

I. SUGGESTIONS FOR WIDENING THE TAX BASE AND INCREASING THE TAX REVENUE

1. Compulsory PAN on air-ticket bookings to Information to form part of annual information return under section 285BA.

Persons booking international air-tickets should be required to give their PAN while booking such tickets. This is especially so when such foreign travel is organised as package tours. This step will bring many high value transactions into the data system, which can be scrutinised for expanding the tax base. Alternatively, the person who is funding the package tour may be required to give his PAN. Those persons who are not having PAN can be asked to give a suitable declaration. To commence with, this requirement may be in respect of those persons who incur expenditure on air travel above a prescribed ceiling limit. Further, the airline companies should be required to forward such declarations to their respective Assessing Officers. This information can be included as part of the return under section 285BA.

2. Payment of electricity bills exceeding Rs. 25,000/- Information to form part of annual information return under section 285BA.

Under the proviso to Section 139(1) certain persons who fulfill any one of the economic criteria (six in number) mentioned therein should file return of income. Further, those persons who pay electricity bills amounting to more than Rs. 25,000 per annum should be also required to file returns.

Alternately, they may be asked to give their PAN to the electricity companies.

3. Notified professionals to file return

The following are the notified professions under section 44AA (Notifications No. SO-17(E) dated 12.1.1977 and No. SO 2675 dated 25.9.1992):

- (i) Accountancy
- (ii) Architectural
- (iii) Authorised Representative
- (iv) Company Secretary
- (v) Engineering
- (vi) Film Artists/Actors, Cameraman, Director, Singer, Story-writer, etc.
- (vii) Interior Decoration

(viii) Legal

(ix) Medical

(x) Technical Consultancy.

All persons carrying on the above professions should be covered by the mandatory requirement of filing the returns as in the case of companies irrespective of the income or loss earned.

4. Transfer of immovable property exceeding Rs.5 lakhs

Persons transferring immovable properties should be required to file return of income under the proviso to section 139(1). To give relief in respect of low value transactions, a minimum limit of Rs.5 lakhs may be prescribed.

II. SUGGESTIONS TO CHECK TAX AVOIDANCE

1. Report on agricultural income

The Income-tax Act exempts several types of incomes. Such incomes are mentioned in the various clauses of section 10. Similarly, it allows deduction in respect of certain incomes like under section 80HHC etc. In order to verify whether the deductions claimed by the assessee are genuine the report of an accountant is generally required for the accuracy of the deduction claimed. The same logic will apply in respect of agricultural income also which is one of the incomes exempt under the Income-tax Act and hence a report from an accountant may be required to verify whether the claim of exemption in respect of agricultural income is genuinely made. This may be required where Agricultural Income forming part of the Return of Income is in excess of Rs. 3,00,000/-.

2. Institutions getting exemption under section 10 to be treated at par with charitable institutions coming within the scope of sections 11 to 13.

At present there is no mandatory requirement to get any information in respect of institutions getting exemptions under the various clauses of section 10 so that the genuineness of the claims for exemptions can be verified. However, for getting exemption under section 10A or 10B or under sections like 80HHC etc. the report of an accountant is required to verify the genuineness of the deduction.

Hence, it is suggested that in order to verify the genuineness of the claim for exemption

under the various clauses of section 10, report from an accountant - containing appropriate particulars may be required in cases where the Total Income before applying the provisions of Sec. 10 is in excess of the minimum sum chargeable to tax.

III. SUGGESTIONS FOR RATIONALISATION OF THE PROVISIONS OF DIRECT-TAX LAWS

INCOME-TAX

A. Residential status

1. Resident but not ordinarily resident

The Finance Act, 2003 has substituted clause (6) in section 6 with effect from A.Y. 2004-2005. This amendment has created many difficulties for expatriates working in India. It has also created many difficulties for non-resident Indians who visit India for personal or business purposes. Further, the earlier clause (6) has stood the test of time in the interpretation of resident but not ordinarily resident. The recent judgment of the Gujarat High Court in the case of *Pradeep J. Mehta v. CIT (256 ITR 647)* interpreting section 6(6)(a) of the Income-tax Act relating to the status of resident but not ordinarily resident will create many difficulties.

The earlier meaning of the term "resident but not ordinarily resident" should be restored to ensure that the interpretation which has been given to the term 'Resident but not Ordinarily Resident' for the last 80 years prior to the above judgment of the Gujarat High Court is given effect to.

B. Incomes which do not form part of total income

2. Income of sports institutions

Section 10(23) has been omitted by the Finance Act, 2002 w.e.f. assessment year 2003-04. This section related to the income of charitable trusts notified by the Central Government for encouragement of sports. However, Explanation 4 to section 80G was substituted by the Finance Act, 2002, w.e.f. assessment year 2003-04 to allow deduction of donation made to charitable trusts notified by the Central Government for encouragement of sports. It seems to be contradictory since at one place the exemption granted is being withdrawn to such charitable trust

and on another place donation made to such charitable trust is being exempted. It is, therefore, suggested that with a view to boosting the promotion of sports, especially as India will be hosting the next Commonwealth Games and will need to urgently enhance its sports infrastructure; Sec. 10(23) may be restored / extended to benefit those bodies creating necessary sporting facilities and infrastructure.

3. Relief for VRS Compensation

Several entities coming within the scope of section 10(10C) are paying VRS compensation to employees. According to the correct principles of Income-tax law the excess amount of VRS compensation over what is exempt under section 10(10C) is treated as profit in lieu of salary and hence taxable. Hence such excess are eligible for relief under section 89(1). However, a letter F.No.174/5/2001-ITA-I dated 23rd April, 2001 has stated that such deduction is not available.

It is suggested that CBDT letter F.No.174/5/2001-ITA-I dated 23rd April, 2001 may be reviewed to give and clarificatory amendment made in Sec. 89. The provisions of section 10(10C) may also be extended to employees of non-corporate entities.

4. SECTION 10BA

Following point needs attention with regard to section 10BA:

(i) Explanation (b) to section 10BA defines "eligible articles or things" as "all hand made articles or things, which are of artistic value and which requires the use of wood as the main raw material." The word 'hand made' may lead to the conclusion by the department as exclusively made by hand and no use of machinery would be allowed. However, the use of machinery in cutting the wood and fixing nails etc. cannot be ruled out. If such strict interpretation is taken then the no benefit could be derived out of this section. The wording may be suitably modified in light of the above difficulty —

5. Requirements of Not for Profit Organisations in India

Until the financial year ending 2001-2002 the Not for Profit Organisations could make a self-declaration in Form 15H and avoid tax deduction at source. But from the financial year 2002-2003, a Not for Profit Organisation has to make an application specifically to the Assessing Officer and obtain a

non-deduction certificate for every investment. A Not for Profit Organisation having several investments, some of which are renewed time and again, finds it extremely difficult to obtain a non deduction certificate for every investment from the Assessing Officer. In most cases, considering that most of entities / trusts enjoy exemption u/s 11; there is increase in procedure without increase in revenue collection. Hence this requirement needs to be reconsidered.

C. Income from house property

6. Annual value - section 23

The new section 23 substituted by the Finance Act, 2001 provides for determination of annual value. Where the property or any part of the property is let and was vacant during the whole or any part of the previous year and owing to such vacancy the actual rent received or receivable by the owner in respect thereof is less than the fair rent the annual value will be the amount so received or receivable. This is as per clause (c) of sub-section (1). The Explanation provides that for the purposes of clause (b) or clause (c) of sub-section (1), the amount of actual rent received or receivable by the owner shall not include the amount of rent which the owner cannot realise. Doubts have been expressed that where on account of unrealised rent the actual rent received is reduced, whether the Assessing Officer can instead of giving the benefit of clause (c) of sub-section 1 can have recourse to clause (a) and adopt fair rent as annual value. This is detrimental to the assessee and cannot be the intention of the legislature.

Hence it is suggested that clause (c) may be suitably amended to include both the situations covered by Explanation thereunder, viz. (i) vacancy and (ii) unrealised rent.

7. Section 24

Deductions allowed under the various sub-clauses of section 24(1) have now been limited to only two items namely (a) a sum equal to 30% of the annual value and (b) interest payable in regard to house property under certain circumstances. As a consequence amount collected from tenants as repairs cess payable to State Government is treated as income of the assessee but not allowed as deduction. The State cess was earlier allowable under section 24(1)(vii). Now they are not deductible causing gen-

uine hardship as the amount can be significant in large metros.

It is suggested that all taxes paid to State Governments by any name called whatsoever should be allowed as a deduction under section 23 along with property taxes paid to local authority while computing income from house property.

D. Profits and gains of business or profession

8. Necessity for increase in rate of depreciation

In earlier years depreciation at 33.1/3% and investment allowance at 25% were given on the cost of machinery so that assessee would have necessary funds for replacement of assets. Investment allowance has been withdrawn. Investment deposit benefit has been withdrawn and depreciation has been reduced to 25%. In terms of rising prices this relief should have been made more generous and even if investment allowance is not reintroduced, it is suggested that depreciation on machinery should be allowed at 33% to meet with the requirement of replacement and in view of rapid technological obsolescence. This is all the more necessary to provide assessee with sufficient plough back of funds especially when bank finance is increasingly becoming scarce for medium and lower segments of business. Sufficient safeguards like creating a depreciation reserve for providing funds for replacements may be introduced.

