

ADVANCED TAX LAWS AND PRACTICE

Time allowed : 3 hours

Maximum marks : 100

NOTE : All references to sections mentioned in Part-A of the Question Paper relate to the Income-tax Act, 1961 and relevant Assessment Year 2011-12, unless stated otherwise.

PART A

(Answer ANY TWO questions from this part)

Question 1

- (a) Write the most appropriate answer from the given options in respect of the following :
- (i) Which schedule to the Constitution of India indicates bifurcation of powers to make laws, between Union government and State governments —
 - (a) First Schedule
 - (b) Seventh Schedule
 - (c) Eighth Schedule
 - (d) Twelfth Schedule.
 - (ii) Which article of the Constitution of India provides that no tax shall be levied or collected except by authority of law —
 - (a) Article 265
 - (b) Article 268
 - (c) Article 269
 - (d) Article 274.
 - (iii) Companies in which public are substantially interested are also referred to as —
 - (a) Indian companies
 - (b) Investment companies
 - (c) Widely-held companies
 - (d) Closely-held companies.
 - (iv) In respect of which area tax planning cannot be attempted at the time of setting-up of new business entity —
 - (a) Form of organisation
 - (b) Locational aspects
 - (c) Nature of business
 - (d) Corporate restructuring.
 - (v) Which return of income cannot be revised by the assessee —
 - (a) Return of loss
 - (b) Defective return

- (c) *Belated return*
- (d) *Revised return.* (1 mark each)
- (b) *Re-write the following sentences after filling-in the blank spaces with appropriate word(s)/figure(s) :*
- (i) *The period from 1st April, 2010 to 31st March, 2015 would be covered by the _____ Finance Commission.*
- (ii) *A company whose gross total income consists mainly of income which is chargeable under the heads 'income from house property', 'income from capital gains' and 'income from other sources' is called _____ .*
- (iii) *Surcharge at the rate of _____ is applicable in case total income of a foreign company exceeds ₹ 1 crore for the assessment year 2011-12.*
- (iv) *Unabsorbed losses and unabsorbed depreciation cannot be allowed to be carried forward and set-off in the hands of the amalgamated company, except in the cases prescribed under section _____ of the Income-tax Act, 1961.*
- (v) *The right to file appeals to the Commissioner (Appeals) against the orders of assessing officer is _____ to the department.* (1 mark each)
- (c) *Examine whether wealth-tax is chargeable in respect of net wealth of following persons under the Wealth-tax Act, 1957 :*
- (i) *Hindu deity*
- (ii) *Holder of an impartible estate*
- (iii) *Partnership firm*
- (iv) *Association of persons*
- (v) *Trustees of a private trust.* (1 mark each)

Answer 1(a)(i)

- (b) *Seventh Schedule*

Answer 1(a)(ii)

- (a) *Article 265*

Answer 1(a)(iii)

- (c) *Widely held companies*

Answer 1(a)(iv)

- (d) *Corporate restructuring*

Answer 1(a)(v)

- (c) *Belated return*

Answer 1(b)

- (i) The period from 1st April, 2010 to 31st March, 2015 would be covered by the **Thirteenth** Finance Commission.
- (ii) A company whose gross total income consists mainly of income which is chargeable under the heads 'income from house property', 'income from capital gains' and 'income from other sources' is called **Investment Company**.
- (iii) Surcharge at the rate of **2.5%** is applicable in case total income of a foreign company exceeds ₹1 crore for the assessment year 2011-12.
- (iv) Unabsorbed losses and unabsorbed depreciation cannot be allowed to be carried forward and set-off in the hands of the amalgamated company, except in the cases prescribed under section **72A** of the Income-tax Act, 1961.
- (v) The right to file appeals to the Commissioner (Appeals) against the orders of assessing officer is **not available** to the department.

Answer 1(c)

- (i) **Hindu deity** : Yes, Hindu deity is chargeable to wealth tax. Trust established for the benefit of Hindu deities are deemed to be individual assessee under the Act and hence chargeable to Wealth-tax. [*B.C. Gupta & Sons Ltd.*, (1990) 182 ITR 240 (Guj)].
- (ii) **Holder of an impartible estate** : Yes, holder of impartible estate are chargeable to wealth tax. Section 4(6) provides that the holder of impartible estate is deemed to be individual owner of all properties, comprised in the estate.
- (iii) **Partnership firm** : No, partnership firms are not chargeable to wealth tax. Wealth tax is chargeable to individuals, HUF and companies only. All other persons are not chargeable to wealth tax.
- (iv) **Association of persons** : No, Association of persons (AOP) is not liable to wealth tax. Where the shares of the members are determinate or known then members of an AOP are liable to wealth tax in respect of their share in the property of the AOP.
- (v) **Trustees of a private trust** : Yes, Trustees of the private trust are chargeable to wealth tax. A trust is not a taxable entity under the Act as it is neither an individual, nor a HUF and nor a company, but the trustees of a private trust (not established for charitable purpose) are assessable as individuals [*Trustees of Gordhandas Govindram Family Charity Trust v. CIT* (1973) 88 ITR 47 (SC)].

