

- Legal risk arises out of Factories/Industrial Disputes/Anti-trust Foreign Exchange management/Trade practices, enactments.

Answer to Qn.10 (c):**Exposures to Agro & Bio-liabilities :**

The basic liability issues that arise are :

- Farmers credit liability
- Consequential losses liability
- Genetically modified crop seed liabilities
- Farmers' Assets Casualty liability
- Public & Professional liabilities
- Royalty liability
- Inflation liability, etc.,

Dr. Swaminathan Committee has identified insurance as a panacea for the above liabilities and the possible steps can be :

- ✓ Recognize agriculture as an 'open roof' industry and bring in the concepts of industry liability insurances.
- ✓ Pre-harvest hedging
- ✓ Cross dimensional liability coverage for inability.
- ✓ Linking of Life Insurances of farming community with their property and casualty insurances.

FINAL EXAMINATION – GROUP III (SYLLABUS - 2008)

SUGGESTED ANSWERS TO QUESTIONS JUNE 2010

PAPER – F-P14 : INDIRECT AND DIRECT TAX MANAGEMENT

Time Allowed : 3 Hours

Full Marks : 100

The figures in the margin on the right side indicate full marks.

Answer Question No. 1 which is compulsory and any five questions from the rest.

Wherever required, the candidate may make suitable assumptions and state them clearly in the answer.

Question 1.**(a) Fill up the blanks :**

1×15=15

- (i) The rate of Minimum Alternate Tax under section 115JB of the Income-tax Act, 1961 has been raised to _____ %.
- (ii) A unit is entitled to SSI concessions under excise provisions if its turnover in the earlier year does not exceed Rupees _____.
- (iii) Parts used during warranty period for repairs or replacement _____ (are/are not) excisable.
- (iv) CVD _____ (is/is not) payable on anti-dumping duty.
- (v) Customs value of excisable goods is determined, inter alia, under section _____ of the Customs Act, 1962.
- (vi) Section 18 of the Customs Act, 1962 provides for _____ of duty.
- (vii) All items other than those which are restricted/prohibited can be imported _____ (freely/subject to nominal import duty of 10% on assessable value).
- (viii) Where advance authorization has been obtained, export obligation should be fulfilled within _____ from the date of _____.
- (ix) Forms received from branches for stock transfers should be submitted to CST authorities on _____ basis.
- (x) Under the Central Sales Tax Act, 1956, sale price means the amount payable to dealer as consideration for sale of goods and _____ (includes/does not include) CST whether shown separately or not.
- (xi) Expenditure relating to exempt income are not deductible as per section _____ of the Income-tax Act, 1961.

- (xii) Marginal relief under the Income-tax Act, 1961 is available to _____ (individuals, firms and companies, companies).
- (xiii) Wealth tax is levied on the value of _____ held by the assessee as on the _____.
- (xiv) An AOP is _____ to wealth tax (assessable/not assessable/assessable under certain situations).
- (xv) In service tax matters, an eligible appeal should be filed within _____ from the date of receipt of order appealed against.

(b) State with reasons, whether the following statements are **True** or **False** (mere conclusion will not deserve any credit; for a "True" conclusion, the question should not be merely repeated, but reasoning should be given) : 2x5=10

- (i) Where an assessee following mercantile system of accounting receives interest on enhanced compensation for lands compulsorily acquired, he has to admit as income the interest relatable to the current year only.
- (ii) Import manifest is required to be submitted at the customs station within twelve hours of arrival of aircraft or vessel.
- (iii) An individual is required to furnish return of income only where the total income exceeds the maximum amount not chargeable to tax.
- (iv) Mrs. Y's mother-in-law gave a diamond necklace worth Rs. 6 lacs at the time of marriage of Mrs. Y on 12.4.2009. Later on, she forcibly took away the necklace on 12.9.2009. The value of diamond necklace is not includible in the net wealth of Mrs. Y as on 31.3.2010.
- (v) Where taxable services are provided by a person not residing in India and are utilized in India, the agent of the non-resident residing on India is liable to collect and pay the service tax on behalf of the non-resident.

Answer to Question No. 1(a)

- (i) 15
- (ii) Four crores
- (iii) Are
- (iv) Is not
- (v) 14
- (vi) Provisional assessment
- (vii) Freely
- (viii) 24 days, issuance of advance authorization
- (ix) Quarterly
- (x) includes
- (xi) 14A
- (xii) Companies
- (xiii) Net wealth, valuation date
- (xiv) assessable under certain situations
- (xv) three months

Answer to Question No. 1(b)

- (i) **False.** As per section 145A, as amended, regardless of the method of accounting followed by the

- assessee, interest on enhanced compensation is taxable on cash basis.
- (ii) **False.** As per section 30(1) of the Customs Act, 1962, the Import manifest should be submitted prior to the arrival of the aircraft or vessel.
- (iii) **True.** In the case of individual (not being a company or firm), as per section 139(1) of the Income-tax Act, 1961, the obligation to file return of income arises only where the total income exceeds the maximum amount not chargeable to tax.
- (iv) **True.** Only the assets held by an assessee as on the valuation date will be includible in the net wealth. Here the gifted necklace has been forcibly taken away by the assessee's mother-in-law, the donor and the necklace is not held by the assessee on the valuation date.
- (v) **False.** Where taxable services are provided by a person not residing in India and are utilised in India, the *recipient of service* is liable to pay the service tax.