It is suggested that general depreciation rate may be increased to 33.1/3%

9. Goodwill

At present, whether the expression "or any other business or commercial rights of similar nature" coming in the definition of the "block of assets" in section 2(11) is not free from doubt. Goodwill is certainly an intangible asset and has been specifically recognized as an asset in Schedule VI to the Companies Act.

Hence, goodwill acquired by purchase should expressly form part of block of assets and be eligible for depreciation. Definition of intangible assets may be suitably amended.

10. VRS deductions and amalgamation

At present, deduction of payment of VRS is allowed in instalments by way of amortisation. There is no enabling provision to continue the deduction after

amalgamation.

It is suggested that the instalments for which deduction has not been allowed earlier, should be allowable in the hands of amalgamated companies, if such company amalgamates with another company.

11. Section 36 - Deduction allowable in respect of provision made for bad and doubtful debts in the case of banks, financial institutions and non banking financial companies (NBFCs)

To allow deduction for provision for bad and doubtful debt based on the prudential norms of RBI is indeed a welcome measure. However, to give full effect to the intention of the legislature the following suggestions are made.

1. *In the provisions dealing with deduction in respect of provisions for non-performing assets, a proper alignment with the prudential norms prescribed by RBI is necessary.*
2. *The words "doubtful assets or loss assets" should be replaced by "sub-standard assets and doubtful assets and loss assets".*
3. *The wordings in the new proviso i.e. "for assets classified by the Reserve Bank of India as doubtful or loss assets in accordance with the guidelines issued by it in this behalf" can be substituted with the following: "for assets classified by the bank as doubtful and loss assets in accordance with the guidelines issued by the Reserve Bank of India in this behalf."*
4. *Once the banks make a provision for doubtful debts as per the prudential norms and the audited accounts reflect such a provision as is necessary for the purpose of showing a true and fair view of the state of affairs of the bank, the entire provision should be allowed as a deduction. In other words, there should be no cap on the deductibility of the provision for bad and doubtful debts.*
5. *The scope of these provisions should be extended to non-banking finance companies also as these companies are also required to follow the prudential norms prescribed by Reserve Bank of India and the audited accounts have to be certified as showing a true and fair view.*

12. Section 40(b) - Remuneration to working partners

The present slab of 90% of first Rs.75,000/- (Rs.1,00,000/- in the case of professional firms) 60% of next Rs.75,000/- and 40% of balance book profit was fixed in the year 1992 (with effect from 1.4.1993). The firms are taxed as separate entities at a flat rate of 35%. The limits on allowance of salary to partners create an artificial restriction. Further, there has been inflation as well as growth in the economy over the past decade. These artificial limits on salaries to partners are acting as a disincentive for the expansion of the firms. Anyhow the revenue will not lose because the remuneration paid to the partners will be taxed in their hands as business income.

It is suggested that the restrictive provisions on remuneration payable to partners of a firm should be deleted and the limits prescribed in the partnership deed should be allowed to prevail.

13. Section 40A(3) - Direct cash deposits in banks due to contractual obligations

Under section 40A(3), 20% of any expenditure in excess of Rs.20,000, if paid otherwise than by way of an account payee cheque/draft would be disallowed. In certain cases however, payments have to be made directly into bank account of the payee - for example purchase of liquor from the State agencies by the licence holders. The authorities are taking a view that such direct payments exceeding Rs.20,000 would be hit by the provisions of section 40A(3). This is causing great practical difficulties and hardship. Such situations were earlier redressed by the Assessing Officer under Rule 6DD(j). However, the same has been omitted. There is a need to exempt such direct payments into bank account of the payee arising out of genuine contractual obligations from the scope of section 40A(3). Alternately, Rule 6DD(j) may be restored to provide relief in cases of genuine hardship. The categories of the payees in respect of whose transactions such exemption shall apply may also be stated to avoid any abuse of this relaxation.

14. Allowability of bonus

The due date for filing return under section 139(1) precedes the time limit for payment of bonus under the Payment of Bonus Act. This causes inconvenience and hardship.

Allowability of bonus paid to workmen should not be linked with the due date for

filing of the return. If bonus is paid before the due date mentioned in the Bonus Act the same should not be disallowed under section 43B.

E. Capital gains

15. Section 45(1A) - Charging profits and gains arising from the receipt of any money etc. under an insurance

Any insurance claim received on damage to a capital asset should not be covered by section 45(1A). The assessee normally spends money for repairing the capital asset when there is damage. Such expenditure is allowed as a deduction as “current repairs” and compensation received is taxed as deemed income under section 41(1) in the normal course of business. Only where damaged asset is taken over and replaced by another asset, section 45(1A) should apply.

Hence the reference to “damage” in section 45(1A) may be modified to clarify the above position in law.

16. SECTION 48

Explanations (iii) and (iv) define the terms “Indexed cost of acquisitions” and “Indexed cost of Improvement” of a capital asset. As per the explanation; where the asset became the property of the assessee by any of the modes specified in section 49(1), the cost of acquisition of the asset shall be indexed from the date when the assessee became the owner of the asset and not from the date when the previous owner acquired the asset. However, the cost of improvement in such a case would be from the date when the improvement took place and not from the date when the current owner became the owner of the asset. The benefit of indexation of cost of acquisition should be given from the date when the previous owner became the owner.

The following example would give better understanding of the above:

Mr. X acquired a house on 1.4.1995 for Rs.200000/-. There were certain improvements made on the above house during the financial year 1997-98 and cost of such improvements was Rs.100000/-. Mr. X expired on 31.03.2000 and the house passed as inheritance to Mr. Y on 31.3.2000. Mr. Y sold the said house on 1.4.2003.

In the above example the cost of acquisition of the house would be indexed from 1.4.2000 whereas the cost of improvement be indexed from the financial

year 1997-98. This would result in a very peculiar situation which cannot be the intention of the legislature. Suitable clarificatory amendment may be made.

17. Section 49

In the event of distribution of assets on dissolution of a firm, profits and gains arising therefrom are chargeable to capital gains. The fair market value will be the consideration for such a transfer. Logically therefore, when such an asset is subsequently transferred, the cost should be the fair market value of the asset on the date of distribution to the partner. But as per the existing provisions of section 49 the cost to the previous owner is being adopted.

In the event of distribution of assets on dissolution that has taken place on or after 01.04.87, as provided under section 45(4), the cost of acquisition of the asset to the partner should be the fair market value of the asset adopted for bringing to tax such deemed gains arising from distribution to the partner.

18. Section 50C

Section 50C being a special provision for considering full value of consideration in certain cases was inserted by Finance Act, 2002 w.e.f. assessment year 2003-2004. Accordingly, where the consideration received or accruing as a result of the transfer by an assessee of a capital asset, being land or buildings or both, is less than the value adopted or assessed by any authority of a State Government for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed shall be deemed to be the full value of the consideration received or accruing as a result of such transfer.

Section 50C which provides for adopting value for stamp duty in the place of actual consideration is similar to section 52(2) withdrawn earlier due to Supreme Court decision in KP Varghese case, 131 ITR 597. We have earlier expressed our reservations in regard to this provision. We reiterate the same for the following reasons:

- (a) *Guideline value is not fixed in a scientific manner by the State Government authorities.*
- (b) *Guideline value is fixed for a particular survey number or division number encompassing sev-*

eral properties whose market value can never be the same.

- (c) The concept of real income gets affected and capital gains will be computed on basis of notional figure.*
- (d) Guideline value is periodically increased in some States even though there is no corresponding increase in the market value.*
- (e) Guideline values were influenced by the peak rates prevailing during 1996-97 after which the real estate market crashed down but guideline value has not been correspondingly reduced.*
- (f) Even under Chapter XXC, guideline value never influenced the decision to purchase any property as the Appropriate Authority always appreciated that market value is different from guideline value. Guideline value is one of the indicative factors but not conclusive as to the fair market value of a property.*
- (g) Any understatement of consideration should be tackled by investigation mechanism and not by such an amendment.*
- (h) Invariably the buyer has to bear the stamp duty. If he goes on appeal against value for levy of stamp duty, it is unjust to deprive the seller assessee in getting the benefit of reference to valuation officer.*
- (i) Reference to valuation officer and the value so estimated can be subject matter of prolonged litigation without ultimate increase in revenue.*
- (j) Computation of capital gain on the basis of unrealised notional value will lead to difficulty in availing exemption by making eligible reinvestment.*
- (k) Even in cases where transactions are approved by public charity commissioner, Reserve Bank of India, Appropriate Authority (up to 1.7.2002) invoking guideline value will lead to anomalous situations.*
- (l) This provision is prone for subjective assessment and prolonged litigation on complex issues/disputes.*

The above mentioned hardship does not arise in States like Delhi and Kerala where no standard guideline value for stamp duty is determined but stamp duty is collected on the value indicated in the document. In certain States like Maharashtra, Andhra Pradesh, Tamil Nadu, Karnataka and other States the guideline value for stamp duty is more by 50% to 100% of the

actual sale consideration. Hence it causes undue hardship resulting in taxing notional income often the notional income chargeable exceeds the net consideration in respect of the transaction. Central legislation placing reliance on State Guidelines, which are not uniform affects harmonious implementation and leads to discrimination.