Question 2

- (a) *Star Gas Ltd. commenced operations of the business of laying and operating a cross country natural gas pipeline network for distribution on 1st April, 2010. The company incurred capital expenditure of ₹ 1,490 lakh (including cost of financial instrument ₹ 2 lakh) during the period January to March, 2010 exclusively for the above business and capitalised the same in its books of account as on 1st April, 2010.*

Further, during the financial year 2010-11, it incurred capital expenditure of ₹6,600 lakh (including cost of land ₹1,100 lakh) exclusively for the above business. Compute the amount of deduction under section 35AD for the assessment year 2011-12, assuming that the company has fulfilled all the conditions specified in section 35AD. (4 marks)

- (b) PQR, a partnership firm, has 3 partners namely Pankaj, Qureshi and Robert. The firm has paid salary of ₹ 1.5 lakh per annum to each of its partners during the previous year 2010-11 and the same is authorised by the partnership deed. The net profit of the firm as shown in the profit and loss account computed in the manner laid down in Chapter IV-D of the Income-tax Act, 1961 is ₹ 6 lakh after providing for salary to the partners. Compute the amount of deduction of remuneration paid to partners assuming that Qureshi is a non-working partner. (5 marks)

- (c) Discuss with the help of a decided case law, if any, whether the claim made by the assessee in the following separate cases is correct or incorrect :

- (i) An assessee has paid the entire amount of tax due for the year by way of self-assessment tax, but filed the return of income belatedly. The assessee claims that interest under section 234A is not leviable on him.
- (ii) An assessee rendered certain services from abroad without parting with technology. The assessee does not have any permanent establishment in India. He claims that he is not liable to pay tax on income from rendering such services. (3 marks each)

Answer 2(a)

Computation of the amount of deduction allowable under section 35AD for the Assessment Year 2011-12

	₹ (in lakhs)
Capital expenditure incurred during Financial Year 2010-11 (excluding the cost of land)	
₹ 6,600 lakh – ₹ 1,100 lakh	5,500
Capital expenditure incurred prior to commencement of business and Capitalized on 1.4.2010 (excluding cost of financial instrument)	
₹ 1,490 lakh – ₹ 2 lakh	<u>1,488</u>
Total deduction under section 35AD for the Assessment Year 2011-12	<u>6,988</u>

Answer 2(b)

Computation of book profit of the firm

	₹
Net profit as per Profit & Loss Account	6.0 lakh
Add: Salary paid to all partners (₹ 1.5 lakh x 3)	<u>4.5 lakh</u>
Book Profit	<u>10.5 lakh</u>

Computation of Amount of deduction under section 40(b) for remuneration to partners:

	₹
On first ₹ 3 lakh of book profit @ 90%	2,70,000
On balance ₹ 7.5 lakh of book profit @ 60%	4,50,000
(i) Maximum limit of remuneration	7,20,000
(ii) Actual remuneration to working partners	
Pankaj and Robert (₹ 1.5 lakh x 2) = ₹ 3,00,000	
Allowable deduction [lower of the (i) & (ii)]	<u>3,00,000</u>

Answer 2(c)(i)

Correct, interest under section 234A is not leviable on the assessee. The honorable Supreme Court in *Dr. Prannoy Roy and another v. CIT* (2009) 179 Taxman 53 (SC) had held that where the assessee had paid the taxes before the due date of filing the return but could not file the return for reasons beyond his control but filed it belatedly, **the charge of interest u/s 234A is not valid as in such case there is no loss to the revenue**. Further, interest under section 234A, being compensatory in nature, shall be levied only where the tax has not been deposited prior to the due date of filing of the return. Accordingly, where the entire amount of self assessment tax was paid before the due date for filing return of income, interest under section 234A for delay or default in filing of return of income shall not be levied.

Answer 2(c)(ii)

Correct, the assessee is not liable to pay tax. The AAR in case of Invensys Systems Inc. (2009) 317 ITR 438 ruled that only where there is parting with technology, the payment would be regarded as technical service. In case of any other services rendered from abroad without parting with technology, there is no liability for the non-resident to pay tax unless the services are rendered by the permanent establishment of the assessee in India.

