

TAX

# amicus

An e-newsletter from Lakshmikumaran & Sridharan, New Delhi, India

April 2012 / Issue-10

## In Focus

- Budget 2012 – Service Tax regime recast
- Budget 2012 – Excise duty & Service Tax rate hiked – Negative list proposed for taxing services
- Manufacture – More deeming provisions inserted in Excise Tariff
- Interest not payable when wrongly availed credit not utilized
- Budget 2012 proposes General Anti-Avoidance Rules
- Service Tax – Time-limit for issuing invoice increased – Adjustment of excess tax paid allowed without limit
- Limitation for raising demand for normal period set to be increased in Service Tax
- Advance Pricing Agreement mechanism set to be introduced
- Cenvat credit earned later utilizable for payment of duty arrears
- Education cess on CVD on imported goods, exempted
- Works contracts – Exemption fee revised in Rajasthan



**April**  
2012

APR 2012

## Contents

### Article

Budget 2012 – Service Tax regime recast	3
Central Excise	5
Service Tax	7
Customs	10
Income Tax	11
VAT	14

## Article

### Budget 2012 – Service Tax regime recast

By **Kapil Sharma and Shivam Mehta**

The Union Budget 2012 has brought about a paradigm shift in the existing Service Tax laws affecting not only tax payers but also tax authorities and other stake holders. The proposals in the Budget 2012 have something to offer to all including the Government and the industry at large. It is imperative for us to understand the major proposals in the budget which will contribute to creating an environment conducive to better compliance by the assesseees and move ahead without hassles.

Budget 2012 has effected from 1-4-2012, an across-the-board increase in the base rate of Service Tax from 10% to 12% with a view to align it with the excise duty rates. The above increase in the rate is coupled with consequential upward revision in the tax rate for various composition schemes such as for works contract services, money changing and the like.

Besides the rate hike along with the proposed introduction of negative list which is seen as pre-cursor to GST, recently introduced Point of Taxation Rules are set to receive a face-lift. Talking of the changes in the Point of Taxation Rules, noteworthy amendments include merging the rule pertaining to continuous supply of services with the main rule and scrapping the beneficial rule permitting individual/firms to pay Service Tax on receipt basis for specified services. However, the issue of mis-match in the timing of introduction of the revised Point of Taxation Rules is being debated by stakeholders since the above changes have created a whole new set of confusion

relating to point of taxation for continuous supply of services.

#### *Change in concept of levy*

One big-ticket change is the announcement to introduce a regime of taxing services based on the concept of negative list which is being described as “sound economic and prudent fiscal management” in the Budget Speech. It is expected that the proposal would address the basic issues of simplicity, certainty in the tax processes and optimizing compliances. The shift from the taxing services on selective basis to the concept of taxing all services except a few qualified services (negative list) is being seen as a preparation to usher Goods and Service Tax (GST) in a more familiar environment. The proposed regime defines the concept of service as an ‘activity for a consideration’, giving it widest amplitude to include negative act such as forbearance to an activity within its scope.

Absence of any announcement relating to time-lines for introduction of GST is disappointing even though the FM stated that drafting of model GST bill is underway and the IT infrastructure GST network is expected to be ready by August 2012.

With the change in the concept of levy along with other proposed changes being perceived as curtain-raiser to the advent of GST, in essence, how far the above objectives will be fulfilled considering the long list of exemptions and exclusions from the negative list and the uncertainty looming over introduction of GST remains a question.

## *Cross-border services*

The draft set of rules for determining the place of provision of service has been placed in public domain for discussion. The said rules propose to replace the existing Export of Services Rules, 2005 and Taxation of Services (Provided from Outside India and Received in India) Rules, 2006. The proposed rules are designed to define the place from where services are deemed to have been provided for restricting the levy of tax to the services rendered in the taxable territory. These rules are being modelled on OECD Guidelines for determining the place of supply of services and are primarily meant for persons dealing in cross border services.

As a general rule, a service is deemed to have been provided from the place where the recipient is located. The proposed rules also carve out exceptions to the above default rule to deal with the specified services such as those relating to performance, events, immovable property, transportation etc. The other proposed amendments include throwing more light on tax treatment of services provided within Jammu & Kashmir wherein it has been proposed that such services will not be liable to tax as J&K is not included within taxable territory.

## *Person liable for payment of tax - Reverse charge*

Another notable introduction has been the proposal to revamp the reverse charge provisions to include a few other categories of taxable services within its sweep. A new twist pertains to the proposal to make, in respect of three specified services, both the service provider and recipient liable to pay Service Tax in specified proportion. It has been suggested that the fresh reverse charge mechanism has been conceived

keeping in mind that there is a large set of registrants which collect tax but do not pay to the government kitty causing loss with no consequential benefit to the compliant section of society.