19. Section 51

The above section came into force prior to the amendments providing for indexation came into force. After the said amendments, this section has not been suitably amended. As a result undue hardship is caused in a number of cases. It is provided in the said section that where any advance money has been received and retained by the assessee, the same shall be deducted from the cost of acquisition of the asset which means that the reduced cost would be the cost of acquisition and the same shall be subjected to indexation. Consequently, the assessee will be subjected to higher capital gains tax just because he had received and retained certain amount of advance. The following example would clearly highlight the difference:

SITUATION – I

- (a) X purchased a property on 1.6.81 for Rs.200000/
- (b) He had entered into an agreement for sale of the said property on 20.12.2002 and received an advance of Rs.100000/ which was forfeited by him due to non fulfillment of the conditions of the agreement by the prospective buyer.
- (c) He finally sold the house on 15.3.2003 for Rs.900000/.

The capital gains would be worked out as under:

Sale Consideration	Rs.900000.00
Less: Cost of acquisition (200000-100000) = 100000	
Indexed cost $\frac{100000 \times 447}{100}$	<u>Rs.447000.00</u>
	Net LTCG <u>Rs.453000.00</u>
Tax @ 20% on 453000/	= Rs.90600/

SITUATION – II

In the above example, if X had not received and retained the advance and only sold the property for a consideration of Rs.1000000/ on 15.3.2003 the capital gains would be worked out as under:

Sale Consideration	Rs.1000000.00
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Less: Cost of acquisition = 200000

Indexed cost	$\frac{200000 \times 447}{100}$	Rs. 994000.00
	Net LTCG	Rs. 6000.00

From the above example, it can be seen that merely because X had retained an advance of Rs.100000/ he has to pay tax on additional capital gain tax to the tune of Rs.84600/ . In both the above examples, X receives a total consideration of Rs.1000000/ only.

It is therefore, suggested that section 51 should be suitably amended so that the original cost of acquisition is indexed upto the date of receipt of advance and the reduced cost is indexed from the date of receipt of advance.

20. Section 55 - Advancing the date of option of fair market value as cost of acquisition

Initially, the option date was 1st day of January, 1954. It was amended to 1.1.1964 w.e.f. 1978-79 assessment year. Subsequently it was amended to 1.4.1974 w.e.f. assessment year 1987-88 and 1.4.1981 was substituted w.e.f. 1993-94 assessment year. A decade has passed since the above revision.

It is suggested that the option date should be advanced to 1st April, 1991.

F. Amalgamations

21. Section 72A

Under the above section accumulated loss does not include the loss under the head "capital gain" and is limited to the loss under the head "profits and gains of business or profession".

The benefit of carry forward and set off of unabsorbed capital loss should be allowed to the resulting company/amalgamated company.

22. Section 72A – Recommendation of the committee

The benefit under section 72A should be extended to all service sector companies as was recommended by the Government Committee appointed for the review of section 72A.

G. Carry forward and set off of losses

23. Section 73 - Explanation

As per Explanation to section 73, in the case of companies, profit/loss arising from the business of purchase and sale of shares is deemed to be a speculation loss except in the case of finance and banking companies. As such all companies engaged in the

business of share broking and doing trading of shares are deemed to be carrying on speculation business. This section was introduced to curb the practice of setting off profit from manufacturing/trading activities against share loss. But, to the corporate sector doing business as share-brokers, these provisions are causing genuine hardship. Further, this goes against the intention of the Government to encourage corporatisation of the members of the recognised stock exchanges.

The stock market has vastly expanded and futures, derivatives and options are common features in stock market trading. These types of trading have become necessary in the normal course of business to hedge against genuine losses.

Therefore, an amendment in section 43(5) dealing with speculative transaction is necessary to the effect that transaction in the nature of futures, derivatives and options are outside the purview of speculative transaction. Correspondingly, consequently, Explanation to section 73 may also be deleted since it affects corporates doing genuine share business.

H. Deductions from gross total income

24. Commissioner's approval under section 80G(5)(vi)

One of the condition to be satisfied for getting a deduction under section 80G is that in relation to donation made after 31.3.1992, the institution or fund is for the time being approved by the Commissioner in accordance with the rules made in this behalf.

It is suggested that the order issued by the Commissioner as referred to above should be made appealable on the lines of the order issued under section 12AA.

25. Section 80IA - Anomaly in sub-clause (12) - Need for a uniform definition of "infrastructure facility".

(i) Sub-clause (12) of section 80IA provides, *inter alia*, that the amalgamating or the demerged company shall not be entitled to claim any deduction for the previous year in which the amalgamation/ demerger takes place. This sub-clause does not take care of a situation where the demerger or amalgamation takes place in between the year.

In order to make the provisions of section

80IA(12) tax neutral, it is suggested that the above sub-clause (a) should be modified to provide that deduction under this section shall be admissible in the hands of the demerged / resulting company or amalgamating and amalgamated company in proportion to the period pre and post merger etc.

- (ii) Further, there is a need for a uniform definition of the term “infrastructure facility”. This is because of the fact several ambiguities exist in the various definitions of the term “infrastructure facility” spread over more than place.

(i) It is suggested that the term “infrastructure facility” may be defined in section 2.

(ii) Education should be recognised as “infrastructure facility” and institutions providing professional education should be encouraged.

I. MAT

26. Section 115JB contains the list of amounts to be reduced from the book profit. Item (ii) specifies incomes to which sections 10, 10A, 10B, 11 or 12 are applicable. Earlier section 10C was not included in the list. Now section 10C has been replaced by section 80-IC. Appropriate amendments may be made to exclude income exempt under section 80-IC from the purview of MAT.

27. Exclusion of long-term capital gains

MAT is payable by companies even on long term capital gain, though the same might not be taxable because of indexation or investment in approved securities in accordance with the provisions of sections 54EC and 54ED of the Act.

Section 115JB should be amended to provide for exclusion of long term capital gains from the ambit of MAT. Further profits exempt under section 80IA/80IB and profit on sale of assets should also be excluded from the scope of MAT.

28. Depreciation or loss

Section 115JB, being a special provision for payment of tax by certain companies was inserted by the Finance Act, 2000 w.e.f. assessment year 2001-2002. This section has adopted a different basis for calculating MAT on companies. Earlier, MAT was calculated under section 115JA. Under both these sections, for the purpose of calculating ‘book profit’ the net profit has, inter alia, to be reduced by the amount

of loss brought forward or unabsorbed depreciation whichever is less as per books of account and for this purpose, the loss shall not include depreciation.

Explanation, as notified by the Finance Act, 2002 provides that in case any one of the items is Nil, no deduction shall be made from the book profits. This amendment would squarely hit service companies where depreciation may be insignificant or may not exist. All such companies would be put to severe hardship as they can never reduce their business loss from the book profit in case there is no depreciation.

This problem needs to be addressed through suitable amendment.

29. Restoration of credit for MAT

Section 115JAA provided for tax credit in respect of tax paid on deemed income relating to certain companies. The above section was inserted by the Finance Act, 1997 w.e.f. A.Y. 1997-98. Sub-section (3) thereof allows the tax credit to be carried forward but such carry forward shall not be allowed beyond the fifth assessment year immediately succeeding the assessment year in which the tax credit becomes allowable.

It is suggested that tax credit in respect of MAT should be restored.

30. MAT credit and mandatory interest under sections 234A, 234B, 234C

At present while calculating interest payable under sections 234A, 234B and 234C the Department is not taking into account the tax credit available to companies under section 115JAA. The tax credit allowed under section 115JAA is certainly in the nature of advance tax and due credit is to be given for the same while calculating interest payable under sections 234A, 234B and 234C. In the alternative, MAT credit should go to reduce the ‘tax payable on total income’ or the ‘assessed tax’ and only thereafter the calculation of interest should be made. Although Assessing Officers are adjusting the MAT Credit to determine the tax payable or refund due, they are not adjusting the same for calculation of interest. Appeals are being filed on this issue. A clarificatory amendment would prevent undue hardship.

31. Deduction of depreciation or loss

Explanation to section 115JB(2) allows deduction in respect of amount of loss brought forward or unabsorbed depreciation, whichever is less, as per books of account. Especially in cases where the total of

losses and depreciation exceeds profit in a particular year, there are no guidelines as to whether profit is to be adjusted against 'loss' or 'depreciation'. Some guidelines may be made for this purpose.

Meanwhile deduction should be allowed for total accumulated loss including depreciation, as the distinction between 'loss' and 'depreciation' does not have any rational ground.

J. Assessment procedures - due date for filing of returns of income

32. The existing due dates for filing of returns of income are causing lot of difficulties due to bunching of corporate and non-corporate assessee's returns on the same due date. Salaried assessee's may be required to file their returns by 30th June. An early due date say 31st July can be fixed for non-corporate non-audit cases involving least amount of complexity. After that a time gap of 1 month may be given for non-corporate audit cases to file their returns. Corporates need not wait till 31st October or 30th November, they may be required to file their returns by 30th September. By that time the accounts of corporate assessee's would be approved in AGMs and hence a time gap of one month would be sufficient to complete the tax audit of corporate assessee's. By this process the flow of returns will be regular and uniform. Revenue collection will also be advanced by a month.

It is therefore suggested that the following new due dates for filing of returns may be adopted.