Question 3

- (a) *Singhai Airlines Ltd. sold tickets to travel agents in India and allowed them to retain the amount collected by them in excess of net fare of ticket under a passenger sales agency agreement. Examine whether the above transaction amounts to commission and liable to deduction of tax at source. Cite relevant case law.* (5 marks)

- (b) *Dhaval was in the business of manufacturing customised kitchen equipments. He was also the managing director and held nearly 65% of the paid-up share capital of Aarav Ltd. A substantial part of the business of Dhaval, was obtained through Aarav Ltd. For this purpose, Aarav Ltd. could pass on the advance received from its customers to Dhaval to execute the job work entrusted to him.*

The assessing officer held that the advance money received by Dhaval is in nature of the loan given by Aarav Ltd. to him, and accordingly is deemed dividend within the meaning of the provisions of section 2(22)(e). The assessing officer,

therefore, made the addition by treating advance money as the deemed dividend income of Dhaval.

Examine whether the action of the assessing officer is tenable in law. Cite relevant case law. (5 marks)

- (c) *Hetal Ltd., engaged in providing cellular phone facilities to their subscribers, had been granted licenses by the Department of Telecommunication for operating in specific circles. For providing inter connection, Hetal Ltd. entered into agreement with MTNL/BSNL, which were regulated by the TRAI and under the agreement, Hetal Ltd. had to pay interconnection, access charges and port charges to the interconnection providers. The income-tax department was of the view that interconnection/port/access charges were liable for tax deduction at source in view of the provisions of section 194J and that these charges were in the nature of fees for technical services.*

Whether the contention taken by the Income-tax department are tenable in law? Discuss. Support your answer with citation of relevant case law. (5 marks)

Answer 3(a)

This case study is based on the Hon'ble Delhi High Court's judgement in the case of *CIT v. Singapore Airlines Ltd.* (2009) 213 Taxation 441 (Del.)

The Hon'ble High Court upheld the findings of the Assessing Officer that the billing analysis clearly showed that supplementary commission was received by the travel agent. The supplementary commission which was the amount retained by the travel agent was commission within the meaning of Section 194H read with the Explanation (1) to the section. Further finding of Assessing Officer that the provisions in the passenger sales agency agreement made it clear and established that the relationship between the travel agent and the airlines was that of principal and agent.

The plea submitted by the airlines that the provisions of Section 194H were not applicable as what was retained by the travel agent was in the nature of discount and not commission.

The stand taken by the company has been rejected on the following ground. The word 'discount' is normally used to describe a deduction from the full amount or value of something, especially a price whereas commission is defined in Explanation (1) to Section 194H as any payment received or receivable, directly or indirectly by an agent for services rendered acting on behalf of the airlines. In view of the fact that the payment retained by the travel agent was inextricably linked to the sale of the air ticket, it could be lead to the conclusion that payment retained which was the supplementary commission, was a commission within the meaning of Section 194H of the Act.

Hence, the retained amount is liable for tax deducted at source.

Answer 3(b)

The case study is based on the judgment of Hon'ble Delhi High Court in the case of *CIT v. Rajkumar* 318 ITR 462 (Del) 2009.

On appeal by the Revenue, the Delhi High Court upheld the decision of the Tribunal and held as under:

The word 'advance' has to be read in conjunction with the word 'loan' usually attributes

of loan are that it involves the positive act of lending, coupled with acceptance by the other side of the money as loan; it generally carries interest and there is an obligation of repayment. On the other hand in its widest meaning the term 'advance' may or may not include lending. The word 'advance' if not found in the company of or in conjunction with the word 'loan' may or may not include the obligation of repayment. If it does, then it would be a loan.

The word 'advance' which appears in the company of the word 'loan' could only mean such advance which carries with it an obligation of repayment. Trade advance which are in the nature of money transacted to give effect to a commercial transaction would not fall within the ambit of the provisions of Section 2(22)(e) of the Act.

The trade advance given to Dhaval by Aarav Ltd. could not be treated as deemed divided under section 2(22)(e) of the Act.

Answer 3(c)

The case study is based on the judgement by Hon'ble Delhi High Court in the case of *CIT v. Bharti Cellular Ltd.*, 319 ITR 119 (Del.).

On appeal filed by the Revenue, the Delhi High Court upheld the decision of the Tribunal and held as under :

The services rendered qua interconnection/port access did not involve any human interface and, therefore, the services could not be regarded as 'technical services' as contemplated under section 194J of the Act. The interconnect/port access facility was only a facility to use the gateway and the network of MTNL/other companies. MTNL or other companies did not provide any assistance or aid or help to the assessee in managing operating, setting up their infrastructure and network.