## *Benevolent amendments*

Talking of benevolent amendments, there have been quite a few retrospective amendments which are aimed at providing relief to the hapless assessee in specified cases. One such amendment pertains to penalty waiver on renting of immovable property services owing to non-payment of Service Tax which comes as a big relief to all the assessees who were facing uncertainties relating to tax on renting of immovable property. Certain exemptions and benefits which existed in the statute book only for part period have been given retrospective effect to remove the anomaly in so far as tax treatment is concerned. For instance, repair of roads was exempt from Service Tax from 2009 onwards, though repair service has been taxable from the year 2005. The current budget has extended the exemption relating to road repair for the earlier period commencing from 2005.

While the public at large is glued to the proposed amendment pertaining to negative list of services, a few amendments providing relief to many have gone un-noticed. These changes include simplified refund scheme introduced by substituting the entire Rule 5 of Cenvat Credit Rules, 2004, proposals to do away with prosecution for mere non-issuance of invoice and extending the facility of settlement to Service Tax, increase in the time limit for issuance of invoice to 30 days from 14 days, scrapping the monetary limit for adjustment of excess Service Tax paid and the like.

*[The authors are Principal Associates, Lakshmikumaran & Sridharan, New Delhi]*

## CENTRAL EXCISE

### Budget Changes - Notifications

**Rate of Central Excise duty increased by 20%:** Peak Rate of Central Excise duty (Cenvat duty) has been increased across the board except for certain petroleum products. To carry out the change in the rate and for certain other purposes, First Schedule of the Central Excise Tariff Act, 1985 is proposed to be amended as per clause 141 of the Finance Bill, 2012 which has come into effect from 17th March, 2012 as per the declaration under the Provisional Collection of Taxes Act, 1931. Notification No. 18/2012-C.E., dated 17-3-2012 has also been issued in this regard and Notification No. 2/2008-C.E. has been rescinded.

Effective rates of 1% and 5% duty have also been increased to 2% and 6% respectively. Notification Nos. 1/2011-C.E. & 2/2011-C.E., both dated 1-3-2011, have been amended by Notification Nos. 16/2012-C.E. and 19/2012-C.E., both dated 17-3-2012 for this purpose. Notification No. 29/2004-C.E. providing for effective rate of duty in case of textile products has also been superseded by Notification No. 7/2012-C.E.

General exemption notifications providing for exemption/effective rates of duties for various products from Chapters 4 to 96 i.e. Notification Nos. 3/2005-C.E., 3/2006-C.E., 4/2006-C.E., 5/2006-C.E., 6/2006-C.E. and 10/2006-C.E. have been rescinded and consolidated in Notification No. 12/2012-C.E.

**Cement and Cigarettes brought under MRP based valuation:** Portland cement other than white cement, classifiable under sub-heading 2523 29 and cigarettes classifiable under heading 2402 of the Central Excise Tariff Act, 1985 have been brought

under the MRP based duty regime. Notification No. 49/2008-C.E. (N.T.) has been amended by Notification No. 7/2012-C.E. (N.T.) to provide for quantum of abatement. While cement has been granted abatement of 30%, cigarettes would enjoy abatement of 50% on the MRP for calculation of Central Excise duty.

**Unbranded jewellery liable to duty:** Budget 2012 has brought unbranded jewellery also under Central Excise levy with effective rate of 1% without Cenvat credit availability. Hitherto, only branded jewellery was liable to such 1% levy. Rate of duty will be 6% if Cenvat credit is availed. Silver jewellery is, however, fully exempted. Further, Notification No. 9/2012-C.E. (N.T.) has been issued to fix a tariff value at the rate of 30% of the transaction value for articles of jewellery falling under heading 7113.

**Cenvat Credit Rules amended:** Cenvat Credit Rules, 2004 have been amended from 1-4-2012 by Notification No. 18/2012-C.E. (N.T.), dated 17-3-2012. some of the notable changes are:

- **Refund of Cenvat credit:** A simplified scheme for refund has been introduced by bringing a new Rule 5. The new scheme does not require the kind of correlation that was earlier needed between exports and inputs & input services used in such exports. The notification prescribing the detailed manner and safeguards is yet to be issued.
- **Distribution of credit by ISD:** Rule 7 has been substituted by a new rule bearing same number to provide for restrictions on the distribution of credit by an Input Service Distributor (ISD). In addition to the existing restrictions, the new restrictions stipulate that credit on input service

shall be distributed to particular unit only if such input service is relatable to that unit and if an input service is relatable to more than one unit, credit shall be distributed proportionately based on turnover.

