POST BUDGET MEMORANDUM ON UNION BUDGET : 2015-16

DIRECT TAX

1. **Order passed by Prescribed Authority U/s 10(23C) clause (vi) and (via) made appealable to ITAT**

   Right of appeal to ITAT against order for approval U/s 10(23C) sub clause (vi) and (via) only had been granted vide budget speech. Whereas there are various other clauses U/s 10 and sub clauses where approvals are granted by Prescribed Authority but right of appeal against approved order passed by such Prescribed Authority has not been granted.

   It is therefore suggested that against all orders passed by prescribed authorities under different clauses and sub clauses of Section 10 should be granted by way of appeal to ITAT.

2. **Section 263 – the reason of order i.e. erroneous in so far as it is Pre-judicial to the interest of revenue**

   It has been proposed to provide that an order passed by the assessing officer, it is erroneous if in the opinion of Principal Commissioner or Commissioner- (a) the order is passed without making enquiry or verification which, **should have been made**…(b) the order has not been passed in accordance with any decision, pre-judicial to the assessee rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or **any other person**.

   The term should have been made should be deleted from the explanation from sub clause (a) since it is highly subjective and vague one and it varies from person to person. Use of such subjective and vague term if used in law would increase litigation.

   It is therefore suggested that the term which should have been made should be deleted from the clause (a).

   High Court or Supreme Court passed orders based on facts of each case. The orders would vary depending on the facts of the case. If one order passed on a person other than the assessee and the same is followed in the proceeding U/s 263, it would lead to undesirable situation and result.

   It is therefore suggested that the term or any other person used in clause (b) should be deleted.

3. Basic exemption from payment of Income Tax

There is a need to provide upward revision of basic exemption to medium income group citizens to provide relief against price rise in consumer products and facing pay cut and job insecurity in private sector.

Category	**Present limit (Rs. in lac)**	**Proposed limit (Rs. in lac)**
Super Sr. citizen	5	12
Sr. citizen	2.5	10
Women below 60 yrs	2	5.5
Others (indv./HUF/AOP/BOI)	2	5

4. Deduction U/s 80C

In order to boost savings and investments present provision allows deduction from income up to a minimum of Rs.1 lac. This limit was fixed up many years back and inflationary effects had minimized its effect. Moreover it includes repayment of principal housing loan amount. To achieve the goals already set by the Government, **it is suggested:**

- **The limit U/s 80C should be enhanced to Rs. 2 lacs.**
- **Housing loan repayment amount should be separately provided for deduction in order to boost housing sector which is of great importance on date.**

5. Section 14A of the Income Tax Act

Method for determining amount of expenditure in relation to income not includable in total income.

The principle of disallowing the expenditure incurred by the assessee in relation to exempt income is acceptable. But the mode of its implementation and bringing indirect expenditure into the network of disallowance is clearly contrary to the main principle for which this provision was enacted. The Central Board of Direct Taxes had provided Rule 8D in exercise of its power given U/s 14A(2) of the Act.

A number of controversies has arisen resulting spate of litigations and appeals pending before different authorities including ITAT and High Courts. This is a result of faulty

drafting and lack of clarity and injustice. Recently a circular dt. 11.02.2014 issued by CBDT had overturned the High Courts' & ITAT Judgments on nil exempt income whereas as per Judicial hierarchy High Courts & ITAT are holding above position over CBDT. Thus there exists total chaos on this provision of the Act.

It is suggested that all present controversies should be settled in a judicious and balanced manner and provisions should be made simple and effective so that there is no injustice and there is no scope of litigation. Therefore, section 14A and rule 8D requires a total overhaul.

6. **Deduction U/s 80TTA – present limit of Rs.10,000/-**
   From bank Savings Account

   In order to boost savings habit and encourage people, keep money in savings account, it is suggested that the limit prescribed U/s 80TTA for deduction of interest income from bank savings account should be enhanced from Rs.10,000/- to Rs.25,000/-.

7. **Black Money**

   A new Bill on black money has been passed in the budget speech. We suggest that effective steps should be taken at a faster speed to bring black money parked out of India back to India and enactment of new law will only complicate the issue and will not achieve the goal of bringing black money into India.

