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Important News of the Week

- **CBEC clarifies certain queries on two new services i.e. Hotel accommodation and Restaurant services** effective from 1st May, 2011 Vides Circular No. 139/8/2011-TRU, Dated : May 10, 2011. (Please read for details in the Digest column of this newsletter).

- **Service Tax - Prosecution - Board Instruction Vides CBEC Circular No. 140/9/2011 – ST., Dated: May 12, 2011:**

  Board has issued instructions on this new persecution. Board says, "Prosecution is meant to contain and tackle certain specified serious violations; since the objective of the prosecution provision is mainly to develop a holistic compliance culture among the tax payers, it is expected that the instructions will be followed in letter and spirit." (Please read for details in the Digest column of this newsletter).

- **Applicability of the provisions of the Export of Services Rules, 2005 in certain situations & expression "Used outside India**" clarified Vides Circular No. 141/10/2011-TRU, dated: May 13, 2011 but it is clarification or confusions??

- **Review of Deemed Export Policy – inviting comments from Members of Trade Vides Trade notice no. 9/2011 Dated: May 13, 2011**

  An Inter-departmental Committee has been constituted under the Chairmanship of Dr. Anup K. Pujari, Director General of Foreign Trade to undertake a review of the Scheme of Deemed Export, as available now in Chapter 8 of Foreign Trade Policy, 2009-2014 vide Order NO. 01/92/180/240/AM 11 PC VI dated 2nd May 2011. The Committee, inter-alia decided to seek the views of all stakeholders on Deemed Export Policy with reference to above terms of reference. Those interested to engage with the Committee and share their views/suggestions with the Committee

- **Status of Delhi HC on Service tax on Renting of Immovable property:**

  Case continued to be argued at length by Mr. A S Chandiok, ASG, UOI for the third session also. He has argued the matter now for nearly 7 hours, by painstakingly taking the Court through allied laws, judgements of the constitutional benches, orders passed by the Courts in other Service tax matters. Petitioners were awaiting their chance to present their final arguments as

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rejoinder, but that could not happen, as the ASG concluded when hardly any time was left for Mr. Abhishek Manu Singhvi and Mr. Ganesh, Sr. Advocates.

Next hearing will now be held on 20th May. Court directed that all arguments must now be submitted in writing. Summer vacations begin from 4th June. There may be an attempt to deliver the final order before the Courts break for vacations.

- **Anti Dumping Duty on Viscose Filament Yarn Extended – Vides Notification No. 38/2001-Cus, Dated : May 9, 2011**

  Anti Dumping Duty on Viscose Filament Yarn originating in, or exported from, the Peoples' Republic of China, was imposed vide Notification No. 45/2006-Customs, dated the 24th May, 2006 and would have expired on 23rd May 2011. Now the Government has extended this till 24th February, 2012.

- **New company law to make it mandatory for companies to disclose details of social sector initiatives**:

  The new company law will make it mandatory for companies to disclose details of social sector initiatives, called CSR, in addition to money spent, to shareholders in their annual reports. Not just how much, but companies will also have to disclose to their shareholders where they have spent the 2 per cent of net profit earmarked for corporate social responsibility (CSR) initiatives, once the Companies Bill 2009 is passed by Parliament. "Although we do not plan to make implementation of the provisions mandatory, companies will have to mention in the footnote of their annual reports how much and where they have spent the money kept for CSR," a senior Corporate Affairs Ministry official told PTI. He said that disclosure is necessary for shareholders to be able to discuss and raise questions on the initiatives taken up or announced by the companies.

- **How to get unique identity number (UID):**

  With a mammoth exercise on to issue an Aadhar number to each of India's 1.2 billion citizens and interested residents, IANS tracks the process involved for getting what will become a unique identity for people in India to access all public or private services.

  The Unique Identification Authority of India (UIDAI) – under the chairmanship of Nandan Nilekani – is the nodal agency, which had appointed registrars across the country to facilitate the enrolment process. Registrars are typically government departments and public sector organisations. They in turn appoint the agency to collect data. Currently, over 200 such agencies have been named including Wipro, Comat Technologies, Alankit and Virgo Softech. “Aadhaar guarantees uniqueness and a universal identity. At its core is a centralised online identity verification process,” said Atul P. Anand, director at Virgo Softech , which is one of the enrolment agencies involved in the process.

“Biometric information like iris and fingerprints ensure this uniqueness. This is also embedded and hence tamper proof. The authority uses data de-duplication process, which also makes sure that only unique data is stored,” Anand told IANS. Officials explained the enrolment is done in four stages — verification of documents including address proof, on-the-spot capture of photos, iris and fingerprint scanning — after which people are given acknowledgment slips at the time of enrolment.