- *Transfer of SAD credit:* A new Rule 10A has been inserted to allow a manufacturer to transfer unutilized SAD credit from one manufacturing unit to another manufacturing unit of the same manufacturer. This facility is not available to units operating under area based exemption notifications. Such transfer can be made at the end of each quarter.
- *Interest only on wrong utilization of credit:* Rule 14 has been amended as per which interest on wrongly availed credit shall only be payable if such credit has been utilized.

### **Budget 2012 – Changes made/proposed by Finance Bill, 2012**

**‘Manufacture’ – More deeming provisions inserted:** Clause 141 of the Finance Bill, 2012 read with the Seventh Schedule thereto seeks to amend various Chapter notes as provided in relevant Chapters of the Central Excise Tariff Act, 1985. In case of Chapter 71, process of affixing or embossing trade name or brand name on articles of jewellery or on specified articles of goldsmiths’ or silversmiths’ wares, shall amount to manufacture. In Chapter 72, as per the proposed note, process of oiling and pickling in respect of goods of heading 7208 shall amount to manufacture. Process of cutting, slitting and printing of aluminium foils in respect of Chapter 76 and processes of matching, batching and charging of Lithium Ion batteries or making of battery packs in respect of Chapter 86 shall amount to manufacture. Further, Third Schedule to the Central Excise Act has also been

proposed to be amended vide clause 140 read with Sixth Schedule of the Bill to deem certain process carried out in relation to cigarettes as ‘manufacture’. These provisions have already come into force with effect from 17th March, 2012 under the Provisional Collection of Taxes Act, 1931 as made applicable to said clauses of the Finance Bill.

**‘Interconnected undertakings’ – Definition inserted in valuation provisions:** Section 4 of the Central Excise Act, 1944 is proposed to be amended by Clause 129 of the Finance Bill, 2012. Definition of inter-connected undertakings as earlier contained in the Monopolies and Restrictive Trade Practices Act, 1969 is being inserted with effect from date of assent of the Bill. The amendment became necessary as MRTP Act was repealed long ago but Section 4 of the Central Excise Act still carries reference to the same to borrow the meaning of inter-connected undertakings.

**Penalty – Reduced penalty benefit when available:** Section 11AC is being proposed to be amended by Clause 133 of the Finance Bill, 2012 to provide for availability of benefit of reduced penalty (25% of the duty) when the penalty also is paid by the assessee within the specified period along with the duty and interest thereon. It seems that there were disputes where assessee had sought the benefit of reduced penalty just by paying duty and interest within the prescribed period of 30 days.

**Jammu & Kashmir – Area based exemption clarified:** Clause 139 of the Finance Bill read with the Fifth Schedule thereto seeks to amend retrospectively Notification No. 1/2010-C.E. from the date of its inception i.e. from 6-2-2010. As per the amendment, exemption under the said notification for the period of 10 years is available to the units which had expanded their capacity, from the date of commercial production from such

expanded capacity. Memorandum to the Finance Bill says that this would clarify the policy intent.

#### Prosecution – Amount of duty involved changed:

Section 9 of the Central Excise Act is being amended by the Finance Bill, 2012 (clause 130) to provide for imprisonment upto seven years and fine when the duty involved in the offence is more than Rs. 30 lakhs. At present such amount is Rs. 1 lakh.

### Circulars

**Export under bond or rebate to Nepal:** The benefit of export under bond/ LUT/ output stage rebate under Rule 18/ 19 of the Central Excise Rules, 2002 would be available even if the export proceeds are realized in Indian Rupee. C.B.E.C.Circular No. 961/04/2012-CX dated 26-3-2012 clarifies that for claiming such benefit, export proceeds can

be realized in any currency subject to compliance with RBI guidelines. As per the circular, in respect of goods meant for export to Nepal that are cleared from the factory prior to 1-3-2012 but yet to be exported, the old procedure (that was in vogue prior to 1-3-2012) will apply.

**Cenvat credit earned later utilizable for payment of duty arrears:** For payment towards demands confirmed under Section 11A of the Central Excise Act, 1944, restriction on utilization of Cenvat credit accruing subsequent to the last date of the month or quarter in which the arrears arise, is not applicable. As per Circular No. 962/5/2012-CX, dated 28-3-2012 issued in this regard, duty payable under Rule 8 is on a different footing from duty payable under Section 11A and hence restrictions of Rule 8 would not be applicable in such cases.

