



ECONOMIC LAWS PRACTICE

ADVOCATES & SOLICITORS

Union Budget 2011

An Analysis of Tax Proposals

Foreword

Dear All,

This year was a watershed year for Tax Policy and Legislation in India, with definitive steps being taken towards complete revamping of both Direct and Indirect Taxes in the country.

Infact, as we move to the DTC and the GST by 1st April 2012, the current Budget could well be the last of the budget exercises, as we have known them till date.

As regards DTC there is continuous affirmation of its introduction by 1st April, 2012. Post the exercise, by the Parliamentary Sub-Committee the final frame work of the DTC will be publicly available over the next few months. There are critical Legislative and Policy formulations yet to emerge, such as, the GAAR provisions and the Safe Harbour provisions.

The challenges as to GST are clearly more enhanced, as the process involves the Centre and the States. Significant work has been done, but, what remains to be done is even more significant. Key milestones going forward will be Constitutional Amendment, the formation of the GST Council and the formation of the dispute settlement mechanism.

In the interim, significant changes have been made to the CENVAT credit provisions, which will more immediately impact the industry.

At ELP, in our continued endeavor to bring you value, we have set out the accompanying detailed analysis of the Budget.

We look forward to your comments and questions.

Warm Regards,



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Date: February 28, 2011

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Chapter 1 – Budget Highlights

1. Indirect taxes

- a. Steps towards roll out of GST
 - a. Constitutional Amendment Bill to be introduced in this session of the Parliament.
 - b. Bill to be introduced this year.
 - c. Reduction in the number of exemption from Central Excise duty.
 - d. Time of Supply Rules to be effective from 01.04.2011 – Notified basis changed from receipt to accrual.
- b. 2 New services introduced, amendment made to 6 services thereby expanding the scope.
- c. Central Excise rate remains at 10%, Service tax retained at 10%, Peak rate of Customs duty left unchanged at 10%.
- d. No change in the rate of CST.
- e. Export of Services Rules and Import of Service Rules amended in a move towards a destination-based levy in respect of B2B services while origin based levy to B2C services.
- f. Amendments made to CENVAT Credit Rules, 2004
 - a. Definition of Input and Input service amended;
 - b. Rule 6(5) withdrawn;
 - c. Trading to be treated as non-taxable service
- g. Section 11A amended to provide for new category of cases where SCN can be issued within 5 years.
- h. Introduction of Self-Assessment scheme under Customs.

2. Direct Taxes

DTC

1. Introduction of DTC w.e.f. April 1, 2012.

International Taxation

2. Toolbox of counter measures proposed to be introduced in relation to the transactions with non-cooperating countries, where there is lack of effective exchange of information.

Transfer Pricing

3. Powers of the TPO have been widened by permitting the TPO to conduct a survey under section 133A.
4. Central Government by altering the present permissible variance of +/- 5% to introduce variances applicable across respective segments of business activities.

LLP

5. LLP's are to be subject to the AMT.

Key Amendments

6. Any income of an IDF is exempt from Income Tax.
7. Investment linked deduction extended to developing and building housing projects and production of fertilizers in India.
8. Deduction in relation to an undertaking engaged in generation, distribution, and transmission of power extended by one more year.
9. MAT levied on SEZ developers and Units situated in SEZ.
10. DDT levied on SEZ developers.

11. Dividends received by the Indian Companies from their foreign subsidiaries to be taxed at 15% plus applicable surcharge and cess.
12. Reporting requirements prescribed for LO.

Tax Rates

13. Surcharge in case of domestic companies reduced from 7.5% to 5%.
14. MAT increased from 18% to 18.5%.

Effective date of various changes

Particulars	Date from when effective
New Services and Changes in Existing Services	From a date to be notified after the enactment of the Finance Bill, 2011
Point of Taxation Rules under the Finance Act, 1994	1 st April, 2011
Amendment to Export of Service Rules, 2004	1 st April, 2011
Amendment to Taxation of Service (Provided from Outside India and Received in India) Rules, 2006	1 st April, 2011
Amendments to CENVAT Credit Rules, 2004 (Other than those specified in the relevant Notifications)	1 st April, 2011
Legislative changes in Customs and Excise	Date of enactment of the Finance Bill, 2011
New Rates of Custom duty	1 st March, 2011
New Rates of Excise duty	1 st March, 2011
Specific levy change for Transport of Passengers by Air Service	From 1 st April, 2011

Chapter 2 - Service Tax

Service tax net widened – 2 New Services Introduced

Service by Air Conditioned Restaurants [Section 65(105)(zzzzv)]

By who to whom	<ul style="list-style-type: none"> • By a restaurant (by whatever name called) having air conditioning facility, in any part of the establishment, any time during the FY and having license to serve alcoholic beverages <ul style="list-style-type: none"> ○ To any person
Coverage	<ul style="list-style-type: none"> • Services provided by restaurant, in relation to serving of food or beverages, including alcoholic beverages or both, in its premises • The Finance Minister has announced 70% abatement towards deemed sale of meals & beverages. The relevant notification would be issued after the enactment of the Finance Bill
ELP's Comments	<ul style="list-style-type: none"> • This new taxable service, proposes to tax high end restaurants whether independent or as part of hotels, serving food and /or beverage (including alcoholic beverage). However, this would exclude take away, home deliveries and also goods sold at MRP (and not in excess of MRP) • Restaurants would become eligible to utilize CENVAT credit, which currently is a cost to them, subject to any restriction as may be specified (vide proposed abatement notification) • In Federation of Hotels and Restaurant Association of India v/s Union of India (AIR 2007 Delhi 137), the Hon'ble High Court held that there is an element of service provided by a restaurant which is incidental to ordering of any article for consumption. Reference was made to Northern Indian Caterers (India) Limited vs Lt. Governor of Delhi (1979 SCR 557) • By this taxing entry the service element under the Article 366 (29A) (f) of the Constitution of India is proposed to be taxed.

Short-term Accommodation in Hotels, Inn, Guesthouse, Clubs or Campsite

[Section 65(105)(zzzzw)]

By who to whom	<ul style="list-style-type: none"> • By a hotel, inn, guesthouse, club or campsite (by whatever name called) <ul style="list-style-type: none"> ○ To any person
Coverage	<ul style="list-style-type: none"> • Services for providing accommodation for a continuous period of less than three months and if the published/declared tariff is Rs. 1,000 per day or higher. • The Finance Minister has announced 50% abatement from the gross value of services. The relevant notification will be issued after the enactment of the Finance Bill
ELP's Comments	<ul style="list-style-type: none"> • This entry proposes to tax accommodation services • Services are taxable if the published/declared rate is Rs. 1,000 or more per day, irrespective of what is actually charged to the customer/client. Accordingly, gross amount paid / payable is liable to tax • Hotels providing taxable (published rate in excess of Rs. 1,000 per day) and exempt services (published rate less than Rs. 1,000 per day) will have to comply with provisions of Rule 6(3) of Credit Rules • Though availment of CENVAT credit may be subject to restrictions, if any, provided under the abatement notification

Scope of Existing Services Enlarged/Amended

Authorized Service Station's Service [Section 65(9) and Section 65(105) (zo)]

Current Scope	<ul style="list-style-type: none"> • Presently, Service Tax is levied on services provided or to be provided by an authorized service station, in relation to any service, repair, reconditioning or restoration of motor cars, light motor vehicles or two-wheeled motor vehicles in any manner.
Expanded Scope	<ul style="list-style-type: none"> • The scope of the taxable service is proposed to be modified to levy Service Tax on services provided by any person. • The scope of the taxable services is proposed to be enlarged to include services of decoration and other similar services. • The scope of the taxable services is proposed to be enlarged to include services provided to any motor vehicle (except three wheeler scooter auto-rickshaw and motor vehicle meant for goods carriage) • The definition of 'authorized service station' is proposed to be omitted as the same becomes redundant.
ELP's Comments	<ul style="list-style-type: none"> • In addition to enlarging the ambit of the taxing entry to tax services of decoration and other similar services, the amendment effectively brings within the Service Tax net, the services provided by any person as opposed to the services provided only by service stations authorized by the motor vehicle manufacturer.

Life Insurance Service [Section 65(61) and 65(105) (zx)]

Current Scope	<ul style="list-style-type: none"> • Presently, Service Tax is levied on services provided to a policy holder or to any person, by an insurer, including re-insurer carrying on life insurance business, in relation to risk cover in life insurance.
Expanded Scope	<ul style="list-style-type: none"> • The definition of taxable service is proposed to be expanded to include any service provided to any policy holder or to any person, by an insurer, including re-insurer carrying on life insurance business.

ELP's Comments	<ul style="list-style-type: none"> • The scope of taxable service is being widened to cover all services provided to a policy holder or any person by an insurer, including re-insurer carrying on life insurance business. • After the enactment of the levy, it is proposed to amend the Service Tax Rules to provide the following two options for discharging the Service Tax liability: <ul style="list-style-type: none"> - Payment of Service Tax on the amount of gross premium charged from the policy holder reduced by the amount allocated for investment (where the break-up of amount allocated for investment is separately shown to the policy holder) - Payment of Service Tax on an amount calculated at 1.5% of the gross amount of the premium charged from a policy holder (where the break-up of amount allocated for investment is not separately shown to the policy holder)
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Club or Association Service [Section 65(25a) and Section 65(105)(zzze)]

Current Scope	<ul style="list-style-type: none"> • Presently, the definition of taxable service covers services rendered by a person or body of persons to its members in relation to services, facilities or advantages. • The taxable service in relation to club or association service covers the services rendered by a club or association to its members only
Expanded Scope	<ul style="list-style-type: none"> • The definition of club or association is proposed to be amended to cover any person or body of persons providing services, facilities, or advantages <u>primarily</u> to its members. • The taxable service in relation to club or association services is proposed to be amended to cover services rendered by a club or association to its non-members also.
ELP's Comments	<ul style="list-style-type: none"> • A number of clubs or associations allow non-members to use their facilities for a separate charge. Services are also provided by clubs or associations to members of other affiliated clubs or associations. • The proposed amendment intends to bring the services provided by clubs or associations to non-members within the Service Tax net.

Commercial Training or Coaching Service [Section 65(26), Section 65(27) and Section 65(105)(zzze)]

<p>Current Scope</p>	<ul style="list-style-type: none"> • The definition of ‘Commercial training or coaching centre’ excludes from its scope, pre-school coaching and training centre or institute or establishment which conducts courses that are recognized under any law for the time being in force.
<p>Expanded Scope</p>	<ul style="list-style-type: none"> • Definition of “Commercial training or coaching centre” is proposed to be amended to delete the exclusion to pre-school coaching and a training centre or institute or establishment which conducts courses that are recognized under any law for the time being in force. • Suitable exemption is proposed to be given to pre-school coaching and to training relating to educational qualifications that are recognized by law. Exemption announced to be introduced post enactment of the Finance Bill.
<p>ELP’s Comments</p>	<ul style="list-style-type: none"> • The levy in its present form, keeps outside its purview, unrecognized courses which are conducted by an institute which also conducts courses recognized by law. Thus, identical courses conducted by two institutes may be treated differently merely because one of the institutes also conducts another course that is recognized by law. The Hon’ble Tribunal in the case of Inst. of Chartered Fin. Analysts of India 2009 (14) S.T.R. 220 (Tri. – Bang.) has <i>inter-alia</i> held that institutions which impart recognized educational courses along with providing training for competitive examinations would be outside the scope of Service Tax. • The proposed amendment seeks to bring all unrecognized courses within the Service Tax net, irrespective of the fact that such courses are being conducted by an institute which also conducts recognized courses.

Health Check up and treatment Service [Section 65(25a) and Section 65(105)(zzzzz)]

<p>Current Scope</p>	<ul style="list-style-type: none"> • The services provided or to be provided by any hospital, nursing home or multi specialty clinic : <ul style="list-style-type: none"> - To an employee of any business entity in relation to health check up or preventive care, when payment is made directly by a business entity; - To persons covered under any health insurance scheme, when payment is made directly by the insurance scheme to the hospital, nursing home or multi specialty clinic.
<p>Expanded Scope</p>	<ul style="list-style-type: none"> • The definition of taxable service is proposed to be substituted to tax: <ul style="list-style-type: none"> - services provided by a clinical establishment having the facility of air conditioning in whole or any part of the establishment and more than 25 beds for in-patient treatment at any time of the year. - The services provided by a clinical establishment in relation to diagnostic test or investigative services. - The services provided by doctors, who are not employees, from the premises of a clinical establishment, i.e. visiting doctors/ specialists • The definition of 'clinical establishment' is proposed to be introduced. • The definition of 'clinical establishment' does not seek to cover establishments under the ownership or control of the government or a local authority, like, Primary Health Centers, ESIC Hospital. Autonomous medical institutes set up by the government under a special act of parliament are also outside the scope of the proposed levy.