Category	Due date
Salaried assessee's	30 th June
Non-corporate non-audit cases	31 st July
Audit cases – non-corporate assessee's	31 st August
Corporate assessee's	30 th September

33. Audit fee under section 142(2A)

Chartered Accountants render services by conducting special audit under section 142(2A) when nominated by the Commissioner of Income-tax. These audits bring out matters that help the Assessing Officer in making a proper assessment. However, there are difficulties faced in realisation of fee from the assessee. The section which provides for fixation of fee by the CIT should also provide for payment of such fee by the Department. This is logical

because the tax auditors are appointed by the Department. Subsequently, such fees can be recovered from the assessee's along with taxes.

34. Method of accounting and accounting standards

The objective of the Income-tax Act is to compute correct income chargeable under the Act. For computing correct income from business, application of correct accounting principles is essential. The ICAI, as the apex body in accounting, has issued several accounting standards enunciating correct principles of accounting. These accounting standards have been recognized under the Companies Act and it is the duty of the management to comply with the accounting standards of the ICAI. If the accounting standards issued by the Institute of Chartered Accountants of India are notified under the Income-tax Act there is no necessity to bring separate amendments for clarifying accounting principles from time to time. For example Explanation 8 to section 43(1) was added to clarify the position of deferred interest. Recently, amendments have been made in sections 30, 31 and 36 regarding capital nature of repairs and interest expenses. These amendments which are made in the Act from time to time will not be necessary if the accounting standards of the ICAI are notified. Correct accounting principles will automatically get enshrined in the Income-tax Act as and when these accounting standards are notified. Adoption of accounting standards of ICAI will considerably reduce litigation, bring more clarity and transparency in the computation of income and pave way for harmony between the assessee and the Department.

It is suggested that the Accounting Standards of ICAI may be notified under section 145(2) to be complied by the assessee's. The accounting treatment - if considered in accordance with the Standards will determine the allowability of certain expenses. Sec. 36 (int.) etc.

35. The need for withdrawing section 145A in view of Accounting Standard 2 (Revised) Valuation of Inventories becoming mandatory

The Institute has issued 28 Accounting Standards on various subjects. These Accounting Standards have been made mandatory. AS 2 (Revised) Valuation of Inventories has been made mandatory from accounting year starting from 1.4.1999

onwards. The mandatory AS also apply in respect of financial statements audited under section 44AB of the Income-tax Act, 1961. Accordingly, members examine compliance with the mandatory accounting standards when conducting such audit. Section 145A is tax neutral as explained in the ICAI's Guidance Note on Tax Audit under section 44AB of the Income-tax Act, 1961.

In view of the above developments it is felt that section 145A may be withdrawn from the statute book and valuation of inventory be governed by AS 2 (as duly notified).

36. Section 155(13) - Rectification of mistakes

Under the above sub-section (13) of section 155, any order can be rectified to give the benefit of section 80HHB, 80HHC, 80HHD, 80HHE, 80-O, 80R, 80RR, 80RRA where such benefit could not be given as the income had not been received in convertible foreign exchange in India. The above clause does not include sections 80HHF giving deduction in the case of export of films etc., and sections 10A and 10B.

It is suggested that reference to sections 10A, 10B and 80HHF should be included in the above sub-section (13) of Section 155.

K. Block assessment:

37. New procedure for search and seizure

Sec 153A provides that in the case of a person where search is initiated under Sec 132 or where books of account, other documents or any assets are requisitioned under section 132A after the 31st May, 2003, the Assessing Officer shall notwithstanding anything contained in section 139, section 147, section 148, section 151 and section 153 issue notice to such person requiring him to furnish the Return of Income in respect of each assessment year falling within the period of six assessment years. This Section also provides that assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years referred to in section pending on the date of initiation of search shall abate.

There can be no abatement or effacement of an assessment or reassessment already made except through the legal process by which the impugned order is set aside, annulled or quashed. Where the assessment already made has been agitated in appeal and the Appellate Authority has confirmed or modified or set-aside the same, treating such assessment as being alive and the appellate order/s as Non -Existent

appears to be totally misconceived and unsustainable.

Where a search or a requisition does not yield any facts or evidence of concealed income (or even income which had escaped assessment) for any of the six assessment years, reopening of assessment for any such assessment year should not be permitted on the basis of mere circumstance that the assessee was subjected to Search or Requisition and ignoring the fact the search or requisition had not yielded anything for that year.

L. Deduction of tax at source

38. Penal interest for late payment of TDS

Late payment of TDS should be subjected to penal interest as provided under section 201(LA) of the Act. This interest should be paid by way of self assessment and challan should be enclosed with the return of TDS.

39. Rectification of TDS returns

Presently there is no provision for revising the TDS return with the result that any mistake/omission to deduct tax at source detected subsequently by the assessee cannot be rectified.

It is suggested that a provision similar to section 139(9) providing for rectification of TDS returns should be enacted.

40. Statutory framework for scrutiny of TDS returns

At present there is no time limit for completion of assessment of TDS returns filed by the assessee, nor for issue of TDS certificates and the filing of TDS returns.

It is suggested that a proper statutory framework should be introduced to provide in the law itself for scrutiny of TDS returns, relevant time limits and also provision for refund of excess tax deducted at source.

41. TDS to be in round figures

While deducting TDS complex calculations are required in view of the requirement to include surcharge. TDS is any way an adjustment towards the final tax due. Therefore, it is necessary that a simple method should be adopted for deducting TDS.

TDS rates should be prescribed in round figures. There should be no need for recalculation by applying surcharge.

42. Quarterly accounts - difficulties faced

Many of the corporates prepare accounts on a monthly/quarterly basis. These companies are also

required to get their quarterly accounts audited/reviewed by the auditors. Therefore, these companies have to pass entries for making provisions of various items on monthly or quarterly basis (especially issues like interest on debentures, other interest, etc.). These entries however are reversed on the on the very next date and therefore these entries are merely recorded as a “memorandum entry” for making the provisions. The departmental officials have at times taken a view that these entries would also mean creation of provision and therefore at that stage itself the TDS should be deducted and failure to do so would result into violation of the provisions of law. It is submitted that this view is too harsh and would make compliance too cumbersome for the corporates. In fact, it is also against the basic scheme of the TDS provisions.

It is therefore requested that amendment be made that TDS shall be deductible on such aggregate provisions only once in a year i.e. the date of end of the financial year; on the aggregate provision made during the financial year - which has not resulted in actual payment to the payee.

43. Time limit

Time limit should be fixed for assessment of TDS returns.

44. TDS and payee's PAN

At times, application for PAN is submitted by the assessee, which is not allotted by the Department for a substantially long period of time in spite of repeated reminders. Accordingly, the payee is not able to intimate the PAN to the payer. Similarly, payer is not able to mention the PAN of the payee in the TDS certificate. Levy of penalty due to reason, which is beyond the control of payee/payer is not at all warranted.

Hence, the provisions of section 272B should be suitably modified.

M. Settlement Commission

45. Section 245D read with sections 234A, 234B and 234C

The Hon'ble Supreme Court in *CIT v. Anjum M.H. Ghaswala* [2001] 199 Taxman 352 (SC) has held that the Settlement Commission, while passing order under section 245D(4) or (6), has no power to reduce or waive interest statutorily payable under sections 234A, 234B and 234C except to extent of granting relief under Circulars issued by the Board

under section 119.

It is suggested that Settlement Commission should be empowered to waive interest payable under sections 234A, 234B and 234C in appropriate cases.

N. Penalty

46. Section 272(2)(e)

Penalty provision for late filing of return in the case of charitable trusts and Institutions should be at par with other assesseees. At present a minimum penalty of Rs.100/- and a maximum of Rs.200/- per day is leviable for each day of default in filing the return of income by charitable trust/institution under section 272A(2)(e). These provisions are too harsh for a charitable trust/institution. Such penalty is still leviable even though the income of the trust/institution may be below taxable limit after exemption under section 11 or 12. Hence, there is a discrimination against such trusts as compared to other assesseees, where penal interest under section 234A is based on tax payable. Further, often, such trusts/institutions do not have full-time office bearers.

To remove this discrimination a token penalty of Rs.1000/- may be levied in case of delayed filing of returns by such trusts/institutions. Alternatively, a ceiling of an amount not exceeding the actual tax payable may be prescribed.

Wealth tax

Where an existing building in an urban area is being demolished for the purposes of real estate development, then the Wealth Tax Authorities are taking a view that during the intervening period before the completion of the new construction, the asset that is chargeable to Wealth Tax Act under section 2(ea) as on the valuation date will be urban land.

As per Rule 20 & 21, those assets for which a specific method of valuation is not provided under Schedule III of the Wealth Tax Act, the Fair Market Value of the asset has to be taken for computing the new wealth.

Relief should be provided to assesseees who have entered into joint venture agreements for demolishing and raising a new structure by stating that such assets shall be exempt if the building has not been completed as on the valuation date. A certain time limit within which the superstructure should be constructed thereon may be specified to prevent any misuse.

IV. SUGGESTIONS RELATING TO INDIRECT TAX LAWS

A. CENTRAL EXCISE

1. Transparency

Taxes at different rates and on different value basis are levied on different industries. These rates are varied from time to time. However, no specific reason for variation in rates / exemption / benefits made available to a particular industry is provided. Also, the contribution by major industries to the overall Government revenue, are not provided although data in relation to the same are now available.

The data of contribution of indirect taxes industry-wise should be published with the budget documents and any variation of rates, exemption/withdrawals of benefits for a particular industry be explained in the budget documents.