INDIRECT TAX

1. Proposal for increase in rate of Service Tax from 12.36% to 14% should be withdrawn

As part of the tax proposals in the budget, the Finance Minister has announced increase in the rate of service tax from the present 12.36% to 14%. This increase in service tax rate will be applicable from a notified date.

The increase in the rate to 14% itself is not justified. The reasons given by the Government is that since GST will come in April 2016 and the GST revenue neutral rate is expected to be anywhere between **22%-27%** ***(with the current excise and state VAT rates of 12.5% plus 14%)*** **,** the Government wants the public to get used to services being taxed at the higher rate.

There is no logic in increasing the service tax rate today just because we are likely to have services being taxed at a higher rate in the future. It throws up an immediate cost for a benefit which may arise only in future.

Presently, the current rate of service tax of 12.36% itself was perceived as high and inflationary. Further, due to rate hike across the board on all services, all the day to day services consumed will become more expensive.

Hence, the reasoning for service tax increase does not sound convincing.

2. Clarity in respect of imposition of Swach Bharat Cess required

Interms of Chapter VI of the proposed Finance Bill, 2015 vide clause 117, the Central Government seeks to impose a cess to be called Swachh Bharat Cess to be levied as Service Tax on all or any of the taxable services at the rate of two per cent on the value of such services for the purposes of financing and promoting Swachh Bharat initiatives or for any other purpose relating thereto.

It is interesting to note that though sub-clause (5) of Clause 117 proposes that the provisions of Chapter V of the Finance Act, 1994 and the rules made thereunder shall apply in relation to the levy and collection of the Swachh Bharat Cess on taxable services, there is no corresponding provisions in proposed Chapter VI to state or enable that the words and expressions used in this Chapter or Chapter V of the Finance Act, 1994 shall have the meanings respectively assigned to them in that Chapter i.e. Chapter V of the Finance Act, 1994.

Therefore, the absence of specific meaning or definition to the word "taxable service" or "service" or "value" in the proposed Chapter VI would lead to an anomalous situation.

Chapter VI of Finance Act and Chapter V of the Finance Act are entirely different in contextual sense and serves different purposes in relation to the financial proposals of the Central Government for a fiscal is concerned.

It is a well settled principle that definition of a term in one statute cannot be used as a guide for construction of a same term in another statute particularly in a case where statutes have been enacted for different purposes.

Further, there is no clarity whether CENVAT Credit of SwachCess will be available to the Service Provider or not. The CENVAT credit on it will not available to the Services Provider in case there are no specific provisions enacted in the CENVAT Credit Rules, 2004 in this regard.

Hence, the above points required greater clarity before imposition of SwachCess

3. **Threshold exemption up to Rs.10 lacs**

   Under the present law an option has been provided to service providers availing of exemption from tax leviable on taxable services of aggregate value not exceeding the limit of Rs.10 lacs. This limit was fixed from the financial year 2008-09. Earlier a limit of Rs.4 lacs was fixed in financial year 2005-06 which was raised to Rs.8 lacs in financial year 2007-08. Thereafter more than six years have passed the limit has not been enhanced.

   It is suggested that considering the inflationary effects in the last seven years the limit of 10 lacs should be enhanced to Rs.20 lacs minimum, may be more. Alternatively it should be linked to index basis for future years following the index cost under Income Tax Law.

4. **Utilization of CENVAT Credit of Education Cess and Secondary and Higher Education Cess by Service Providers – Needs enabling provision in CENVAT Credit Rules**

   Service providers are required to pay EC and SHEC on service tax at present, those manufacturers who are also service providers and liable to pay service tax can utilize such credit for payment of the EC and SHEC on service tax till the time such levies are in force. In the absence of clear enabling provisions in the Credit Rules, the utilization of credit of EC and SHEC on excise duty taken as a manufacturer for the payment of EC and SHEC on service tax as a service provider is certainly another concern which can surface owing to this amendment.

Hence, suitable enabling provision is required to be added in CENVAT Credit rules so the Service Provider can utilize the CENVAT Credit of Education and Secondary and Higher Education Cess.