Question 2.

- (a) Is it correct to say that mandatory levy of penalty under section 11AC of the Central Excise Act, 1944 is not applicable to every case of non-payment or short-payment of duty? 5
- (b) LMN Aluminium Ltd. is engaged in manufacture of aluminium sheets and allied products. The assessee noticed some difference at the time of physical verification of stock, as compared to book records, due to several reasons like rain seepage, weight differences, accounting method employed, etc. The assessee applied under Rule 21 of the Central Excise Rules, 2002, seeking remission of duty. This claim is resisted by the Department on the ground that the reasons for the differences were neither due to natural causes, nor due to unavoidable accident. The assessee's request was hence turned down, though there was clear evidence to the effect that the assessee has suffered loss of stock.
Is the action of the Department justified? Advise the assessee suitably. 6
- (c) Who are the persons not eligible for compounding of offence as per the provisions of the Central Excise Act, 1944? 4

Answer to Question No. 2(a)

Imposition of penalty under section 11AC of the Central Excise Act, 1944

The conditions and the circumstances that would attract the imposition of penalty under section 11 AC of the Central Excise Act, 1944 have been laid down by the Apex Court in case of *VOI v. Rajasthan Spinning & Weaving Mills 2009 (238) EL T 3 (SC)*. In the instant case, the Apex Court, overruling the decision of the Tribunal, held that mandatory penalty under section 11AC of the Central Excise Act, 1944 is not applicable to every case of non-payment or short-payment of duty. In order to levy the penalty under section 11AC, conditions mentioned in the said section should exist. Supreme Court held that the Tribunal was not justified in striking down the levy of penalty against the assessee on the ground that the assessee had deposited the balance amount of excise duty (that was short paid at the first instance) before the show cause notice was issued. The Apex Court elaborated that the payment of the differential duty whether before/after the show cause notice is issued cannot alter the liability for penalty. The conditions for penalty to be imposed are clearly spelt out in section 11AC of the Act.

The Supreme Court clarified that both section 11AC as well as proviso to sub-section (1) of section 11A use the same expressions: by reasons of fraud, collusion or any willful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, ... ". Hence, it drew the inference that the penalty provision of section 11AC would come into play only if the notice under section 11A(1) states that the escaped duty was the result of any conscious and deliberate wrong doing and if the order passed under section 11A(2), there is a

legally tenable finding to that effect.

Answer to Question No. 2(b)

Remission of duty under rule 21 of the Central Excise Rules, 2001

The contention of the Department is not tenable in law.

The facts of the given situation resemble the one in the case of *UOI v. Hindustan Zinc Limited 2009 (233) EL T. 61 (Raj.)* wherein the High Court held that the expressions "natural causes" and "unavoidable accident" were required to be given, reasonable and liberal meaning, lest the provisions of rule 21, so far as they relate to admissibility of remission, on these two grounds, would be rendered altogether ineffective. The Court noted that if the contention of Revenue was accepted, no loss or destruction would fall in either of these clauses because in either case, grounds might be projected, on the anvil of requirement of appropriate storage, or safety measures, and so on and so forth. Even in cases of "unavoidable accident", it could always be contended that the accident could have been avoided by taking recourse of one or more measures.

Thus, a bit liberal rather more practical approach was required to be taken in the matter. The aspect of satisfaction under rule 21, was essentially a subjective satisfaction of authority concerned and in the instant case; the Tribunal independently recorded its satisfaction about the loss, or destruction having been sustained by the assessee under the circumstances as covered by rule 21. Therefore, merely on the basis of method of accounting of physical stock, the remission of duty could not be denied.

Answer to Question No. 2(c)

Persons not eligible for compounding under section 9A(2)

Finance (No.2) Act, 2009 provides that the following mentioned persons shall not be eligible for compounding under section 9A(2) :

1. Person who has been allowed to compound once in respect of any of the offences under the provisions of clause (a), (b), (bb), (bbb), (bbbb) or (c) of section 9(1).
2. A person who has been accused of committing an offence under this Act which is also an offence under the Narcotic Drugs and Psychotropic Substances Act, 1985.
3. A person who has been allowed to compound once in respect of any offence under this Chapter for goods of value exceeding rupees one crore.
4. A person who has been convicted by the court under this Act on or after 30.12.2005.

Question 3.

- (a) VSK Motors manufactures Light Motor Vehicles (LMV). The practice followed is that the chassis of the LCV is sent to Nathan Ltd. for building the body as per design and specifications furnished. The LCV chassis is not sold but is transferred after payment of excise duty on stock transfer basis. Nathan Ltd. avails CENVAT credit on the excise duty on chassis; after completing the body building, Nathan Ltd. discharges the duty on the assessable value comprising the value of chassis and the job charges. After receipt of the body-built LMV from Nathan Ltd., VSK Motors sells the same at a higher price.