A 12-digit unique identification number is then delivered in 20-30 days at the person’s address through speed post after verification of biometrics and demographic data. Data verification is done by the authority under a centralised system. The system ensures duplicate data is deleted, leaving only one copy to be stored.“If you try to enrol yourself for the second time by using some different demographic information or data, you cannot do it. That’s also because you can’t change your iris and fingerprint. So duplicate data automatically gets deleted,”. There is also no age bar to enrol for the number.

But the unique number of a child up to five years of age is linked to that of his or her parents or guardians. On completion of 15 years of age, biometric data is updated, but the number remains the same. The people who don’t remember their date of birth and have no documents to back it can provide approximate age. Transgender have also been included; so under gender options, there are three categories — male, female and transgender.

- **Bring back money from Swiss bank accounts and legitimize by paying 15% tax:**

There's some delightful news for those with Swiss bank accounts. Indians, who opted for such numbered account service, have a way to mislead anyone trying to hunt them down. For them, a new window in the tax law has flung open just when some of the doors are about to shut. The law of the land has made it possible for them to bring back the money , legitimise it by paying 15% tax, and park it in any account with a bank in India. No questions will be asked. The taxman won't harass them because it's money on which tax has been paid.

Officials at the enforcement directorate can't slap asummon because it's authorised transfer of funds from an overseas firm to a company in India through official banking channels. There are certain expenses involved as lawyers and accountants have to be hired to make the money transfer look genuine. You can't really ask your Swiss banker to send the money straightaway to your savings account with the State Bank's Santacruz branch. The man may think you have finally lost it.

There are other foolproof ways of going about with such business. A new company has to be set up in one of the tax havens, money has to be moved out from the secret numbered account to the account of the newly-formed company with another bank and then pay the amount as dividend to an Indian company. Ask your chartered accountant; he knows all about it, and even if he doesn't , he will give you the telephone number of a professional who does. Such a professional will guide you through the maze of foreign exchange and tax rules to help you bring back the money that is rightfully or wrongfully yours.

Take one step at a time: Step 1: Set up a company in Dubai. It's easier than setting up one in India: Apply for a name with Dubai authorities and submit a simple memorandum . It will cost a few lakhs and will be done in a week. You will get an address, bank account and directors pooled in from an army of 'service providers' floating around in Dubai. (In a recent seminar, one of the Dubai state officials promised all assistance to Indian companies setting up arms in UAE). An Indian firm controlled by the Swiss bankaccount holder floats the Dubai subsidiary . This new subsidiary has a single purpose: to hold the money that will move out of Switzerland to Dubai, before it travels to India.

Step 2: Now, the money lying with the Alpine bank has to be transferred to a Dubai Bank, where the newly set-up company has an account. Let's call this firm Fei Qian - the Chinese term for flying money. Since it's unlikely that any company in Dubai will carry such a name, authorities in UAE will take little time in giving the permission. Hours after the Swiss bank receives instruction, money flows out of the numbered account to Fei Qian's account in Dubai.

Important Judicial Pronouncement of the Week

- **Amazing Jurisprudence: Customs – Commissioner (Appeals) passes two orders in same case – One in favour and another against - CESTAT sets aside both - Commissioner of Customs, Cochin Vs. Shri Abhiraj Barfiwala (2011-TIOL-521-CESTAT-BANG)**

- Two orders passed by Appellate Commissioner bearing same number and date but issued on different dates – One order received by Revenue and currently under appeal – Other order not received by Revenue but received by assessee – Statement of facts in both orders same but findings and conclusions different, one in favour of Revenue and another in favour of assessee – Both orders set aside by invoking Rule 40 of CESTAT (Procedure) Rules, 1982 – Matter remanded to Appellate Commissioner to pass a speaking order.

• **M/s Ahluwalia Contracts (India) Ltd Vs CST, New Delhi (2011-TIOL-575-CESTAT-DEL**

- **Issue:** Whether free supply of goods by contractee needs to be included while availing an abatement of 67%.

- **Held:** Notification 1/2006-ST - Availment of an abatement of 67% of the value of the taxable services, without including the value of the freely issued goods would defeat the very purpose of the notification – issues involved in the present appeal are contentious and arguable - Pre-deposit ordered of Rs.5 Crores.