ELP's Comments	<ul style="list-style-type: none"> • The scope of the services has been expanded to include services rendered to all individuals by clinical establishments and diagnostic centers. • The levy is extended to cases where payment is directly made by the individual concerned and is no more restricted to service provided to employees of a business entity where the business entity directly makes payments, or to individuals covered under a health insurance scheme where the insurance company makes direct payments • Doctors, other than employees, who provide services from the specified premises of a clinical establishment, are now to be covered under the new levy. i.e. visiting doctors and / or specialists. • Announcement in relation to introduction of 50% exemption from the value of this service. Exemption notification will be issued post enactment of the new levy / Finance Bill.
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Business Support Service [Section 65(104c) and Section 65(105)(zzzq)]

Current Scope	<ul style="list-style-type: none"> • Means services provided in relation to business or commerce and inter alia includes operational assistance for marketing.
Expanded Scope	<ul style="list-style-type: none"> • The definition of 'business support services' is proposed to be modified to substitute "operational assistance for marketing" with the words "operational or administrative assistance in any manner".
ELP's Comments	<ul style="list-style-type: none"> • The scope of the taxable service is being expanded to include operational or administrative assistance of any kind. Hence, all support activities that are outsourced by a business or organization will be under the purview of Service Tax. • Vide Circular 334/4/2006-TRU dt. 28.2.2006 it was clarified that Business Support Service provides within its definition, an indicative list of outsourced services. The proposed amendment seems to reaffirm the same. • The words "operational and administrative assistance" have a very wide scope and can include certain services which are already taxed under some other taxable category. In such cases, the classification shall be governed by Section 65A.

Legal Consultancy Service [Section 65(19b) and Section 65(105)(zzzzm)]

<p>Current Scope</p>	<ul style="list-style-type: none"> • Presently, Service Tax is levied on services provided or to be provided to a business entity by any other business entity in relation to advice, consultancy, or assistance in any branch of law, in any manner. • The proviso to Section 65 (105) (zzzzm) specifies that services provided by way of an appearance before any court, tribunal or authority shall not amount to taxable service.
<p>Expanded Scope</p>	<ul style="list-style-type: none"> • The scope of taxable service is proposed to be enlarged, to bring within its ambit: <ul style="list-style-type: none"> - Services provided by a business entity to individuals in relation to advice, consultancy or assistance in any branch of law, in any manner - Representational service provided by any person to any business entity - Service of arbitration provided by an arbitral tribunal to any business entity • Explanation to the proposed clause provides that “arbitration” and “arbitral tribunal” shall have the meanings assigned to them under Arbitration and Reconciliation Act, 1996.
<p>ELP’s Comments</p>	<ul style="list-style-type: none"> • Representation services provided by an individual to any business entity is proposed to be taxed. • Individual practitioners representing business entities would come within the CENVAT credit scheme and will be eligible to utilize the CENVAT credit, which is currently cost to them. • Practicing Chartered Accountants, Cost Accounts and Company Secretaries currently continue to enjoy exemption from paying Service Tax in respect of the representational services provided to its clients before any statutory authority vide Notification No. 25/2006- ST dated 13.7.2006. However, this Notification may be made in line with legal services, once the aforesaid amendment is made effective.

Key Legislative Changes

Amendments to the Act

The penal provisions in relation to Service Tax have been recast. The amendments provide for reduced penalties in cases where transactions are captured fully and truthfully in the records, and further reductions in cases of prompt payments. The penalties for intentional violations have been made more stringent.

Penalty for delay in filing return

- The maximum penalty under Section 70 for delay in filing of return has been increased from Rs.2,000 to Rs.20,000. The amount of penalty will continue to be computed in accordance with Rule 7C of the Service Tax Rules, 1994, i.e. Rs. 500 for the first 15 days, Rs. 1000 for the first month, and Rs. 100 per day thereafter

Penalty in cases of fraud, collusion etc.

- Section 73(1A) and both the provisos of Section 73(2) have been deleted, whereby the benefit of reduced penalty is not available in cases of fraud, collusion, etc.

Bona fide cases of short levy or short payment of tax

- New sub-section 4A introduced under Section 73
 - In situations where the true and complete account of transactions is available in the specified records, the assessee may pay the applicable Service Tax along with the interest payable thereon under Section 75 and a reduced penalty of 1% of the tax for each month during which the default continues, up to a maximum of 25% of the tax amount, before service of notice, in conclusion of the matter. "Specified Records" have been defined to mean records including computerized data as are required to be maintained by an assessee in accordance with any law for the time being in force or where there is no such requirement, the invoices recorded by the assessee in the books of account.
- Section 78 - Penalty for suppressing value of taxable services
 - Decreased from up to twice the amount of tax to an amount equal to the tax.
 - Where the taxpayer has captured the true and complete information in the specified records, penalty shall be 50% of the tax amount.

- The latter penalty (only) further reduced to 25% if the tax dues are paid within a period of one month together with interest and reduced penalty.
 - For assessees with turnover up to Rs.60 lakh, the period of one month increased to ninety days.
- The effect of the amendments to penal provisions is as under:

Situation	Position in records	Penalty & Provision	Mitigation	Complete Waiver
No fraud, suppression etc.	Captured	1% of tax or Rs 100 per day upto 50% of tax amount: Section 76	Totally mitigated if tax and interest paid before issue of notice: Section 73(3)	On showing reasonable cause under Section 80
Cases of fraud, suppression etc.	Captured true & complete position in records	50% of tax amount: Proviso to Section 78	(a) 1% per month; max of 25% if all dues paid before notice: Section 73(4A); (b) 25% of tax if all dues paid within 30 days (90 days for small assesses): Provisos to Section 78	-do-
	Not so captured	Equal amount: Section 78	No mitigation at all	Not possible

Reduced rate of interest under Sections 73B and 75

- The applicable rate of interest for assessees whose turnover does not exceed Rs. 60 lakh is reduced by 3% (including firms and corporate), i.e. to 15%

Amendments to penal provisions

- Sections 76, 77, 78 and 80

- Penalty under Section 76 reduced to Rs. 100 per day for every day during which the failure continues, or at the rate of 1% per month, whichever is higher, subject to a maximum of 50% of the tax amount.
- Residuary penalty under Section 77 has been increased from Rs. 5000 to Rs. 10000.
- Equivalent penalty under Section 78 for suppressing value of taxable service has been made mandatory - if true and complete records available, penalty will be reduced to 50%, and if penalty paid within 30 days of date of communication of the relevant order, penalty is 25% of Service Tax. Further, if value of taxable service does not exceed Rs. 60 lakh during any of the years covered by the notice or in the preceding financial years, period of 30 days extended to 90 days.

Central Excise provisions to be applied to Service Tax

- The provisions of the Central Excise Act in relation to offences being non-cognizable, compounding, offences by companies, option to pay fine in lieu of compensation etc. have been made applicable.

Service Tax liability under Act to be first charge

- Any amount payable under the Act shall be the first charge on the property of a defaulter, subject to Section 529A of the Companies Act, 1956, the Recovery of Debt due to Bank & Financial Institution Act, and the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and notwithstanding any contrary provision in any Central or State Act.

Provisions relating to prosecution reintroduced

- Section 89 has been introduced which provides for prosecution in the following situations:
 - Provision of service without issue of invoice;
 - Availment and utilization of CENVAT credit without actual receipt of inputs or input services;
 - Maintaining false books of accounts or failure to supply any information or submitting false information; and
 - Non-payment of amount collected as Service Tax for a period of more than six months.
- More stringent penal provisions will apply for repeat offences.

Retrospective exemption for Club or Association Services

- Retrospective exemption for Club or Association Services in relation to trade and industry associations

Amendments to the Service Tax Rules, 1994

- Issuance of invoice/bill/challan to be within 14 days of date of “provision of service” (previously reference was to date of completion of service)
- Proviso in relation to requirement of raising invoice within 14 days for continuous services has been deleted, in view of introduction of the Point of Taxation Rules, 2011.
- Insertion of Rule 5B stating that applicable rate of tax to be determined as per the Point of Taxation Rules, 2011.
- Tax point per Rule 6(1) amended in accordance with the Point of Taxation Rules, 2011
- Rule 6(3) has been amended to provide that in case where service is not provided, wholly or partly, and payment from customer is refunded, or a credit note is issued, the service provider has the option to take credit of excess Service Tax, in place of the adjustment of the Service Tax paid.
- Ceiling for adjustment under Rule 6(4B)(iii) increased to Rs. 2 lakh.
- Sub-clause (6A) has been inserted in Rule 6 to allow for recovery of Service Tax and interest where the same has been self-assessed but not paid in full or in part.
- Presumptive rate of taxation for purchase or sale of foreign currency reduced to 0.1%.

ELP's Comments

- Consequential amendments to correspond to introduction of Point of Taxation Rules, 2011.

Amendment to Service Tax (Determination of Value) Rules, 2006

- New Rule 2B inserted and provides a formula for arriving at taxable value of service in relation to Purchase or Sale of foreign currency including Money Changing
 - Taxable Value = (Buying/Selling rate) – (RBI's reference rate) x Total units of currency; or
 - In case where the reference rate for any currency is not available:
Taxable Value = 1% of gross amount of INR provided or received by the Money Changer
 - In case where two foreign currencies are exchanged:
Taxable Value = 1% of the lesser of the two amounts gross amount when converted into INR as per RBI reference rate
- An Explanation has been inserted in Rule 5 to provide that, value of telecom service provided by telegraph authority, shall be the gross amount paid by the service receiver. Accordingly, the value shall be the gross amount charged from the subscriber or the ultimate user of the service and not the amount paid by the distributor or any such intermediary to the telegraphic authority.

ELP's Comments

- Calculation of the tax base as the difference between the buying and selling rates provides an objective basis for the determination of the value provided in money changing. As can be seen from the examples in the Notification itself, the 1% presumptive value may be significantly different from the spread earned.
- The amendment in relation to the valuation of telecommunication services to bring to tax, the amount paid by the receiver of the telecom services overcomes the decision of the CESTAT in the case of **Commissioner of Service Tax, Mumbai v/s. Reliance Communications Ltd 2008 (11) S.T.R. 258 (Tri. - Mumbai)** in which it was held that tax was payable on the amount collected by the telecom service provider (from the distributor).

Amendment to Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007

- New Rule 3(2A) provides that any person providing Works Contract Service under the composition scheme can avail CENVAT credit only to the extent of 40% of Service Tax paid on the following input services:

- Erection, Commissioning and Installation Service
- Commercial or Industrial Construction Service
- Construction of Complex Service

ELP's Comments

- The restriction on CENVAT credit on input services will increase the project cost for real estate developers at a time when demand has been sluggish and developers have been finding it difficult to obtain financing.

Introduction of the Point of Taxation Rules, 2011

- These Rules have been introduced with effect from 1 April 2011. Rule 9 clarifies that the Rules shall not apply to invoices issued prior to this date
- “Point of taxation” defined as the point in time when “service shall be deemed to have been provided”
- The basis set out in Rule 3 is that the Point of Taxation (PoT) is determined by the earliest of 3 factors, viz. (i) time when service is provided or to be provided, (ii) raising of invoice, and (iii) receipt of payment
- In the event that an advance payment is made, the PoT is the date of receipt of advance payment
- A specific Rule provides for the PoT for payments made under the reverse charge. In such cases, the PoT is the earlier of the receipt of an invoice and the making of payment.
- In the event of rate change, where the three factors (service provision, invoice and payment) do not all occur before / after the rate change, two thumb rules have been adopted:
 - Where both invoice and payment occur before / after rate change, the PoT is the earlier of the two
 - Where the invoice and payment are on opposite sides of rate change, the PoT is based on the factor which on the same side of the rate change as the provision of service

Provision of service	Raising of invoice	Payment	Point of taxation
Before	After	After	Earlier of raising of invoice and payment
Before	Before	After	Raising of invoice
Before	After	Before	Payment
After	Before	After	Payment
After	Before	Before	Earlier of raising of invoice and payment
After	After	Before	Raising of invoice

- In the case of new taxable services, no tax is payable if the invoice is raised, and payment is made prior to the introduction of the new service OR payment received prior to the introduction of new service and invoice raised within 14 days (per Rule 4A of the Service Tax Rules, 1994).
- A separate set of rules has been prescribed for continuous services (which are defined as services provided or to be provided, under a contract, for a period exceeding 3 months, or as notified in the Official Gazette by the Central Government). The PoT for continuous services is ordinarily the due date of payment under the contract. However, if an invoice is raised or payment made before the due date, the PoT shifts accordingly.
- In the case of associated enterprises, debit or credit in the books of account of person liable to pay Service Tax is also counted as a PoT in addition to the other 3 factors.
- In the case of services for which the whole amount of consideration is not ascertainable when the service performed (e.g. royalty for copyright, trademark, patents, designs), the PoT is the earlier of the raising of an invoice or payment.

