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Important News of the Week

- **Customs - Powers of Adjudication - CBEC issues new instructions Vides CBEC Circular No. 24/2011-Customs, Dated. May 31, 2011 (Pls read for details in Digests column of the newsletter)**

- **Mega units to take a hit on withdrawal of tax incentives in Maharashtra:**

  In a bid to stem the apparent erosion of its revenue on account of its much-hyped Mega Project Incentive Policy, the state government of Maharashtra has launched radical changes to the Value Added Tax (VAT) regulations that could possibly nullify the very intention with which the Policy was introduced in the first place. The amendments announced by the government in March this year restrict the setoff available to the stand-alone distributors and distribution companies purchasing goods manufactured by Mega Units, a change that is sure to severely damage the revenues of both the distribution companies and the Mega Units.

  Under the present Industrial Policy of Maharashtra, a number of Mega Units have set up captive distribution or marketing companies within the state to carry out their marketing & distribution activities. Additionally, there could be independent distribution companies that carry on the business of selling the products manufactured by the Mega Units. These distribution companies discharged VAT on their sales within Maharashtra and Central Sales Tax (CST) on their inter-state sales after claiming setoff of the VAT paid on their purchases from the Mega Units. A distribution company, on making inter-state sales, would typically discharge tax at the rate of 2%, but would get a set-off on its purchases at the rate of 12.5%. The 10.5% point difference was available to these distribution companies as a refund making the operation tax cost neutral.

  Why do companies set up separate distribution/ marketing companies? Besides the commercial rationale of hiving off the marketing and distribution function to a separate entity to achieve nimble-footed responses to market vagaries, another factor that encouraged Mega Units to sell all their goods locally to the distribution companies was the manner in which the Industrial Promotion Subsidy is given out by the government. The subsidy received by a Mega Unit is pegged to the output VAT charged by it. When all sales are to a marketing company, then the Mega Unit realizes subsidy at a faster rate as the tax payment is more than that under a conventional model of direct sale.

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- **Sunil Mitra appointed as the Finance Secretary & Sumit Bose is the new Expenditure Secretary:**

  Mitra, a 1975-batch IAS officer from the West Bengal cadre, retains the charge of Revenue Secretary as well, according to an official statement.

  Sumit Bose is the new Expenditure Secretary, the portfolio held by Nath who enjoyed the status of the Finance Secretary. Bose, a 1976-batch IAS from the Madhya Pradesh cadre, has been given dual charge, as he would continue to be Disinvestment Secretary till his replacement in the key department is firmed up.

- **India emerges as fourth fastest wealth creator country in the world:**

  India has emerged among the four fastest wealth creator countries in the world and its growth momentum is expected to gather further steam going forward, a global study has said.In its annual Global Wealth Report, management consulting firm Boston Consulting Group has listed the United States, China, the United Kingdom and India as the nations showing the largest absolute gains in wealth in 2010.
  Global wealth continued a solid recovery in 2010, driven by growth in nearly every region and registered an increase of $9 trillion, to a record of $121.8 trillion.

- **Income Tax department continues to enjoy the power to tap telephone conversation:**

  The Income Tax department today said it continues to enjoy the power to tap telephone conversations, as was given to it earlier in 2006. “Power of interception stays with the CBDT and there is no change in the factual background when the power was given in 2006, and at present circumstances are identical,” Sudhir Chandra, the outgoing chairman of Central Board of Direct Taxes (CBDT) told reporters here. Referring to the issue of standard procedures on phone tapping raised by the Home Ministry, Chandra said, “those standard procedures already exist.”

  Earlier a Committee of Secretaries, constituted by Prime Minister Manmohan Singh in the wake of leakage of telephone tapes of corporate lobbyist Nira Radia, had suggested that CBDT should be removed from the list of agencies that can intercept phone calls.

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The Committee has argued that tax evasion cases neither have criminal liability nor they involve national security issue as these are only civil matters. In the corporate lobbyist Radia's case, the income tax department was allowed to tap her phone on the basis of a November 2007 letter, received by the Finance Ministry.

The government had last month constituted a 15-member inter-ministerial group, headed by Home Secretary, to recommend effective monitoring of provisions of telephone tapping and curtailing its leakage to the public at large.

