the imported goods under Section 14 of the Act, ibid.

2. The matter has been examined by the Board in the light of provisions of Section 14 (1) of the Customs Act, 1962 as well as the relevant pronouncements of Hon'ble Supreme Court. Section 14, at present, reads as:

   "For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, the value of the imported goods and export goods shall be the transaction value of such goods, that is to say, the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation, or as the case may be, for export from India for delivery at the time and place of exportation, where the buyer and seller of the goods are not related and price is the sole consideration for the sale subject to such other conditions as may be specified in the rules made in this behalf."

2.1 The current Section 14 states that the value of the imported goods shall be the transaction value of goods, that is to say, the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation. The sale of goods after warehousing them in India cannot be considered a sale for export to India. It cannot be stated that the export of goods is not complete even after the imported goods were cleared for warehousing in the country of import. Thus, the price at which the imported goods were sold after warehousing them in India does not qualify as the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation and, hence, the value at which such transaction takes place will not qualify as the transaction value, as per Section 14.

3. For the period prior to October 2007, Section 14 read as:

   "For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, where-under a duty of customs is chargeable on any goods by reference to their value, the value of such goods shall be deemed to be the price at which such or like goods are ordinarily sold, or offered for sale, for delivery at the time and place of importation or exportation, or as the case may be, in the course of international trade ---".

3.1 The sale of imported goods made after warehousing cannot be considered to have been made in the course of international trade and hence, the price at which such sale takes place is not a price at which such or like goods are ordinarily sold, or offered for sale, for delivery at the time and place of importation, in the course of international trade, in terms of Section 14.

4. The CBEC manual also states at Para 15 of Chapter 10 that:

   "The rate of duty applicable is as per provisions of Section 15 of the Customs Act i.e. on the date on which the goods are actually removed from the warehouse. However, when the warehousing period or the extended warehousing period has expired, the duty payable is with respect to the date when the warehousing/extended warehousing period expired and not the actual date of removal. In so far as value for assessment of duty for warehoused goods is concerned, it is not required to be re-determined and it is the original value as determined at the time of filing of Into-Bond Bill of Entry and assessments done before warehousing."

5. In this connection, the decision of Hon'ble Supreme Court in the case of Garden Silk Mills [1999 113 ELT 358 SC] was also examined. Hon'ble Supreme Court had held in the case of Garden Silk Mills that "-- the value has to be determined with relation to time when physical delivery to the importer can take place. Physical delivery can take place only after Bill of Entry, inter alia, for home consumption is filed and it is the value at that point of time which would be relevant --".

However, in the case of Garden Silk Mills, the Court was considering the issue of includibility of landing charges in the assessable value of imported goods. The goods in that case were cleared for home consumption after import and no warehousing or sale was involved before clearance of the imported goods. The issue of whether sale of imported goods after warehousing would constitute a sale in the course of international trade was not an issue before the Hon'ble Court. Thus, the main issue involved as well as the facts and circumstances of the present case are not identical to those of Garden Silk Mills case. Hence, the rationale of the said case cannot be applied to the present case.

6. Further, Board had examined the valuation of goods sold on "high-seas-sales" basis and had issued Circular 32/2004 Customs dated May 11, 2004 stating that in such case, the actual high-seas-sale-contract price paid by the last buyer would constitute the transaction value under Rule 4 of Customs Valuation Rules, 1988 and inclusion of commission on notional basis may not be appropriate and that, however, the responsibility to prove that the high-seas-sales-transaction constituted an international transfer of goods lies with the importer. The facts and circumstances of a sale of warehoused goods are not similar to the case of "high-seas-sales" since the sale/transfer of imported goods after warehousing cannot be considered to have been made in the course of international trade. Further, the above-referred circular had clarified that the inclusion of commission on notional basis may not be appropriate even in case of "high-seas-sales". Therefore, the question of adding any amount on notional basis in the case of goods already warehoused in India and sold subsequently would not arise.

7. Thus, in the case of sale of imported goods after they are warehoused on Indian territory, the value at which such transaction took place will not qualify as the transaction value, as per Section 14.