ELP's Comments

- While the Rules have been simplified further as compared with the draft version issued in August, 2010, the practical administration will still be a challenge. In fact, Rules 4, 5 and 6 are redundant, given the basic rule set out in Rule 3.
- The Rules have not been made applicable to refundable deposits (the draft rules had specifically stated that no tax was payable on refundable deposits).

Amendments to the Export Rules

- Certain taxable services have been shifted from one category to another vide Notification No. 12/2011-ST dt. 01.03.2011

Sr. No.	Taxable Service	Existing Category	Proposed Category
1.	Provision of preferential location or external or internal development of complexes Service	Category III	Category I
2.	Credit Rating Agency's Services	Category II	Category III
3.	Market Research Agency's Services	Category II	Category III
4.	Technical Testing and Analysis Service	Category II	Category III
5.	Transport of Goods by Air Service	Category II	Category III
6.	Transport of Goods by Road Service	Category II	Category III
7.	Opinion Poll Service	Category II	Category III
8.	Transport of Goods by Rail Service	Category II	Category III
9.	Rail Travel Agent's Service	Category III	Category II

Sr. No.	Taxable Service	Existing Category	Proposed Category
10.	Health Check-Up and Treatment Service	Category III	Category II

- The test of export under Category I is that services are provided in relation to immovable property situated outside India.
- The test of export under Category II is that services are performed outside India.
- Category III is the residual category.

Amendments to the Import Rules

- Identical changes made to the Import Rules vide Notification No. 13/2011-ST dt. 01.03.2011. However, specific exemptions have been provided in relation to transportation between two locations outside India and for air freight which has been included for the purpose of customs valuation.

Amendments in relation to rates of interest

- Rate of interest on delayed payment of Service Tax under Section 75 of the Act increased from 13% to 18% per annum vide Notification No. 14/2011-ST dt. 01.03.2011
- Rate of interest on amount of tax collected in excess of the tax assessed under Section 73B of the Act increased from 13% to 18% per annum vide Notification No. 15/2011-ST dt. 01.03.2011

New Exemptions / Concessions

Sr. No.	Taxable Service	% value on which tax is payable	Conditions/ Terms
1.	Business Exhibition Services	Nil	<ul style="list-style-type: none"> • When provided by an organizer of business exhibition for holding a business exhibition outside India

Sr. No.	Taxable Service	% value on which tax is payable	Conditions/ Terms
			Notification No.05/2011-ST dt. 01.03.2011
2.	Works Contract Service	Nil	<ul style="list-style-type: none"> When provided for the purpose of construction of new residential complex or part thereof, or completion and finishing services of new residential complex under Jawaharlal Nehru National Urban Renewal Mission and Rajiv Awaas Yojna Notification No.06/2011-ST dt. 01.03.2011
3.	General Insurance Services	Nil	<ul style="list-style-type: none"> Insurance under the Rashtriya Swasthya Bima Yojna Notification No. 07/2011-ST dt. 01.03.2011
4.	Transportation of Goods by Air Service, Transportation of Goods by Road Service and Transportation of Goods by Rail Service	Nil	<ul style="list-style-type: none"> Provided to a person located in India, When the goods are transported from a place outside India to a final destination which is also outside India. Notification No.08/2011-ST dt. 01.03.2011
5.	Transportation of goods by Air Service	Nil	<ul style="list-style-type: none"> To the extent of amount of air freight included in the value determined under section 14 of the Customs Act. Exemption available with effect from 01.04.2011 Notification No. 09/2010-ST dt. 01.03.2011
6.	Works Contract Service	Nil	<ul style="list-style-type: none"> When provided wholly within an airport; and Classified as Airport Services Notification No.10/2011 dt. 01.03.2011

Sr. No.	Taxable Service	% value on which tax is payable	Conditions/ Terms
7.	Works Contract Service	Nil	<ul style="list-style-type: none"> When provided wholly within the port or other port; and for construction, repair, alteration and renovation of wharfs, quays, docks, stages, jetties, piers and railways Notification No.11/2011 dt. 01.03.2011
8.	Transportation of Coastal Goods and Goods transported through National Waterways and Inland Water Service	25%	<ul style="list-style-type: none"> Abatement of 75% provided through amendment to Notification No. 01/2006-ST which is subject to the following conditions: <ul style="list-style-type: none"> Credit of duty on inputs, capital goods or of service tax on input services, used for providing such taxable service, has not been taken Benefits under Notification No. 12/2003-Service Tax has not been availed. Notification No.16/2011 dt. 01.03.2011

Existing Exemptions / Concessions amended

Sr. No.	Taxable Service	Existing Notification No.	Conditions
1.	Transportation of Passenger by Air Service	26/2010- ST dt. 22.06.2010	<ul style="list-style-type: none"> Exemption has been revised as under: <ul style="list-style-type: none"> 10% of gross value or Rs. 150/- (earlier 100/-), whichever is less, for passengers travelling in economy class (earlier any class) 10% of gross value or Rs. 750/- (earlier 500/-), whichever is less, for passengers embarking in India for an

Sr. No.	Taxable Service	Existing Notification No.	Conditions
			international journey in economy class Notification. No.04/2011, dt. 01.03. 2011.

Exemption in respect of services received by SEZ Developers and Units [Notification 17/2011-ST dt. March1, 2011]

- Notification No. 9/2009-S.T., dt. 3.3.2009 as amended by Notification No. 15/2009-S.T., dt. 20.5.2009 superseded.
- Benefit available to specified approved services for the SEZ Unit or Developer i.e. taxable services approved by the Approval Committee of the concerned SEZ, and utilized by SEZ Unit or SEZ Developer for authorized operations.
- Specified services bifurcated into two categories for the purpose of the exemption/ refund:
 - In respect of services “wholly consumed” within the SEZ, service provider or recipient of service under reverse charge mechanism has option not to pay Service Tax *ab initio* instead of the SEZ Developer or the SEZ Unit claiming the exemption by way of refund.
 - Whether a service is “wholly consumed” or not to be ascertained in line with the Export Rules:
 - i. For Category I services, Export Rules – provided in relation to immovable property situated within the SEZ
 - ii. For Category II services, Export Rules – wholly performed within the SEZ
 - iii. For Category III services, Export Rules – when provided to a Developer or Unit of SEZ who does not own or carry on any business other than operations in the SEZ, subject to such Developer or Unit furnishing a declaration in Form –A1 to be verified by the Specified Officer of the SEZ
 - In respect of services “not wholly consumed within the SEZ” i.e. shared between authorized operations in SEZ Unit and DTA Unit, refund restricted to extent of the ratio of the export turnover to the total turnover for the given period to which the claim relates i.e.

$$\begin{aligned} \text{Maximum refund} &= \text{Service Tax paid on specified services} \\ &\quad \text{used for SEZ Authorized Operations} \quad \times \quad \text{Export turnover of SEZ Unit} \\ &\quad \text{shared with DTA Unit for the period} \quad \quad \quad \text{for the period} \\ &\quad \quad \quad \text{-----} \\ &\quad \quad \quad \text{Total turnover for the period} \end{aligned}$$

Where —

- i. total turnover = value of (all output services and exempted services provided, including the value of services exported + all excisable and non-excisable goods cleared, including the value of the goods exported + bought out goods sold)
 - ii. export turnover of SEZ Unit = value of (final products + output services exported) during the period of which the invoices pertain and the exporter claims the facility of refund under this Notification.
- Time limit for filing the refund claim increased from six months to one year.
 - Procedure for claiming refunds specified vide the Notification

ELP's Comments

- Scope of the term “wholly consumed” in the context of services clarified.
- Benefit extended to services taxable under the reverse charge mechanism.
- Service Tax exemption extended to Education Cess and Secondary and Higher Education Cess.
- Separate mechanism prescribed as regards refund claims filed in respect of services not consumed wholly within the SEZ.

Chapter 3 – Excise Duty

Legislative Changes

Amendments to the Central Excise Act, 1944

- Section 11A of the Central Excise Act, 1944 was by far the most litigated statutory provision. The Finance Bill 2011 proposes to replace Section 11A with a completely new regime, the key features whereof are as under:
 - An Assessee may on his own ascertainment or on the ascertainment by a Central Excise officer, prior to the service of notice, pay the duty together with interest thereon under Section 11AA and inform the Central Excise officer of such payment, in which case, unless the Central Excise officer is of the opinion that the amount so paid falls short of the amount actually payable, no Show Cause Notice shall be issued. Where, however, the Central Excise officer is of the opinion that the amount so paid falls short of the amount actually payable, he may issue a notice in respect of the shortfall within a period of one year from the date of receipt of information in relation to the payment made by the Assessee. The latter provision operates to extend the period of limitation even in cases where no element of fraud, collusion, willful misstatement, suppression or contravention of any provision of Act or the Rules with intent to evade duty, has been alleged.
 - Where an element of fraud, collusion, willful misstatement, suppression or contravention of any provision of Act or the Rules with an intent to evade duty is involved, -
 1. the Assessee may, before the service of the Show Cause Notice, pay the duty in full or in part as may be accepted by him together with interest under Section 11A and penalty equal to 1% per month of such duty amount but not exceeding 25% of the duty, in which case no notice shall be served on the Assessee.
 2. but if it is found that the details relating to the transaction are available in the specified record, a notice may be served within 5 years from the relevant date

requiring the Assessee to show cause why the Assessee should not pay the amount of duty together with interest under Section 11A and penalty equivalent to 50% of the duty shall be issued to the Assessee.

3. In every other case, a notice demanding the payment of duty together with interest under Section 11A and penalty equivalent to 100% of the duty shall be issued to the Assessee

- In every other case, a notice demanding duty shall be issued within one year from the relevant date.
- In computing the period of one year or 5 years as the case may be, the period during which there was any stay by an order of the Court of Tribunal in respect of payment of such duty shall be excluded. This could potentially extend the period of limitation into an indefinite period. At the same time, protective demands need not be issued.
- Where any Appellate Authority or Tribunal or Court holds that the charge of fraud, collusion, willful misstatement, suppression or contravention of any provision of Act or the Rules with an intent to evade duty has not been established, the Central Excise officer shall determine the duty of Excise for the period of one year as if the longer period of limitation was not invoked.
- The duty demands will have to be adjudicated within 6 months from the date of notice where the longer period of limitation is not invoked or within one year from the date of notice where the longer period of limitation has been invoked.
- Where the Appellate Authority modifies the amount of duty determined by the Central Excise officer, the penalty and interest shall be accordingly modified.
- Where the amount as modified by the Appellate Authority is more than the amount determined by the Central Excise officer, the time within which the interest or penalty is payable shall be counted from the date of the order of the Appellate Authority in respect of such increased amount.

- Where an adjudication order has been passed, the Assessee shall pay the amount so determined along with interest due thereon whether or not the amount of interest is specified separately.

The above changes are intended to eliminate the litigation on technicalities where, several hundred crores of revenue have been lost to procedural/interpretational hassles.