- **LIC to offer UID to 4 crore policyholders this year:**

  Unique Identification Authority of India's (UIDAI) plan to offer a unique identification number (UID) to every resident Indian is slated to get a fillip, with the country's largest life insurer — Life Insurance Corporation of India (LIC) — saying it is ready to offer unique identification cards to its policyholders. About a year ago, LIC had signed an agreement with UIDAI to share its database of over 200 million policyholders with the government agency and issue biometric cards to these policyholders.

- **Software piracy caused $866-m tax loss to Govt.:**

  A staggering $866 million - That was the tax revenue that Government missed collecting in 2009 because business and consumers did not buy genuine software. Business Software Alliance – a software advocacy body with members such as Apple, Adobe, Autodesk and Corel – has conducted a study which reveals that only a third of the overall PC software revenues are captured and the rest are lost to software piracy. The notional tax loss figure primarily takes into account evasion of indirect taxes (VAT, CVD and Octroi) when consumers and enterprises do not opt for genuine software. The study also computed the loss of direct tax in the entire value chain. It argued that, but for piracy, distributors and resellers would have earned more and, therefore, would have paid higher taxes. A 65 per cent piracy (of packaged software labels such as Microsoft and Adobe) means that more than six out of 10 PC software programs installed in the Indian market in 2009, were not paid for. In 2010, the piracy levels cooled-off but only by one percentage point to 64 per cent.

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Important Judicial Pronouncements of the Week

- **CCE, Mumbai Vs S Narender Kumar (2011-TIOL-52-SC-CX)**

  - **Issue:** Suppression of Facts – If Classification List approved – Is it suppression?

  - **Held:** Central Excise - Suppression - Classification List approved - no suppression: In taxation, it ("suppression of facts") can have only one meaning that the correct information was not disclosed deliberately to escape payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression.

- **Sandoz Pvt. Ltd Vs CCE, Belapur (2011-TIOL-673-CESTAT-MUM)**

  - **Issue:** Whether Appellant entitled to carry forward Cenvat credit on conversion from DTA unit to a 100% EOU?

  - **Held:** Conversion from DTA unit to a 100% EOU – reversal of Cenvat Credit – issue no longer res integra – Appellant entitled to carry forward Cenvat credit in view of decision in Sun Pharmaceuticals Industries.

- **CCE, Madurai Vs M/s GGN Spinning Mills P Ltd (2011-TIOL-671-CESTAT-MAD)**

  - **Issue:** Whether Revenue neutrality claimed by the assessee removed capital goods on which CENVAT credit was availed to their sister unit while applying depreciation at the rate of 25% as provided under the Income Tax Act.

  - **Held:** Central Excise – CENVAT – Capital goods transferred to sister unit – Claim of Depreciation - Revenue neutrality - The assessee removed capital goods on which CENVAT credit was availed to their sister unit. Duty was paid on depreciated value applying depreciation at the rate of 25% as provided under the Income Tax Act. Assessee claims grounds of revenue neutrality. HELD - Depreciation as admissible under the Income Tax law not allowed. Depreciation for customs and excise purposes has to be calculated as per straight line method applying a lower prescribed percentage fixed for subsequent years as per CBEC Circular F. No. 314/19/94-FTT dated 21.4.1998. Plea of revenue neutrality is not valid as the sister concern is only allowed to take credit of 50% of the duty in the first year and not the credit of the entire amount of duty immediately as per

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CENVAT Credit Rules. Matter remanded to re-calculate duty liability allowing depreciation as admissible.

- **SGS India Pvt. Ltd Vs CST, Mumbai (2011-TIOL-666-CESTAT-MUM)**

  - **Issue:** Whether Services provided in India as Export of Service and consideration for such services paid in convertible foreign exchange - liable to Service tax?

  - **Held:** Foreign parties requisitioning the services of the appellant to inspect/test/analyse samples of the goods in India and provide certificates guaranteeing import-worthiness - consideration for such services paid in convertible foreign exchange not liable to Service Tax - CBEC has held export of services as tax-free notwithstanding the notifications - Appeal allowed

- **M/s V G Steel Industry Vs CCE (2011-TIOL-338-HC-P&H-CX)**

  - **Issue:** When excise duty paid in excess of what was payable, CENVAT Credit can be denied unless excess duty paid has been refunded?