No doubt, the facility of interconnection and port access provided by MTNL/other companies was 'technical' in the sense that it involved sophisticated technology. The expression 'technical service' was not to be construed in the abstract and general sense but in the narrower sense as circumscribed by the expressions 'managing service' and 'consultancy service' as appearing in Explanation 2 to Section 9(1)(vii) of the Act. The expression 'technical service' would have reference to only technical service rendered by a human. It would not include any service provided by machines or robots.

Therefore, the interconnect charges/port access charges could not be regarded as fees for technical services hence not liable for tax deducted at source.

PART B

(Answer Question No. 4 which is compulsory and any two of the rest from this part.)

Question 4

(a) *Write the most appropriate answer from the given options in respect of the following :*

(i) *Under Rule 15 of the Central Excise Rules, 2002, compounded levy scheme is presently applicable to —*

(a) *Pan masala*

- (b) *Gutkha*
- (c) *Chewing tobacco*
- (d) *Aluminium circles.*
- (ii) *Under section 27A of the Customs Act, 1962, interest on refunds is payable, if refund due is not disbursed within —*
 - (a) *3 Months from the date of application*
 - (b) *6 Months from the date of application*
 - (c) *3 Months from the date of order granting refund*
 - (d) *6 Months from date of order granting refund.*
- (iii) *Effective rate of customs duty on general baggage is —*
 - (a) *150%*
 - (b) *100%*
 - (c) *35%*
 - (d) *10%.*
- (iv) *With the sanction of the proper officer and on the payment of prescribed fees, the owner of any goods after warehousing —*
 - (a) *Cannot inspect the goods*
 - (b) *Can show the goods for sale*
 - (c) *Cannot sale, export or dispose off the goods*
 - (d) *Cannot separate damaged or deteriorated goods from the rest.*
- (v) *The books of account or other documents, seized by the Central Excise Officer shall be returned within —*
 - (a) *6 Months of seizure of documents*
 - (b) *90 Days of issue of show cause notice*
 - (c) *30 Days of issue of show cause notice*
 - (d) *60 Days of issue of show cause notice.* (1 mark each)
- (b) *Re-write the following sentences after filling-in the blank spaces with appropriate word(s)/figure(s) :*
 - (i) *Application to settlement commission can be made only when a case is pending before _____ on the date of application.*
 - (ii) *In the case of goods imported by post, any label or declaration accompanying the goods showing the contents, description, quantity and value shall be treated as _____.*
 - (iii) *Shipping bill for export of goods under claim for duty drawback should be in _____ colour.*
 - (iv) *Section 117 of the Customs Act, 1962 provides general penalty to a person who contravenes any provisions of the Act or abets in contravention and if no penalty has been prescribed, the penalty would be upto _____.*
 - (v) *Under section 35B of the Central Excise Act, 1944, any person aggrieved by any decision or order passed by the Commissioner (Appeals) may appeal*

to CESTAT within _____ from the date of communication of the order contested. (1 mark each)

(c) Discuss in brief whether CENVAT credit will be admissible in following cases:

- (i) Inputs gone in process loss.
- (ii) Cement used for installation of machinery.
- (iii) Accessories cleared alongwith the final product.
- (iv) Paints used in factory to protect plant.
- (v) Tubes and pipes used in the factory. (1 mark each)

(d) When does e-filing of return become mandatory under the Central Excise Rules, 2002 ? (5 marks)

Answer 4(a)(i)

- (d) Aluminum circles.

Answer 4(a)(ii)

- (a) 3 months from the date of application.

Answer 4(a)(iii)

- (c) 35%

Answer 4(a)(iv)

- (b) Can show the goods for sale

Answer 4(a)(v)

- (c) 30 days of issue of show cause notice.

Answer 4(b)

- (i) Application to settlement commission can be made only when a case is pending before **Adjudicating authority** on the date of application.
- (ii) In the case of goods imported by post, any label or declaration accompanying the goods showing the contents, description, quantity and value shall be treated as **an entry** .
- (iii) Shipping bill for export of goods under claim for duty drawback should be in **Green** colour.
- (iv) Section 117 of the Customs Act, 1962 provides general penalty to a person who contravenes any provisions of the Act or abets in contravention and if no penalty has been prescribed, the penalty would be upto **₹ 1,00,000** .
- (v) Under section 35B of the Central Excise Act, 1944, any person aggrieved by any decision or order passed by the Commissioner (Appeals) may appeal to CESTAT within **three months** from the date of communication of the order contested.