You are required to examine whether the practice followed is correct in terms of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. 4

- (b) What is the quantum of CENVAT credit that can be availed in respect of inputs and capital goods cleared on or after 07.09.2009 from an EOU or by a unit in electronic hardware technology park or in a software technology park? 5
- (c) State the cases under which the Central Government is empowered under Rule 12CC of the Central

Excise Rules, 2002 to withdraw facilities or impose restrictions on a manufacturer, first stage or second stage dealer, or an exporter. 6

Answer to Question No. 3(a)

As per rule 10A (ii) of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 the assessable value for the purpose of charging central excise duty, in cases where the job-worker transfers the excisable goods to the Depot/Sale office/Distributor and/or any other sale point of the principal manufacturer, shall be the transaction value on which goods are sold by the principal manufacturer from such a place. Accordingly, after the insertion of Rule 10A, the practice of discharging the duty on cost construction method by Nathan Ltd. is not legally correct.

Circular No. 90212212009 CX dated 20.10.2009 also clarifies that wherever goods are manufactured by a person on job work basis on behalf of a principal, then value for the purpose of payment of excise duty may be determined in terms of the provisions of Rule 10A of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 subject to fulfillment of the requirements of the said rule.

Thus, Nathan Ltd. should pay the duty on the transaction value on which vehicles are sold by MB Motors from its depot.

Answer to Question No. 3(b)

CENVAT credit that can be availed in respect of inputs and capital goods cleared on or after 07.09.2009 from an EOU

Sub-rule (7) of the CENVAT Credit Rules, 2004 *inter alia* provides that credit in respect of inputs and capital goods cleared on or after 07.09.2009 from an export-oriented undertaking or by a unit in electronic hardware technology park or in a software technology park, as the case may be, on which such undertaking or unit has paid —

- A. excise duty leviable under section 3 of the Excise Act read with serial number 2 of the Notification No. 23/2003 CE, dated 31.03.2003; and
- B. the education cess and the secondary and higher education cess on the excise duty referred to in (A),

shall be the aggregate of —

- I. that portion of excise duty referred to in (A), as is equivalent to -
 - i. the additional duty leviable under section 3(1) of the Customs Tariff Act, which is equal to the duty of excise under section 3(1)(a) of the Excise Act;
 - ii. the additional duty leviable under section 3(5) of the Customs Tariff Act; and
- II. the education cess and the secondary and higher education cess referred to in (B).

Answer to Question No. 3(c)

Cases under which the Central Government is empowered to withdraw facilities or impose restrictions on a manufacturer, first stage or second stage dealer, or an exporter

Notification No. 3212006 CE(NT) dated 30.12.2006 issued under rule 12CC specifies that Member (Central Excise), Central Board of Excise and Customs may order for withdrawal of facilities or impose restrictions where a manufacturer, first stage or second stage dealer, or an exporter including a merchant exporter is *prima facie* found to be knowingly involved in any of the following :

- (a) removal of goods without the cover of an invoice and without payment of duty;
- (b) removal of goods without declaring the correct value for payment of duty, where a portion of sale price, in excess of invoice price, is received by him or on his behalf but not accounted for in the

- books of account;
- (c) taking of CENVAT credit without the receipt of goods specified in the document based on which the said credit has been taken;
- (d) taking of CENVAT credit on invoices or other documents which a person has reasons to believe as not genuine;
- (e) issue of excise duty invoice without delivery of goods specified in the said invoice;
- (f) claiming of refund or rebate based on the excise duty paid invoice or other documents which a person has reason to believe as not genuine;
- (g) removal of inputs as such on which CENVAT credit has been taken, without paying an amount equal to credit availed on such inputs in terms of sub-rule (5) of rule 3 of the CENVAT Credit Rules, 2004.

Question 4.

4. (a) State the cases where the import duty shall be refunded to the person who has paid such duty, as laid down in section 26A of the Customs Act, 1962. 5

(b) Mr. Bhar imported goods on ... 14.1.2010

Bill of entry presented on	...	15.1.2010
Assessable value (in Euro)	...	50,000
Goods were removed to warehouse. Order permitting the deposit of goods in bonded warehouse issued on	...	19.1.2010

Mr. Bhar neither obtained permission of time for the warehousing period, nor cleared the goods within the permitted warehousing period of 18.4.2010. Only after a notice was issued under section 72 demanding duty and other charges, Mr. Bhar removed the goods from the warehouse, on 15th May, 2010.

Assuming that no additional duty or SAD is payable, on the basis of following information, compute the amount of duty payable by Mr. Bhar while removing the goods :

	15.1.2010	18.4.2010	15.5.2010	
Rate of exchange (1 Euro =)	65	66	67	
Basic customs duty	12%	15%	18%	5

- (c) Mis. Nigamanth Cables are engaged in the business of providing cable TV and high speed internet services in Salem, Tamil Nadu. For their business requirements, they imported Optic Fibre Cables (OFC) and classified them under Heading 85.44 of the Customs Tariff. This was not accepted by the Revenue and according to them, the goods should be classified under Heading 90.01. The assessee's stand was accepted by Commissioner of Customs (Appeals). The matter was carried in appeal before CESTAT against the said order, which has yet not been decided.