  - **Held:** Central Excise - When duty paid in excess of what was payable, CENVAT Credit cannot be denied unless the excess duty paid has been refunded even if the duty has been paid in excess of the amount finally held to be payable, unless the excess duty paid has been refunded, the assessee could claim cenvat credit as the department could not get the duty twice. Reliance has been placed on order of this Court dated 22.7.2010 in CEA No.42 of 2010 Commissioner Central Excise, Chandigarh Vs. M/s Guwahati Carbons Ltd 2010-TIOL-609-HC-P&H-CX, wherein after referring to earlier judgments of this Court and judgment of Madras High Court, the plea of the assessee was upheld. The counsel for the Revenue is unable to distinguish the applicability of the judgment relied upon on behalf of the appellant.

- **M/s Steel Strips Vs CCE , Ludhiana (2011-TIOL-656-CESTAT-DEL-LB)**

  - **Issue:** Whether Refund of unutilized credit is permissible other than the case of export of goods?

  - **Held:** Central Excise - refund of unutilized credit is only permissible in case of export of goods and for no other reason whatsoever - equity, justice and good conscience are the guiding factors for Civil Courts, no fiscal Courts are governed by these concepts: Considerations of hardship, injustice or anomalies do not play any useful role in construing taxing statutes unless there be some real ambiguity.

It has also been said that if taxing provision is "so wanting in clarity that no meaning is reasonably clear, the court will be unable to regard it as of any effect. It has also been held that in interpreting taxing statute, equitable considerations are entirely out of place nor can taxing statutes be interpreted on any presumptions or assumptions: DELHI CESTAT (LARGER BENCH)

Important Digests of the Week

- <u>**CUSTOMS - POWERS OF ADJUDICATION - CBEC**</u> **issues new instructions Vides CBEC Circular No. 24/2011-Customs, Dated. May 31, 2011: CBEC** has issued fresh instructions on powers of adjudication of various officers.

- **Cases where SCNs are issued under section 28 of the Customs Act**

Level of Adjudication Officer	**Nature of cases**	**Amount of duty involved**
Commissioner	All cases	Without limit
ADC/JC	All Cases	Up to Rs.50 lakhs
AC/DC	All cases	Up to Rs. 5 lakhs

- **Proper officer for the issuance of Show Cause Notice and adjudication of cases under the provisions of Rule 16 of the Customs, Central Excise and Service Tax Drawback Rules:**

i. In case of simple demand of erroneously paid drawback, issuing Show Cause Notice and adjudication of case without any limit by Assistant / Deputy Commissioner of Customs
ii. In cases involving collusion, wilful misstatement or suppression of facts etc.,

Level of Adjudication Officer	**Amount of Drawback**
Additional / Joint Commissioner of Customs	Without any limit
Deputy / Assistant Commissioner of Customs	Up to Rs.5 lakhs

iii. In case of Export Promotion Schemes i.e. DEPB / Advance Authorization / DFIA / Reward Schemes etc.

Level of Adjudication officer	Duty Incentive amount
Commissioner of Customs.	Without any limit.
Additional / Joint Commissioner of Customs.	Upto Rs.50 lakhs.
Deputy / Assistant Commissioner of Customs.	Upto Rs.5 lakhs.

Board has clarified that in spite of the revision, in all cases where personal hearing has been completed, orders will be passed by adjudicating authority before whom the personal hearing has been held.

Board wants an immediate exercise to be undertaken to take stock of the present pendency and transfer of relevant files and records to respective adjudicating authorities and the exercise of transfer of case records should be completed by 15.06.2011 under proper receipt.

- **<u>DATE PROTECTION LAWS IN INDIA:</u>**

The Government of India (Government) promulgated the Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011 (Rules) pursuant to Section 43A of the Information Technology Act, 2000 (IT Act). The Rules are very similar to the procedures under the UK Data Protection Act and have significant ramifications on everybody corporate.

Important definitions include: (a) sensitive personal data which has been broadly defined to include passwords, financial information, medical information, etc; and (b) body corporate means any company and includes a firm, sole proprietorship or other association of individuals engaged in commercial or professional activities.

Significant provisions are as follows:

- **Collection of Information**

Everybody corporate is required to have a privacy policy for handling or dealing in sensitive personal data, which must be published on the website of the body corporate.

A body corporate must obtain the consent of the provider of sensitive personal data as regards the purpose of its use prior to collecting the information.