- Section 11AA and Section 11AB are proposed to be merged into a single provision viz. Section 11AA. Importantly, the interest @18% would be payable whether or not the payment of duty is made voluntarily or after determination of the amount of duty under Section 11A.
- Section 11AC is also proposed to be substituted by a provision in line with the proposed Section 11A.
- A new provision, Section 11E is proposed to be inserted to codify the Judgment of the Hon'ble Supreme Court in **UOI vs. SICOM Ltd. [(2009) 233 ELT 433 (SC)]** to create a first charge on the property of a defaulter for Excise dues subject to certain provisions of the Companies Act, Recovery of Debt due to Bank & Financial Institution Act and Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act. The dues of Central Excise will now rank above all other secured creditors, except, the ones covered by the above mentioned Legislations.
- Section 12 amended with retrospective effect from May 10, 2008 to include reference to duties collected on the basis of compounded levy scheme imposed under Section 3A of the CEA
- Section 12F newly inserted to empower Joint Commissioner /Additional Commissioner to conduct search or seizure themselves or to authorize any subordinate officer
- Section 35R newly inserted to empower the Board to issue instructions prescribing monetary limits below which appeals / applications / references need not be filed. This is in line with the new National Litigation Policy announced by the Law Minister last year. Importantly, the non-filing of an Appeal only by reason of monetary consideration will not

preclude the filing of an Appeal in any other case involving the same or similar question of law, nor shall the non-filing of an appeal by virtue of this provision amount to acquiescence or a waiver at the end of the revenue.

- The Notifications in respect of area based exemptions for the manufacturers of tobacco, cigars and cheroots in the North-Eastern States is proposed to be retrospectively amended so as to extend the time for making investments from 6 months to 2 years, and in the case of Notification 28/2004-CE from 2 years to 4 years; and to likewise extend the time for carrying out the appraisal by the Investment Appraisal Committee.

Amendments to the Central Excise Tariff Act, 1985

- First schedule of the CETA amended and following processes held to be amounting to manufacture:
 - o Process of repacking from bulk to retail packs, labeling, or re-labeling of containers or adoption of any other process to render the product marketable shall be a process amounting to manufacture through the insertion of a Chapter Note in Chapter 22.
 - o Process of conversion of ores into concentrates shall be a process amounting to manufacture through the insertion of a Chapter Note in Chapter 26.
 - o The term “Brand Name” defined and read to include both registered as well as non-registered brand names. Process of affixing brand name on the product, labeling or re-labeling of containers or packing or repacking from bulk packs to retail packs, or the adoption of any treatment to render the product marketable shall be a process amounting to manufacture through the insertion of a Chapter Note in Chapter 63.
 - o Process of refining of gold ore bars shall be a process amounting to manufacture through the insertion of a Chapter Note in Chapter 71.
 - o Process of galvanization shall be a process amounting to manufacture through the insertion of a Chapter Note in Chapter 72. This amendment seeks to overcome the decision of the Hon’ble Supreme Court in **Siddharth Tubes Limited vs. CCE [(2006) 193 ELT 6 (SC)]**, which was consistently being followed.
- Third Schedule of the CETA retrospectively amended to include specified goods viz. parts, components and assemblies of vehicles falling under chapter 87 excluding vehicles of

headings 8712, 8713, 8715 and 8716 w.r.e.f. February 27, 2010 and parts components and assemblies of certain vehicles falling under chapter 84 w.r.e.f. April 29, 2010

Vide Notification No.4/2011-CE(NT)

- Onus of payment of Excise duty shifted from job worker to principal manufacturer in respect of articles of apparel and clothing and other textile articles. However, principal manufacturer may authorize job worker to make such payments on his behalf.

Vide Notification No.5/2011-CE(NT)

- Interest on duty determined as payable under Section 11AA of the CE Act after adjudication of show cause notice for period prior to 11.05.2001 raised to 18% from 15%.

Vide Notification No.6/2011-CE(NT)

- Interest on duty determined as payable under Section 11AB of the CE Act after adjudication of show cause notice for period after 11.05.2001 raised to 18% from 13%.

Vide Notification No.7/2011-CE(NT)

- Scope of MRP based valuation for apparels and clothing widened to include clothing accessories and other made up textile articles or sets falling under Chapter 63 of the CETA.

Changes in Rate of Excise Duty

Rate structure for goods, other than petroleum goods

- The standard rate of Excise duty has been maintained at 10%.
- The concessional rate of 4% is being increased to 5% on 76 items.

Increase / Introduction in rate/ Withdrawal of exemptions/ Concessions

- Excise duty at 1% *ad valorem* is being imposed on 130 items with the condition that no CENVAT credit of the Excise duty on Input and Input Services is availed. CENVAT credit of Excise duty of 1% will also be not available to the customer.
- In case of jewellery of gold, silver or other precious metal as well as articles of these metals falling under heading no. 7114, the levy would apply only to goods either bearing a brand name or sold under name. Full exemption from Excise duty is being retained for unbranded products of this class.
- Excise duty exemption available on automatic looms and projectile looms is being withdrawn.
- Excise duty exemption available on micro- processors, other than motherboards, floppy disc drive, hard disc drive, CD-ROM drive, DVD drives/ writers, flash memory, and combo drives meant for fitment inside a laptop/ CPU is also withdrawn and would be chargeable at a concessional rate of 5%.
- Excise duty exemption available to paper manufactured from non- conventional raw material for the first clearances not exceeding 3500 per metric tonne per annum made from a unit has been withdrawn.

- Excise duty is being reduced to 5% and Special Additional Duty of Customs is being fully exempted on LED's used for manufacture of LED lights and light fixtures with actual user condition.

Full exemption from Excise duty

- Air-conditioning equipments, panels and refrigeration panels for installation of cold chain infrastructure for preservation, storage or transport of agricultural produce and apiary, horticultural, dairy, poultry, aquatic and marine produce and meat as well as processing thereof;
- Conveyor belt systems for use in cold storage and in mandis and warehouses for the storage of food grains and sugar
- Goods required for the expansion of an existing mega/ultra mega power project subject to specified conditions
- Specified parts of sewing machines (other than those with inbuilt motors)
- Parts of power tillers when cleared to another factory of the same manufacturer for manufacture of power tillers
- Cotton stalk particle board
- Enzymatic preparations for pre tanning of leather
- Colour, unexposed cinematographic film in jumbo rolls of 400 feet and 1000 feet
- Pipe fittings required for a water supply project
- For parts/ components of PC connectivity cable imported for its manufacture.

- For sub parts of parts and components of battery charger, hands free headphones and PC connectivity cable imported for manufacture of these parts of mobile handsets including cellular phones

Cement

Central Excise Duty rates on cement clinker are being revised as follows:

I	Mini Cement Plant:	Existing duty rate	New duty rate
	All goods cleared in Packaged form		
	(i) of retail sale price not exceeding Rs. 190 per 50 kg bag or of per tonne equivalent retail sale price not exceeding Rs. 3800;	Rs. 185 per tonne	10% ad valorem
	(ii) of retail sale price exceeding Rs. 190 per 50 kg bad or of per tonne equivalent retail sale price exceeding Rs. 3800;	Rs. 315 per tonne	10% ad valorem + Rs. 30 per MT
	(iii) All goods other than those cleared in packaged form	Rs. 375 per tonne	10% ad valorem
II	Other than Mini Cement plant	Existing duty rate	New duty rate
	All goods cleared in Packaged form		
	(i) of retail sale price not exceeding Rs. 190 per 50 kg bag or of per tonne equivalent retail sale price not exceeding Rs. 3800;	Rs. 290 per tonne	10% ad valorem + Rs. 80 per MT
	(ii) of retail sale price exceeding Rs. 190 per 50 kg bad or of per tonne equivalent retail sale price exceeding Rs. 3800;	10% of retail sale price	10% ad valorem + Rs. 160 per MT

	(iii) All goods other than those cleared in packaged form	10% or Rs. 290 per tonne whichever is higher	10% ad valorem
III	Cement clinker	Rs. 375 per tonne	10% ad valorem + Rs. 200 per MT

Ready-made garments and made-up articles:

- Ready-made garments and made-up articles of textiles bearing a brand name or sold under a brand name are chargeable to Excise duty at the rate of 10%.

Automobiles

- Exemption available to taxi with a capacity of 7 people is modified so that concession is available to vehicles with capacity up to 13 persons including the driver, and manufacturer would be entitled to a concessional rate equivalent to 80% of the Excise duty paid on such vehicles at the time of clearance.
- Concessional duty of 10% and 5% are being prescribed for hydrogen vehicles based on fuel cell technology and specific parts of hybrid vehicles and plug-in kits for conversion of normal fuel vehicles into hybrid vehicles respectively.

Precious metals

- Excise duty on serially numbered gold bars, other than tola bars, when manufactured from the ore/ concentrate stage is being reduced from Rs. 280 per 10 grams to Rs. 200 per 10 grams.
- The rate of Excise duty on gold and silver arising in the course of manufacture of unwrought copper from copper ore or concentrate through the smelting process is being rationalized at Rs. 300 per 10 grams and Rs. 1500 per kg respectively. The same

concessional rate is also being extended when such bars are manufactured starting from the stage of “gold ore bars”.

Goods for Ultra Mega-Power/Mega Power Projects

- The description of goods in Notification No. 6/2006 –CE has been amended to align it with the description under heading No. 98.01 (project imports) and the condition regarding eligibility of Customs exemption has been deleted to avail full exemption from Excise duty for Ultra Mega Power/Mega Power projects.
- Full exemption from Excise duty has also been extended to specified goods supplied to expansion projects of existing mega power projects, subject to certain conditions.

Reduction in rate

- Concessional Duty of 1% is being provided for sanitary napkins, baby and clinical diapers and adult diapers.
- Excise duty has been reduced from 10% to 5% on grease proof paper and glassine paper.

Chapter 4 – Customs Duty

Legislative Changes

Amendments to the Customs Act & the CTA

Introduction of ‘self-assessment’ scheme

- Scheme to be introduced in respect of imported and exported goods. Intention to replace existing legal requirement of assessment of every bill of entry or shipping bill. Legal provisions are being aligned to current scheme of assessing select bills of entry based on risk parameters and allowing balance to be facilitated. Customs administration is to move towards trust based compliance management. Departmental resources to be freed up for more incisive verification and audit of high-risk consignments and strike balance between trade facilitation and law enforcement.
 - Section 2 (2) – definition of “assessment”, is being amended to include self-assessment.
 - Section 17 – proposed to be substituted with a new set of provisions.
 - i. The amended provisions provide that an importer / exporter shall self-assess the duty leviable on the imported or exported goods, which proper officer may verify and for this purpose, examine and test such goods or part thereof [Sub-Sections 1 and 2].
 - ii. In circumstances where it is found (upon verification, examination or testing of the goods, or otherwise) that the self-assessment is not done correctly, the proper officer may re-assess duty leviable on such goods [Sub-Section 4].
 - iii. Where the re-assessment under Sub-Section 4 is contrary to the self-assessment and unless the importer or exporter, confirms acceptance of said re-assessment, in writing, the proper officer shall pass a speaking order within 15 days from date of re-assessment of the bill of entry or shipping bill as the case may be [Sub-Section 5].

- iv. In circumstances where re-assessment has not been done, or a speaking order issued, the proper officer may audit the assessment of duty of the goods at his office, or the premises of the importer / exporter, as may be expedient [Sub-Section 6]. It has also been explained that pending the President's assent to the Finance Bill, 2011, the assessment of imported or exported goods shall be governed by the provisions of Section 17 as it stood prior to the date of assent.
- o Section 18 – is proposed to be simultaneously amended, so as to include the inability to self-assess as an instance of provisional assessment. A request in writing, in this behalf, will have to be provided to the proper officer. Unrelated to the scheme of 'self-assessment', previously, where the proper officer was satisfied that an importer or exporter was unable to produce any document or furnish information necessary for the assessment of duty, such officer could direct that the goods be assessed provisionally. An amendment is proposed whereby, where necessary documents have not been produced or information has not been furnished, and the proper officer deems it necessary to make further enquiry, the proper officer may direct that the duty on imported or export goods be provisionally assessed.

Section 19 proposed to be amended

- Previously, where imported goods consisted of set of articles chargeable to duty at differing rates, these articles were assessed at the highest rate, unless the importer was able to evidence, to the satisfaction of the proper officer the value of the articles liable to different rates, in which case such articles were assessed to duty at the rate applicable to it. Proposed amendment, requires application of separate rate in relation to the value of goods, should the evidence be available.

Section 27 proposed to be amended

- The time limit for claiming refund of duty and interest for all categories of importers has been enhanced to one year, as against previous limitation of six months.