Meanwhile, the customs authorities (DRI officers) had seized the consignment of OFC imported and permitted Nigamanth Cables to clear the goods on payment of duty assessed under Heading 90.01 and forced Nigamanth Cables to pay the differential duty between Headings 85.44 and 90.01 by threat and coercion.

You are required to consider the validity of the aforesaid action of the customs authorities in the light of judicial pronouncements. 5

Answer to Question No. 4(a)**Refund of import duty u/s 26A**

Sub-section (1) of section 26A provides that in the following cases the import duty paid on clearance of imported goods for home consumption shall be refunded to the person who has paid such duty if on importation the goods are capable of being easily identified as such imported goods :

- Goods are defective/not as per specifications* : The goods are found to be defective or otherwise not in conformity with the specifications agreed upon between the importer and the supplier of goods. Further, the goods should not have been worked upon, repaired or used after importation except where such use was indispensable to discover the defects or non-conformity with the specifications;
- (b) *Goods identified as imported goods* : The goods are identified to the satisfaction of the Assistant Commissioner of Customs or Deputy Commissioner of Customs as the goods which were imported;
- (c) *No drawback claimed* : The importer does not claim drawback under any other provisions of this Act; and
- (d) *Importer exports the goods/relinquishes title to goods/destroys or renders them commercially valueless* :
- the goods are exported; or
 - the importer relinquishes his title to the goods and abandons them to customs; or
 - such goods are destroyed or rendered commercially valueless in the presence of the proper officer in the prescribed manner within 30 days from the date on which the proper officer makes an order for the clearance of imported goods for home consumption under section 47.

However, the period of 30 days may, on sufficient cause being shown, be extended by the Commissioner of Customs for a period not exceeding 3 months.

Answer to Question No. 4(b)

It may be noted that the provisions of this section do not apply to the goods regarding which an offence appears to have been committed under this Act or any other law for the time being in force.

Applicable rate of duty (Note 1)	15%
Relevant rate of exchange (Note 2)	Rs. 65
Assessable Value	E 50,000 × Rs. 65
	= Rs. 32,50,000
Customs duty @ 15%	Rs. 4,87,500
Add : Education cess @ 2% and secondary and higher education cess @ 1% of customs duty	Rs. 14,625
Total duty payable	Rs. 5,02,125

Note 1: In *Kesoram Rayon v. CC 86 EL T 464 = (1996) 5 SCC 576*, it has been held that goods which are not removed from the warehouse within the permissible period are deemed to be improperly removed on the day they ought to have been removed. In other words, the last date on which goods should have been removed is taken as the 'deemed date of removal' and the relevant rate of duty is the rate prevalent on that date. Hence, the applicable rate of duty is 15%, the rate prevalent on 18.04.2010, the last date when warehousing period gets over.

Note 2 : The relevant rate of exchange will be the rate as in force on the date on which bill of entry for warehousing is presented. Subsequent changes in foreign exchange rate are not relevant. Hence, relevant exchange rate is 1 Euro = Rs. 65 prevalent on 15.01.2010, the date on which bill of entry for warehousing is presented.

Answer to Question No. 4(c)

The action of the customs authorities is not valid. The facts of the given case are similar to the case of *Vodafone Essar South Ltd. v. UOI 2009 (237) E.L.T. 35 (Born.)*. In the instant case, the Bombay High Court has held that the action of the Directorate of Revenue Intelligence (D.R.I. officers) in seizing the goods and collecting money from the petitioners is wholly unjustified and uncalled for, because of the following five reasons :

- (i) When the Commissioner of Customs (Appeals) in petitioner's own case had held that OFC imported by them were classifiable under Heading 85.44 of the Customs tariff, the petitioners were not wrong in classifying the goods imported after the said order under Heading 85.44 *ibid*.
- (ii) Decision of Commissioner (Appeals) was neither stayed by CESTAT nor by any other competent authority. Hence, mere fact that appeal filed by Revenue against the decision of Commissioner (Appeals) was pending could not be a ground to hold the petitioner guilty of misclassification of goods.
- (iii) D.R.I. officers were bound by the decision given by Commissioner of Customs (Appeals).
- (iv) The OFCs were cleared on payment of duty assessed under Heading 85.44. Therefore, till the assessment was set aside, the customs authorities could not have seized the goods assessed and cleared under Heading 85.44, on the ground that the goods were liable to be assessed under Heading 90.01.
- (v) In the absence of any reassessment order passed determining the duty liability, there would be no question of recovering differential duty.

Question 5.