5. <u>Budget proposal for taxing reimbursable expenditure should be withdrawn</u>

As per Clause 109 of Finance Bill 2015, the clause (a) of explanation to Section 67 of the Finance Act, 1994 has been amended (effective from the date of enactment of the Finance Bill, 2015) to include all reimbursable expenditure or cost incurred and charged by the service provider in the course of providing or agreeing to provide a taxable service except as may be provided under the Rules. It is explained that the intention has always been to include reimbursable expenditure in the value of taxable service. However, in some cases courts have taken a contrary view. Therefore, the intention of legislature is being stated specifically in Section 67. This effectively means that the consideration for the taxable services shall include any out of pocket expenditure incurred and charged by the service provider in the course of providing taxable services except as may be dealt with under the Rules.

The sweeping impact of this amendment could bring under the service tax net, even 'pass through' transactions and cost recoveries, to the detriment of the Industry.

This new definition of 'consideration' would still be subject to litigation before the High Courts, vis-à-vis the levy of service tax on reimbursements, where the very essential element of 'service' is not present or alternatively, in the case of a reimbursement, there is no 'consideration' as well.

Hence, it is suggested that amendment proposal for taxing reimbursable should be withdrawn before the enactment of Finance Bill 2015.

6. <u>100% Cenvat to be allowed for NBFCs (Service Tax)</u> : -

Under the **Rule 6(3B) and Sec. 65 of the Finance Act 1994**, a banking company and a financial institution (FI) including an NBFC, providing taxable service shall pay for every month an amount equal to 50% of the CENVAT Credit availed on inputs and input services in that month. Tax research unit of Ministry of Finance explained vide D.O.F.No. 3345/3/2011-TRU dated 28th February 2011, Para 1.16 of Ann-C, that substantial part of the income of a bank is by way of interest in which a number of inputs and input services are used. There have been difficulties for the department in ascertaining the amount of credit flowing into earning these amounts. Thus, a banking company or an FI, including NBFC, providing banking and financial services, is being obligated to pay an amount equal to 50% of the credit availed.

We most humbly like to submit that every loan transaction which fetches interest income is associated with various fees income viz. Management Fees, Processing Fees, etc. which are already subject to Service Tax. Interest income from Loan is out of the purview for valuation of Service Tax, but its associated fee based incomes are subject to Service Tax.

The need of the hour is a circular for clarification. A circular under Sec. 65 may be issued to the effect that **those NBFCs which deposit an amount of Service Tax in relation to fee based income which is associated with loan transactions must be allowed to avail 100% Cenvat Credit on input services availed instead of arbitrary 50% Cenvat Credit availed as per prevailing provisions**.

7. **Levy of Tax on "Transfer of Right to use" –**

As per the amended provisions of Article 366(29A) of The Constitution of India, "Transfer of Right to use" any goods is covered by the meaning of the word "Sale" empowering the State Governments to levy Sales Tax / VAT on the same. Accordingly almost all the States have amended the definition of the term "Sale" so as to include "Any Transfer of Right to use any goods for any purpose for cash, deferred payment or other valuable consideration" within its ambit and levy taxes thereon. Even the definition of the term "Sale" given in Sec. 2(g) of CST Act, 1956 was amended to include "Transfer of Right to use any goods" within the scope of said definition.

Further as per the existing provisions of the Finance Act, 1994, Service Tax is levied on "Supply of Tangible Goods including machinery, equipment, appliances etc. for use without transferring right of possession and effective control of such assets" since the same is treated as one of the taxable services under the Finance Act, 1994.

There lies a very thin line of difference between a transaction with "Transfer of Right to use" and a transaction without it. In case of former, State Governments have the power to levy Sales Tax /VAT since the same is covered by the definition of the term "Sale of goods". In case of latter, the Central Government ONLY has the power to levy Service Tax.

The term "Transfer of Right to use" has been a subject matter of litigation since the 46th Constitutional Amendment and there are series of contradictory pronouncements by judicial Authorities. Even the pronouncement by the Apex Court made long time back has not resolved the issue till date.

As a result of aforesaid controversy, "Double Taxes" are being levied and/or demanded by Revenue Authorities on the same transaction – VAT by the State Revenue Authority and Service Tax by the Central Revenue Authority.

