Issue In Capital Gain

CA Jayesh Shah

CAPITAL GAINS

- CA JAYESH SHAH
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To Understand the calculations of Income Under the Head " CAPITAL GAINS " we require to refer following provisions of the Act :

Sr. No.	PARTICULARS	SEC.
1.	Definitions - Capital Asset - Transfer - Long Term Capital Asset - Short term Capital Assets	Sec. 2 (14) Sec.2 (47) Sec.2 (29 A) Sec.2 (42 A)
2.	Income Deemed to accrue & Arise In India	Sec.9
3.	CAPITAL GAINS	Sec.45 to 55 A
4.	Exemptions in Capital Gains	Sec.10
5.	Set Off & Carry forward of Loss	Sec.71 & 74
6.	Determination of Tax In special Cases	Sec.111A & 112

Section 45 of The Income Tax Act provides that any profit or gains arising from the transfer of a Capital Asset effected in the previous year will be chargeable to Income Tax under the head "Capital Gains". Such capital gains will be deemed to be the Income of the previous year in which the transfer took place. In the Charging section of capital gain, two terms are important. One is "Capital Asset" and the other is "Transfer".

Sec.2 (14) - Capital Asset

According to Section 2(14), a capital asset means property of any kind held by an assessee, whether or not connected with his business or profession, but does not include-

(a) Any stock-in-trade, consumable stores or raw materials held for the purpose of the business or profession of the assessee;
(b) Personal effects, that is to say, movable property (including wearing apparel and furniture) held for personal use by the assessee or any member of his

family dependent on him, but excludes: jewellery, archaeological collections, drawings, paintings, sculptures or any work of art

(c) Rural agricultural land in India i.e. agricultural land in India which is not situated in any specified area. Hence, Urban agricultural lands constitute capital assets. Accordingly, agricultural land situated within the limits of any municipality or cantonment board having population of 10,000 or more according to latest census will be considered as capital asset. Further, agricultural land situated in areas lying within a distance of 8 Kms from the local limits of such municipality or cantonment board will also be considered as capital assets.

(d) $6^{1/2}$ % Gold Bonds, 1977 or 7% Gold Bonds, 1980, or National Defence Gold Bonds, 1980, issued by the Central Government

(e) Special Bearer Bonds, 1991 issued by the Central Government (The Income on Transfer or maturity or redemption of Zero Coupon Bonds is to be treated as capital Gains.)

(f) Gold Deposit Bonds issued under the Gold Deposit Scheme, 1999 notified by the Central Government

Sec.2 (47) Transfer

The Act contains an inclusive definition of the term 'transfer'. Accordingly, transfer in relation to a capital asset includes the following types of transactions:-

(i) The Sale, exchange or relinquishment of the asset; or

(ii) The extinguishment of any right therein; or

(iii) The compulsory acquisition thereof under any law; or

(iv) The owner of a capital asset may convert the same into the stock-in-trade of a business carried on by him. Such conversion is treated as transfer; or

(v) The maturity or redemption of a Zero Coupon Bond; or

(vi) Part performance of the contract: sometimes, possession of an immovable property is given in consideration of part-performance of a contract.

(vii) Lastly, there are certain types of transactions which have the effect of transferring or enabling the enjoyment of an immovable property. For example, a person may become a member of a Co-op. Society, or AOP or Company which may be building houses/flats. When he pays an agreed amount, the society etc. hands over possession of the house to the person concerned. No conveyance is registered. For the purpose of Income Tax, the above transaction is a transfer. Even power of attorney transactions are covered.

Sec. 2 (42 A) SHORT –TERM AND LONG –TERM CAPITAL ASSETS:

Section 2(42A) defines short –term capital asset as a capital asset held by an assessee for not more than 36 Months immediately preceding the date of its transfer. Therefore, a capital asset held by an assessee for more than 36 Months immediately preceding the date of its transfer is a long –term capital asset.

However, in the case of company shares, various securities listed in a recognised stock Exchange in India, units of the Unit Trust of India and of Mutual Funds

specified under section 10(23D) or a Zero Coupon Bond will be considered as long – term capital assets if they are held for more than 12 Months.