## SERVICE TAX

### Budget 2012 Changes

#### Service Tax rate increased to 12% from 1-4-2012:

Service Tax rate has been increased to 12% from 10% from 1-4-2012. Notification No. 8/2009-ST, dated 24-2-2009 which provided the effective rate as 10% so far, has been rescinded by Notification No. 2/2012-S.T., dated 17-3-2012.

**Budget 2012 - Other rate changes:** The following changes have been made in respect of Service Tax rate wherever optional rates have been provided and these changes are in force from 1-4-2012:

- Service Tax rate under Works Contract Composition Scheme has been increased to 4.8% from 4% by Notification No.10/2012-ST, dated 17-3-2012.
- The rate of Service Tax on Life Insurance Service

has been increased to 3% from 1.5% for the first year and for subsequent years it will be 1.5% as per Notification No. 3/2012-S.T., dated 17-3-2012.

- The existing rates on services related to purchase and sale of foreign currency including money changing have been increased proportionately by 20% vide Notification No. 3/2012-S.T., dated 17-3-2012.
- The tax rates, in case of distributors/selling agents of lotteries, have been increased from Rs. 6,000 and Rs. 9,000 to Rs. 7000 and Rs. 11,000 respectively in specified cases as per Notification No. 3/2012-S.T., dated 17-3-2012.

- The dual rate structure of maximum Service Tax of Rs. 150 and Rs. 750 in case of economy class air travel for domestic and international journey respectively has been replaced by an ad valorem rate of 12%, with abatement of 60% subject to the condition that no credit on inputs and capital goods is taken. This change has been made by Notification No. 6/2012-S.T., dated 17-3-2012.

**Service Tax Rules amended:** By Notification No. 3/2012-S.T., dated 17-3-2012 the following changes have been made in Service Tax Rules, 1994 effective from 1-4-2012:

- Rule 4A has been amended to increase the period for issuance of invoice from 14 days to 30 days. For those providing Banking & Other Financial Services, 45 days time has been provided for issuance of invoice or bill or challan.
- Under Rule 6(1), a proviso has been introduced whereby benefit of payment of Service Tax on receipt of payment basis will be available to individuals and firms whose aggregate value of taxable services provided in the previous financial year is upto Rs. 50 lakhs. These persons will have option to pay Service Tax on taxable services upto a total value of Rs. 50 lakhs in the current financial year on receipt basis.
- Rule 6(4B) has been substituted to provide for adjustment of excess amount paid without limit. Such adjustment facility will not be available in cases involving interpretation, taxability, classification, valuation or applicability of exemption notification.
- In case of exporters, the period specified or extended by Reserve Bank of India has also been included in the period for which the tax liability is allowed to be deferred.

**Point of Taxation Rules, 2011 (POT Rules) amended:** POT Rules have been amended by Notification No. 4/2012-S.T., dated 17-3-2012 as follows from 1-4-2012:

- The definition of continuous supply of service has been amended. Post-amendment, continuous supply of service will include services provide on recurring basis also besides hitherto covered category of services provided continuously. Existence of contract and provision of service for more than 3 months are retained with the addition of mention about obligation for payment periodically or from time to time.
- Rule 6 of the Point of Taxation Rules has been omitted with respect to continuous supply of service and has been merged with Rule 3 of the POT Rules. Further, Rules 4 and 5 which deal with the situations pertaining to change in effective rate of tax and taxation of new services will now be applicable to continuous supply of services also.
- For receipt of payments upto Rs. 1,000 in excess of the amount shown in invoice, point of taxation for such excess amount will be the time when invoice is issued and the same shall be at the option of the service provider. If invoice is not issued within prescribed time, date of completion of provision of service will be taken as point of taxation in this case.
- A new residual rule has been incorporated to ascertain the point of taxation by Central

Excise Officer on best judgment basis in cases where the same cannot be ascertained by the rules.

- Rule 2A has been introduced to define the date of payment. The said definition becomes relevant in case of change of rate of tax or new levy. The date of payment in such cases shall be the actual credit in the bank account if the said credit in the bank account is received after 4 days from the date of change of rate or new levy.
- Rule 7 has been amended restricting the application only to cases where the recipient of service is liable to pay tax with regard to the services notified under section 68(2) of the Act. Thus, the earlier provision in Rule 7 which allowed for individuals and firms to pay service tax on actual receipt of consideration in respect of eight specified services has been omitted.