Answer 4(c)

- (i) **Yes**, CENVAT is available on entire quantity of input even if part of input goes in process *loss-Multi Metals Ltd. v. ACCE* (1992) 57 ELT 209 (SC).
- (ii) **No**, as per explanation 2 to definition of input, cement used for installation of machinery is not eligible for CENVAT Credit.
- (iii) **Yes**, as per rule 2(k)(i) of the CENVAT Credit Rules, 2004, accessories are eligible for CENVAT credit if these are cleared along with the final product.
- (iv) **Yes**, goods used as paint in or in relation to manufacture of final products or for any other purpose, within the factory of production are eligible for CENVAT Credit [*Ruchi Health Foods v. CCE* (2007) 218 ELT 716 (CESTAT)].
- (v) **Yes**, as per definition of Capital Goods in Rule 2(a) of the CENVAT Credit Rules, tubes and pipes are capital goods if used in the factory.

Answer 4(d)

With effect from 1-04-2010 e-filing of return has been made mandatory. Proviso to Rule 12 of the Central Excise Rules provides that when an assessee has paid duty of rupees ten lakhs or more including the amount of duty paid by utilization of CENVAT Credit in the preceding financial year, he shall mandatorily file the monthly or quarterly return, as the case may be, electronically.

Question 5

- (a) *Priya and Co. manufactured 1,000 units of Product-P, out of which 800 units were cleared to a sister unit for captive consumption and balance 200 units were lying in stock. Compute assessable value for central excise purposes of Product-P from the following particulars :*

- *Cost of production of 1,000 units as per CAS-4 = ₹ 7,90,000.*
- *Profit margin as per annual report of the company = 12% on cost.*
- *Selling price per unit (excluding excise duty and other taxes) = ₹ 900.*

What will be your answer, if balance 200 units were sold to an unrelated buyer @ ₹ 925 per unit on the same day ? Give reasons for your answer. (5 marks)

- (b) *Bholaram imported certain goods in November, 2009 and an 'into bond' bill of entry was presented on 28th November, 2009. Assessable value was US \$1,00,000. Order permitting the deposit of goods in warehouse for 3 months was issued on 2nd December, 2009. Bholaram neither obtained extension of warehousing period nor cleared the goods within the permitted warehousing period of 1st March, 2010. Only after a notice was issued under section 72 of the Customs Act, 1962 demanding duty and other charges, Bholaram removed the goods on 15th April, 2010.*

Compute the amount of duty payable by Bholaram while removing the goods from warehouse, assuming that no additional duty or special additional duty is payable. You are supplied with the following information :

	28.11.2009	01.03.2010	15.04.2010
Rate of exchange per US \$	₹ 46	₹ 45	₹ 44
Rate of basic customs duty	15%	10%	5%

(5 marks)

(c) What is the remedy available to an assessee aggrieved by following decisions/orders in each separate case :

- Adjudication order passed by Additional Commissioner of Central Excise.
- Adjudication order passed by the Commissioner of Central Excise.
- Order passed by the Commissioner (Appeals) relating to rebate of duty of excise on goods exported outside India.
- Order passed by the Tribunal relating to valuation of goods.
- Order passed by the Tribunal relating to penalty. (1 mark each)

Answer 5(a)

In case goods are supplied to a 'related person' for captive consumption, valuation is done on the basis of cost of production plus 10% (proviso to rule 9 of Central Excise Valuation Rules). Rate of profit margin or selling price is not considered.

	₹
Cost per unit as per CAS-4 = $\frac{7,90,000}{1,000}$	790
Add : 10% notional profit as per Rule 8	79
Assessable value per unit	869

Assessable value of 800 units (as per proviso to Rule 9)

$$= ₹ 869 \times 800 \text{ units} = ₹ 6,95,200$$

If the balance 200 units were sold to unrelated buyers @ ₹ 925 per unit then assessable value shall be Rs.1,85,000 (200 x 925) as Priya and Co. directly selling the goods to unrelated party not through the sister unit.

Answer 5(b)

Relevant rate of Exchange (Note 1)	=	₹ 46
Applicable rate of duty (Note 2)	=	10%
Assessable value US\$ 1,00,000 x ₹ 46	=	₹ 46,00,000
Customs Duty @ 10%	=	₹ 4,60,000
Add : EC@2% & SHEC@1% of Customs Duty	=	₹ 13,800
Total customs duty payable	=	₹ 4,73,800

Note 1 : The relevant rate of exchange will be the rate in force on the date on which 'into bond' bill of entry is presented. Subsequent change is not relevant. Hence exchange rate relevant is 1 US \$ = ₹ 46 on 28.11.2009.

Note 2 : In *Kesoram Rayon v. CC* (1996) 86 ELT 464, it was held that goods which are not removed from the warehouse within the permissible period are deemed to be improperly removed on the last date on which goods should have been removed. Hence, the applicable rate of duty is 10%, i.e., on 01.03.2010, the last date when the period was over.