• **CC, Bangalore Vs M/s. Leela Scottish Lace Ltd (2011-TIOL-276-HC-KAR-CUS)**

- **Issue:** Whether DTA entitled to Duty Drawback when DTA unit exports goods manufactured by EOU

- **Held:** Duty Drawback - not entitled when DTA unit exports goods manufactured by EOU : The language of the notifications, rule and the section, make it very dear that the benefit of duty drawback in respect of goods manufactured at a 100% EOU or EPZ unit is not available when such goods are exported as benefit of duty drawback is available only when the inputs of goods manufactured for exporting had suffered duty i.e. customs duty when imported and even assuming that some part of it has suffered excise duty. No exemption by implication or by a logical deduction.

• **Caprihans India Ltd Vs CCE, Thane(2011-TIOL-584-CESTAT-MUM)**

- **Issue:** When duty cannot be demanded u/s 11A, Can question of demanding interest under sec 11AA is justified.

- **Held:** When duty cannot be demanded under section 11A, the question of demanding interest under section 11AA also does not arise - provisional assessments have to be finalized and the final duty amount has to be determined under the provisions of Rule 9B of CER, 1944.

- **Booz Allen and Hamilton Inc. Vs. SBI Home Finance Ltd. & Ors. (Supreme Court)**

  - **Issue:** Whether Mortgage suit can be referred for settlement through arbitration

  - **Held:** All disputes are not capable of settlement through arbitration. Some by nature have to be adjudicated by courts, according to the Supreme Court. A suit for sale, foreclosure or redemption of mortgaged property should be tried by a court and not by arbitral tribunal, the court stated in the judgment. In this case, two firms took loan from SBI to buy flats in Mumbai and they entered into leave and licence agreements with Booz. The borrowers did not repay the loan and so SBI filed a mortgage suit before the Bombay high court. Booz moved the high court for arbitration which was dismissed. Its appeal was also dismissed by the Supreme Court. It stated that a court where the mortgage suit is pending should not refer the parties to arbitration as it is not an “arbitrable” issue. This is so because only a court can protect the interests of third parties. Arbitration deals with only disputes between parties to the arbitration agreement. The court gave similar instances where arbitration should not be attempted, like insolvency and winding up matters, tenancy, wills, criminal offences, matrimonial disputes and guardianship issues.

- **M/s Shree Balaji Alloys Vs CIT (2011-TIOL-269-HC-J&K-IT)**

  - **Issue:** Whether Central Excise refund and interest subsidies received from State Govt's new Industrial Policy U/S 80IB of the IT Act, 1961 are to be treated as revenue receipts – ***Relevant for Direct Tax but incomplete unless you read Excise Notifications.***

  - **Held:** Sec 80IB - Whether excise refunds and interest subsidies received from the State Govt's new Industrial Policy are to be treated as revenue receipts - Whether purpose behind the incentives is determinative test - Whether any public purpose is served by such incentives so as to change the nature of subsidies.

    The assessees are in appeal before the High Court of Jammu & Kashmir aggrieved by the orders of ITAT Amritsar Bench which held that excise refunds and interest subsidies received by them in pursuance of the New Industrial Policy and other Concessions announced for the State of J & K by DIPP OM dated June 14, 2002 as revenue receipts.

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The High Court considered the salient features of the New Industrial Policy and its amendments, Central Excise Notifications 56/2002-CE and 57/2002-CE both dated 14.11.2002 issued in pursuance of this policy, the submissions made on behalf of the assessees and the Revenue in support of their rival contentions and the landmark judgments of Apex Court in Sahney Steel and Press Works Limited = (2002-TIOL-11-SC-IT) and others vs. CIT and CIT vs. Ponni Sugars and Chemicals Ltd = (2008-TIOL-174-SC-IT), and made the following observations.

ITAT interpreted the incentives in question, as **'production incentives'** and hence taxable as '**revenue receipts'** in the hands of the assessees by relying various paragraphs in the judgments of Supreme Court in Sahney Steel and Press Works Limited and others vs. CIT and CIT vs. Ponni Sugars and Chemicals Ltd = (2008-TIOL-174-SC-IT) without appreciating the context in which the Supreme Court made those observations in respect of the schemes.

while arriving at this decision, the ITAT was influenced by the following factors viz., the Excise Refund and Interest Subsidy had not been given to the assessees to establish industrial units because the industry already stood established; the incentives were not available unless and until commercial production had commenced; the incentives were recurring in nature and were limited to a period of 10 years from the date of commencement of commercial production; the incentives in the form of Excise Duty Refund and Interest Subsidy were not given to assessees for purchasing Capital asset or for purpose of machinery; and the incentives were given for easy market accessibility and to run the business more profitably.