### **Budget 2012 – Changes proposed in Finance Act, 1994 by Finance Bill, 2012**

Section 73 of the Finance Act, 1994 dealing with demand is proposed to be amended whereby the normal period of limitation will get increased to 18 months from present 12 months. The changes contemplated also provide for issuance of mere statement for subsequent period demands without fresh show cause notice and such statement itself will be deemed as SCN.

For filing appeal before Commissioner (Appeals), the time-limit is being reduced to 2 months extendable by one month from the present 3+3 months. For appeals to CESTAT, the period available for assessee remains the same while for the Department, it is sought to be increased to 4 months. Amendments proposed also provide for non-imposition of penalty

in respect of Renting of Immovable Property Service, if Service Tax as on 6-3-2012 is paid with interest within 6 months from date of assent of Finance Bill, 2012.

Prosecution will not be launched for mere non-issuance of invoice when evasion of Service Tax is not involved. A simplified form for Service Tax Return (EST-1) is proposed and time period for filing of the same is set to be reduced to 1 month for the large assesseees from the existing 6 months. Facility of settlement will also be available to Service Tax assesseees as per the proposals.

**Retrospective amendments:** Rule 6(6A) of Cenvat Credit Rules, 2004 (CCR) was introduced from 1-4-2011 for excluding from substantive provisions of Rule 6, taxable services provided to SEZ developer or unit for their authorized operations. This benefit is being given retrospective effect from 10-2-2006.

Repair of roads has been exempted from Service Tax by Notification No.24/2009-S.T. dated 27-7-2009. This exemption is now proposed to be given retrospective effect from 16-6-2005. Exemption is also proposed retrospectively in respect of management, maintenance or repair services provided in relation to non-commercial government building starting from 16-6-2005.

**Negative List:** This year's Budget takes Service Tax regime into entirely new territory by proposing to change the basis from positive list to a negative list. Accordingly, except 17 categories of services mentioned in the negative list, all services will be liable to Service Tax once the proposals get statutory sanction and date is notified for the same. Consequential changes have also been made in several notifications which will also take effect later.

## CUSTOMS

### Budget 2012 - Notifications

#### Budget 2012 - New jumbo notification issued:

The jumbo notification providing for customs exemption on various goods specified in the First Schedule of the Customs Tariff, i.e. Notification No. 21/2002-Cus., has been superseded by Notification No. 12/2012-Cus., dated 17-3-2012. The new notification consolidates and rearranges the items provided in the previous Notification No. 21/2002-Cus., while also changing the rate of duty for some items. Some of the highlights of the new notification are:

- (a) BCD increased from 1% to 2% on gold ores and concentrates for use in manufacture of gold;
- (b) Steam coal covered under CTH 2701.19.20 fully exempted from BCD along with 1% CVD;
- (c) BCD reduced from 10% to 5% on organic/inorganic coating material for manufacture of electrical steel subject to conditions (CTH 3209);
- (d) BCD and CVD exempted subject to conditions on pneumatic tyres (new or retreaded) for aircrafts;
- (e) BCD increased from 1% to 2% on gold dore bars having gold content not exceeding 95%;
- (f) BCD increased from 2% to 4% on gold bars having gold content not below 99.5%;
- (g) BCD reduced from 10% to 7.5% on pipes and tubes for use in manufacture of boilers;
- (h) BCD @ 5% extended to raw material, required for the manufacture of parts of blades for rotors of wind operated generators;
- (i) Full exemption from BCD on import of LCD and

LED panels for 20 inches and above;

- (j) Full exemption from BCD extended to coal mining projects.

#### Re-export of unutilized goods under IGCR Rules:

Notification No. 22/2012-Cus. (N.T.) dated 17-3-2012 has inserted Rule 7A in the Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 1996 (IGCR Rules). Rule 7A allows the manufacturer to re-export unutilized or defective goods within six months from the date of import provided the value of such goods for re-export is not less than the value of the said goods at the time of import. This insertion comes in the wake of duty demand being raised on re-export of goods imported under IGCR Rules on the ground that the goods were not utilized for intended purpose i.e., manufacturing of excisable goods.

#### Exemption from E-cess and SHE-cess on CVD when goods imported into India:

Notification Nos. 13 & 14/2012-Cus., dated 17-3-2012 have been issued to grant exemption from Education Cess and Secondary & Higher Education Cess on CVD when goods are imported into India.