- (a) M/s. DPC & Co., a consulting engineering firm, has provided consulting engineering services to NFD Ltd. in connection with construction of power plant during the financial year 2009-10, for a value of Rs. 50 lacs, excluding service tax. While providing the services, DPC & Co. appointed Mr. X, sub-consultant, to provide services to the extent of Rs. 11 lacs, inclusive of all expenses and taxes, if any. A show cause notice has been served on Mr. X, requiring them to pay services of Rs. 11 lacs rendered by it to DPC & Co., who have utilised the same in providing the services to NFD Ltd. Mr. X is of the opinion that he is not liable to service tax since DPC & Co. have paid the service tax on the entire contract of Rs. 50 lacs. In the light of these facts, state
 - (i) Whether the ground taken by Mr. X for non-payment of service tax is correct.
 - (ii) If the answer is in the negative, what is the service tax payable, assuming that Mr. X has crossed threshold limit.
 - (iii) How payment of service tax by Mr. X is beneficial to DPC & Co. 1+2+1=4
- (b) With reference to business auxiliary services, examine whether service tax liability is attracted in following cases :
 - (i) Manufacture of an excisable goods on behalf of the client, which is exempt from duty.
 - (ii) Business auxiliary service provided by a service provider to any other person (service receiver) during the course of manufacture or processing of alcoholic beverages by the service provider, for or on behalf of the service receiver. 2+4=6

- (c) Compute the net VAT liability of Janak from the under-mentioned information :

Particulars	Rs.
Raw material purchased from foreign market (including duty paid on imports @20%)	47,000
Raw material purchased from local market (including VAT charged on the material @ 1%)	10,100
Raw material purchased from another State (excluding CST)	20,000
Storage, transportation cost and insurance	3,000
Other manufacturing expenses incurred	600

Janak sold the goods to Prem adding margin of profit @ 10% on the selling price. VAT rate on sale of such goods is 10%. 5

Answer to Question No. 5(a)

Service tax payable by a sub-contractor

- (i) The stand taken by Mr. X is incorrect. As per CBEC circular no. 999.03/2-8-2007, it is clarified that a sub-contractor is also liable where he renders taxable services which are utilised by the main service provider.
- (ii) In view of above, Mr. X is liable to pay service tax on Rs. 11 lacs (problem states that he has already exceeded the threshold limit). Since the amount due to him is inclusive of taxes, this amount is inclusive of service tax.
So service tax payable by him is $11,00,000 \times 10.3/110.3$ i.e. Rs. 1,02,720.
- (iii) M/s DPC & Co can take input tax credit of the service tax paid by Mr. X, while discharging their service tax obligation.

Answer to Question No. 5(b)

Scope of business auxiliary services

- (i) The Finance (No.2) Act, 2009 has amended the definition of business auxiliary service under section 65(19) of the Finance Act, 1994 so as to exclude any activity that amounts to manufacture of excisable goods. That the said goods are exempt from duty does not alter the position. Therefore, manufacture of excisable goods for or on behalf of the client shall not attract service tax.
- (ii) Notification No. 39/2009 ST dated 23.09.2009 exempts the taxable service under the category of business auxiliary service provided by a person (service provider) to any other person (service receiver) during the course of manufacture or processing of alcoholic beverages by the service provider, for or on behalf of the service receiver, from so much of value which is equivalent to the value of inputs, excluding capital goods, used for providing the same service, subject to the following conditions, namely :
 - (a) that no Cenvat credit has been taken under the provisions of the Cenvat Credit Rules, 2004;
 - (b) that there is documentary proof specifically indicating the value of such inputs; and
 - (c) where the service provider also manufactures or processes alcoholic beverages, on his or her own account or in a manner or under an arrangement other than as mentioned aforesaid, he or she shall maintain separate accounts of receipt, production, inventory, despatches of goods as well as financial transactions relating thereto.

Here, 'input' and 'capital goods' shall have the meaning as is assigned to them under rule 2 of the CENVAT Credit Rules, 2004.

Answer to Question No. 5(c)**Computation of VAT payable**

Particulars	Rupees
Raw material imported from outside India (Note - 1)	47,000
Raw material purchased from local market (Rs. 10,100 - Rs. 100) (Note - 2)	10,000
Raw material purchased from outside state (Note - 3)	20,400
Storage, transportation cost and insurance	3,000
Other manufacturing costs incurred	600
Total manufacturing cost	81,000
Add: Profit earned @ 1/9th of cost price (10% on SP)	9,000
Selling Price	90,000
VAT @ 10% on sales	9,000
Net VAT liability of Janak :	
VAT on sale price	9,000
Less : Set-off of Input credit	
On imported goods	Nil
On local purchases	100
	100
Net VAT payable by Janak	8,900

Notes :

1. Since the customs duty paid on imports is not a State VAT; it will form part of cost of input.
2. VAT charged on purchases within State is Rs. 100. Since, the input tax credit of this would be available; it shall not be included in the cost of input.
3. Credit/set-off for CST paid on inter-State purchases is not available.

Question 6.