2. Settlement Commission

The Finance Act, 1998 proposed setting up a Settlement Commission in order to overcome the problems of pending disputes. Benches of the Settlement Commission have been set up in order to deal with and settle the disputes brought before the Settlement Commission. Both under the Central Excise Act and the Customs Act cumulative conditions have to be satisfied before a person can approach the Settlement Commission.

It may be noted that prior to Finance Act 2000, the conditions were not cumulative and, therefore, even if a show cause notice had not been issued, a person could approach the Settlement Commission. However, the Finance Act 2000 has amended this position and made the conditions cumulative. This vitiates against the very purpose of establishing the Settlement Commission as this prevents settlement of a possible dispute.

The cumulative conditions prevailing under the Customs and the Central Excise Act in order to approach the Settlement Commission should be done away with and the pre Finance Act 2000 status regarding application to Settlement Commission should be brought into force.

3. Principal amount for computing Interest

Section 11AB(1) provides that in all cases where duty has not been levied or short levied or short paid or erroneously refunded, the person liable to pay the duty also has to pay interest from the first day of the month succeeding the month in which the duty

ought to have been paid.

Proviso to Section 11AB(1) provides that in case where duty is payable consequent to issuance of order, instruction or direction by the Board and the same is voluntarily paid within 45 days in full without reserving any right to appeal against such payment at subsequent stage, no interest shall be payable. However, in all other cases, the interest is payable on the whole amount including the amount already paid. Prima facie reading of this proviso leads to an interpretation which is explained below by way of an illustration.

Assume that in terms of a Board dated 01/06/2002, the duty payable is Rs.100/-. This amount of Rs.100/- has to be paid by 16/07/2002 so as to avail the facility of interest waiver. However, if an amount of Rs.50/- is paid till 16/07/2002 and the balance Rs.50/- is paid on 16/12/2002 then interest will be charged on the entire amount of Rs.100/- and the period will be first day of month following the month in which it is due till 16/12/2002. In other words, even in respect of Rs.50/- which has been paid before 16/07/2002 interest will be charged till 16/12/2002. Charging of interest for a period beyond the period of receipt of the amount is unfair and goes against the very canons of imposing interest.

The provision for levy of interest be deleted on the amount already paid or it may be clarified that interest will be charged only for the period till the amount is outstanding.

4. Disparity in interest rates

Section 11BB of the Central Excise Act, 1944 which deals with interest payable on refund provides for interest at least 5 per cent but not exceeding 30 per cent.

On the contrary, Section 11AB requires payment of interest at rates not below 10 per cent and not above 36 per cent, from the first day of the month succeeding the month in which the duty ought to have been paid. This is unfair since in case of recovery of central excise duty, rate of interest is high whereas in case of refund of the same, it could be as low as 5 per cent. Further, with fall in interest rates, charging interest at a high rate of 10% / 36% is unfair as interest is in the nature of compensation for non-availability of funds. The prevailing interest rate of 15% is penal in nature and partakes the character of penalty which already exists.

The rate of interest payable on refund of central excise duty be brought in line with the rate of interest applicable in case of recovery of central excise duty.

COMPREHENSIVE SUGGESTIONS ON SERVICE TAX

A. CHANGES IN LAW

1. SUBSTANTIVE CHANGES

1.1 Clarification on “services provided in India” – Territorial jurisdiction

By Section 64(1) of Chapter V of the Finance Act, 1994 (“Act”), the law governing service tax, the Act extends to the whole of India except the State of Jammu & Kashmir and by section 64(3) it applies to taxable services *provided*. Hence, service tax is a tax on services *provided* in India. The word ‘provided’ in this context may lend itself to mean –

- (i) ‘performed’; or
- (ii) ‘supplied’;

Thus, the issue is for a service to be treated as being provided in India –

- (i) whether the services must be “performed” in India ? or
- (ii) whether the services must be “supplied” in India ?

If it is interpreted as services performed in India the taxable base would be “*service provider centric*”. If it is interpreted as services supplied in India the taxable base would be “*service receiver / customer centric*”. In the UK VAT Act, 1994 there are separate ‘Place of Supply’ rules for each service to determine the place of supply and the territorial jurisdiction for taxation. In our country too the Act should clearly provide for this. Separate supply rules maybe drafted *qua* each type of service.

Further, it should also be clarified that in the event the *situs* of taxation is *customer centric* whether import of services would be liable for service tax and if so whether a separate Act is required on the lines of Customs Act, 1962 to tax import of services.

1.2 Separate enactment for service tax

It would be advisable to have a separate enactment for service tax instead of incorporating the provisions in Chapter V of the Finance Act, 1994 (Sections 64 to 96) and also making certain sections of Central Excise Act applicable to Service Tax. It may be noted that the Expert Group has also recommended a separate enactment for service tax in its Final Report (*vide* para 6.5) which recommendation also finds place in the recent Kelkar Committee Report [*vide* para 2.2.1 (iv) of Chapter 8].

1.3 “Maintenance and repair services” – Alternative remedy where AMC includes cost of parts / other materials

Section 67 of the Act provides that in case of maintenance and repair services the cost of parts / other materials sold can be excluded for the purpose of levy of service tax. However, in many cases the AMC includes the cost of parts/other materials since in actual practice parts / other materials maybe used or may not be used depending on the exigencies of the situation. Hence in such a scenario it is not possible to determine the cost of the parts / other materials to be excluded at the time of preparation of the bill or contract.

To mitigate the above hardship the following suggestions are made :

- (i) On a monthly / quarterly basis when the service tax is paid on maintenance and repair services the cost of parts / other materials may be deducted from the value of maintenance and repair services and service tax maybe paid on the net amount;
- (ii) A standard rate of abatement may be given like in case of mandap keepers (40% for catering), tour operator (60% for package tour which includes accomodation booking), etc.;
- (iii) Credit may be given for the excise duty paid on the parts / accessories since The Finance Act, 2003 has empowered the Central Government to make rules to provide for credit of duties paid on goods used for providing a taxable service.

1.4 Minimum/threshold limit to be provided

A minimum/threshold limit should be provided for registration. Presently, if a person renders taxable service even for a paltry amount of Rs.100/- he has to register, collect and pay service tax. With the tax net becoming wider in every budget this measure is of utmost importance for effective administration. Further, in case of small, unorganized self-employed services (which are now being brought into the service tax net in greater numbers) it would cause undue hardship and costs of compliance to the taxpayer without commensurate revenue to the government. It may be noted that Income tax, sales tax, the UK model of VAT, all provide for a threshold limit. The Expert Group constituted by the Central Government to review the levy of service tax (“Expert Group”) recommended a minimum threshold limit of Rs.10,00,000/- for minimizing the cost of collection and for making the tax system

more efficient and acceptable. The Kelkar Committee has recommended that service providers who provide services upto a value of Rs.10,00,000/- in a financial year should be subjected to a total tax of 1% on the value of the services on an annual basis on the basis of simple declaration and be exempted from the normal procedures and documentation but such persons would not be entitled to input credit. Ideally, a threshold limit of Rs.10,00,000/- as suggested by the Expert Group would be welcome.

1.5 No service tax on reimbursements – to be provided in the Act / rules itself

It is suggested that the Act or rules should clearly provide that no service tax will be payable on reimbursement of out of pocket expenses subject to production of documentary evidence substantiating the claim. reimbursements in any case cannot be considered to be part of the value of taxable services. Presently, the deduction is being granted by way of trade notices on a selective basis and same may be clarified by suitable amendment.

1.6 Clarification that excise duty and service tax should not be levied on the same transaction

Recently commissioning and installation has been brought into the service tax net w.e.f. 1/7/2003. In certain cases commissioning and installation may also form part of value for the purpose of excise duty if the commissioning and installation is done along with sale of machinery.

It should be clarified that the commissioning and installation should either be liable for excise duty or service tax at the option of the assessee but not for both. Further, the Act should clearly provide that service tax is not payable in a transaction if excise duty has already been paid on the transaction.

1.7 No service tax on receipts in convertible foreign exchange – condition for non-repatriation may be deleted

Notification No. 21/2003 – SERVICE TAX, dated 20th November 2003 provides that services in respect of which payment is received in India in convertible foreign exchange are exempt from service tax provided that the payment is not repatriated outside India. The condition that the exemption will be available to the assessee only if the payment is not repatriated outside India causes difficulty to many assesseees who have numerous transactions (both

receipts and payments) in foreign exchange. In the case of these assesseees the exemption may be denied on the ground that the receipts are repatriated outside India in the form of salaries, professional charges, dividends, etc. which the assesseees may have to incur in the regular course of business and which may have no direct nexus with the receipts in foreign exchange. Hence the condition that the payment must not be repatriated outside India should be deleted in order to avoid denial of exemption to many assesseees and also to avoid litigation.

**2. PROCEDURAL CHANGES IN LAW
PAYMENT OF SERVICE TAX**

2.1 *Separate provisions dealing with the machinery to levy and collect service tax required in certain cases where availer of services is liable to pay service tax.*

In respect of certain cases viz. in respect of services provided by a non-resident or a person outside India, services provided by insurance agents in relation to general insurance and life insurance services, the availer of services is liable to pay service tax. As per Rule 2(1)(d)(iii) and (iv) of the Service Tax Rules, 1994 as amended by the Service Tax Amendment Rules, 2002, the person liable to pay service tax –

- (i) in respect of services provided by a person who is a non-resident or from outside India and does not have an office in India to register, is the person receiving the services in India; and
- (ii) in relation to insurance auxiliary services provided by an insurance agent, is the person carrying on general insurance business or life insurance business.