8. Pending assessments on the issue, if any, should be finalized accordingly.

Notification No. 24/2010 - Service Tax dated 22nd June, 2010

In exercise of the powers conferred by clauses (A) and (B) of section 76 of the Finance Act, 2010 (14 of 2010), the Central Government hereby appoints the 1st day of July, 2010, as the date on which the provisions of the said Act shall come into force.

Notification No. 29/2010 - Service Tax dated 22nd June, 2010

G.S.R. (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 makes the following further amendment in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 1/2006-Service Tax, dated the 1st March, 2006, G.S.R. 115 (E), dated the 1st March, 2006, with effect on and from the 1st day of July, 2010, namely :-

In the said notification, in the Table, after S. No. 7 and 10 and the entries relating thereto, the following S. No 7(a) and 10(a) and entries shall be inserted, namely:-

(1)	(2)	(3)	(4)	(5)
"7(a).	(zzq)	Commercial or Industrial Construction	This exemption shall not apply in cases where the taxable services provided are only completion and finishing services in relation to building or civil structure, referred to in sub-clause (c) of clause (25b) of section 65 of the Finance Act. Explanation.- The gross amount charged shall include the value of goods and materials supplied or provided or used for providing the taxable service by the service provider. This exemption shall not apply in cases where the cost of land has been separately recovered from the buyer by the builder or his representative.	25";
"10(a).	(zzzh)	Construction of Complex	This exemption shall not apply in cases where the taxable services provided are only completion and finishing services in relation to residential complex, referred to in sub-clause (b) of clause (30a) of section 65 of the Finance Act. Explanation.- The gross amount charged shall include the value of goods and materials supplied or provided or used for providing the taxable service by the service provider. This exemption shall not apply in cases where the cost of land has been separately recovered from the buyer by the builder or his representative.	25".

Notification No. 36/2010 - Service Tax dated 28th June, 2010

G.S.R.(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 specified in clause (A) of section 76 of the Finance Act, 2010 (14 of 2010) other than services referred to in clause (zzc) and (zzzz) of sub-section (105) of section 65 of the Finance Act from so much of the service tax leviable thereon under section 66 of the Finance Act as is equal to the service tax calculated on a value which is equivalent to the amount of advance payment (advance payment means consideration received for the said taxable services to be provided) received before the said appointed date, i.e. before 1st July, 2010.

Effect of this notification is that any advance received in respect of services specified by Finance Act, 2010 before the 1st day of July would not be liable to charge of service tax except services of commercial training or coaching centre and renting of immovable property.

M.F.(D.R.) ORDER NO. 1/2010 dated 22nd June, 2010 [F. No. 334 / 3 /2010 -TRU]

G.S.R. (E).- In exercise of the powers conferred by sub-section (1) of section 95 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the Finance Act), the Central Government, hereby makes the following Order, namely :-

1. (1) This Order may be called as the Service Tax (Removal of Difficulty) Order, 2010.

   (2) This Order shall come into force on the 1st day of July, 2010.

2. For the purposes of sub-clauses (zzq) and (zzzh) of clause (105) of section 65 of the Finance Act, the expression 'authority competent' includes, besides any Government authority,-

(i) architect registered with the Council of Architecture constituted under the Architects Act, 1972(20 of 1972); or

(ii) chartered engineer registered with the Institution of Engineers (India); or

(iii) licensed surveyor of the respective local body of the city or town or village or development or planning authority;

who is authorised under any law for the time being in force, to issue a completion certificate in respect of residential or commercial or industrial complex, as a precondition for its occupation.

OTHER LAWS

OTHERS

Rakesh Kumar Gupta vs. ITAT (No. 2) (CIC) (Appeal No. CIC/LS/ A/2010/000378 & 379)

ITAT subject to RTI though case details cannot be disclosed without applicant showing public interest

The Applicant sought from the CPIO, ITAT, inspection of records relating to appeals of Escorts Limited & another and information on how third parties can become interveners and inspection of records relating to s. 4 RTI compliance. Information on the procedure to make vigilance complaints was also sought. The application was rejected by the CPIO on the ground that 'larger public interest' had not been established. The appeal was rejected by the appellate authority on the ground that the Applicant was "misusing the provisions of the RTI Act to create unnecessary proceedings before the authorities who are expected to do the important government work". It was held that the Applicant was "harassing the authorities under the said Act in the name of doing certain public good work, which is known only to his imaginations". It was also alleged that the Applicant was not a 'whistle-blower' but a 'nuisance maker' and that he may be using the RTI Act as a 'black-mailing or arms twisting tactics'. It was also held that judicial records were not liable for disclosure. On second appeal, HELD by the CIC:

(i) The argument that because the information held by ITAT is in the form of only judicial record, such record is outside the purview of the RTI Act is not acceptable. Even the Supreme Court and High Courts have rules for disclosure of judicial information. The only requirement is that applicant must adhere to the particular rules in making an application under the RTI Act.