- (a) What are the reasons for setting up of Export Promotion Councils? Write a brief note on their responsibilities and types of Councils in India in the context of foreign trade policy. Should an exporter compulsorily register himself as a member of such Export Promotion Council? 5
- (b) Briefly explain the different types of Drawback rates. 7
- (c) While importing goods under Duty Free Import Authorisation (DFIA), should any customs duty be paid? Is the DFIA transferable? 3

Answer to Question No. 6(a)**Export Promotion Councils**

Export Promotion Councils have been set up to promote and develop export of the country. These EPCs (Export Promotion Councils) are expected to monitor and encourage exports and to assist and guide the exporters. Their main aim is to project India's image abroad as a reliable supplier of high quality goods and services.

EPC are non-profit autonomous organizations.

Each Council is responsible for promotion of a particular group or products like Engineering Export Promotion Council, Apparel Export Promotion Council, Gem and Jewellery Export Promotion Council etc. These Councils are non-profit organisations registered as Companies or registered Societies.

Export Promotion Council for EOU and SEZ units has also been constituted.

Some Agencies like Coffee Board, Tea Board, Tobacco Board etc. are also considered as Export Promotion Councils. These are autonomous professional bodies. Government may provide financial support to these EPCs [para 2.65 of HBP Vol 1].

Services Export Promotion Council- Services Export Promotion Council has been established at New Delhi.

RCMC - Exporter has to obtain Registration Cum Membership Certificate (RCMC) from Export Promotion Councilor Commodity Board. Membership of EPC is compulsory, if an exporter intends to get export incentives. In other cases, membership is optional.

Answer to Question No. 6(b)**Type of Drawback Rates**

Duty drawback rates are of following types - (a) All Industry Rate (b) Brand Rate and (c) Special Brand Rate.

All Industry Drawback Rates – All Industry Drawback rates are fixed by Directorate of Drawback, Dept. of Revenue, Ministry of Finance, Govt. of India. The rates are periodically revised normally on 1 st June every year. Data from industry is collected for this purpose.

Whenever specific rates are provided, drawback shall be payable only if amount is more than 1% of FOB value, except when the drawback claim per shipment exceeds Rs. 500. Revised rates have been announced vide Notification No. 68/2007-Cus(NT) dated 16-7-2007 [earlier Notification No. 81/2006-Cus(NT) dated 3-7-2006].

The all industry drawback rates are given in two ways — (a) when Cenvat facility has been availed and (b) when Cenvat facility not availed. The difference between the two is central excise portion of duty drawback. If rate indicated in both is same, it means that it pertains to only customs portion and is available irrespective of whether exporter has availed Cenvat or not — Condition No 5 to Notification No. 68/2007-Cus(NT) dated 16-7-2007 [earlier No. 81/2006-Cus(NT) dated 13-7-2006].

Duty drawback rate shall not exceed 33% of market price of export goods (Rule 8A w.e.f. 15-2-2006).

In case of some cases, value cap has been fixed. In such cases, maximum drawback allowable per unit of quantity has been specified (This is to avoid misuse by over-valuation of export goods).

Brand Rate of duty drawback – It is possible to fix All Industry Rate only for some standard products. It cannot be fixed for special type of products. In such cases, *brand rate* is fixed under rule 6. The manufacturer has to submit application with all details to Commissioner, Central Excise. Such application must be made within 60 days of export. This period can be extended by Central Government by further 30 days. Further extension can be granted even upto one year if delay was due to abnormal situations as explained in MF(DR) circular No. 82/98-Cus dated 29-10-1998.

Duty drawback rate shall not exceed 33% of market price of export goods (Rule 8A w.e.f. 15-2-2006).

Special Brand Rate of duty drawback — All Industry rate is fixed on average basis. Thus, a particular manufacturer or exporter may find that the actual excise/customs duty paid on inputs or input services is higher than All Industry Rate fixed for his product. In such case, he can apply under rule 7 of Drawback Rules for fixation of Special Brand Rate, within 30 days from export. The conditions of eligibility are (a) the All Industry Rate fixed should be less than 80% of the duties paid by him (b) rate should not be less than 1 % of FOB value of product except when amount of drawback per shipment is more than Rs. 500 (c) export value is not less than the value of imported material used in them - i.e. there should not be 'negative value addition'.

Answer to Question No. 6(c)**DFIA**

DFIA is initially issued with 'actual user condition'. Imports will be exempted from payment of basic customs duty, additional customs duty, education cess, anti-dumping duty and safeguard duty, if any [para 4.4.2 of FTP]. After export obligation is fulfilled, the scrip can be made transferable by Regional Authority. After endorsement of transferability, duty free inputs (except fuel) can be transferred. However, where SION is subject to 'actual user' norm, transferability is not allowed. In case of fuel, import entitlement can be transferred only to companies which have been granted authorisation to market fuel by Ministry of Petroleum and Natural Gas.

Material imported under DFIA will be transferable after fulfilment of export obligation, subject to above. In case of DFIA, 20% value addition is required, except in case of gem and jewellery sector.

Question 7.