Section 28 proposed to be amended

- Section 28 is proposed to be substituted with a completely new regime, the key features whereof are as under:
- An Assessee may on his own ascertainment or on the ascertainment by a Customs officer, prior to the service of a notice pay the duty together interest thereon under Section 28AA and inform the Customs officer of such payment, in which case unless the Customs officer is of the opinion that the amount so paid fall short of the amount actually payable, no Show Cause Notice shall be issued. Where, however, the Customs officer is of the opinion that the amount so paid fall short of the amount actually payable, he may issue a notice in respect of the shortfall within a period of one year from the date of receipt of information in relation to the payment made by the Assessee. The latter provision operates to extend the period of limitation even in cases where no element of fraud, collusion, willful misstatement, suppression or contravention of any provision of Act or the Rules with intent to evade duty, has been alleged.
- Where an element of collusion, willful misstatement, suppression or contravention of any provision of Act or the Rules with an intent to evade duty is involved, -
 - (a) The Assessee may pay the duty in full or in part as may be accepted by him together with interest under Section 28AA and penalty equal to 25% of the duty, within 30 days of the receipt of the notice and inform the proper officer of such payment in writing.
 - (b) In every other case, a notice demanding the payment of duty together with interest under Section 28 shall be issued to the Assessee. In such cases the ratio of the decisions of the Hon'ble Supreme Court in **Union of India v/s. Dharamendra Textile Processors [2008 (231) E.L.T. 3 (S.C.)]** and **Union of India v/s. Rajasthan Spinning & Weaving Mills [2009 (238) E.L.T. 3 (S.C.)]** will continue to apply.
- In computing the period of one year or 5 years as the case may be, the period during which there was any stay by an order of the Court of Tribunal in respect of payment of such duty shall be excluded. This could potentially extend the period of limitation into an indefinite period. At the same time, protective demands need not be issued.

- The duty demands will have to be adjudicated within 6 months from the date of notice where the longer period of limitation is not invoked or within one year from the date of notice where the longer period of limitation has been invoked.
- Where an adjudication order has been passed, the Assessee shall pay the amount so determined along with interest due thereon whether or not the amount of interest is specified separately.

Section 28AA and 28AB proposed to be substituted with new Section 28AA

- Now, interest @ 18% as against 15% at present (u/s 28AA), and 13% (u/s 28AB) will be chargeable.
- Interest is to be calculated from the first day of the month succeeding the month in which the duty ought to have been paid or from the date of erroneous refund. Earlier, interest was payable after the expiry of three months.
- No interest is payable in case duty is voluntarily paid in full within 45 days from the date of order, instruction or direction, without reserving the right to appeal against the said payment.

Section 110A proposed to be amended

- Adjudicating Authority empowered to allow release of seized goods. Originally, only the Commissioner of Customs had this power.

Section 124 proposed to be amended

- Show Cause Notice to be issued with the prior approval of an officer not below the rank of an Assistant Commissioner of Customs, as against Deputy Commissioner presently.

Section 131D* inserted¹

- This Section empowers the CBEC to issue orders, instructions or directions to Commissioner of Customs, fixing such monetary limit as it may deem fit for the purpose of regulating filing of appeal, application, revision, or reference by Commissioner of Customs under the provisions of Chapter XV.
- In pursuance of the orders or instructions or directions, if the Commissioner of Customs has not filed any appeal, application, revision or reference against any decision or order passed under the provisions of this Act, then it shall not preclude such Commissioner of Customs from filing appeal, application, revision or reference in any other case involving the same or similar issues or questions of law.
- In view of the fact that no appeal, application, revision or reference has been filed by Commissioner of Customs pursuant to the orders or instructions or directions issued by CBEC, no person, being a party in appeal, application, revision or reference shall contend that the Commissioner of Customs has accepted the decision on the disputed issue by not filing appeal, application, revision or reference.
- The Appellate Tribunal or Court hearing such appeal, application, revision or reference shall have regard to the orders or instructions or directions issued under sub- section (1) and the circumstances under which appeal, application, revision or reference was not filed by the Commissioner of Customs.
- Every order or instruction or direction issued by the CBEC on or after the 20.10.2010, but, before the date on which the Finance Bill, 2011 receives the assent of the President, fixing monetary limits for filing of appeal, application, revision or reference, shall be deemed to have been issued under this section and all provisions of this section shall apply accordingly.
- This amendment will take effect retrospectively from the 20th day of October, 2010.

¹ * The Finance Bill, 2011, at paragraph 48 refers to this amendment as Section 131BA

Section 142A inserted

- Vide this Section, first charge has been created on the property of defaulter for recovery of the customs dues from such defaulter. This provision is subject to provisions of Companies Act, 1956, the Recovery of Debt due to Bank and Financial Institution Act, 1993 and Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.
- This is again to minimize litigation on the issue of priority of secured creditors over crown debts or vice versa and it (the provision) operates to codify the ratio of the judgment of Hon'ble Supreme Court in **Union of India v/s Sicom Ltd. [2009 (233) E.L.T 433 (S.C)]**, while ensuring that the crown debts rank in priority to secured creditors other than those enjoying protection under the Recovery of Debt due to Bank and Financial Institution Act, 1993 and Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

Section 150 proposed to be amended

- New Proviso inserted to state that where it is not possible to pay the balance of proceeds in respect of unclaimed cargo to the owner within the stipulated period from the date of sale of such goods then, balance of the sale proceeds shall be paid to the Central Government.

Amendment in Customs Notifications in relation to promotional schemes under Chapter 3 of FTP

- The following Notifications have been retrospectively amended (in the case of first four w.e.f. 1.4.2008 and Notification No. 136/2008 w.e.f. 24.12.2008).
 - Notification No. 92/2004-Customs dt. 10th September, 2004
 - Notification No. 41/2005-Customs dt. 9th May, 2004
 - Notification No. 90/2006-Customs dt. 1st September, 2006
 - Notification No. 64/2008-Customs dt. 9th May, 2008 and
 - Notification No.136/2008-Customs dt. 24th December, 2008

- The implication of these amendments is that the benefit of reward schemes such as the Served from India Scheme, Focus Market Scheme and Focus Product Scheme etc. would be available in respect of foreign exchange counted towards fulfillment of export obligation under EPCG Scheme.

Miscellaneous amendment

- Restriction on import of acetate tow and filter rods introduced, except when these are used for manufacture of filter rods and filter cigarettes respectively. Notification No. 16/2011-Customs (N.T), dt.01.03.2011

Section 3 of CTA proposed to be amended

- The reference to Standards of Weights & Measures Act, 1976 in this Section, is being substituted with Legal Metrology Act, 2009 (an Act to be effective from 1.3.2011), with effect from 1.3.2011 as the former has been repealed by the latter.
- The First Schedule to the CTA is being amended to include editorial changes in the Harmonized System of Nomenclature (HSN) in certain chapters, which would be effective from 01.01.2012.

Amendments to the Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Amendment Rules (2011) (“Rules”)

- An amendment to the Rules is proposed to be introduced under Annexure III of the Rules whereby the calculation of the Non-Injurious Price has been codified and amongst other factors, the following elements of cost of production are required to be examined for working out the Non-Injurious Price, namely:-
 - The best utilization of raw materials by the constituents of domestic industry, over the past three years period and the period of investigation, and at period of investigation rates may be considered to nullify injury, if any, caused to the domestic industry by inefficient utilization of raw materials.

- The Propriety of all expenses, grouped and charged to the cost of production may be examined and any extra-ordinary or non-recurring expenses shall not be charged to the cost of production and salary and wages paid per employee and per month may also be reviewed and reconciled with the financial and cost records of the company.
- To ensure the reasonableness of amount of depreciation charged to cost of production, it may be examined that no charge has been made for facilities not deployed on the production of the subject goods, particularly in respect of multi-product companies and the depreciation on re-valued assets, if any, may be identified and excluded while arriving at reasonable cost of production.
- The expenses to the extent identified to the product are to be directly allocated and common expenses or overheads classified under factory, administrative and selling overheads may be apportioned on reasonable and scientific basis such as machine hours, vessel occupancy hours, direct labor hours, production quantity, sales value, etc., as applied consistently by domestic producers and the reasonableness and justification of various expenses claimed for the period of investigation may be examined and scrutinized by comparing with the corresponding amounts in the immediate preceding year.
- The expenses, which shall not to be considered while assessing non-injurious price include,-
 - a. Research and development Provisions (unless claimed and substantiated as related to the product specific research);
 - b. Since Non-Injurious Price is determined at ex-factory level, the post manufacturing expenses such as commission, discount, freight-outward etc. at ex-factory level;
 - c. Excise duty, sales tax and other tax levies on sales;
 - d. Expenses on job work done for other units;
 - e. Royalty, unless it is related to technical know-how for the product;
 - f. Trading activity of product under consideration; or
 - g. Other non-cost items like bad debts, donations, loss on sale of assets, loss due to fire, flood, etc.
- A reasonable return (pre-tax) on average capital employed for the product may be allowed for recovery of interest, corporate tax and profit. The average capital employed is the sum of “net fixed assets and net working capital” which shall be taken on the basis of average of the same as on the beginning and at the end of period of

investigation. The impact of revaluation of fixed assets shall not be considered in the calculation of capital employed. Interest is allowed as an item of cost of sales and after deducting the interest, the balance amount of return is to be allowed as pre-tax profit to arrive at the Non-Injurious Price.

- The WTO Agreement permits a member country to impose duties to the full extent of the dumping (put simply the difference between the normal value of the exporting country when compared to the export price in India). However, since inception, India has followed the “lesser” duty rule whereby duty is only imposed to the extent of the injury margin. A calculation of a price at which the domestic industry will not suffer any injury (“Non-Injurious Price”) is the cornerstone of such an exercise.
- The injury margin has been a long standing subject matter of dispute. At best, the practices hitherto followed by Directorate General of Anti-dumping and Allied Duties (“DGAD”) have been debatable. Based on the Drug Price Control Order, the Non Injurious Price was fixed on the basis of a return of 22% on capital employed as a fair return. In reality, however, for most products a return of 22% capital employed is aspirational and often times wholly unrealistic.
- The first time this concept was challenged in 1997. In **Nippon Zeon v/s the Designated Authority [1997 (96) E.L.T. 126 (Tribunal)]**, it was held that notwithstanding any inefficiencies of the domestic industry, the process of fixing the Non-Injurious Price was also *de facto* approved. Subsequently this methodology was considered again in **Indian Spinners Association v/s Designated Authority [2004 (170) E.L.T. 144 (Tribunal)]** where the Tribunal did question the basis for fixation of the Non-Injurious Price, but the case remained applicable to the facts to the dispute and was not generally implemented; so the practice of fixing the Non-Injurious Price on the basis of 22% return on capital employed continued. Ironically the position of the Tribunal has now found place in the amendment.
- This has been the undisturbed position until this budget.
- Relevant changes have made to Rules 4, 17(1) to reflect the above introduction of Annexure III.

- Other amendments/clarifications to the Rules have also been made under Rule 23(1): The DGAD now has the express authority to review the duty on its own initiative rather than await any petition by any interested party. Further, it has been clarified that any definitive Anti-Dumping Duty shall be effective for a period not exceeding five years from date of imposition unless it is extended pursuant to a review, wherein a finding of reoccurrence of dumping and injury is made.

Changes in Rate of Customs Duty

There is no change in the peak rate of BCD. The existing rate of 2%, 2.5% and 3% are being made into a single rate of 2.5%.