The information cannot be retained by the body corporate longer than required for the purpose for which it was sought.

The body corporate must designate a grievance officer to address grievances of a provider of information / data subject.

- **Disclosure of Information**

For a body corporate to disclose sensitive personal data or information, consent of the data subject is required unless the data subject has agreed to such disclosure in a contract with the body corporate or the body corporate is under a legal obligation to disclose such information.

Such information can be shared with Government agencies mandated under law to obtain such information, provided that the Government agencies do not publish or share such information with any other person. The body corporate cannot publish the sensitive personal data or information.

- **Transfer of Information**

A body corporate may transfer sensitive personal data or information to another Indian or overseas body corporate that ensures the same level of data protection that is adhered to by the body corporate under the Rules. The transfer is allowed only if it is necessary for the performance of a lawful contract between the body corporate or any person on its behalf and the provider of information or where such person has consented to the data transfer.

- **Reasonable Security Practices and Procedures**

A body corporate will be considered to have complied with reasonable security practices and procedures if it has implemented the International Standard IS / ISO / IEC 27001 on Information Technology. Any other standard must be notified by the Government.

The reasonable security practices and procedures are also required to be audited at least once a year or when there is a significant upgradation of the body corporate's processes and computer resource, through an independent auditor duly approved by the Government.

- **Penalty**

  A body corporate which fails to put in place reasonable security practices and procedures in accordance with the Rules, may be liable to compensate the data subject for any loss for which not limit has been provided. The body corporate may be liable to a penalty not exceeding INR 25,000.

- **Conclusion**

  The privacy norms contained in the Rules will bring India on par with the European Union on the implementation of data protection laws. Such protection accords with the constitutional rights of Indian citizens as recognized by the Supreme Court of India as integral part of the right to life. These Rules have significant ramifications on all body corporate involved in the collection of personal data. Virtually every organization must immediately put in place systems and processes for protection of such data.

• **RECENT INITIATIVES OF THE GOVERNMENT FOR JUSTICE DELIVERY AND LEGAL REFORMS:**

The Government is taking various initiatives to improve justice delivery system in the country and for improving justice delivery and legal reforms and steps to reduce pendency in courts from 15 to 3 years by 2012. These are as under:

National Mission for Justice Delivery and Legal Reforms: The Government has 'in principle' approved setting up of National Mission for Justice Delivery and Legal Reforms. The National Mission would help implementing the two major goals of

- increasing access by reducing delays and arrears in the system
- enhancing accountability at all levels through structural changes and setting performance standards and facilitating enhancement of capacities for achieving such performance standards.

Judicial Standards and Accountability Bill, 2010: To bring about greater transparency and accountability in the higher judiciary, the Government has introduced a Bill in the Parliament to lay down judicial standards, to enable declaration of assets and liabilities by the Judges, and to establish a mechanism to enable investigation and follow-up action into complaints against judges. The Bill has been referred to the Standing Committee on 1st December, 2010 and is presently under its consideration.

13th Finance Commission grant: With the objective of improving justice delivery, the Thirteenth Finance Commission (TFC) has recommended a grant of Rs. 5000 crore to be utilized over a period of five years up to 2010-2015. An amount of Rs.1000 crore has been released to State Governments in the year 2010-11. This grant is aimed at providing support to improve judicial outcomes. Many States have already formulated State Litigation Policies as per the requirement for further release of TFC grant.

National Litigation Policy: The Government has already announced a National Litigation Policy effective from 1st July, 2010 to to reduce government litigation in Courts so that valuable court time would be spent in resolving other pending cases so as to achieve the goal in the national legal mission to reduce average pendency time from 15 years to 3 years.

ICT enablement of courts: The Government has implemented a central sector scheme for computerization of the District and Subordinate Courts (e-Courts project) in the country and for upgradation of the ICT infrastructure of the Supreme Court and the High Courts, at a cost of Rs. 935 crore for the first phase which will connect 14,249 courts in the country including video conferencing facilities.

Access to Justice for the marginalized section: Provision of legal aid enables the marginalized sections of the society in accessing justice. To strengthen Legal aid authorities a sum of Rs 200 crores had been provided under the TFC grants. The mission launched for release of under trial prisoners last year had appreciable results and is continuing. In the period 26 January 2010 to 31 May 2011, 562379 under trials have been released on bail, 77940 have been discharged, 68744 convicted, adding to a total of 709081 cases that have been disposed off. Software to trace cases of under trials by courts is also under consideration for integration into the e-courts software.