Answer 5(c)

- (i) He may appeal to Commissioner (Appeals)
- (ii) Appeal can be made to Customs, Excise & Service Tax Appellate Tribunal (CESTAT) against the order passed by Commissioner of Central Excise.
- (iii) In this matter appeal shall not lie with CESTAT. Revision application has to be filed with Central Government.
- (iv) Appeal shall lie with Supreme Court
- (v) Appeal can be filed with High Court.

Question 6

- (a) *The assessee, a manufacturer of small juicer, used to avail of the benefit of SSI-exemption. The said goods were sold under their own brand named 'Fatafat'. However, in case of sale to Smart Tele Shopping (STS), who were further selling the product through tele-shopping network, the supervisors of STS used to examine the goods and affix a sticker thereon containing the name of STS.*

The department denied SSI-exemption in respect of goods bearing the name/symbol of STS contending that the same amounts to affixation of brand name so as to dis-entitle the exemption. Discuss in the light of decided case law, if any, whether contention of the department is tenable in law. (5 marks)

- (b) *Is the port trust liable to pay duty on goods pilfered while in their possession ? Explain in brief under the Customs Act, 1962. (5 marks)*

- (c) *What is ad hoc exemption under the Customs Act, 1962 ? Can it be granted even after duty is paid ? (3 marks)*

- (d) *What is ACES ? Discuss briefly. (2 marks)*

Answer 6(a)

If a manufacturer clears goods under his own brand name, SSI-exemption is available. But if the manufacturer clears goods bearing the brand name of any other person, SSI-exemption is not available.

The facts of the given case are similar to the case of *Unison Electronics Pvt. Ltd.* [2009] 235 ELT 206 (SC), wherein it was held that, the sticker containing name/symbol of the buyer were fixed after quality checking, therefore, the same was a brand name used for the purpose of indicating a connection in the course of trade between the goods and the buyer. Accordingly, the assessee was not entitled to SSI-exemption in respect of goods sold to this particular buyer. So the assessee is not entitled to avail the benefit of SSI-exemption in respect of goods sold to STS.

Answer 6(b)

Section 45(3) of the Customs Act, 1962 casts liability on the custodians to pay customs duty in case of any pilferage taking place while the goods are under their custody. However, Section 45(3) applies to 'person referred to in section 45(1)'. Section 45(1) provides for approval of custodians by the Commissioner of customs. Accordingly, the major Ports notified under the Major Port Trusts Act, 1963 who are authorized to function as custodian under their respective Acts, do not require any approval before acting as custodians. Therefore, provisions of Section 45(1) do not apply to them.

In *Board of Trustees v. Union of India* (2009) 241 ELT 513 (Bom.), it was held that under Section 45(1) of the Customs Act, the recovery of duty in respect of pilfered goods could only be made from the approved person and the port trust is not liable to pay duty on goods pilfered while in their possession.

The Court interpreted that the intention of the law might have been to check the pilferage taken place from a private warehouse or a customs warehouse run by a private party. The negligence of such private parties should not cause loss to the exchequer.

Answer 6(c)

Section 25(2) of the Customs Act permits the Central Government to issue *ad hoc* exemption from customs duty by issue of a special order in public interest and under exceptional circumstances. The order should specify the exceptional circumstances for granting *ad hoc* exemption.

It has been clarified that such exemption can be granted even after duty is paid. In such case, duty has to be refunded-MF (DR) Circular no.12/97-Cus dated 12.05.1997.

Answer 6(d)

ACES stands for Automation of Central Excise and Service Tax. It is a centralized, web based software application which automates various processes of Central Excise & Service Tax assesses and Department and gives complete end to end solution. Any assessee can register with department using ACES application, can file tax return, claims and intimations, track its status and get online message.

Question 7

- (a) What are the conditions governing refund of import duty under section 26A of the Customs Act, 1962 ? Explain briefly. (5 marks)
- (b) Distinguish between the following :
 - (i) Export under bond by 'merchant exporter' and 'manufacturer exporter' under Rule 19 of the Central Excise Rules, 2002.
 - (ii) 'Brand rate' and 'special brand rate' for duty drawback. (4 marks each)
- (c) Can an application for advance ruling be made by the following :
 - (i) Government department.
 - (ii) A resident importing goods under project import scheme. (1 mark each)

Answer 7(a)

Section 26A of Customs Act, as inserted by the Finance (No.2) Act, 2009 w.e.f. 19.8.2009 makes provision for refund of import duty paid if goods are found defective or not as per specifications. Other conditions are as under:

- (i) The imported goods are found to be defective or not in conformity with the specifications and they should not have been reworked or repaired or used after import.
- (ii) The goods should be identified to the satisfaction of the AC/DC of Customs as the goods which were imported.
- (iii) The importer had not claimed drawback under any other provision of this Act.
- (iv) Goods should either be re-exported or abandoned or destroyed in the presence of the proper officer within 30 days from the date on which goods were imported (the period can be extended upto three months).
- (v) Application for refund should be made within six months from the relevant date in prescribed form and manner.