(a) Discuss whether the following expenses are permissible deductions while computing the business income of M/s. Hemalatha & Co., a partnership firm engaged in fertilizer business :

- (i) Interest to partners A, B and C (to each) Rs. 6,00,000 calculated at 15% simple interest, as provided for in the partnership deed. C is a non-resident. The firm has not deducted tax at source from these interest payments.
 - (ii) Salaries paid to resident employees Rs. 4,20,000. Of this, in respect of a salary payment of Rs. 3,20,000, the required TDS was remitted only on 2.10.2010.
 - (iii) On a building taken on lease, the firm has incurred expenditure on wooden partitions and laying of floor tiles to the tune of Rs. 3,60,000.
- (b) N. T. Dhoni, a resident Indian, received a sum of Rs. 5,00,000 for playing cricket match in a nation with which India does not have a DTAA. In that nation, withholding tax (TDS) of Rs. 1,00,000 was made. In India, he has received match fees of Rs. 15,000 for playing cricket matches. Assuming that he has paid life insurance premium of Rs. 1,50,000 and mediclaim premium of Rs. 20,000, compute his tax liability for the assessment year 2010-11.
- (c) Can the Income-tax Appellate Tribunal pass a rectification order after four years, under section 254 of the Income-tax Act, 1961?

Answer to Question No. 7(a)**Allowability of certain items in hands of firm**

- (i) The assessee is a partnership firm. Hence the payment of interest has to be within the limits laid down in section 40(b). Interest rate permitted is 12% maximum. Here the payment having been made at 15%, the excess payment of Rs. 1,20,000 to each of the partners will be disallowed u/s 40(b).

TDS need not be deducted where interest is paid to resident partners. However TDS has to be deducted where interest is paid to non-resident partner. In respect of interest paid to C, TDS should have been deducted u/s 195 of the Income-tax Act, 1961.

Since TDS has not been effected, the same will face disallowance u/s 40(a)(i).

Total disallowance will therefore be Rs. 3,60,000 + Rs. 4,80,000 = Rs. 8,40,000.

- (ii) Salary is not covered by the provisions of section 40(a)(ia). Hence belated remittance of TDS from salary paid to a resident employee will not face any disallowance and the entire sum will be allowed.
- (iii) These expenses are revenue expenditure as they do not create any new asset or a permanent or

everlasting advantage. See the decision of the Madras High Court in case of **Malabar Mills** (2007) 288 ITR 815(Mad).

Explanation 1 to section 32(1) can be invoked only where construction of any structure is made in a building taken on lease but not in a case where the land was taken on lease and a building was constructed thereon. The distinction in the two situations may be noted.

Answer to Question No. 7(b)**Double Taxation relief u/s 91**

An assessee shall be allowed deduction under section 91 provided all the following conditions are fulfilled :

- (a) The assessee is a resident in India during the relevant previous year.
- (b) The income accrues or arises to him outside India during that previous year.
- (c) Such income is not deemed to accrue or arise in India during the previous year.
- (d) The income in question has been subjected to income-tax in the foreign country in the hands of the assessee and the assessee has paid tax on such income in the foreign country.
- (e) There is no agreement under section 90 for the relief or avoidance of double taxation between India and the other country where the income has accrued or arisen.

Particulars	Rs.	Rs.
Indian Income		
Foreign Income		5,15,000
Gross Total Income		5,00,000
		10,15,000
Less : Deduction under Chapter VI-A		
Section 80C LIP maximum	1,00,000	
80D Mediclaim premium	15,000	
		1,15,000
Total income		9,00,000
Tax on above total income	1,74,000	
Add : Education cess at 2%	3,480	
SAH cess at 1%	1,740	
Total tax payable	1,79,220	
Average rate of tax in India	$= 1,79,220/9,00,00 \times 100$ i.e. 19.91 %	
Average of tax in foreign nation	$= 1,00,000/5,00,000 \times 100$ i.e. 20%	
Double taxed income		5,00,000
Double taxation relief u/s 91 to be given at 19.91% of above		99,550
	Rs.	Rs.
Gross tax payable	1,79,220	
Relief u/s 91	99,550	
Balance tax payable		79,670

Answer to Question No. 7(c)**Tribunal's power to pass rectification order after four years**

The issue as to whether a rectification order can be passed by the Income-tax Appellate Tribunal under

section 254 beyond four years from the date of its order sought to be rectified was considered by the Apex Court in *Sree Awanar Spinning and Weaving Mills Ltd. v. CIT* (2008) 301 ITR 434 (SC). Section 254(2), dealing with the power of the Appellate Tribunal to pass an order of rectification of mistakes, is in two parts. The first part refers to the suo motu exercise of the power of rectification by the Appellate Tribunal, whereas the second part refers to rectification on an application filed by the assessee or Assessing Officer bringing any mistake apparent from the record to the attention of the Appellate Tribunal. Where the application for rectification is made within four years from the date of the order, the Appellate Tribunal is bound to decide the application on merits and not on the ground of limitation.

Question 8.