For example, if A, a non-resident renders certain consulting engineering services to B in India and A does not have an office in India B is liable to pay service tax on the services rendered by A. In this context several issues arise –

- (a) Does B have to register himself in his name or in the name of A through B separately ?
- (b) If B received services from A, A1 & A2, three different persons, has he to take one registration or 3 different registrations ? Would it make a difference if A, A1 & A2 render 3 different types of services?
- (c) If B is already registered for service tax, can he endorse his existing registration certificate in

respect of services provided by A or he has to take a separate registration ?

- (d) If the service is only a one-time service whether B must continue to hold on to the registration number or surrender the certificate of registration ?
- (e) Does B have to pay the service tax on the services rendered by A in a separate challan?
- (f) What would be the date from which the due date for payment of tax would be reckoned -
 - (i) from the date on which B makes payment to A ? or
 - (ii) from the date on which A realizes the amount abroad ? or
 any other date ?
- (g) What would be the due date for payment of service tax if 'A' is a company and 'B' is a non-company ?
- (h) Is B entitled to input tax credit in respect of service tax paid on behalf of A if he renders the same type of service to his client ?
- (i) Does B have to file a separate return and whether separate assessments shall be made ?

These issues would pose innumerable problems in the administration and implementation of service tax provisions dealing with the levy and collection of service tax in case of non-residents where the availer of service tax is liable for payment of service tax.

Thus it would be advisable to delineate the provisions governing levy and collection of service tax where the availer of the services is liable to pay service tax from the normal provisions where the service provider is the person liable to pay service tax. Hence there should be separate provisions for payment of service tax and filing service tax return by an availer of services.

In this context it is to be noted that the Income-tax Act, provides special machinery provisions for deduction of tax at source (Sections 190 to 206) which cast an obligation on the person responsible for paying income to deduct tax and pay it to the Government. Briefly these provisions specifically provide for the following matters :

- (i) The provisions clearly define the person responsible for deducting income tax ;
- (ii) The registration formalities to be complied with viz., application for a separate tax deduction

account number (TAN), etc.;

- (iii) The time of deduction of tax at source;
- (iv) The time by which the amount so deducted has to be deposited with the Central Government;
- (v) The returns to be filed by the person deducting tax at source which are in addition to the regular return which the person deducting tax may file in respect of his own income;
- (vi) Interest and Penalties for failure to comply with the provisions;

Separate provisions for tax deduction at source facilitate the administration and implementation of the mechanism of deducting tax at source.

Accordingly, the law governing service tax must also provide for a separate machinery provisions for levy, collection and payment of service tax in cases where the availer of services has to pay service tax. The provisions must specifically provide for the following :

- (i) Define the person responsible for paying service tax;
- (ii) The registration formalities to be complied with viz., the application for separate registration number, etc. must be provided and the number applied as an availer of services should be separate and distinct from that as a service provider;
- (iii) The challan for payments which should be preferably different from the normal TR-6 challan in yellow colour;
- (iv) The time frame for payment of service tax to the credit of Central Government;
- (v) The returns to be filed;
- (vi) Interest and penalties for failure to comply with the provisions.

RETURNS

2.2 Revision of returns

Rule 7 as amended vide Notification no. 54/98 dated 7th October 1998 dealing with filing the returns does not provide for revising the returns due to any omission or wrong statement as was existing in the erstwhile section 70(3) (prior to 16th October, 1998) and which is prevalent in all other statutes warranting filing of returns.

It is therefore, suggested that there should be a provision for revising the returns, which is absent in the present dispensation.

VERIFICATION/ASSESSMENT

2.3 Streamlining provisions relating to verifica-

tion/ assessment

Section 71 as amended by the Finance Act, 2001 provides for verification/ assessment.

“Verification of tax assessed by the assessee, etc.

- (1) *The Superintendent of Central Excise may, on the basis of information contained in the return filed by the assessee under section 70, verify the correctness of the tax assessed by the assessee on the services provided.*
- (2) *The Superintendent of Central Excise may require the assessee to produce any accounts, documents or other evidence as he may deem necessary for such verification as and when required.*
- (3) *If on verification under sub-section (2), the Superintendent of Central Excise is of the opinion that service tax on any service provided has escaped assessment or has been under-assessed, he may refer the matter to the Assistant Commissioner of Central Excise or, as the case may be, Deputy Commissioner of Central Excise, who may pass such order of assessment as he thinks fit.”*

The following points need to be noted :

- (a) Sub-section (2) provides that the Superintendent of Central Excise may require the assessee to produce any accounts, documents, or other evidence as he may deem necessary for such verification as and when required. But, the sub-section does not categorically provide for an issuance of notice as clearly provided in the erstwhile section 71 (1) (prior to 16/7/2001);
- (b) The section does not provide for a time limit within which the accounts, documents, etc. for verification of a return filed by the assessee, may be called;
- (c) The section does not provide for a time limit for completion of verification/ assessment;
- (d) It appears that the Superintendent of Central Excise can call for the documents for a particular year any number of times he wishes since there is no finality to the verification process reflected by way of an order;
- (e) Further, sub-section (3) provides for passing an order by the Assistant Commissioner of Central Excise or Deputy Commissioner of Central excise if –
 - (i) the Superintendent of Central Excise is of the opinion that service tax on any service provided has escaped assessment or has been under-assessed; and
 - (ii) he refers the matter to the Assistant

Commissioner of Central Excise or Deputy Commissioner of Central excise.

Thus, there would be no requirement to pass an order under section 71 after the verification by the Superintendent of Central Excise in the event there is no escapement or under assessment of service tax.

- (f) The power to assess or reassess service tax escaping assessment is already provided in section 73.

Therefore, it is suggested that Section 71 may be suitably amended to provide for –

- (i) issuance of notice by the Superintendent of Central Excise under section 71(2) in case he wants to verify the accounts, documents, etc.
- (ii) a time limit for issue of a notice under section 71(2);
- (iii) a time limit for completion of verification;
- (iv) passing of an order in every case (even if there is no escapement or under assessment) which is taken up for verification so as to impart finality to the verification process;
- (v) dispensing with the power to assess or reassess service tax escaping assessment in section 71 since it is already provided in section 73.

2.4 Revision of mistakes even after assessment is over

Just as under section 84 where power is given to the Commissioner of Central Excise to revise orders passed by his subordinates, the assessee should also be given a right to rectify mistakes even after assessment is over. It is to be noted that section 84 is analogous to sections 263/264 of the Income Tax Act, 1961. However, the right of an assessee to apply for revision is conspicuous by its absence.

It is hereby suggested that the Act must be suitably amended to provide a right to the assessee to apply for revision of mistakes even after the assessment is over.

2.5 Annual verification/assessment

The verification of returns should be on an annual basis and not on half yearly basis just as in sales tax, income tax, professional tax etc. Thus there should be only one verification in a year. The unit of verification should be a year. This is a natural corollary after the concept of annual return as elucidated hereinafter is accepted. Secondly, it would also obliterate a lot of paper work and reduce the time of the department and the assessee.

PENAL CONSEQUENCES

2.6 Penalty for failure to pay service tax under sec-

tion 76 to be deleted - Presently assessee penalised twice for the same default.

Presently, in a case where the assessee fails to pay service tax, in addition to paying tax,—

- (i) he has to pay interest u/s 75 @15% p.a.;
- (ii) he is liable for penalty for failure to pay tax u/s 76 which is minimum of Rs. 100 and maximum of Rs. 200 per day during which the default continues restricted to the amount of service tax.;
- (iii) he is liable for penalty for concealment or suppression of value of taxable service u/s. 78 which is a minimum of 100% and a maximum of 200% of service tax evaded.

It is to be noted that in all the revenue laws (including excise) if there is interest for delayed payment there is no separate penalty for delay in payment of tax. There is only penalty for concealment or suppression resulting in evasion of tax. In service tax the assessee is penalised twice.

Hence it is hereby suggested that—

- (i) *the penalty under section 76 for failure to pay tax be deleted; and*
- (ii) *the penalty under section 78 for suppression or concealment of value of taxable service be retained.*
- (iii) *Interest under section 75 @ 15 % p.a. be retained.*

2.7 Relief/concession in penalty in respect of belated registration

Section 80 provides that no penalty under section 76, 77, 78, or 79 shall be imposed if the assessee proves that there is “reasonable cause” for the failure referred to in the said sections. It is to be noted that the penalty under section 75A which penalizes failure to register in accordance with the provisions of section 69 with a penalty of Rs. 500/- is not included in section 80 of the Act. Hence condonation of penalty under section 75A on “reasonable cause” ground is not provided in the existing dispensation.

It is hereby suggested that section 80 of the Act be amended to provide for condonation of penalty under section 75A in case the assessee shows reasonable cause.

OTHERS

2.8 Powers of revision (Section 84) – drafting improvements

Section 84 seeks to provide for powers to the

Commissioner of Central Excise for Revision of Orders as mentioned in the caption of the section. However, the operative part of the section does not seem to bring out the intention since it provides that the Commissioner of Central Excise may make an enquiry on any ‘proceeding’ taken by the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, and thereafter pass such Orders as he thinks fit. It does not categorically provide for revision of orders of the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise.