Exemption from duty

- *Full Exemption from BCD*
 - Toughened glass and silver paste for manufacture of Solar cells/modules
 - Works of art or antiquities for exhibition or display in private art galleries or similar premises that are open to general public subject to specified conditions
 - Memorials of a public character intended to be put up in a public place including material used, or to be used in their construction, whether worked or not subject to specified conditions
 - Antiques intended for exhibition in a public museum or national institution subject to specified conditions
 - Books, being antiques of an age exceeding 100 years subject to specified conditions
 - Works of art created by an Indian artist abroad, irrespective of the fact whether such works are imported along with the artist or the sculptor on their return into India
 - Works of art including statutory and pictures intended for public exhibition in a museum or art gallery
 - Water projects which are water pumping stations or water storage facility (reservoir). It is to be noted that whether the water projects cover water pumping stations in terms of the present definition is pending before the larger bench in the case of ***Subhash Projects and Marketing Limited Vs. Commissioner of Customs, Cochin [2008 (223) ELT 278 (Tri - Bangalore)]***
 - Parts/ components required for the manufacture of PC Connectivity, cables and sub-parts of parts and components of battery chargers, hands free headphones and PC connectivity cables of mobile handset including cellular phones
 - De-oiled rice bran oil cake
 - Fin fish feed
 - Value of gold and silver contained in the copper concentrate
 - Specified parts of the hybrid vehicles
 - Cotton waste
 - Stainless steel scrap

- Crude palm stearin for use in the manufacture of laundry soap on actual user basis
- Gold dore bars of upto 80% gold purity imported for refining and manufacturing serially numbered gold bars in India
- Endovascular stents
- Cash dispensers and also to parts required for manufacture of cash dispensers on actual user basis.
- Bio-based asphalt sealer and preservation agent, millings remover and crack filler, asphalt remover and corrosion protectant and sprayer system for bio-based asphalt applications
- Import of spares and consumables required for repairs of ocean going vessels by owners of such vessels registered in India
- Specified capital goods and raw materials for the manufacture of electronic hardware
- 'Tunnel Boring machines' and parts thereof for construction of roads

- *Concessional BCD @5%*
 - Specified raw material for the manufacture of syringes, needles, catheters, cannulae on actual user basis
 - Mailroom equipments compatible with printing machinery imported by registered newspaper establishments
 - Specified high voltage transmission equipments

Reduction in rate - BCD

- *From 100% to 30%*
 - Sun-dried dark seedless raisins

- *From 30% to 10%*
 - Vannamei broodstock
 - Raw Pistachios
 - Bamboo used for manufacture of agarbattis
 - Cranberry products

- *From 30% to 5%*
 - Raw Silk (not thrown) of all grades

- *From 25% to 10%*
 - Lactose for use in the manufacture of homeopathic medicine

- *From 5% to 2.5%*
 - Specified agriculture machineries
 - Acrylonitrile
 - Ryon grade wood pulp
 - Waste paper
 - Ferro-nickel
 - Carbon black feed stock
 - Petroleum coke
 - Mineral gypsum

- *From 7.5% to 2.5%*
 - Parts and components required for the manufacture of the Specified agriculture machineries
 - Vanadium pentoxide and vanadium sludge

- *From 7.5% to 5%*
 - Micro irrigation equipment (Tariff item 84248100)
 - Poly Tetra Methylene Ether Glycol (PTMEG) and Diphenylmethane 4, 4-diisocyanate (MDI) subject to actual user condition
 - Sodium Polyacrylate
 - Specified gems and jewellery machineries

- *From 10 to 7.5%*
 - Caprolactum
 - Nylon Chips, fibre and yarn

- *From 10 to 5%*
 - Specified life savings drugs and their bulk drugs
 - Solar lantern or lamps

Exemption from CVD

- Specified life savings drugs and their bulk drugs
- Packaged or canned software which is not required to bear Retail Sale Price is being exempted from CVD to the extent of value of transfer of right to use of such software
 - CVD continues to be payable on the value of the medium on which it is recorded along with freight and insurance
- 'Tunnel Boring machines' and parts thereof for construction of roads
- Spares and consumables required for repairs of ocean going vessels by owners of such vessels registered in India
- Plastic materials reprocessed out of scrap or the waste of goods falling under specified chapter by SEZ unit and supplied to DTA unit

Concessional CVD @5%

- Mailroom equipments compatible with printing machinery imported by registered newspaper establishments
- Specified high voltage transmission equipments
- Specified parts of the hybrid vehicles subject to actual user condition and will be available till 31.3.2013
- Parts of DVD Drive or DVD Writer, Combo Drives, CD- ROM Drives
- Parts of inkjet and laser-jet printers
- LED used for manufacture of LED Lights or fixtures

- Specified raw material for the manufacture of syringes, needles, catheters, cannulae on actual user basis

Concessional CVD

- Concessional CVD @ Rs 140 per 10 gm on Gold dore bars of upto 80% gold purity imported for refining and manufacturing serially numbered gold bars in India

Exemption from SAD

- Earlier exemption to goods manufactured or produced in SEZ was available. Now all the goods cleared from SEZ will be exempt
- Copper dross, copper residues, copper oxide mill scale, brass dross and zinc ash
- Parts of inkjet and laser-jet printers
- Light emitting diodes imported for manufacture of LED Lights or fixtures
- Parts of DVD Drive or DVD Writer, Combo Drives, CD- ROM Drives
- Specified raw material for the manufacture of syringes, needles, catheters, cannulae on actual user basis
- Full exemption on parts, components and accessories for manufacture of mobile handsets including cellular phones is being extended upto 31.3.2012
- Patent and proprietary medicines
- Specified parts of the hybrid vehicles
- Gold ore bars of upto 80% gold purity imported for refining and manufacturing serially numbered gold bars in India

- Mailroom equipments compatible with printing machinery imported by registered newspaper establishments
- Specified high voltage transmission equipments
- Spares and consumables required for repairs of ocean going vessels by owners of such vessels registered in India
- 'Tunnel Boring machines' and parts thereof for construction of roads.

Withdrawal of exemption

- Works of art, namely:
 - Statutory and pictures to be put up for public benefit in public place
 - Works of art intended for exhibition in a public museum or national institution
- Exemption from Education Cess and Secondary and Higher Education Cess presently available to aircraft is being withdrawn
- BCD @ 2.5% on import of aircraft for non scheduled operations. However, exemption for CVD and SAD would continue.

Safeguard Duty

- Import of Caustic soda lye during the period 4.12.2009 to 3.3.2010

Definition of 'Completely Knocked Down' ('CKD') unit inserted in the Notification No. 21/2002 – Customs dated 1st March 2002

CKD unit means a unit having all the necessary components, parts or sub-assemblies for assembling a complete vehicle but does not include-

- a) A kit containing a pre-assembled engine or gear box or transmission mechanism; or*
- b) A chassis or body assembly of a vehicle on which any of the component or sub – assembly viz., engine or gearbox or transmission mechanism is installed*

Export Duty

- The Second Schedule to the Customs Tariff Act **is being recast** so as to align the entries with the Harmonized System of Nomenclature (HSN) and introduce a new entry for de-oiled rice bran cake
- The effective rates of export duty on all items other than iron ores lumps, fines and pellets and de-oiled rice bran cake are being maintained through Notification no. 27/2011-Customs dated 1st March, 2011
- The export duty on iron ore lumps and fines has been enhanced from 15% and 5% respectively to a uniform rate of 20%
- Full exemption from export duty has been provided to iron ore pellets
- Export duty has been imposed at the rate of 10% on de-oiled rice bran cake

Project Import-facilitation measures

The security amount to be tendered at the time of registration of a contract under Project Import Regulations is reduced to 2% of the contract value with a ceiling of Rs. 1 Crore to be taken in the form of bank guarantee. The bank guarantee would not be required to be renewed if the finalization is not completed within 6 months of the submission of the necessary documentation by the importer.

Chapter 5 - CENVAT Credit Rules, 2004

Amendments proposed to be made to definitions²- Amended by Notification No. 3/2011 dt. 1.03.2011

- “Capital goods”

The definition has been extended to include goods used outside the factory of the manufacturer for the generation of electricity for captive use within the factory.

- “Exempted goods”

The definition has been amended to include goods which will attract the lower central Excise duty rate of 1%. Accordingly, CENVAT credit will not be available in relation to the manufacture of these goods.

This amendment shall take effect on 1.03.2011.

- “Exempted services”

The definition has been widened to include:

- (a) taxable services which are partly exempt from service tax on the condition that no CENVAT credit on inputs and input services used for providing such services shall be taken; and
- (b) trading.

- “Input”

The meaning of the term has been extended to include:

- (i) all goods used in the factory by a manufacturer of final products,

² Unless otherwise provided, these amendments will take effect on 1.4.2011.

- (ii) goods cleared along with the final product, the value of which is included in the final product, and
- (iii) goods used for providing free warranty service

but excludes:

- (i) any goods used for construction of a building or civil structure or part thereof or for the laying of foundation or structure for support of capital goods except goods used for the provision of the following output services, viz. Port Services, Other Port Services, Airport Services, Commercial or Industrial Construction Services, Construction of Complex Services and Site Formation Services,
- (ii) capital goods except when used as parts or components in the manufacture of final products,
- (iii) motor vehicles,
- (iv) goods used primarily for personal use or consumption of an employee, such as food items and goods used in a guesthouse / residential colony / club / recreational facility / clinical establishment, and
- (v) goods having no relationship with the manufacture of a final product.

- “Input service”

The ambit of “input service” has been reduced to exclude services used in relation to the setting up of a factory or premises, and “activities relating to business”. Business Exhibition Services and Legal Services have been added to the list of services that were defined as “activities relating to business”.

The scope of the term also excludes:

- (i) Architect Services Port Services, Other Port Services, Airport Services, Commercial or Industrial Construction Services, Construction of Complex Services and Site Formation Services used for construction of a building or civil structure of part thereof or for the laying of foundation or structure for support of capital goods, except in cases of sub-contracting of these services
- (ii) General Insurance Services, Rent-A-Cab Services, Authorized Service Station Services and Supply of Tangible Goods services insofar as they relate to a motor vehicle, except when used to provide taxable services for which credit on the motor vehicle is allowed as capital goods

- (iii) Services used primarily for personal use or consumption of any employee such as those provided in relation to outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, club, health and fitness centre, life insurance, health insurance and travel benefits

Key sector specific changes

- Services provided to a unit in an SEZ or a developer in an SEZ for their authorized operations will not be treated as exempted services, and will therefore not require any credit reversal. This amendment shall take effect on 1.03.2011.
- All banking companies and financial institutions including NBFCs will be required to reverse 50% of the CENVAT credit availed on inputs and input services availed every month.
- Providers of life insurance services and management of investment in ULIPs will be required to reverse 20% of the CENVAT credit availed on inputs and input services availed every month.
- CENVAT credit of CVD on ships, boats and other floating structures imported for breaking up has been capped at 85%. This amendment shall take effect on 1.03.2011.

New provisions relating to availment and utilisation of CENVAT credit

- CENVAT credit cannot be utilised for the payment of excise duty on goods which will attract the lower central excise duty rate of 1%. This amendment shall take effect on 1.03.2011.
- Reversal of CENVAT credit will not be required in cases of removal of inputs from the factory for providing free warranty for final products.
- Reversal of CENVAT credit (for inputs or capital goods before being put to use) in cases where these are written off fully or provided for fully in the books of account has been extended to situations of partial write-off or partial provision. This amendment shall take effect on 1.03.2011.

- Given that CENVAT credit in respect of input services is allowed on or after the date of payment, in cases where any payment or part thereof made toward an input service is returned, proportionate CENVAT credit reversal is required. This reversal can be made by debit to the CENVAT credit or in cash. Failure to make such payment will attract recovery and penal consequences under Rule 14.

Treatment of common inputs and input services

- Under revised rule 6(3), a manufacturer of dutiable and exempted goods and a provider of taxable and exempted services opting not to maintain separate accounts for the receipt, consumption and inventory of inputs or the receipt and use of input services in accordance with rule 6(2) shall have the following three options:

Option 1	Pay an amount equal to 5% of the value of exempted goods and exempted services.
Option 2	Pay an amount as determined under sub-rule (3A), i.e. provisional and then final payment of the amounts of CENVAT credit attributable to inputs and input services used in relation to the manufacture of exempted goods and the provision of exempted services
Option 3	Maintain separate accounts for the receipt, consumption and inventory of inputs and avail credit only on inputs used in or in relation to the manufacture of dutiable final products (excluding exempted goods) and for the provision of output services (excluding exempted services), and pay an amount as determined under revised sub-rule (3A) only in respect of input services.