The following points must be noted in this regard:

(i) In the case of a share held in a company in liquidation, the period subsequent to the date on which the company goes into liquidation should be excluded.

(ii) Section 49(1) specifies some special circumstances under which capital asset becomes the property of an assessee. For example, an assessee may get a capital asset on a distribution of assets on the partition of a HUF or he may get a gift or he may get the property under a will or from succession, inheritance etc. in such cases, the period for which the asset was held by the previous owner should be taken into account.

(iii) In the case of shares held in an amalgamated company in lieu of shares in the amalgamating company, the period will be counted from the date of acquisition of shares in the amalgamating company.

(iv) In the case of a capital asset being shares in an Indian company, which becomes the property of the assessee in consideration of a demerger, the period of holding shall include the period for which the shares were held in the demerged company by the assessee.

(v) In the case of a capital asset, being any specified security or sweat equity shares allotted or transferred, directly or indirectly, by the employer free of cost or at concessional rate to his employees (including former employees), the period shall be reckoned from the date of allotment or transfer of such specified security or sweat equity shares.

(vi) In respect of other capital asset, the period for which any capital asset is held by the assessee shall be determined in accordance with any rules made by the CBDT in this behalf.

SCOPE AND YEAR OF CHARGEABILITY (SECTION 45)

(I) **General Provision [Section 45(1)] –** Any profits or gains arising from the transfer of a capital asset effected in the previous year (other than exemptions covered under this chapter) shall be chargeable to Income Tax under this head in the previous year in which the transfer took place.

(II) **Receipts from Insurance parties [Section 45(1A)] –** Where any person receives any money or other assets under any insurance from an insurer on account of damage to destruction of any capital asset, then any profits or gains arising from receipt of such money or other assets shall be chargeable to Tax under this head and shall be deemed to be the income of the such person for the previous year in which money or other asset was received.

For the purpose of section 48, the value of any money or the fair market value of other assets on the date of such receipts shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of such capital assets.

(III) **Conversion or treatment of a capital asset as stock-in- trade [Section 45(2)]-** A person who is the owner of a capital asset may convert the same or treat it as stock-in-trade of the business. As noted above, the above transaction is a transfer. As per section 45(2), the profit or gains

arising from the above conversion or treatment will be chargeable to Tax as his Income of the previous year in which such stock-in-trade is actually sold or otherwise transferred. In order to compute the capital gains, the fair market value of assets on the date of such conversion or treatment shall be deemed to be full value of the consideration.

(IV) **Transfer of beneficial interest in securities [Section 45(2A)] -** Where any person has had at any time during the previous year any beneficial interest in any securities, then, any profits or gains arising from the transfer made by the Depository or participant of such beneficial interest in respect of Securities shall be chargeable to tax as the income of the beneficial owner of the previous owner of the previous year in which such transfer took place and shall not be regarded as income of the depository who is deemed to be the registered owner of the securities. For the purpose of section 48 and proviso to section 2(42A), the cost of acquisition and the period of holding of securities shall be determined on the basis of the first-in-first-out (FIFO) method.

(V) **Introduction of capital asset as capital contribution [Section 45(3)] –** where a person transfer a capital asset to a firm, AOP or BOI in which he is already a partner/member or is to become a partner/member by way of capital contribution or otherwise, the profits or gains arising from such transfer will be chargeable to tax as Income of the previous year in which such transfer takes place. For this purpose, the value of the consideration will be the amount recorded in the books of account of the firm, AOP or BOI.

(VI) **Distribution of capital assets on a firm's or AOP or BOI's dissolution [Section 45(4)] –** The profit or gains arising from the transfer of capital assets by way of distribution of capital assets on dissolution of a firm, AOP or BOI or otherwise shall be chargeable to tax as the income of the firm etc. of the previous year in which such transfer takes place. For this purpose, the fair market value of the asset on the date of such transfer shall be full value of consideration.