Answer 7(b)(i)**Export under bond by merchant exporter and manufacturer exporter**

Procedures for export under bond under Rule 19 of the Central Excise Rules, 2002 are prescribed in Notification No.42/2001-CE(NT) dated 26.6.2001.

Merchant exporter is required to execute a bond in Form B-1. Merchant Exporter registered with recognized Export Promotion Council and Star Export Houses do not have to furnish any security/surety while executing bond, unless they have come to adverse notice of department. After execution of bond, merchant exporter has to obtain CT-1 certificates from excise office.

He will send CT-1 certificate to the manufacturer from whom goods are to be procured for export without payment of duty. The merchant exporter will maintain a 'Running Bond Account' for export.

The manufacturer exporter needs not to execute a bond. He can furnish a Letter of Undertaking (LUT) in Form UT-1. The LUT once given is valid for 12 calendar months. The LUT will not be discharged unless proof of export is submitted or duty is paid upon deficiency with interest.

Answer 7(b)(ii)**'Brand rate' and 'special brand rate' for duty drawback**

All industry drawback rates are fixed by the Directorate of Drawback. It is possible to fix all industry rates 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 an application with all details to the Commissioner, Central Excise. Such application must be made within 60 days of export.

All industry rates are fixed on average basis. In case the manufacturer or exporter finds that the (a) duty-drawback as per all industry rate is less than 80% of the duties

paid by him (b) rate is not 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. In such cases, he can apply for fixation of special brand rate to the Commissioner of Central Excise and Customs. He can apply under Rule 7 for fixation of Special Brand Rate, within 30 days from export.

Answer 7(c)(i)

No, Government Department cannot apply for advance ruling, as it is not included in the definition of Public Sector Company.

Answer 7(c)(ii)

Yes, resident importing goods under project import scheme under heading 9801 can apply for advance ruling –Notification No.124/2009-Cus (NT) dated 20.8.2009.

PART C

Question 8

Attempt any five of the following :

- (i) *What is 'tax heaven' ? What are the parameters to consider whether a jurisdiction is tax heaven or not, as outlined by the Organisation for Economic Co-operation and Development (OECD) ?* (4 marks)
- (ii) *Mahesh, aged 64 years, is resident and ordinarily resident in India. His income is ₹ 16,80,000 from a business in India and ₹5,45,000 from a business in a foreign country with whom India has agreement for avoidance of double taxation (ADT). According to the ADT agreement, income is taxable in the country in which it is earned and not in other country. However, in the other country, such income can be included for computation of tax rate.*

According to the tax laws of the foreign country, Mahesh has paid ₹ 32,000 as tax in that country. During the previous year, Mahesh has paid ₹ 28,000 as tuition fee for his daughter in India and ₹ 90,000 as tuition fee for his son outside India for full time education. Mahesh has also received an interest of ₹ 48,000 on Government securities. Find out the tax liability of Mahesh for the assessment year 2011-12. Does it make any difference, if Mahesh is a non-resident ? (4 marks)
- (iii) *What are the entry options available for foreign companies planning to set-up business operations in India ? Explain briefly.* (4 marks)
- (iv) *Explain the binding nature of advance rulings under the Income-tax Act, 1961.* (4 marks)
- (v) *What is the role of 'Transfer Pricing Officer' ? Is it possible for the Assessing Officer to pass the assessment order pertaining to the assessment year 2011-12 without considering arm's length price determined by the Transfer Pricing Officer ?* (4 marks)
- (vi) *Distinguish between 'Cross Border Transactions' and 'International Transactions'.* (4 marks)

Answer 8(i)

A tax heaven is a place where there is no tax on income or it is taxed at low rates of tax structure. Some critics call it as a method of tax avoidance but doing business through tax heaven countries may not always be profitable.

The OECD has outlined the following parameters to consider whether a jurisdiction is tax heaven or not as under:

- (i) Imposes no or only nominal taxes:
- (ii) Whether there is a lack of transparency: Transparency ensures that there is an open and consistent application of tax laws among similarly situated taxpayers and that information needed by tax authorities to determine a taxpayer's correct tax liability is available
- (iii) Whether there are laws or administrative practices that prevent the effective exchange of information for tax purposes with other governments on taxpayers benefiting from the no or nominal taxation.
- (iv) Where there is absence of a requirement that the activity is substantial : the lack of such activities suggests that a jurisdiction may be attempting to attract investment and transactions that are purely tax driven.