- (a) In a search conducted in the premises of Mr. Raghav on 20th November, 2009, assets worth Rs. 40 lacs were found. The explanation of Mr. Raghav was that such assets had been acquired out of the income of the previous year relevant to the assessment year 2009-10. However in the return of income filed for the assessment year on 15th October, 2009, there was no disclosure of the aforesaid income. According to the assessee, he is not liable for concealment penalty under section 271(1)(c) of the Income-tax Act, 1961? Is his claim tenable in law? 4
- (b) The assessee Mr. Jaydev, wrote off the amount due to him from Dhruv for the goods supplied four years back in the course of business. His claim for deduction of bad debts is resisted by the Revenue on the ground that the assessee has to still show that the impugned debt had turned bad and that mere writing off of the bad debt is not sufficient. Is the said contention correct? 6
- (c) Mr. L., against whom penalty proceedings had been initiated under section 17(1)(c) of the Wealth-tax Act, 1956, died. Penalty had however not been levied. After his death, can the proceedings be continued against the legal representative of deceased Mr. L.? 5

Answer to Question No. 8(a)

Levy of penalty u/s 271(1)(c)

Explanation 5A to section 271(1) is applicable in respect of searches conducted on or after 1st June, 2007. This Explanation provides that where an assessee is found to be the owner of any

- asset and he claims that such assets have been acquired by him by utilizing his income for any previous year; or
- income based on any entry in the books of account or documents or transactions and he claims that such entry represents his income for any previous year, which has ended before the date of the search and the due date for filing of the return has expired and return has not been filed, such income would be deemed to be concealed income, even if such income is declared in the return of income filed on or after the date of search.

The scope of Explanation 5A has been expanded retrospectively w.e.f. 151 June, 2007 to cover cases where the assessee has filed the return of income for any previous year before the date of search and the income found during the course of search relating to such previous year is not disclosed in the return of income. In such cases also, the assessee would be deemed to have concealed the particulars of income and would be liable for penalty under section 271.

Therefore, by virtue of this amendment to Explanation 5A to section 271(1), Mr. Raghav is liable to pay penalty under section 271(1), which is 100% to 300% of the tax sought to be evaded. The claim of Mr. Raghav that he is not liable for penalty under section 271 is, hence not tenable.

Answer to Question No. 8(b)

As per section 36(1)(vii), subject to the provisions of sub-section (2), the assessee is entitled to claim deduction of the amount of any bad debt or part thereof which is written off as irrecoverable in the

accounts of the assessee for the previous year. The above is the legal position consequent to the amendment w.e.f. 1-4-1989.

It is well established that subsequent to the amendment, the consequences are mainly three :

- (i) The assessee cannot arbitrarily, irrationally or malafide treat a good debt as bad and write it off in his accounts;
- (ii) Where the assessee has acted bona fide and reasonable, the Assessing Officer cannot substitute his own subjective judgment, but must accept the assessee's decision, as to the quality of the debt.
- (iii) The assessee is not obliged to write off and claim the debt in the very year in which it becomes bad. He can write it off and claim it in a subsequent year in which the debt continues to remain bad.

In the given situation, the assessee has considered the financial position of the debtor and has arrived at the decision that the debt is not recoverable. So, it cannot be said that the assessee acted in an irrational or malafide manner. It is the assessee's decision which is important and the AO cannot sit in judgment over the same.

What is important is the write off. The assessee came to the conclusion that the debt is not recoverable and wrote it off during the current assessment year. This is sufficient to claim the deduction under section 36(1)(vii). Even assuming that the debt has turned bad in an earlier year, the assessee can write it off in the current year and treat the same as bad.

Board's explanatory Circular No. 551 dated 23rd January, 1990 is also on above lines and is in favour of the taxpayers.

Note to Examiners : High Courts have consistently held in favour of the assessee. Few important decisions are *CIT vs. Morgan Securities and Credits P. Ltd.* (2007) 210 CTR (Del) 336, *CIT vs. Getit Information Ltd.* (2008) 307 ITR 306 (Del) and *CIT vs. Global Capital Ltd.*, (2008) 306 ITR 332 (Delhi).

Recently the Supreme Court has approved the said view, in *TRF Ltd vs. CIT* (2010) 230 CTR (SC) 14 decided on 14th February, 2010 but the students are not expected to be aware of the decision.

Answer to Question No. 8(c)

Levy of penalty on legal representatives of the deceased

The prerequisites of sub-s. (1) of s. 19 is that should be an assessment and the liability to pay wealth-tax or any other sum should arise during the lifetime of the deceased.

The problem states that during the lifetime of deceased, though the penalty proceedings were initiated, no penalty order was passed during the lifetime of the deceased.

To make the legal representative liable for penalty under s.19(1), it is not enough that the penalty proceedings should be initiated during the lifetime of the deceased. It is also necessary that such penalty proceedings must result into penalty orders during his lifetime.

No penalty orders have been passed during the lifetime of the deceased and hence it cannot be said that any sum of penalty would have been payable by the executor, administrator or other legal representative under the wr Act, on the death of the deceased if he had not died.

The plain reading of sub-so (3) of s. 19 makes it clear that the legislature has purposefully not included either s. 18 or s. 158. Under s. 19(1) neither the penalty can be levied on the executor administrator or other legal representative nor can it be recovered from him.

It has been so held in a number of decisions.