The root cause of the problem seems to be the absence of definition of the term "Right to use" in the statute book.

Even the existing provisions of the CST Act, 1956 are silent as to when a sale or purchase is deemed to have taken place during the course of inter-State trade or commerce, during the course of import or export so far as the transfer of "Right to use" is concerned.

Accordingly it is suggested that –

(i) The levy of Service Tax as well as VAT / CST on the same transaction should be annulled to avoid multiplicity of taxes;

(ii) The term "Transfer of Right to use without transferring right of possession and effective control" should clearly be defined in the Finance Act, 1994 for the purpose of levy of Service Tax;

(iii) The term "Transfer of Right to use with transferring right of possession and effective control" should be defined in the CST Act, 1956 for the purpose of levy of Sales Tax/ VAT.

(iv) Where a dealer is paying VAT /CST, such transaction should be treated as sale of goods and accordingly beyond the jurisdiction of Service Tax Authorities to examine such transactions for the purpose of levy of Service Tax.

(v) The benefit of exemption available U/s 5(2) and 6(2) of the CST Act, 1956 should also be made available to a transaction involving Right to use treated as sale under the CST Act, 1956. Suitable amendment should be made in this regard to reduce existing litigations and controversies.

8. <u>Increase in the Effective Rate of Interest towards delay /overdue payment of Service Tax:-</u>

As per the Notification No. 12/2014 – ST dated 11.07.2014, the Rate of Interest for delayed / overdue payment of Service Tax would progressively go up with the increase in the period of delay as under: -

Extent of delay	Interest Rate p.a. (w.e.f. 1st Oct, 2014)
Upto 6 months	18%
More than six months &up to one year	18% for first 6 months, AND 24% for delay beyond 6 months
More than 1 year	18% for first 6 months, AND 24% for second 6 months, AND 30% for delay beyond 1 year

The aforesaid concept of "Progressive Rates of Interest" for delayed payment of Service Tax would cause immense hardship to the assessee.

Although statutes had given powers to the Government to Notify Interest Rates up to36% p.a. but in last one decade the Rate of Interest has never been fixed beyond 18% p.a.

Considering the fact that a large number of cases are pending for quite some time before Appellate Authorities (including CESTAT, HC & SC) all over the Country for which the assesse is neither responsible nor has got any role to play, the recovery of interest at the Rate as high as 30% p.a. would act as deterrent for the Economic Growth of the Country.

9. <u>Non-levy of Service Tax on Government Grants/Support Fund/Viability Gap Fund</u>

Many a times Private Entrepreneurs join hands with Government Authorities for developing infrastructure facilities across the country and especially in the Rural areas for masses to achieve the overall socio-economic objectives of the Government of India by forming Public – Private Partnership.

For providing concessional and/or free of cost aforesaid type of services, the Government gives grant on Revenue as well as Capital Account to the assessee. Such grants do not represent any consideration for services provided by the assessee.

However, Service Tax Authorities have been issuing show cause notices and also raising demands for Service Tax on the aforesaid Grants received by assessee from Government Authorities.

Accordingly, it is suggested that –

(i) A suitable clarification should be issued so as to clarify that the Government Grants – Capital or Revenue in nature is not subject to levy of Service Tax or

(ii) The receipt of Government Grant should specifically be covered by negative list of services specified in the Act.

Accordingly it is suggested that the proposal to levy interest at Progressive Rates ranging from 18% p.a. to 30% p.a. may be withdrawn and the existing Provision to levy interest at the Rate of 18% p.a. may be continued.

10. <u>Mandatory Pre-deposit at the time of filing 1st stage and 2nd stage Appeal:-</u>

There is a provision of mandatory pre-deposit of 7.5% and 10% respectively for filing and appeal before the Commissioner (Appeal) at the first stage and before the Tribunal at the second stage against the disputed demand of duty or duty and penalty or disputed penalty where only penalty has been imposed. The amount of pre-deposit payable would be subject to a ceiling of Rs. 10 crore. All pending appeals / stay application would be

governed by the statutory provisions prevailing at the time of filing such stay applications/appeals. The aforesaid implementation of this new provision can be abused by Revenue Authorities in order to harass honest assesses. Further, provision of mandatory deposit is creating an unnecessary extra financial burden on assessee against the remedial measures undertaken by the assessee against the disputed demand.