However, sub-section (5) provides that no order shall be passed under this section after the expiry of 2 years from the date on which the ‘order’ sought to be revised is passed. This gives the clear indication that the revision pertains to orders passed by the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise.

It is therefore, suggested that the section be amended to clearly bring out the intention on the same lines as section 263 of the Income Tax Act.

2.9 Provisions of the Customs Act, 1952 to be directly adopted

Section 12 of the Central Excise Act, 1944 is sought to be made applicable to service tax by virtue of an amendment proposed in section 83 of Chapter V of the Finance Act, 1994, the law governing service tax. Section 12 of the Central Excise Act empowers the Central Government to notify provisions of the Customs Act, 1962 relating to levy and exemption of customs duty, drawback, warehousing, offences and penalties, confiscation and procedure relating to offences and appeals, that would be made applicable to the Central Excise Act, 1944 with such modifications as mentioned in the notification.

It would be advisable to incorporate the provisions of the Customs Act directly in the law governing service tax rather than in a circuitous manner by referring to Section 12 of the Central Excise Act, which adopts certain provisions of the Customs Act.

2.10 Advance Ruling Mechanism to be widened

A new Chapter V–A is proposed to be inserted to provide for Advance Ruling mechanism in service tax. The ruling shall be in respect of a question of law or fact regarding the liability to pay service tax in relation to a service proposed to be provided by –

- (a) a non-resident setting up a joint venture in India

in collaboration with a non-resident or a resident; or

- (b) a resident setting up a joint venture in India in collaboration with a non-resident; or
- (c) a wholly owned subsidiary Indian company, of which the holding company is a foreign company.

It is suggested that the Advance Ruling should not be restricted to the above 3 situations but should be extended to all categories of transactions with non-residents.

B. CHANGES IN RULES

3. CHANGES IN THE SERVICE TAX CREDIT RULES, 2002 – INPUT TAX CREDIT MECHANISM

3.1 Clarification on the availability of input tax credit for service tax paid on reimbursable expenses or pass through transactions.

Under the Service Tax Credit Rules, the tax paid on input service is allowed to be deducted from tax payable on output service. In certain cases like custom house agents, steamer agents, clearing and forwarding agents, etc. the agent pays port dues, cargo handling charges, storage and warehousing charges, etc. on behalf of his principal / importer / exporter / shipper, etc. and recovers them from such persons. In the case of such agents such expenditure is of a reimbursable nature and is a pass through transaction. The issue is who will be entitled to the credit of service tax paid on such expenses - the agent who pays service tax only on his commission or the principal / importer / exporter / shipper, etc. who bears the expenditure.

In the event the steamer agent / the custom house agent / the clearing and forwarding agent is entitled to input tax credit then the credit may be much more than the service tax on his commission. In the event the principal / importer / exporter / shipper, etc. is entitled to the input tax credit what would be the document for the purpose of claiming the input tax credit? Is the invoice raised on the agent adequate since in this case the principal / importer / exporter / shipper, etc. may not be able to obtain the invoice of input service provider i.e. the Port? It is to be noted that the service tax rules do not provide for such a contingency. A similar scenario is dealt with in the CENVAT Credit Rules where the cenvat credit can be claimed on the basis of the invoice of a

first stage dealer and a second stage dealer. In the excise scenario where the inputs flow from the manufacturer to the first dealer and then to the ultimate customer, the ultimate customer would be eligible for CENVAT credit on the amount of duty paid by the first stage dealer to the manufacturer on the basis of the invoice issued by the first stage dealer.

It is hereby suggested that in such cases where service tax is paid on reimbursable expenses or on pass through transactions the service tax credit rules must provide that input tax credit may be claimed by the person who bears such expenses on the basis of a debit note provided by the agent mentioning the amount of value of input service and the service tax paid by the agent on behalf of the principal / importer / exporter / shipper, etc. This may be mentioned in the debit note for his commission.

3.2 Utilisation of input tax credit on input services received and consumed in relation to output services provided from more than one registered premises.

There are several situations where the input services are incurred / paid from one premises/office but the input service is utilised for output services provided from two or more registered premises.

In such a scenario the Rules may be amended to clarify that –

- (a) *The input tax credit may be availed by any one premises as the assessee may opt for;*
- (b) *In the alternative, the input tax credit may be utilized in the ratio of the taxable output turnover or service taxes payable.*

3.3 Availment of input tax credit when input services received and consumed for providing taxable as well as non-taxable services – 35% rule maybe modified to make it equitable.

Presently, under the Service Tax Credit Rules, 2002, where an output service provider provides both taxable and exempt / non-taxable services and does not maintain separate accounts distinguishing between receipt and consumption of input service meant for rendering taxable output services and receipt and consumption of input services meant for rendering non-taxable / exempt output services he shall be allowed to utilize input tax credit for payment of service tax on output service only upto a maximum of 35% of the amount of service tax payable on such output service. This rule is not equitable. It does not distinguish between one assessee who has a low percentage of taxable turnover (say only 10%) as against

another assessee who has a higher percentage of taxable turnover (say 95%). Ideally the availability of input credit should be a proportion of taxable turnover to total turnover and related to the amount of tax paid on the input and not on the tax payable on output. In other revenue laws like sales tax, set-off is available in the ratio of the taxable turnover to total turnover and related to the input tax and not the output tax. Such a rule has also been recognized in the UK VAT Act, 1994.

Hence it is hereby suggested that in a case where input services is received and consumed for providing taxable as well as non-taxable services, availability of that input tax credit should be calculated on the basis of the following formula :

$$\text{Input tax credit available} = \frac{\text{Taxable turnover}}{\text{Total turnover}}$$

N. B. The turnover maybe the figures when the input tax credit is claimed though ideally it should be at the time when the input service is availed.

3.4 Clarification on availability of input tax credit if only part payment is made to the input service provider

Presently, input tax credit is available on or after the day on which the output service provider makes payment of the value of input service and the service tax to the input service provider. However, the law has not expressly provided for a case where the bill of the input service provider is paid in part though on a reading of the rules it can be inferred that input tax credit would be available to the extent of the amount of the bill paid. For e.g. if the input service bill is Rs.100000/- value of taxable service and Rs.8000/- service tax and the bill is partly settled to the extent of Rs.40000/- then input tax credit available would be calculated as under:

$$\text{Input tax credit available} = \frac{40,000/- \times 8000/-}{1,08,000/-} = \text{Rs. } 2963/-$$

Hence it is hereby suggested that the service tax credit rules must clearly provide that service tax credit would be available even if a part payment is made to the input service provider but only to the extent of payment made to the input service provider and the amount of credit maybe calculated on a pro rata basis as under :

$$\text{Input credit available} = \frac{\text{Amount paid}}{\text{Total amount of billing including service tax}} \times \text{Service tax on input service}$$

3.5 Definition of input service to mean all taxable services which are “directly or indirectly” consumed in providing output services - definition to be in line with the Central Excise definition of “inputs”.

Presently, Rule 2(c) of the Service Tax Credit Rules, 2002 defines “input service” as follows :

“2. Definitions.- (1) In these rules, unless the context otherwise requires,-

(a)

(b)

(c) “input service” means any taxable service received and consumed by a service provider in relation to rendering of output service.”

In the context of CENVAT / MODVAT Credit for Central Excise duty rule 2(g) of the Cenvat Credit Rules, 2002 defines the term “Inputs” as follows :

“(g) “input” means all goods, except used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final product or not and includes”

In CENVAT / MODVAT credit rules the words “directly or indirectly” were inserted to clarify the legal position and the Legislative intention. This was done after a spate of Tribunal and Court decisions.

Hence in order to avoid litigation in service tax along the same lines, it is suggested that the definition of an input service must be amended and defined as follows :

“2. Definitions.- (1) In these rules, unless the context otherwise requires,-

(a)

(b)

(c) “input service” means any taxable service received and consumed, directly or indirectly, by a service provider in relation to rendering of output service.”

3.6 Recovery of service tax credit to be applicable only in certain cases

Rule 6 of the Service Tax Credit Rules, 2002 provides as follows :

“6. Recovery of service tax credit.- Where the service tax credit has been wrongly availed or utilized or service tax has not been paid by the input service provider for any reason, whatsoever, such credit along with interest shall be recoverable from the person availing such service tax credit and the provisions of section 73, 75, 76 and 78 of the Act shall apply mutatis mutandis for effecting such recoveries.”

On a reading of the above rule it will be seen that in

the following cases service tax credit alongwith interest and penalty shall be recovered -

- (i) where service tax credit has been wrongly availed; or
- (ii) where service tax credit has been wrongly utilized; or
- (iii) the input service provider has not paid service tax for any reason whatsoever.

The output service provider can comply with the first two conditions but he will have no control over the payment of service tax by the input service provider.

In this context rule 13 of the Cenvat Credit Rules provides for a similar penalty but the penalty is imposable only if the credit is availed without taking "reasonable steps" to ensure that appropriate duty on the inputs/ capital goods is paid. Rule 5(2) of the Service Tax Credit Rules, 2002 has already cast a duty on the output service provider for taking such reasonable steps.

Hence it is hereby suggested that Rule 6 of the Service Tax Credit Rules, 2002 be amended on the lines of rule 13 of Cenvat Credit Rules, 2002 so as to read as follows :

3.7 Option to the assessee to pay service tax at a lower rate without across the board service tax credit.

The rate of service tax has been to be increased from 5% to 8% effective on the enactment of the Finance Act, 2003. The increase is very steep, almost 60%. This is presumably to offset the extension of input tax credit across the board for all services for which rules have been notified.