For the purposes of determining value for sub-rules (3) and (3A), the meaning of “value” shall:

- have the meaning under section 67 of the Finance Act, 1994 read with the Valuation Rules, or be the value determined under section 3 or 4 or 4A of the Central Excise Act, 1944 read with the Central Excise valuation rules
- in cases of the following taxable services, viz. Travel Agent’s Services, Money Changers Services, Rule 7C and Works Contract Services, the value arrived at by a process of back-working such that the Service Tax rate under Section 66 read with any applicable

exemption notification applied on such value shall result in the tax calculated per the presumptive rates (at the current service tax rate of 10%, the computed value would be ten times the service tax amount)

(c) vis-a-vis trading the difference between the sale price and purchase price of the goods traded

- In respect of partially exempt services (conditional upon no CENVAT credit of inputs and input services in relation thereto having been availed), the amount payable under Option 1 will be 5% of the exempted portion of value. Any duty of excise paid on exempted goods is to be reduced from the amount payable.
- In addition to the amount attributable to input services used in or in relation to the manufacture of exempted goods, reversal of credit of input services used in or in relation to the clearance of these goods up to the place of removal will also be required.
- Payment of amounts shall be deemed to be CENVAT credit not taken for the purpose of an exemption notification requiring that CENVAT credit of inputs and input services is not taken.
- Rule 6(5), allowing 100% of the CENVAT credit on the 16 services covered thereunder, has been deleted.

Chapter 6 – Direct Taxes

Toolbox of counter measures in respect of transactions with non-cooperating countries prescribed [Section 94A]

Amendment	
	<ul style="list-style-type: none"> • Section 94A has been introduced to empower the Central Government to specify any country/territory as “notified jurisdictional area”, if there is lack of effective exchange of information from them. The section provides that parties to the transaction in a “notified jurisdictional area” shall be deemed to be AE, and, such transactions will be deemed to be international transactions, thereby attracting TP Provisions and Guidelines. • Besides subjecting the parties and transaction to TP compliance, the section seeks to disallow deduction of payments made to Financial Institutions unless the CBDT or any other Income Tax Authority is authorized to seek relevant information from the Financial Institutions. • Further, the expenditure/allowance (including depreciation) will not be allowed as deduction unless the Assessee maintains and furnishes the prescribed documents. • The section also provides that the receipts by an assessee of any sum from any source situated in such jurisdiction shall be treated as an income if the explanation as to the source of such receipt in the hands of the entity situated in such jurisdiction, is not provided to the satisfaction of the AO. • If the payment is “chargeable to tax” in India, then such payment would be subject to withholding tax at 30% or more plus applicable surcharge and cess.

ELP's Comments

- The introduction of this section is the first visible step towards tightening the noose on transactions with non-cooperating countries, and, abiding by its commitment towards ensuring transparency in international cross-border financial transactions. The countries such as USA, UK, Sweden, South Africa have also incorporated legislative anti-tax avoidance provisions in their domestic legislations as a tool to prevent the use of low tax structures in non-cooperating countries.
- However, the section throws various challenges for its effective implementation. While, no guidelines and/or basis of listing of country/territory as “notified jurisdictional area” has yet been outlined, other than lack of effective exchange of information.
- Equally important to note is the fact that there is no prescription as to the minimum threshold for identifying the parties either on the basis of minimum share holding pattern or income.
- Further, the onus has been placed on the taxpayers to justify the transactions to the satisfaction of the Department, which, going by the experience is a tough task. Such wide and subjective powers to the Department as to determining the genuineness of the transaction may lead to wide litigation on the issue of allowability of deduction and tax withholding. Also, contentious is the provision of applying the highest withholding rate on payments made to parties in such jurisdiction, as, in terms of the settled law withholding will apply only if “income is chargeable to tax” in India.

Transfer Pricing

Permissible Variance [Section 92C (2)]

<p>Amendment</p>	<ul style="list-style-type: none"> • The second proviso to sub-section (2) of the Section 92C of the IT Act, permits a variation of +/- 5%, between ALP determined in terms of the provisions of Section 92C of the IT Act and the actual price at which the international transaction is undertaken. • The proposed amendment seeks to alter the aforesaid permissible variance of +/- 5%. • The Central Government, vide a notification to be published in the official gazette, shall introduce permissible variations across segments of business activities. • The amendment is proposed to be effective from 1.4.2012, and will be applicable from AY 2012-13.
<p>ELP's Comments</p>	<ul style="list-style-type: none"> • The permissible variance of +/- 5% was an ad-hoc safe harbour granted to an Assessee, and the same seems to have outlived its utility. • Commercial prudence and pricing factors vary from industry to industry, and to enforce a blanket tolerance level of +/- 5% has its own challenges. • CBDT has been empowered to outline the Safe Harbour Rules, which are yet to be notified. • While the proposed amendment seeks to address the issue of the permissible variance, there has been a lot of controversy in relation to the applicability of such variance, which has been left unaddressed.

Reference to the TPO [Section 92CA]

Amendment	<ul style="list-style-type: none">• Section 92CA of the IT Act provides that the TPO can determine the ALP in relation to an international transaction, only in an instance where the same has been referred to the TPO by the AO.• Vide the introduction of sub-section 2A to Section 92CA of the IT Act, the TPO, in addition to sub-section (1), has been empowered to determine the ALP in relation to any international transaction which the TPO comes across during the course of the proceedings (without the same being referred to by the AO).• Sub-section (7) of the Section 92CA of the IT Act provides that in order to determine the ALP, after being referred to by the AO, TPO can exercise the powers available to the AO to call for further information under Section 131(1) of the IT Act and for issuing summons Section 133(6) of the IT Act.• The amendment to sub-section (7), proposes to add to the powers of the TPO, by empowering the TPO to conduct a survey in terms of Section 133A of the IT Act.• The Amendments are proposed to be effective from 1.6.2011.
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ELP's Comments

- The aforesaid amendments to the Section 92CA of the IT Act, while seeking to make an amendment to the present procedure, have given wide ranging powers to the TPO to conduct a survey under Section 133A of the IT Act.
- Now, beginning the 1.6.2011, it shall be within the prerogative of the TPO to call for information, carry out a survey, and thereby initiate proceedings to determine the ALP. This proposal is a matter of concern for the Assessee.
- In our view, the amendment does not restrict the powers of the AO, while giving additional powers to the TPO. The moot point of consideration which shall also be a matter of debate is the overlapping of the jurisdiction exercised by the AO and the TPO, leading to multiplicity of proceedings.
- The decision of the ITAT, Delhi in the case of ***Amadeus India Pvt. Ltd.*** reported in ***2011-TII-22-ITATDel-TP*** which has held that the TPO cannot initiate proceedings beyond the ones referred to by the AO, thereby limiting the jurisdiction of the TPO. The present amendment proposes to over-rule the aforesaid principle.

LLP

AMT applicable to LLP [Section 115JC]

<p>Amendment</p>	<ul style="list-style-type: none"> • A new Chapter XII-BA has been introduced for LLP's. Under Section 115JC the total income earned by a LLP will be subject to an AMT at 18.5% where the regular income tax of the LLP is less than the AMT. • This Section will come into force from April 1, 2012 and will apply for AY 2012-13. • AMT is to be calculated on the Adjusted Total Income, which is the total income as increased by: <ul style="list-style-type: none"> ◦ Deduction claimed by an SEZ unit under Section 10AA; and ◦ Deduction under Chapter VI-A. • Tax credit is available where AMT exceeds Income Tax payable under the IT Act <ul style="list-style-type: none"> ◦ This credit could be carried for ten AY's from the AY in which the credit becomes available ◦ The AMT paid can be set-off against the income tax payable in any FY subject to minimum payment of AMT.
<p>ELP's Comments</p>	<ul style="list-style-type: none"> • LLP as a form of business becomes less attractive as a result of AMT, specifically involved in providing infrastructure facility eligible for deduction under section 80-IA of the IT Act and SEZ Units. • Clarity is required on carry forward and set-off of AMT when the LLP is converted to a Company and vice-versa.

Key Amendments

IDF and other related amendments [Section 10(47), Section 115A (ia) and Section 194LB]

Amendment	<ul style="list-style-type: none"> • In order to boost investment in the Infrastructure Sector, Government proposes to introduce a dedicated IDF scheme. The IDF will invite funds from overseas investors. A new Section 10(47) is sought to be introduced which will exempt from taxation any income earned by a notified IDF. • An amendment is also made to Section 115A which seeks to tax the interest received by a non-resident or a foreign company on investment in notified IDF at the reduced rate of 5%. • A corresponding amendment is made to Section 194LB to enable IDF to withhold taxes at a reduced rate of 5% on interest paid to a non-resident or foreign company
ELP's Comments	<ul style="list-style-type: none"> • This is certainly a welcome development and will go a long way in reducing the cost of investments.

Investment linked deduction extended to affordable housing project and production of fertilizer (Section 35AD)

Amendment	<ul style="list-style-type: none"> • Section 35AD of the IT Act provides for deduction in respect of expenditure of capital nature in relation to certain “specified business”. • By way of amendment, the definition of “specified business” under Section 35AD has been enlarged to include two new businesses, which are as follows: <ul style="list-style-type: none"> ○ Developing and building a housing project under a scheme for affordable housing framed by the Central Government or the State Government subject to the guidelines to be prescribed; and ○ Production of fertilizer in India • The dates of commencement of the above specified businesses in a new plant or an in newly installed capacity in an existing plant shall be on or after April 1, 2011.
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ELP's Comments	<ul style="list-style-type: none"> • One of the expectations from the Budget 2011-12 was to extend the benefit of investment linked deduction to other sectors. • This amendment seeks to extend the benefit to housing project under a scheme for affordable housing and production of fertilizers in India. • The government proposes to phase out profit linked tax incentive under the DTC and in this regard, it is gradually introducing investment linked tax incentives. The above provision seems to be a step in this direction.
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Sunset clause for infrastructure services (Section 80-IA and 80-IB)

Amendment	<p><u>Section 80-IA</u></p> <ul style="list-style-type: none"> • Under section 80-IA (4) (iv) of the IT Act, deduction is available to undertakings engaged in the generation, distribution and transmission of power. However, such deduction was available till the end of the year March 31, 2011. • Tax holiday extended to undertakings in power sector for a further period of one year i.e. for undertakings eligible for deduction under section 80-IA till March 31, 2012 <p><u>Section 80-IB</u></p> <ul style="list-style-type: none"> • Section 80-IB (9) (ii) of the IT Act provides for deduction in case of production of mineral oil located in any part of India. • Deduction available for commercial production of mineral oil will not be available for blocks licensed under a contract awarded after March 31, 2011 under the New Exploration Licensing Policy announced by the Government of India. • The amendment will be effective from April 1, 2012 i.e. from AY 2012-13.
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ELP's Comments	<ul style="list-style-type: none"> • The extension of the tax holiday in case of power sector is a welcome measure and would certainly boost the undertakings in the power sector. • However, the extension of the sunset clause has not been extended to an undertaking which develops and operates or maintains and operates an industrial park, which was also to expire on March 31, 2011.
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Taxation of dividends received by Indian Companies from their foreign subsidiaries

[Section 115BBD]

Amendment	<ul style="list-style-type: none"> • In terms of the existing provisions of the IT Act, dividend received from foreign companies is taxable in the hands of an Indian Company, at the rate of 30% plus applicable surcharge and cess. • The proposed amendment, vide an introduction of a new Section 115BBD, seeks to tax the dividends declared, distributed, or paid by the foreign subsidiary of the Indian Company, at the reduced rate of 15% plus applicable surcharge and cess. • The proposed amendment also seeks to disallow the expenditure incurred in relation to earning of such dividends.
ELP's Comments	<ul style="list-style-type: none"> • The aforesaid provision has been introduced to encourage the Indian Companies to bring the profits parked in subsidiaries outside India. • However, the cause of concern which remains is the disallowance of the expenditure incurred to earn such dividend. While the provisions in the present form, charge the applicable marginal rate of tax to the Indian Company, the expenditure incurred for earning such dividends is allowed.

Levy of MAT on a unit and a developer of SEZ

Amendment	<ul style="list-style-type: none"> • Section 115 JB(6) of the IT Act provides for exemption from payment of MAT on the profits derived by any business carried by a unit or a developer of an SEZ. • Section 115 JB(6) has now been amended and by way of a proviso the exemption granted has been restricted to the AY 2012-13 and every unit or a developer is liable to pay MAT on the income accrued or arising from the business carried in SEZ.
ELP's Comments	<ul style="list-style-type: none"> • The proposal brings the tax position in line with the DTC proposals.

Levy of DDT on dividends distributed by a developer of a SEZ

Amendment	<ul style="list-style-type: none"> • Section 115-O (6) of the IT Act provides for exemption to a developer of an SEZ for the payment of DDT on the dividend distributed. • The said section is now been amended and by way of proviso the exemption shall cease to have effect from 1st June 2011. • Simultaneous amendments have also been made in Section 10(34) of the IT Act thereby discontinuing the exemption enjoyed by a developer by not including the dividends distributed in the total income w.e.f. 1st June, 2011.
ELP's Comments	<ul style="list-style-type: none"> • While the proposed amendment seeks to create uniformity with the DTC, however, it simultaneously exerts an additional tax liability on the SEZ developer who shall now be liable to pay DDT.