The aforesaid implementation of this new provision would encourage the Revenue Authorities to maliciously issue demand notices on honest assesses to extract revenue.

Accordingly it is suggested that aforesaid proposal for mandatory fixed pre-depositing of taxes / duties may kindly be withdrawn.

11. <u>Recovery proceedings pending disposal of Stay Petition:</u> -

Central Board of Excise and Customs (CBEC) issued Circular No. 967/01/2013-CX dated 01.01.2013, instructing Departmental officers to initiate recovery proceedings in cases where the assessee has not filed an application for stay or has not obtained a stay order or on lapse of a specified period of time after passing of stay order. The Circular is draconian in nature and is against the principles of natural justice in as much as it seeks to deny rightful legal remedies available to assessee.

The assessee is, invariably, not in a position to expedite the litigation and hasten proceedings before quasi-judicial authorities and courts of law. The taxpayer can only file an appeal before the Appellate Commissioner / Tribunal within the statutory period. It is not within the competence of the taxpayer to ensure that his stay application is also disposed off within 30 days of filing of appeal.

Again, Stay applications hardly get disposed off in a short time span of 30 days by Appellate Commissioner / Tribunal due to various reasons such as leave of Appellate Commissioner/CESTAT Members, pendency of matters, etc.

Accordingly, it is recommended that on grounds of natural justice CBEC Circular No. 967/01/2013-CX dated 01.01.2013 be withdrawn and Departmental officers should be instructed not to resort to coercive action during pendency of Applications for Stay or in cases where Stay Order has been granted but the matter is pending disposal.

12. <u>Safeguards against Coercive Measures:-</u>

There have been instances reported of field officers threatening assessee with arrest / prosecution unless disputed amounts of tax discovered during investigations / audit are immediately paid up even before an opportunity is provided to the assessee by issuing him a show cause notice to explain the “short payment / non-payment” etc.

It is requested that adequate safeguards be provided in law in order to ensure that coercive measures are not used to demand excise, service tax, and customs duties in case of disputes

involving duty payments/credits (especially in cases involving duties / taxes in excess of Rs.50 lakhs).

It is recommended that suitable administrative measures need to be put in place to deter the officers from routinely summoning senior executives and issuing threats of arrest and prosecution while seeking to demand payment of disputed tax amounts.

Guidelines be prescribed listing out the specific Do's and Don'ts for the officers to observe in situations where the officers feel that there has been a short payment or a non-payment and they seek to recover the amounts even before a show cause notice is issued. Correspondingly there should be a charter of rights for the taxpayers to ensure that the officers do not misbehave with the taxpayers.
No coercive measures should be initiated till at least the adjudication is over.

13. <u>Prosecution Provisions for Indirect taxes:-</u>

Customs, Central Excise and Service Tax laws envisage prosecution of specific offences. Pursuant to the enactment of Finance Act, 2013 some of these offences have been made cognizable or non- bailable with the power of arrest being granted to relevant officers.

While the safeguard of provisions relating to prosecution as well as arrest of offenders may be necessary, the circumstances warranting the same should be clearly specified under the statute. In the absence thereof, industry apprehends misuse and abuse of these provisions.

The following among other offences are specified to be cognizable or non bailable:

"Contravenes any of the provisions of the Central Excise Act, 1944 or the rules made thereunder in relation to credit of any duty allowed to be utilized towards payment of excise duty on final products".

The provision in its present form can be invoked against even a perceived incorrect utilization of credit based on a different interpretation of the provisions of law on eligibility to credit while the intention of the law is to invoke power to prosecute and arrest in relation to incorrect utilization of credit in a situation where the credit is fraudulently availed in respect of goods not received.