**SAD exemption amended:** Notification No. 21/2012-Cus., dated 17-3-2012 has been issued as part of Budget 2012 superseding Notification Nos. 20/2006-Cus. and 29/2010-Cus. Now exemption from SAD on import of goods where BCD and CVD is 'Free' or 'Nil' is not available if BCD is exempted on the basis of country of origin of the imported goods. Earlier, the SAD exemption notification had a list of only 11 notifications and an importer availing such notification would be ineligible for such SAD

exemption. It appears that an omnibus clause has been added to take care of ever increasing FTA notifications. Another significant change brought about by this notification is the exemption from SAD on pre-packaged goods. On specified goods (Sr. No. 2, 46, 70, 87, 98) including pre-packaged goods, exemption from SAD, with effect from 1-5-2012, will be subject to conditions viz., declaration of the State where goods are 'intended to be sold' for first time after importation on payment of VAT and VAT registration number in such State.

**Scope of project import expanded:** Projects for installation of mechanized handling systems and pallet racking system in mandis and warehouses for horticultural produce would now be eligible for project import benefits. Notification No. 17/2012-Cus., dated 17-3-2012 amending Notification No. 42/96-Cus. in this regard also extends project import status to green house projects set up for protected cultivation of horticulture and floriculture produce. Notification 18/2012-Cus., dated 17-3-2012 makes similar amendments to Project Import Regulations, 1986.

### **Budget 2012 – Amendment to Customs Act, 1962 proposed by Finance Bill, 2012**

**Recovery from person who obtained duty credit scrip by fraudulent means:** The Finance Bill, 2012 proposes insertion of Section 28AAA under Customs Act, 1962 for recovery of duty from the person to whom duty credit scrip was issued when

the same has been obtained by fraudulent means. This change has come in the light of Hon'ble Bombay High Court judgment in the case of Jupiter Exports, 2007 (213) ELT 641 (Bom.) wherein it was held that duty under Section 28 cannot be demanded from the exporter to whom export benefit instruments were issued. The Section also provides that action against importer under Section 28 is not precluded and the provision is applicable only if no order is passed against importer. While no time limit for issuance of show cause notice has been provided in the new section, provision is applicable prospectively for instruments utilized after enactment. Further, interest is payable from date of 'utilization' till date of payment of duty.

### **Other changes**

**Deemed export benefits withdrawn on supply to non-mega power project:** Deemed export benefits shall not be available for supplies made to non-mega power projects as per DGFT Notification No. 107(RE-2010)/2009-2014, dated 21-3-2012 inserting Para 8.7 in the Foreign Trade Policy, 2009-14. It is noteworthy that Notification No.92(RE-2010)/2009-2014 dated 28-12-2011 was issued by the DGFT whereby Para 8.4.4(iv) of FTP was amended to state that in respect of supplies to non-mega power projects, supplier shall be eligible for benefit under Para 8.3(a) of the FTP, i.e. Advance Authorization only. However, even this benefit has been withdrawn now.

## **INCOME TAX**

### **Budget 2012 – Changes proposed in Income Tax Act by Finance Bill, 2012**

The proposals with respect to direct taxes in Finance Bill, 2012 include insertion of a new chapter on General Anti-Avoidance Provisions,

extending transfer pricing regulations to domestic transactions, a host of retrospective amendments expanding scope of 'royalty', 'capital asset' and the

like besides numerous changes in personal taxation and TDS provisions.

**Transfer pricing:** The definition of 'International transaction' in Section 92B of the Income Tax Act, 1961 is proposed to be amended to clarify that international transaction would include inter alia;

- Capital financing, including any type of long-term or short-term borrowing, lending or guarantee
- Provision of services including market research, administrative, accounting, legal, technical, consultation services
- A transaction of business restructuring or reorganisation, entered into by an enterprise with an associated enterprise, irrespective of the fact that it has bearing on the profit, income, losses or assets of such enterprises at the time of the transaction or at any future date.

Further 'intangible property' will be clarified as including marketing related and technology related intangible assets, customer related assets such as open purchase orders, human capital related assets such as trained workforce and methods, campaigns, studies, forecasts or technical data and location related intangible assets like air rights and water rights.

**Transfer pricing on domestic transactions:** A new section 92BA on 'specified domestic transactions' is proposed to be inserted to extend applicability of transfer pricing provisions to specified domestic transactions beyond the threshold of Rs. 5 crores. These primarily pertain to Chapter VI-A deductions and claim of SEZ tax-holiday.

**Advance Pricing Agreements (APA):** APA is proposed to be operational in India through insertion of new sections 92CC and 92CD empowering the CBDT to enter into an APA with any person in relation

to an international transaction to determine the arm's length price (ALP) or specifying the manner in which ALP is to be determined. These agreements would be binding on either side upto a period of five consecutive previous years except if there is change in law or facts. The APA can be declared void ab initio by the CBDT if there is any misrepresentation or fraud.