Reporting of activities of LO (Section 285)

Amendment	<ul style="list-style-type: none"> • A new section 285 is proposed to be introduced, wherein a non-resident having a LO in India is required to file an annual statement within sixty days from the end of the FY.
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ELP's Comments	<ul style="list-style-type: none"> • It has been held by various judicial forums including in the case of DDIT vs. Nike Inc Indian Liaison Office [2009-TII-29-ITAT-BANG-INTL] and IKEA Trading Hong Kong Ltd [2008-TII-23-ARA-INTL] that a LO does not create a PE in India. • In the absence of a PE, non-resident were not filing return of income in India • With the proposal to introduce a new section wherein the non-resident having LO in India is required to file a statement annual, the tax department will have data to examine whether LO is a PE or not. Such examination may increase litigation on this aspect.
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Income Tax rates

For Individuals, Hindu Undivided Families, Association of Persons and Body of Individuals.

Existing		Proposed	
Income (INR) #	Rate (%) @	Income (INR)	Rate (%) @
0 -1,60,000	Nil	0 -1,80,000	Nil
1,60,001 - 5,00,000	10	1,80,001 - 5,00,000*	10
5,00,001 - 8,00,000	20	5,00,001 - 8,00,000*	20
8,00,001 and above	30	8,00,001 and above	30

@ Education cess of 2% and Secondary Education cess of 1% is leviable on the amount of income-tax.

The basic exemption limit is:

- INR 1,90,000 for resident women below the age of 65 years
- INR 2,40,000 for resident individuals of the age of 65 years or more

* The proposed exemption limits are:

- INR 1,90,000 for resident women below the age of 60 years
- INR 2,50,000 for resident individuals of the age of 60 years or more
- INR 5,00,000 for Very Senior Citizens of the age of 80 years or more

For Others

Description	Existing Rate (%)	Proposed Rate* (%)
A) Domestic company		
Regular tax	33.22 [@]	32.45 [@]

Dividend income from overseas subsidiary	33.22 [@]	16.22 ^{@@}
MAT	19.93 ^{**} (of book profits)	20 ^{***} (of book profits)
DDT	16.608	16.22
B) Foreign company		
Regular tax	42.23 [#]	42 [#]
C) Firms & LLP		
Regular tax	30.90	30.90
Alternate Minimum Tax	Nil	19.06

* Inclusive of applicable surcharge (5% in case of residents and 2% in case of non-residents). Education cess of 2% & Secondary Education cess of 1% is leviable on the amount of income-tax.

@ 30.90% where the total income is equal to or less than INR.10 million

@@ 15.45% where the total income is equal to or less than INR.10 million

** 18.54% where the total income is equal to or less than INR.10 million

*** 19.06% where the total income is equal to or less than INR.10 million

41.20% where the total income is equal to or less than INR.10 million

Banking, Finance and Infrastructure Update

The Government has continued its liberal outlook in relation to the banking, finance and infrastructure sectors.

This section of the analysis of the Budget has been divided in to:

- A: Financial Sector
- B: Infrastructure Sector
- C: Forthcoming Legislations, Amendments and Regulations

A. Financial Sector:

(i) Banking Licenses

Similar to the previous year's budget, the Finance Minister mentioned that issuance of additional banking licenses to private sector players would be considered. Additionally, the RBI will introduce changes to the Banking Regulation Act 1949, and issue guidelines for banking licenses before close of the present financial year. This is going to attract several non-banking financial companies, as well as foreign banks and financial institutions looking to set up a banking presence in India.

However, in the discussion paper issued by the Reserve Bank of India last year, issues *inter alia* in relation to promoter contribution, public shareholding and conflicts of interest were highlighted for discussion. Any Policy for licensing of new banks would remain subject to resolution of these, amongst other considerations.

(ii) Re-capitalisation of Public Sector Banks and RRBs

To provide relief to the 'stressed' financial assets of certain public sector banks, the Finance Minister has proposed to provide a sum of ₹ 6,000 crore (USD 1.33 Billion) for the year 2011-12 to enable public sector banks to maintain a minimum Tier I CRAR at 8 per cent.

Additionally, it is proposed to provide ₹ 500 crore (USD 110.5 Million) to regional RRBs during 2011-12 to enable them to maintain a CRAR of at least 9 percent as on March 31, 2012.

These measures have been taken to ensure that the risk appetite of the public sector banks and RRBs increase. Such decisions have also been made in furtherance of the Government's initiatives to make credit available to the rural and semi-rural sector.

(iii) Microfinance Institutions

With a view to providing a positive thrust for the creation of a dedicated fund for providing equity to smaller MFIs, it has been proposed to set up an "India Microfinance Equity Fund" of ₹ 100 crore (USD 22.1 Million) with SIDBI.

To encourage wider participation of women's self help groups at the micro-finance level, it has also been proposed to institute a "Women's SHG's Development Fund" with a corpus of ₹ 500 crore (USD 110.5 Million).

B. Infrastructure Sector

The impetus to infrastructure, urban, semi urban and rural, is clear from the fact that the Budget, proposes to provide ₹ 2,14,000 crore (USD 47.3 Billion), which accounts for over 48.5 per cent of the total plan allocations, for infrastructure development in the country. The allocation has seen an increase of 23.3% from the last allocation in 2010-11.

For infrastructure to develop, it is not as much equity but long term loans at reasonable rates that are important. Currently, projects are unable to procure such long term loans easily. Therefore, the Budget proposes:

- Development of a wholesome policy to be used by the State and the Centre for further developing public-private partnerships as a means to procure physical infrastructure.

- IIFCL is expected to achieve a cumulative disbursement target of ₹ 20,000 crore (USD 4.42 Billion) by March 31, 2011 and ₹ 25,000 crore (USD 5.52 Billion) by March 31, 2012.
- The Take Out Financing scheme announced in the Budget 2009-10 has been reported to have been implemented and seven projects have been stated to have been sanctioned with a debt of ₹ 1,500 crore (USD 331.4 Million).
- Issuance of tax free bonds of ₹ 30,000 crore (USD 6.62 Billion) by various government undertakings, including the Indian Railway Finance Corporation, National Highway Authority of India, HUDCO and Ports. The nature of entities permitted to subscribe to such instruments remains unclear.
- It has been proposed to create special vehicles in the form of notified infrastructure debt funds. The interest payment on the borrowings of these funds would be subject to a reduced withholding tax rate of 5% and the income of the fund has been proposed to be exempt from tax.
- In order to promote savings and raise funds for infrastructure, an additional deduction of ₹ 20,000 crore (USD 4.42 Billion) for investment in long-term infrastructure bonds was notified by the Central Government in 2010-11. The same has been proposed to be extended for this fiscal year.
- To enhance the flow of funds to the infrastructure sector, the FII limit for investment in corporate bonds, with residual maturity of over five years issued by companies in infrastructure sector, has been raised to USD 25 Billion (₹ 113,162.5 crore). Since most of the infrastructure companies are organised in the form of SPVs, FIIs would also be permitted to invest in unlisted bonds with a minimum lock-in period of three years.

New Inclusions in Infrastructure sub-sector

It has been proposed to include fertilizer production, cold chains and post harvest storage as investment into 'infrastructure' sub-sector. It remains to be seen whether all benefits accruing to infrastructure companies would now also be

available to fertilizer producing entities, including, *inter alia*, the availability of foreign lending through the External Commercial Borrowing route and procuring finance through the IIFCL.

C. Forthcoming Legislations, Amendments and Regulations

(i) Disinvestment

The Budget proposes to raise further monies to the amount of ₹ 40,000 crore (USD 8.84 Billion) through the divestment/public participation process. This could be one of the ways in which fiscal deficit could be reduced.

(ii) Foreign Investment

In order to encourage the inflow of foreign funds into India, the government has been making efforts through changes, both substantial and procedural. One measure towards the same was the streamlining and review of the FDI Policy every six months.

While only FIIs and their sub-accounts registered with SEBI and NRIs have till now been permitted to invest in mutual fund schemes, the Budget aims to liberalise the portfolio investment route, by permitting SEBI registered mutual funds to accept subscriptions from foreign investors who meet the KYC requirements for equity schemes. This would enable Indian mutual funds to have direct access to foreign investors and widen the class of foreign investors (possibly non-resident body corporates and individuals) in Indian stock market.

(iii) List of forthcoming legislations/ amendments

- (a) The Insurance Laws (Amendment) Bill, 2008;
- (b) The Life Insurance Corporation (Amendment) Bill, 2009;
- (c) Re-introduction of Pension Fund Regulatory and Development Authority Bill;
- (d) Banking Laws Amendment Bill, 2011;
- (e) Bill on Factoring and Assignment of Receivables;
- (f) The State Bank of India (Subsidiary Banks Laws) Amendment Bill, 2009;
- (g) Amendments to the RDB Act;
- (h) Amendments to the SARFAESI Act;

- (i) Amendments to the Indian Stamp Act, 1899; and
- (j) Re-introduction of Companies Bill.

This Budget seeks to develop an active debt market through parceling of debt and making it available to both foreign and Indian investors. The processes set in motion propose to make debt more market oriented for meeting the funding requirements for businesses, as opposed to such business being financially over reliant on large financial institutions and the equities markets. The financial institutions thereby, would have the liquidity to make their funds available to a larger spectrum of infrastructure, both physical and social and other such projects; a move clearly in line with the policies of other mature market economies.

GLOSSARY OF TERMS

Abbreviation	Meaning
ADR	Alternate Dispute Resolution
AMT	Alternate Minimum Tax
ALP	Arms Length Price
AO	Assessing Officer
AY	Assessment Year
AE	Associated Enterprise
BCD	Basic Customs Duty
CBDT	Central Board of Direct Taxes
CBEC	Central Board of Excise and Customs
CE Act	Central Excise Act, 1944
CE Rules	Central Excise Rules, 2002
CESTAT / Tribunal	Customs, Excise and Service Tax Appellate Tribunal
CETA	Central Excise Tariff Act, 1985
CETH	Central Excise Tariff Heading
Credit Rules	Cenvat Credit Rules, 2004
CST	Central Sales Tax
CTA	Customs Tariff Act, 1975
CTH	Customs Tariff Heading
Customs Act	Customs Act, 1962
CVD	Additional Duty of Customs
DRP	Dispute Resolution Panel
dt.	dated
DTAA or Tax Treaty	Double Taxation Avoidance Agreement entered into by India
DTC	Direct Taxes Code Bill, 2010
DTC	Direct Taxes Code Bill, 2009
Export Rules	Export of Services Rules, 2005
FTS	Fees for Technical Services
FY	Financial Year

GST	Goods and Services Tax
HUF	Hindu Undivided Family
Import Rules	Taxation of Services (Provided from Outside India and Received in India) Rules, 2006
IT Act	Income Tax Act, 1961
ITAT	Income Tax Appellate Tribunal
IDF	Infrastructure Debt Fund
LO	Liaison Office
LLP	Limited Liability Partnership
LLP Act	Limited Liability Partnership Act, 2008
MAT	Minimum Alternate Tax
PY	Previous Year
SEZ	Special Economic Zone
SEZ Act	Special Economic Zone Act, 2005
the Act	Finance Act, 1994
TIEA	Tax Information Exchange Agreements
TP	Transfer Pricing
TPO	Transfer Pricing Officer
WDV	Written Down Value
w.e.f.	with effect from
w.r.e.f.	with retrospective effect from
WT Act	Wealth Tax Act, 1957
CRAR	Capital to Risk Weighted Asset Ratio
IIFCL	India Infrastructure Finance Company Limited
RBI	Reserve Bank of India
RRB	Regional Rural Bank
MFI	Micro-Finance Institution
FII	Foreign Institutional Investor
RDB	Recovery of Debts due to Banks and Financial Institutions Act, 1993
SARFAESI	Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interests Act, 2002

Notes

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Prepared by Economic Laws Practice, for client service and internal use only. This document summarizes the indirect and direct tax proposals of the Union Budget 2011. Expert guidance may be sought before acting upon the proposals.

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