In case of small assesseees the maintenance of records for claiming input tax credit would be cumbersome and further input tax credit maybe denied due to technical lapses.

Hence, it is suggested that an option should be given to the assessee to either pay service tax @ 8% with across the board input tax credit or 5% with input tax credit.

4. CHANGES IN THE SERVICE TAX RULES, 1994

REGISTRATION

4.1 Multiple taxable services – one single registration certificate to be issued.

Rule 4(4) of the Service tax Rules provides that where an assessee is providing more than one tax-

able service, he may make a single application mentioning therein all the taxable services provided by him. The intention of the specific rule 4(4) is to have single registration for all the taxable services provided by an assessee. However, some departmental officers are of the view that it is only the application for registration which has to be single one and separate registration numbers should be given in respect of each taxable service in which case the payment of service tax and the filing of returns shall be separate for each taxable service. Some of the officers are of the view that the registration maybe one but the returns will be separate for each category of taxable service. This is not the intention of the legislature as can be seen in the newly changed Return form ST-3 w.e.f. 16-8-2002 where:

- (i) The form contains a requirement to furnish at sl. No. 3, "category of services" and at sl. No 4 "Service tax Registration No." Further, a column containing "Name of the taxable service provided" is mentioned.
- (ii) Note 1 in Form ST-3 states that "Details in each of the column should be furnished separately for each of the taxable service rendered by the assessee."

These changes indicate that the details of all the taxable service should be given under one registration number and in one return. Thus, there is no requirement to make a separate application for registration for service tax in case the assessee renders more than one taxable service. The intention is to provide for a single registration number in respect of all the taxable services and a single return to be filed for all the taxable services.

4.2 Provision to be made for amendment of registration certificate in certain cases - change in the name, place, nature of the business, etc.

Rule 4 as amended *vide* Notification no. 54/98 dated 7th October, 1998 dealing with registration does not provide for amendment of registration certificate due to change in the name or place of the assessee, etc. as was existing in the erstwhile section 69(6) (prior to 16th October, 1998).

It is hereby suggested that the following changes be made –

- (a) *by providing two provisos in rule 4(5) as follows :*

"Provided that in a case where an assessee is providing more than one taxable service the Superintendent of Central Excise shall issue a

single registration certificate for all the taxable services with provision for suitable modifications therein for additional services etc.

Provided further that where an assessee is already registered for a taxable service but subsequently commences a business of providing another taxable service or services, he shall intimate the concerned Superintendent of Central Excise, who shall endorse the registration certificate indicating the additional taxable service or services."

(b)

- (b) *providing a sub-rule in rule 7 dealing with returns which should clearly provide that an assessee rendering multiple taxable service is required to file only one single return.*

PAYMENT OF SERVICE TAX

4.3 Adjustment of taxes against subsequent liability - rule 6(3) to provide for all adjustments

Under the new rule 6(3) the assessee is allowed to adjust against his subsequent period's liability the excess service tax paid by him for services which is not wholly or partially provided by him for any reason provided he has refunded the amount charged as also the service tax thereon to the client. It is to be noted that rule 6(3) does not cover cases of excess payment of service tax *per se*, say, due to clerical mistake etc.

In such cases the assessee has to follow the cumbersome procedure laid down in section 11B of Central Excise Act to claim the refund of excess tax paid.

It is suggested that Rule 6(3) should be amended to provide for adjustment of all taxes paid in excess from the shortfall of tax paid in an earlier or subsequent period, provided there is no unjust enrichment.

In this context attention is drawn to the Delhi Tribunal in Commissioner of Central Excise, New Delhi vs. Sentinel Security (P) Ltd. (2001) 134 ELT 806 (Tri-Delhi) which allowed the adjustment of excess tax paid for one half-year period against the amount payable in the subsequent half-year period.

4.4 Rule to clarify the computation of service tax where bill is inclusive of service tax

In the present scenario in many cases especially in the unorganised sector like internet cafes, beauty parlours, dry cleaners, the amounts collected from the customers are inclusive of service tax. Many contracts do not provide for charging service tax separately but

provide for an all inclusive rate to be charged by the service provider. Further, the commission which an Indian agent may receive from a foreign principal may be liable for service tax under business auxiliary services but would have to be borne by the Indian agent. Similarly, contracts entered into with foreign customers before the withdrawal of exemption in respect of foreign currency receipts would have not factored the additional burden of service tax and hence service tax would have to be borne by the Indian service provider. Thus, in many cases the bills / monies received would be inclusive of service tax.

In such cases the rule should clearly provide that the tax should be computed applying the following methodology -

$$\frac{8}{108} \times \text{Amount of bill}$$

The above method of calculation of service tax viz. 8/108 is substantiated by the Mumbai Tribunal decision in K. R. Choksey and company Vs. Commissioner of Central Excise, Mumbai - I reported in 1996 (88) ELT 566. This method of calculation viz. 8/108 is also envisaged in the UK model of VAT in certain circumstances and also by our sales tax laws. ***Under the service tax law also a specific provision should be made to this effect by an amendment in the Rules.*** Accordingly, in such cases the compliance of section 12A of the Central Excise Act, 1944 viz., to indicate the service tax separately in the bill should be dispensed with.

4.5 Annual payment of taxes

Annual payment of taxes may be allowed in case of small assesses (as is the case in sales tax)- say where annual tax liability is less than Rs. 5000/10000.

RETURNS

4.6 Annual returns

There should be annual returns instead of half yearly returns though taxes could be paid on a quarterly/monthly basis. Annual return would also ensure that the return is in line with the accounts of the assessee. It would also obliterate a lot of paper work and reduce the time involved in verification of the department and the assessee.

4.7 Deletion of the word "quarterly or" in rule 6(5)

In Rule 6(5) which provides for filing a reconciliation statement in Form ST-3A alongwith the returns in case of provisional assessment the words "quarterly or" maybe deleted since returns have to be submitted only half-yearly under the present dispensation.

5. CLARIFICATIONS REQUIRED

5.1 Maintenance & Repair Services - Services provided on one-time basis to be excluded

“Maintenance or repair” means any service provided by -
 (i) any person under a maintenance contract or agreement; or
 (ii) a manufacturer or any person authorised by him, in relation to maintenance or repair or servicing of any goods or equipment, excluding motor vehicle” – section 65(63)

From the wording of the definition of maintenance and repair services it appears that service tax is applicable only on the maintenance or repair services performed –

- (i) by a manufacturer or a person authorised by him; or
- (ii) by a person in pursuance of a **contract or agreement** existing at the time of performance of services.

Thus, the idea presently is to cover only AMCs i.e. those services where there is an existing contract at the time the service is being performed. The Explanatory memorandum to the Finance Bill, 2003 also mentions AMCs. Hence the intention appears to be to exclude one-time repairs such as plumbing, electricians work, umbrella repairs, shoe repairs, watch repairs, etc. However the CIRCULAR NO 59/8/2003, dated June 20, 2003 issued while imposing service tax on

new services does not clarify this point. In absence of a threshold limit it should be clarified that one-time repairs would not attract service tax.

5.2 Visit to the assessee’s premises to be restricted

Chapter V of the Finance Act, 1994 (“Act”), the law governing service tax, by and large encompasses the unorganised sector including the self-employed persons. Further, it is based on the concept of voluntary compliance. Thus, the visits by the Assessing Officers or the department personnel to the premises of the assessee should be restricted to the cases of search, survey, etc. due to tax evasion.

Service tax is basically a document/ record based as against excise which is physical goods based. There is no necessity to visit the premises of the assessee which could be damaging and a retrograde step and run contrary to the concept of voluntary compliance. Further, the Act does not envisage such visits. This is in contrast to the Excise Laws where Rule 22 of the Central Excise Rules, 2002 clearly provides that an authorized officer of Central Excise shall have access to any registered premises for the purpose of carrying out any scrutiny, verification of records and checks as may be necessary to safeguard the interest of the revenue. Thus, the field formations may be advised accordingly. ■

The Institute of Chartered Accountants of India
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29-CA/LAWD-127/2004

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Notification

Chartered Accountants

No. 29-CA/LAW/D-127/2004: In exercise of the powers conferred by Sub-Section (2) of Section 20 of The Chartered Accountants Act, 1949 read with Regulation 18 of the Chartered Accountants Regulations, 1988, it is hereby notified by the Council of the Institute of Chartered Accountants of India that the Hon’ble High Court of Gujarat has, in pursuance to Section 21(6)(c) of the said Act, in Chartered Accountant Reference No. 1/2003, ordered on 11th November, 2003 that the name of Shri Mukesh R. Shah, FCA, M/s Mukesh R. Shah & Co., Chartered Accountants, 307 Mahakant, Opp. V.S. Hospital, Ashram Road, ahmedabad 380 006, (M. No. 31399) be removed from the membership of the Instiute permanently for having been found guilty of “other misconduct” under section 21 read with Section 22 of the Chartered Accountants act, 1949. Accordingly, it is hereby informed that the name of the said Shri mukesh R. Shah shall stand removed from the membership of the Instiute permanently w.e.f. 1st February 2004. From the aforesaid date he shall not be entitled to practise as a Chartered Accountant in terms of the said order of the Hon’ble High Court of Gujarat.

(Dr. Ashok Haldia)
 Secretary