**Anti avoidance provisions:** Chapter X-A pertaining to General Anti Avoidance Rules (GAAR) is proposed to be inserted after Chapter X of Income Tax Act, 1961. These rules seek to undo any tax benefits that may be obtained by the assessee by entering into an impermissible avoidance arrangement wherein inter alia the transactions lack commercial substance or are not bonafide. As per the proposed provisions an arrangement shall be presumed to have been entered into for the purpose of obtaining a tax benefit if the main purpose of a step or part of the agreement is to obtain a tax benefit even though the main purpose of the whole arrangement is not to obtain a tax benefit. Also, the applicability of these Rules will override all other provisions of the Act and therefore even though a particular result is provided under the Act, the treatment may be different after applicability of the GAAR.

**Retrospective amendments:** The following amendments are proposed with retrospective effect (from 1962 onwards):

- 'Capital asset' defined in Section 2 clause (14) of the Income Tax Act, 1961 will include "any rights in or in relation to an Indian company, including rights of management or control or any other rights whatsoever"
- 'Transfer' in clause (47) of Section 2 in respect of capital asset will include even indirect interest

creation.

- Section 9, which deems certain income to be taxable in India, is proposed to be amended to declare it a 'look through' provision. Corresponding provision has also been introduced in the General Anti Avoidance Rules (GAAR) to empower the tax authorities to 'look through' the corporate structures in impermissible avoidance arrangements. Also as per explanation 4 proposed to be inserted in the Section 9(i), shares of a foreign company shall be deemed to be capital assets situated in India if such shares derive their substantial value from Indian assets.
- Tax deduction requirement under Section 195 will apply and extend to non-residents even if they do not have any business connection or presence in India.

The following amendments are proposed in Section 9 with retrospective effect (from 1976 onwards);

- The consideration for rights to use of computer software is deemed to be 'royalty' and not business income. The argument of the assessee that the subject matter is a copyrighted article may thus no longer be valid.
- The contentious issues of 'equipment royalty' and 'process royalty' are also proposed to be settled in as much as consideration for grant or transfer of 'any right, property or information even if located outside India and even if simultaneously also used by the receiver of income, is deemed to be royalty.
- Consideration for utilization of transponders, cables etc. for 'transmission by satellite' is deemed to be royalty.

## Other Changes

**New return filing requirement in specified case:** The Budget introduces a new return filing requirements as per amendments proposed in Section 139 for residents having asset located outside India or signing authority in any account outside India.

**Limitation for reopening assessment in certain cases:** The time-limit for reopening of assessment under Section 149, where income in relation to an asset including financial interest in any entity located outside India has escaped assessment, is proposed to be increased to sixteen years instead of the general rule of six years. The time-limit for reopening of assessment for agents of non-residents is also to be increased from two to six years.

**DDT:** Cascading effect of dividend distribution tax is proposed to be removed by amending Section 115-0.

**Share Premium** charged by closely held companies is sought to be specifically brought to tax net by taxing the difference between fair market value of the shares and the consideration received on issue of such shares.

**Treaty benefit:** The benefit of tax treaties will now be subjected to obtainment of 'tax residency certificates' and application of GAAR provisions.

**Investment based incentives:** As per amendments proposed to Section 35AD deduction for new units is to be increased to 150% of the expenditure for subsequent assessment years. The deduction has also been extended to other eligible businesses such as setting up and operating inland container depot or warehousing facility for storage of sugar; bee-keeping etc.

**Tax audit:** The monetary thresholds for mandatory

audit under Section 44AB are set to be increased for subsequent financial years thereby reducing a lot of paper-work for those assesseees.

Presumptive taxation under Section 44AD is clarified as to be not applicable for professionals, brokerage or commission income or agency business.

**Capital gains:** The law will be prospectively amended to levy tax on capital gains by treating the fair market value of the asset transferred as consideration if is consideration is not otherwise ascertainable. Thus rulings of AAR in the case of Dana Corporation and others on this issue are now undone.

**Unexplained money:** The explanation as to source of share capital of companies will need to be supplemented by the explanation of the source of investor as well, failing which the share capital can be treated as unexplained money taxable as per amendments proposed to Section 68.

**AMT:** The Alternate Minimum Tax (AMT) provisions introduced in the previous budget for LLPs, is proposed to be extended to non-corporate assesseees. Further, AMT is now applicable to all persons claiming Chapter VI-A or SEZ benefits with adjusted total income above twenty five lakhs.