Gram Nyayalayas: The Gram Nyayalayas Act, 2008 was enacted to provide for the establishment of Gram Nyayalayas, a new tier of courts, at the grass-root level for the purpose of providing access to justice to the citizens at their doorsteps and to ensure that opportunities for securing justice are not denied to any citizen. The Act came into force on 2 October 2009 and enables the State Governments to establish Gram Nyayalayas at Intermediate Panchayat levels.

Increase in the age of retirement of Judges of High Courts: The Government has introduced 'the Constitution (One Hundred and Fourteenth) Amendment Bill, 2010' in the Lok Sabha on 25th August, 2010 for increasing the age of retirement of Judges of the High Courts from 62 to 65 years. It aims at retaining the judges for three more years which would avoid occurrence of new vacancies on account of superannuation and result in continuance of judges to clear the backlog of cases in the High Courts. The Bill has been examined by the Department related Parliamentary Standing Committee on Personnel, Public Grievances and Law and Justice is to be slated for discussion in the Parliament.

Infrastructure Development at Subordinate courts: In the financial year 2011-12, the allocation for the Centrally Sponsored Scheme on Infrastructure Development has been increased 5 folds from Rs.100 crores to Rs. 500 crores.

Setting up of a Legal e-Library: The Government is finalizing the setting up a 'National Legal e-library' focusing on 933 law schools in India. ,It is expected to benefit the students and practitioners of Law. It is proposed to get operationalised on 15 August 2011.

Rajiv Gandhi Advocate's Training Scheme: The Rajiv Gandhi Adhivakta Prashikshan Yojna to be launched on 27June 2011, will select about 10 practicing advocates from each state and impart a two-month long professional training by a National Law School/College – to them and encourage them to to serve the need of law professionals at the grass root level.

Creation of All India Judicial services: The proposed to set up an All India Judicial Service is awaiting Cabinet approval. This service is expected to attract the best of talent to the judiciary.

Comprehensive Electoral Reforms: The Government has held 6 Regional Consultation on Electoral Reforms. The seventh is scheduled on 12 June 2011 in Guwahati to be followed By the National Consultation in New Delhi on 2-3 July 2011. Following this, Comprehensive Amendments will be brought about to the Electoral System. Further, the Government has also passed legislation and has enabled NRI Voting and the Maximum limits of Election Expenses have been increased for both Parliament and Assembly Elections.

- **<u>COMPLIANCE OF PROVISIONS OF COMPANIES ACT AND RULES THERETO:</u>**

1) The date for filing DIN4 for registration of PAN has been extended till 30th September, 2011 vides General Circular No 32/2011 dated 31.05.2011.

2) Ministry of Corporate Affairs vide General Circular No 33/2011 dated 01.06.2011 came up with a circular to cling hard against the companies which are not filing up to to date Annual Filing documents and are just making event based filing. The Circular would be effective w.e.f 3rd July, 2011.

   Ministry has clarified that no other event based filing except Form 32, 20B, 21A, DIN-3, 21, 23AC, 23ACA, 1INV, 23B and 66 would be accepted by the Registrar of Companies from these companies and this too just to ensure the interest of the stakeholders.

   It has also been clarified that:

   - No other e-filing would be accepted from the Directors of the defaulting companies for any other company also.
   - CS/Auditor shall not sign and certify any other form except one mentioned here above.
   - No certificate would be issued by members of ICAI, ICSI and ICWAI other than for forms mentioned here above.

3) MCA Vides General Circular no. 31/2011 dated. 31/5/2011 clarified for the purpose of declaration of dividend under section 205 for the companies referred in section 616(c) of the companies act 1956 (the Act) i.e. the companies engaged in the generation or supply of electricity are approaching MCA for fixation of dep rates. Further, the Ministry has considered the whole matter and it is hereby clarified that Section 616 (C) the Companies Act, 1956 provides that the same shall apply to companies engaged in the generation or supply of electricity, except in so far as the said provision is inconsistent with the provisions of the Indian Electricity Act, 1910 or the Electricity Supply Act, 1948 as repealed by enactment of the Electricity Act, 2003.

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

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