(ii) On the question whether the information sought by the Applicant can be regarded as "information, the disclosure of which would amount to invasion of privacy" and exempt from disclosure u/s 8(1) (j), in Rakesh Kumar Gupta vs. PIO it was held that s. 8(1)(j) would not apply. However, as that order has been stated by the Delhi High Court, the earlier order of the CIC in Raj Kumari vs. CCIT would apply where it was held that personal information given to a public authority was not liable for disclosure. Disclosure of personal information will amount to invasion of privacy unless public interest is disclosed. Accordingly, inspection of the case files of third parties cannot be granted. However, the ITAT is liable to disclose the other information sought.

(iii) The decision of the Appellate Authority seems moved more by animosity than in reliance upon the law. The Applicant represents a class of persons created by the ITAT itself to generate information regarding delinquent activities of tax payers. In doing this, it cannot treat such a resource as a mere pest but must accept responsibility for this requirement. It may be kept in mind that this resource is sustained only by financial returns promised by disclosure about delinquent tax payers to the Department. While encouraging such an activity, the Income Tax Department cannot then seek to keep itself aloof from the consequences.

Clean Energy Cess Rules, 2010 for raw coal, raw lignite and raw peat

Notification No. 06/2010-Clean Energy Cess, Dated : June 22, 2010

In exercise of the powers conferred by Section 84 of the Finance Act, 2010 (14 of 2010), the Central Government hereby makes the following rules, namely:-

Chapter 1

PRELIMINARY

1. Short title, extent and commencement .-

(1) These rules may be called the Clean Energy Cess Rules, 2010.

2. They extend to the whole of India.

3. They shall come into force on the 1st day of July, 2010.

2. **Definitions.** - In these rules, unless the context otherwise requires,

(a) "Act" means the Finance Act, 2010 (14 of 2010);

(b) Board means the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963);

(c) cess means the Clean Energy Cess levied under section 83 of the Act;

(d) Central Excise Officer shall have the meaning assigned to it in the Central Excise Act, 1944(1 of 1944);

(e) mine shall have the meaning assigned to it under Mines Act,1952 (32 of 1952);

(f) producer means any person engaged in the production of specified goods and includes a owner or agent as defined under section 2 of the Mines Act, 1952 (32 of 1952);

(g) removal means despatch of specified goods from a mine and shall include despatch of such goods for captive consumption within that mine for any purpose other than for raising of such goods;

(h) specified goods means raw coal, raw lignite and raw peat.

Chapter 2

COLLECTION AND ASSESSMENT OF CESS

3. **Registration.-** Every producer who is liable to pay cess shall get registered immediately with the jurisdictional Central Excise Officer but not later than a period of thirty days from the date of commencement of these rules by making an application to the jurisdictional Central Excise Officer :

Provided that where a producer commences production of the specified goods at any time after the commencement of these rules, such producer shall obtain registration within thirty days from the commencement of such production ;

Provided further that where a producer has a centralized billing or accounting system in respect of such specified goods produced at different mines, he may, instead, opt for registering only the premises or office from where such centralized billing or accounting is done.

4. **Cess payable on removal** .- Every producer shall pay the cess leviable on the removal of the specified goods in the manner provided in rule 6.

5. **Assessment of cess** .- The producer shall himself assess the cess payable on the specified goods.

6. **Manner of payment** .- (1) Cess on the specified goods removed from the mine during a month shall be paid by the 5 th of the second month, following the month in which the removals were made:

Illustration .- Cess payable on specified goods removed from the factory for the month of July, 2010 shall be paid by the 5 th of September, 2010.