it is settled position of law that orders passed by Higher Courts in a case in the given facts and circumstances do not operate as binding precedent, for, it is only the ratio decidendi thereof that operates as precedent in law. in Ponni Sugars and Chemicals Ltd., the Supreme Court highlighted the ratio laid down in the Sahney Steel case - the legal position adumbrated by the Apex Court in these two cases is that to determine as to whether **the nature and intent of the incentives are revenue** receipts or capital receipts, the purpose underlying the incentives would be the determinative test;

the New Industrial Policy and other Concessions in DIPP OM dated June 14, 2002 explicitly provides to achieve twin objectives of **i) accelerating industrial development in the State of J & K and (ii) generation of employment in the State of J & K.** This is also eloquently demonstrated by the amendment issued in November 28, 2003 by the Central Government to the DIPP Policy extending the incentives. The excise notifications were also issued pursuant to these objectives. Thus the paramount consideration of the Central Government in providing the incentives to the new industrial units and substantial expansion of existing units is generation of employment through acceleration of industrial development to deal with the social problem of unemployment in the State of J & K;

Such incentives designed to achieve a public purpose **cannot be construed as production or operational incentives designed for the benefit of assessees** as held by ITAT.

- **M/s Instrumentation Ltd Vs CCE, Jaipur (2011-TIOL-561-CESTAT-DEL)**

  - **Issue:** If assessee is engaged in both activities i.e. manufacturing and providing services, whether the assessee has to maintain separate Cenvat credit account of input/output service.

  - **Held:** Applicants are having a common account and they have utilized the entire credit against the output services and have not utilised the credit for clearing manufactured products - in Cenvat Credit Rules, no where it is specified that if an assessee is engaged in both activities i.e. manufacturing and providing services, the assessee has to maintain separate cenvat credit account of input/output service - Prima facie, the availing of credit or its utilization cannot be denied - Applicants have made out a strong case in their favour - Pre-deposit waived and stay granted.

Important Digests of the Week

- **CBEC clarifies certain queries on two new services i.e. Hotel accommodation and Restaurant services** effective from 1st May, 2011 Vides Circular No. 139/8/2011-TRU, Dated : May 10, 2011.

  - S.65(105)(zzzzv) – Service provided or to be provided to any person, by a restaurant, by whatever name called, having the facility of air-conditioning in any part of the establishment, at any time during the financial year, which has licence to serve alcoholic beverages, in relation to serving of food or beverage, including alcoholic beverages or both, in its premises;
  - S.65(105)(zzzzw) – Service provided or to be provided to any person by a hotel, inn, guest house, club or campsite, by whatever name called, for providing of accommodation for a continuous period of less than three months AND The tax

on accommodation is applicable only if the 'declared tariff' is more than Rs. 1000/ per day.

Now the Board clarifies certain queries on these services by potential tax payers.

- **Temporary Accommodation service:**

Query No.1: What is the relevance of declared tariff? Is the tax required to be paid on declared tariff or actual amount charged?

CBEC Response: "Declared tariff" includes charges for all amenities provided in the unit of accommodation like furniture, air-conditioner, refrigerators etc., but does not include any discount offered on the published charges for such unit. The relevance of 'declared tariff' is in **determining the liability to pay service tax** as far as short term accommodation is concerned. However, the **actual tax** will be liable to be paid **on the amount charged** i.e. declared tariff minus any discount offered. Thus if the declared tariff is Rs 1100/-, but actual room rent charged is Rs 800/-, tax will be required to be paid @ 5% i.e. (after 50% abatement) on Rs 800/-

Food for Thought: What if the declared tariff is Rs. 950/- and the actual amount collected is Rs 1200? There is no service tax!!!!!

Query No. 2: Is it possible to levy separate tariff for the same accommodation in respect of corporate/privileged customers and other normal customers?

CBEC Response: It is possible to levy separate tariff for the same accommodation in respect of a class of customers which can be recognized as a distinct class on an **intelligible criterion**. However, it is not applicable for a single or few corporate entities.

Food for Thought: Will Service Tax officers conduct surveys to ascertain how different rates are charged? And what could be the **intelligible criterion**?

Query No. 3: Is the declared tariff supposed to include cost of meals or beverages?

CBEC Response: Where the declared tariff includes the cost of food or beverages, Service Tax will be charged on the total value of declared tariff. But where the bill is separately raised for food or beverages, and the amount is charged in the bill, such amount is not considered as part of declared tariff.

Query No. 4: What is the position relating to off-season prices? Will they be considered as declared tariff?