The Bombay High Court in case of *Commissioner of Income Tax vs. A.N. Naik Associates (2004) 136 Taxman 107* held that the idea behind the introduction of sub-section 4 in section 45 was to plug in a loophole and block the escape route through the medium of the firm. The High Court observed that the expression 'otherwise' has not to be read *ejusdem generis* with the expression 'dissolution of a firm or BOI or AOP'. The expression 'otherwise' has to be read with the words 'transfer of capital assets by way of distribution of capital assets'. If so read, it becomes clear that even when a firm is in existence and there is a transfer of capital assets, it comes within the expression 'otherwise' since the object of the amendment was to remove the loophole which existed, whereby capital gains was not chargeable.

(VII) **Compensation on compulsory acquisition [Section 45(5)] –** When a building or other capital assets belonging to a person is taken over by the Central Government by way of compulsory acquisition. In that case, the consideration for the transfer is determined by the Central Government and Govt. pays the above compensation, capital gains arises on such are

chargeable as income of the previous year in which such compensation is received.

Enhanced Compensation – Many times, persons whose capital assets have been taken over by the Central Government and who get compensation from the Govt. go to the court of law for enhancement of compensation. If the court awards a compensation which is higher than the original compensation, the difference thereof will be chargeable to capital gains in the year in which the same is received from Govt. For this purpose, the cost shall be taken at Nil.

(VIII) **Repurchase of mutual fund units referred to in Section 80CCB [Section 45(6)] –** The difference between the repurchase price and the amount invested will be chargeable to tax in the previous year in which such repurchase takes place or the plan referred to in section 80CCB is terminated.

CAPITAL GAINS ON DISTRIBUTION OF ASSETS BY COMPANIES IN LIQUIDATION [SECTION 46]

(1) Where the assets of a company are distributed to its shareholders on its liquidation, such distribution shall not be regarded as a transfer by the company for the purpose of section 45 [section 46(1)]. If however, the liquidator sells the assets of the company resulting in a capital gain and distributes the funds so collected, the company will be liable to pay tax on such gains.

(2) Share holders receive money or other assets from the company on its liquidation. They will be chargeable to Income tax under the head 'capital gains' in respect of the market value of the assets received on the date of distribution, or the moneys so received by them. The portion of the distribution which is attributable to the accumulated profits of the company is to be treated as dividend income of the shareholder under section 2(22)(c).

CAPITAL GAINS ON BUYBACK, ETC. OF SHARES [SECTION 46A]

Any consideration received by a shareholder from any company on purchase of its own shares or other securities held by such holder shall be chargeable to tax on the difference between the cost of acquisition and the value received.

Sec. 47 -Certain Transactions not regarded as Transfer

Section 47 specifies certain transactions which will not be regarded as transfer for the purposes of capital gains tax:

(1) Any distribution of capital assets on the total or partial partition of a HUF;

(2) Any transfer of a capital asset under a gift or will or an irrevocable trust;
However, this clause shall not include transfer under gift or an irrevocable trust of a capital asset being shares, debentures or warrants allotted by a company directly or indirectly o its employees under the Employees Stock Option Plan or Scheme offered to its employees in accordance with the guidelines issued in this behalf by the Central Government.

(3) Any transfer of a capital asset by a company to its subsidiary company

Conditions- (i) the parent company must hold the whole of the shares of the subsidiary company; (ii) The Subsidiary company must be an Indian Company.

(4) Any transfer of capital asset by a subsidiary company to a holding company

Conditions- (i) the whole of shares of the subsidiary company must be held by the holding company; (ii) The holding company must be an Indian Company.

Exception- The exemption mentioned in 3 or 4 above will not apply if a capital asset is transferred as stock-in-trade.

(5) Any transfer in a scheme of amalgamation of a capital asset by the amalgamating company to the amalgamated company if the amalgamated company is an Indian company.

(6) Any transfer in a scheme of amalgamation of shares held in an Indian company by the amalgamating foreign company to the amalgamated foreign company.

Conditions- (i) At least 25 percent of the shareholders of the amalgamating foreign company must continue to remain shareholders of the amalgamated foreign company; (ii) Such transfer should not attract capital gain in the country in which the amalgamating company is incorporated.

(7) Any transfer in a scheme of amalgamation of a banking company with a banking institution sanctioned and brought into force by the Central Government under section 45(7) of the Banking Regulation Act, 1949, of a capital asset by such banking company to such banking institution.

(8) Any transfer by a shareholder in a scheme of amalgamation of shares held by him in the amalgamating company.