(2) A producer who has opted for centralized registration in respect of its mines located at different places under rule 3, shall discharge the cess liability in respect of the aggregate removal of specified goods from all such mines effected during a month by the stipulated period specified in sub-rule (1)

(3) Where a producer has paid to the credit of the Central Government any amount in excess of the amount required to be paid towards cess liability for a month, such producer may adjust such excess amount paid by him against the cess liability for the next month:

Provided that the adjustment of excess amount paid under sub-rule (2) shall be subject to the condition that such excess amount paid is on account of reasons not involving interpretation of law, taxability, or applicability of any exemption notification;

Provided further that the producer may, instead, file a refund claim for any excess amount of cess paid if such producer fails to adjust the excess amount against the cess liability for the next month.

(4) Where any producer fails to pay the cess by the due date, he shall be liable to pay the outstanding amount along with interest at the rate specified by the Central Government under section 11AB of the Central Excise, 1944 (1 of 1944) on the outstanding amount for the period starting from the first day after the due date till the date of the actual payment of the outstanding amount.

(5) Where any producer defaults in payment beyond thirty days from the due date as specified in rule 6, such specified goods shall be deemed to have been cleared without payment of cess and the consequences and penalties under these rules and provisions of the Central Excise Act, 1944 (1 of 1944) as have been made applicable, shall follow in addition to payment of interest under sub-rule (4).

(6) The provisions of section 11 of the Central Excise Act , 1944 (1 of 1944) shall be applicable for recovery of the cess as assessed under rule 5 and the interest under sub-rule (4) in the same manner as they are applicable for recovery of any sums payable to the Central Government.

Explanation. – For the purposes of this rule, -

(i) Cess liability shall be deemed to be discharged only if the amount payable is credited to the account of the Central Government by the specified date;

(ii) Where the registered person deposits cess by cheque, the date of presentation of the cheque in the bank designated by the Board for this purpose shall be deemed to be the date on which the cess has been paid subject to realization of the cheque.

7. **Maintenance of records.-** (1) Every producer shall maintain accounts showing the quantity of specified goods actually removed during a month, particulars to whom these were removed, the amount of cess payable during a month and the total amount of cess paid:

Provided that where a producer has opted for centralized registration under rule 3, such producer shall maintain mine wise details mentioned in the sub-rule (1).

(2) The amount of cess payable on any removals shall be rounded off to the nearest rupee and the actual weight of a consignment shall be rounded off to the nearest tonne.

8. **Access to registered premises or mine** .- (1) An officer empowered by the Commissioner in this behalf shall have access to any mine or premises registered under these rules for the purpose of carrying out any scrutiny, verification and checks as may be considered necessary to safeguard the interest of revenue.

(2) Every producer shall furnish to the officer empowered under sub-rule (1) ,-

(i) all records prepared and maintained for accounting of transactions in regard to production, storage or removal of specified goods; and

(ii) financial records and statements including cost audit reports etc.

9. **Goods to be removed under proper documents** .- (1) No specified goods leviable to cess shall be removed from a mine except under cover of a document indicating the quantity of specified goods and the name and address of the consignee.

10. **Cess shall be shown separately in the invoice or bill** .- Cess shall be shown separately by the producer in the bill or invoice raised in respect of specified goods.

11. **Filing of return** .- Every producer shall submit to the Jurisdictional Central Excise Officer, a return in Form – I showing the quantities of specified goods removed during the month in respect of which the payment has been made, the amount paid under rule 6 and other particulars specified in that form enclosing the evidence of payment of cess not later than 10 th day of the month in which the payment has been made:

Provided that in the case of a producer who has obtained centralized registration under rule 3 , the return in Form-I shall contain mine-wise information.

12. **General penalty.-** Whoever contravenes any of the provisions of these rules shall be liable to pay a penalty which may extend to ten thousand rupees and confiscation of the goods in question in respect of which the contravention is made, if no penalty is provided elsewhere.

Due Dates of key compliances pertaining to the month of July 2010:

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***
15th July	***TDS/TCS return of first quarter***
21st July	***ESIC Payment for June***
31st July	***Return of income for A.Y. 2010-11 for assessees whose accounts are not required to be audited.***

Now you can also file your returns through www.taxsum.com

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