It is desirable to specify explicitly in the law itself the situations which may warrant the arrest of the offenders. It should be specifically stated in the law that, provisions relating to prosecution and more specifically provisions relating to arrest shall not apply inter alia to the following cases:

(i) Where the taxpayer is registered under the relevant law and there is no risk of flight of the taxpayer;

(ii) The taxpayer has been subjected to periodic audits and has duly co-operated during the course of audit / investigation proceedings; and

(iii) The issue involved concerns a specific tax position adopted by the tax-payer (i.e. the tax was not paid or an exemption / drawback was claimed or credit was utilized) based on an interpretation of a provision of law including a judicial ruling.

The cognizance of offences including the power to arrest should be confined to cases where there has been a blatant and fraudulent evasion or in cases where tax has been collected but not deposited with the Government for over 6 months. The power to arrest should be withdrawn in respect of all other cases.

14. <u>Amendment in CST Act to specifically include Sec. 5(2) and Sec. 6(2) for Lease/HP Transaction</u>

Operating lease transaction came within the tax net under various state sales tax statutes by virtue of the 46th Constitutional Amendment Act, 1982. In line, Section 2(g) of the Central Sales Tax Act, is amended by Finance Act No. 20 of 2002 which received the assent of President of India on 11.05.2002.

There are number of Judgments of High Courts and Supreme Courts where it is held that Deemed Sale is at par with normal Sale. Since the assessment under CST is done by respective State Authorities while CST Act is administered by Centre. Authorities in the states have been treating Operating lease transaction as different from Normal Sale and are rejecting claims of High Sea Sales and Sale in Transit 6(2). In the absence of clear explanation under Sec 5(2) and 6(2) for allowing exemption from CST State VAT authorities who have been denying benefit of the exemption, by treating deemed sale as different from Normal Sale and thus rejecting exemption form CST.

The present provisions under section 5(2) and 6(2) of the CST Act are read as;

"Section 5(2) - A sale or purchase of goods shall be deemed to take place in the course of the import of the goods into the territory of India only if the sale or purchase either occasions such import or is effected by **a transfer of documents of title** to the goods before the goods have crossed the Customs frontiers of India."

"Section 6(2) - (2) Notwithstanding anything contained in sub-section (1) or sub-section (1A), where a sale of any goods in the course of inter-State trade or commerce has either occasioned the movement of such goods from one State to another or has been effected by a **transfer of documents of title t**o such goods during their movement from one State to another, any subsequent sale during such movement effected by a transfer of documents of title to such goods to a registered dealer, if the goods are of the description referred to in sub-section (3) of section 8, shall be exempt from tax under this Act"
Most of the construction equipment, machinery given by NBFCs are under operating lease for Public Infrastructure. Thus, such an erroneous treatment puts unnecessary burden and cost. It is requested to kindly make appropriate amendment(s) in the legislation so as to get

the explanation making exemption under 5(2) and 6(2) equally applicable for Deemed Sale also or issue a requisite clarification for correct field formation.

All these have led to the untimely and unfortunate death of Leasing in India. NBFCs have moved to simple Loans against Hypothecation. We need to appreciate the fact that Leasing is the most preferred and viable mode of lending all over the world. As such, there is an urgent need to bring clarity on the tax treatment of Lease and promote leasing in India.

15. Immediate reduction of CST rate to 1%: -

With the introduction of VAT, it was announced that CST rate would be brought down to 1% in successive years. However, as of now the CST rate is 2% and the last reduction was done on 1st June 2008. However, no further reduction of the CST has been effected.

It is recommended that CST rate be reduce to 1% immediately and brought down to "Zero" upon introduction of GST.

16 Other Changes:-

(a) Works contract

Definition of 'works contract' as per Central Sales Tax Act may be incorporated in the Finance Act, 1994 for uniform interpretation of the scope of the expression.

(b) Charges /recoveries towards electricity supplies

Clarification may be issued that recovery of costs relating to electricity supplied by developer to tenants either by way of diesel generating sets or by way of purchase of power from the State Electricity Board would not be subject to levy of service tax. Presently only electricity supplied by an electricity transmission or distribution authority is exempt.

CENTRAL SALES TAX ACT

Rate of Central Sales Tax Act on interstate sale to Registered Dealers

In the light of introduction of GST, it is suggested that the rate of tax under CST Act for interstate sales to registered dealers should be brought down from present 2% to 1% or nil.

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