**MAT:** On the MAT front, revaluation reserves are sought to be subjected to MAT upon disposal or retirement of the revalued asset.

**DRP:** The powers of Dispute Resolution Panel are proposed to be extended by including and deeming to have included with effect from 1-4-2009, power to examine even those issues which have not been raised by the assessee before them. Further, the Commissioners are authorised to file appeal against orders passed by these panels.

## VALUE ADDED TAX (VAT)

### Notification

**Motor spirits and petroleum products sold by one oil company to another – Partial exemption in Maharashtra:** Sale of petroleum products and motor spirits by one oil company to another has been exempted from the payment of tax in excess of 5% of the turnover of sales. Notification No. VAT 1512/CR 18/Taxation-1, dated 29-2-2012 which is effective from 1-3-2012 also lists 10 oil companies eligible for the exemption. The exemption shall be subject to the condition that the goods are not used in manufacturing or for self-consumption.

**Entry tax on motor vehicles in Andhra Pradesh increased:** The rate of entry tax on motor vehicles has been increased to 14.5% from 12% under the Andhra Pradesh Tax on Entry of Motor Vehicles into

Local Areas Act, 1996 by Notification G.O. MS. No. 159 dated 12-3-2012.

**Works contracts – Exemption fee revised in Rajasthan:** The rates of exemption fee in respect of different kinds of works contracts have been revised in Rajasthan vide Notification No. S.O. 203- No. F.12 (15)FD/Tax/12-114 dated 26-3-2012 effective from 1-4-2012.

### Ratio decidendi

**Duplex coated board, Mill board and Grey board classifiable as articles of packing:** The Uttarakhand High Court in its recent order has held that the products known as 'Duplex coated board', 'Mill board' and 'Grey board' are classifiable as 'articles

of packing' mentioned in Entry 9 of Schedule II(B) of the Uttarakhand VAT Act, 2005 and not under the residuary entry and taxable at the rate of 12.5%. The Court agreed with the finding of the tribunal and held that in commercial world and in common parlance the use of such boards is as articles of packing [*Commissioner, Commercial Tax, Uttarakhand v. Sahota Papers Ltd.* - Commercial Tax Revision No. 32 of 2010 decided on 13-3-2012].

#### **Dermicool powder classifiable as medicament:**

The Madhya Pradesh High Court has held that the product Dermicool powder is covered as drugs and medicines under the Madhya Pradesh Commercial Tax Act. The question that arose for determination before the Court was regarding the applicable rate of tax on the said product where the competing entries were Entry 41 in Schedule II, Part-III covering items like scents, perfumes, hair tonics and hair creams which are taxable @ 12%, Entry 49 of Schedule II, Part-III covering items like tooth paste, tooth powder, talcum powder and toilet soap *including medicinal*

*preparation thereof* taxable at 12% and Entry 11 of Schedule II, Part-IV which read as "Drugs and medicines excluding those specified elsewhere in this Schedule" and taxable @ 8%.

The Court while relying on earlier Supreme court cases dealing with classification of Nycil prickly heat powder observed that the test as to whether an item falls in Entry 41 or 49 or falls within Entry 11 would be whether these items can be used as a cosmetic item for enhancement of beauty of the body, irrespective of the specific medical problems which they claim to relieve or cure. It held that if the item can be used only for treating specific medical condition and not otherwise, it would not fall within the Entry 41 or 49. It was held that "Dermicool" being a prickly heat powder and normally used only for relieving prickly heat problem the same would fall under Schedule II, Part-IV Entry 11, taxable @ 8% [*Popular Sales v. The State of Madhya Pradesh* - 2012-VIL-23-MP].

---

**Disclaimer:** Tax Amicus is meant for informational purpose only and does not purport to be advice or opinion, legal or otherwise, whatsoever. The information provided is not intended to create an attorney-client relationship and not for advertising or soliciting. Lakshmikumaran & Sridharan does not intend to advertise its services or solicit work through this newsletter. Lakshmikumaran & Sridharan or its associates are not responsible for any error or omission in this newsletter or for any action taken based on its contents. The views expressed in the article(s) in this newsletter are personal views of the author(s). Unsolicited mails or information sent to Lakshmikumaran & Sridharan will not be treated as confidential and do not create attorney-client relationship with Lakshmikumaran & Sridharan. This issue covers news and developments till 29th March, 2012. To unsubscribe, e-mail Knowledge Management Team at [newsletter@lakshmisri.com](mailto:newsletter@lakshmisri.com)  
[www.islaw.in](http://www.islaw.in)

---