Answer 8(ii)

**Computation of Tax Liability of Mahesh
For the Assessment Year 2011-12**

	₹
Business income in India	16,80,000
Interest on Government Securities	48,000
Gross Total Income	17,28,000
Less : Deduction under Section 80C (see note)	28,000
Total Income	17,00,000
Add : Foreign income to be included for rate purpose	5,45,000
Total	22,45,000
Tax on ₹ 22,45,000	₹
Upto ₹ 1,60,000	Nil
From ₹ 1,60,001 to ₹ 5,00,000 @ 10%	34,000
From ₹ 5,00,001 to ₹ 8,00,000 @ 20%	60,000
On balance ₹ 14,45,000 @ 30%	4,33,500
Add : Education Cess (2% of tax)	10,550
Add : Secondary and higher education cess (1% of tax)	5,275
Tax payable	5,43,325
Average rate of tax $\frac{5,43,325}{22,45,000} \times 100 = 24.20\%$	
Indian tax liability (₹ 17,00,000 x 24.20%)	4,11,400

It will not make any difference if Mahesh is a non-resident. The Non Resident can certainly take the benefit of the provisions of DTAA entered into between India and the country, in which he resides.

Note : Deduction under Section 80C is not available for tuition fee paid outside India.

Answer 8(iii)

A foreign company planning to set-up business operations in India has the following entry options:

- (i) As an incorporated entity by getting incorporated under the Companies Act, 1956 or through Joint Ventures, as wholly owned subsidiaries;
- (ii) As an office of a foreign entity like a liaison office/representative office/project office/branch office.

Entry routes can be through technical collaboration or through financial collaboration.

Such investments are made either under automatic route or approval route. Investment under automatic route involves *post facto* approval of RBI for the investment made and the investment under approval route requires prior approval of FIPB (Foreign Investment Promotion Board).

Answer 8(iv)

According to Section 245S of the Income Tax Act, 1961, the advance ruling pronounced by the authority under Section 245R shall be binding only:

- (i) On the applicant who had sought it;
- (ii) In respect of the transaction in relation to which the ruling had been sought; and
- (iii) On the commissioner, and the Income-Tax Authorities subordinate to him, in respect of the applicant and the said transaction.

The advance ruling referred to above shall be binding as aforesaid unless there is a change in law or facts on the basis of which the advance ruling has been pronounced. The effect of the ruling is, understandably, stated to be confined to the applicant who has sought it as well as the Commissioner and the Income-Tax Authority subordinate to him having jurisdiction over the case and that too only in relation to transaction for which advance ruling was sought. It may, however, be stated that the Authority generally follows the ruling in other cases on materially similar facts and, most certainly in other cases raising the same question of law, if any, which it has decided. The rule here is different from the position in other countries where either the taxpayer or the revenue or both are at liberty to accept the ruling or not.

Answer 8(v)

Role of “Transfer Pricing Officer”

If Assessing Officer considers it necessary or expedient to refer the Computation of Arm's Length Price of an International Transaction to the Transfer Pricing Officer then he may do so with the previous approval of the Commissioner.

On the date specified in the above notice or as soon as thereafter as may be :

- (a) after hearing such evidence as the assessee may produce, including any information or documents and after considering such evidence as the transfer pricing officer may require on any specified points and
- (b) after taking into account all relevant material which he has gathered.

The transfer pricing officer shall by order in writing determine the arm's length price in relation to the international transaction and send a copy of his order to the AO and to the assessee.

No, it is not possible for the Assessing Officer to pass the assessment order pertaining the assessment year 2011-12 without considering arm's length price determined by the Transfer Pricing Officer. As per section 92CA(4), it will mandatory for the Assessing Officer to compute the total income on the basis of arm's length price determined by the TPO.

Answer 8(vi)

'Cross border transaction' is a transaction in an international or foreign country, or a transaction in a domestic country in which at least one of the counterparties is located outside the home country of the domestic country. All international transactions are cross border transaction. Examples of Cross border transaction are Joint venture agreements, Share purchase and sale agreements, Patent and trademark license agreements, Sales representation agreements, Distributorship agreements, Expatriate employment agreements, Host government agreements

'International transaction' is a transaction must be between two associated enterprises and at least one of such enterprise must be a non-resident. The transaction must be in the nature of purchase, sale or lease of tangible or intangible property, provision of services, lending or borrowing money or any such transaction having a bearing on the profits, income, losses or assets of such enterprises.