CBEC Response: When the declared tariff is revised as per the tourist season, the liability to pay Service Tax shall be only on the declared tariff for the accommodation where the published/printed tariff is above Rupees 1000/-. However, the revision in tariff should be made uniformly applicable to all customers and declared when such change takes place.

Food for Thought: Is this the way to guide the hotel industry how they should plan their business?

- **<u>A/c Restaurant's service:</u>**

Query No. 1: If there are more than one restaurants belonging to the same entity in a complex, out of which only one or more satisfy both the criteria relating to air-conditioning and licence to serve liquor, will the other restaurant(s) be also liable to pay Service Tax?

CBEC Response: Service Tax is leviable on the service provide by a restaurant which satisfies two conditions: (i) it should have the facility of air conditioning in any part of the establishment and (ii) it should have license to serve alcoholic beverages. Within the same entity, if there are more than one restaurant, which are clearly demarcated and separately named, the ones which satisfy both the criteria is only liable to service tax.

Query No. 2: Will the services provided by taxable restaurant in other parts of the hotel e.g. swimming pool, or an open area attached to a restaurant be also liable to Service Tax?

CBEC Response: The taxable services provided by a restaurant in other parts of the hotel e.g. swimming pool, or an open area attached to the restaurant are also liable to Service Tax as these areas become extensions of the restaurant.

Query No. 3: Is the serving of food and/or beverages by way of room service liable to service tax?

CBEC Response: When the food is served in the room, service tax cannot be charged under the restaurant service as the service is not provided in the premises of the air-conditioned restaurant with a licence to serve liquor. Also, the same cannot be charged under the Short Term Accommodation head if the bill for the food will be raised separately and it does not form part of the declared tariff.

But, Food when served in Swimming pool is taxable, but not taxable when served in a room. But do they serve food in a swimming pool? And for both the services, luxury tax and VAT are not to be included in value.

- **Service Tax - Prosecution - Board Instruction Vides CBEC Circular No. 140/9/2011 – ST., Dated: May 12, 2011:**

Sanction for prosecution has to be accorded by the Chief Commissioner of Central Excise, in terms of the section 89(4) of the Finance Act, 1994. In accordance with Notification 3/2004-ST dated 11th March 2004, Director General of Central Excise Intelligence (DGCEI), can exercise the power of Chief Commissioner of Central Excise, throughout India.

Board has decided that monetary limit for prosecution will be **Rupees Ten Lakh** in the case of offences specified in section 89(1) of Finance Act, 1994, to ensure better utilization of manpower, time and resources of the field formations. Therefore, where an offence specified in section 89(1), involves an amount of less than Rupees Ten Lakh, such case need not be considered for launching prosecution. However the **monetary limit will not apply in the case of repeat offence.**

"89. (1) whoever commits any of the following offences, namely: -

(a) ***provides any taxable service*** *chargeable to service tax under subsection (1) of section 68 or receives any taxable service chargeable to tax under sub-section (2) of said section,* ***without an invoice*** *issued in accordance with the provisions of this Chapter or the rules made there under; or*

(b) ***avails and utilises credit*** *of taxes or duty* ***without actual receipt*** *of taxable service or excisable goods either fully or partially in violation of the rules made under the provisions of this Chapter; or*

(c) ***maintains false books of account*** *or fails to supply any information which he is required to supply under this Chapter or the rules made thereunder or (unless with a reasonable belief, the burden of proving which shall be upon him, that the information supplied by him is true) supplies false information; or*

*(d) collects any amount as service tax but **fails to pay the amount so collected** to the credit of the Central Government beyond a period of six months from the date on which such payment becomes due."*

Provisions relating to prosecution are to be exercised with due diligence, caution and responsibility after carefully weighing all the facts on record. Prosecution should not be launched merely on matters of technicalities. Evidence regarding the specified offence should be beyond reasonable doubt, to obtain conviction. The sanctioning authority should record detailed reasons for its decision to sanction or not to sanction prosecution, on file.

Prosecution proceedings in a court of law are to be generally initiated after departmental adjudication of an offence has been completed, although there is no legal bar against launch of prosecution before adjudication. Generally, the adjudicator should indicate whether **a case is fit for prosecution**, though this is not a necessary pre-condition. To launch prosecution against top management of the company, sufficient and clear evidence to show their direct involvement in the offence is required. Once prosecution is sanctioned, complaint should be filed in the appropriate court immediately. If the complaint could not be filed for any reason, the matter should be immediately reported to the authority that sanctioned the prosecution.

But who is to file the complaint? This is not clarified either in the Act or the instructions!

Note: Please do write to us for any clarifications/ suggestion.

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