Conditions- (i) The transfer is made in consideration of the allotment of any share in the amalgamated company to him; (ii) The amalgamated company is an Indian company.

(9) Any transfer in a demerger, of a capital asset by the demerged company to the resulting company, if the resulting company is an Indian company.

(10) Any transfer in a demerger, of a capital asset, being a share or shares held in an Indian company, by the demerger foreign company to the resulting foreign company.

Conditions- (i) The shareholders holding at least three-fourths in value of shares of the demerged foreign company continue to remain shareholders of the resulting foreign company; and (ii) Such transfer does not attract tax on capital gains in the country, in which the demerged company is incorporated. However, the provisions of sections 391 to 394 of the companies Act, 1956 shall not apply in case of demergers referred to in this clause.

(11) Any transfer in a business reorganisation, of a capital asset by the predecessor co-operative bank to the successor co-operative bank.

(12) Any transfer by a shareholder, in a business reorganisation, of a capital asset being a share held by him in the predecessor co-operative bank

if the transfer is made in consideration of the allotment to him of any share or shares in the successor co-operative bank.

(13) Any transfer or issue of shares by the resulting company, in a scheme of demerger to the shareholders of the demerged company if the transfer or issue is made in consideration of demerger of the undertaking.

(14) Any transfer of bonds or shares referred to in section 115AC(1)

Condition – (i) The transfer must be made out side India; (ii) The transfer must be made by the non-resident to another non-resident.

(15) Any transfer of agricultural lands affected before 1-3-1970.

(16) Any transfer of any of the following capital asset to the government or to the University or the National Museum, National Art Gallery, National Archives or any other public museum or institution notified by the Central Government to be of (national importance or to be of) renown throughout any State: Work of art, archaeological, scientific or art collection, book, manuscript, drawings, paintings, photographs, printings.

(17) Any transfer by way of conversion of bonds or debentures, debentures stock or deposit certificates in any form, of a company into shares or debentures of that company.

(18) Any transfer by way of conversion of Foreign Currency Exchangeable Bonds into shares or debentures of a company.

(19) Transfer by way of exchange of a capital asset being membership of a recognised stock exchange for shares of a company to which such membership is transferred.

Conditions – (i) such exchange is affected on or before 31st December, 1998 and (ii) such shares are retained by the transferor for a period of not less than three years from the date of transfer.

(20) Capital gain arising from the transfer of land under scheme prepared and sanctioned under section 18 of Sick Industrial Companies (Special Provisions) Act, 1985, by a sick industrial company which is managed by its workers' co-operative.

Conditions – Such transfer is made in the period commencing from the previous year in which the said company has become a sick industrial company and ending with the previous year during which the entire net worth of such company becomes equal to or exceeds the accumulated losses.

(21) Where a firm is succeeded by a company or where an AOP or BOI is succeeded by a company in the course of demutualisation or corporatisation of a recognised stock exchange in India, any transfer of a capital asset or intangible asset (in case of a firm).

Conditions – (i) all the partners of the firm immediately before the succession become the shareholders of the company and the proportion in which their capital accounts stood in the books of the firm on the date of succession remains the same; (ii) the partners of the firm do not receive any consideration or benefit in any form, directly or indirectly, other than by way of allotment of shares in the company (iii) the partners of the firm together hold not less than 50% of the total voting power in the company, and their shareholding continues in such manner for a period of 5 years from the date of succession (iv) the corporatisation of a recognised stock exchange in India

is carried out in accordance with a scheme for demutualisation or corporatisation approved by SEBI.

(22) With effect from assessment year 2011-12, transfer of a capital assets by a private company unlisted public company to a limited liability partnership (LLP), or any transfer of a share or shares held in the company by a shareholder, as a result of conversion of the company into LLP in accordance with section 56 and 57 of the Limited Liability Partnership Act, subject to the following Conditions :

i. All assets and liabilities of the company immediately before conversion should become the assets and liabilities of the LLP at the time of Conversion;

ii. All the shareholders of the company immediately before conversion should become the partners of the LLP and their capital contribution and profit sharing ratio in the LLP are in the same proportion as their shareholding in the company on the date of Conversion;

iii. No consideration would be paid by LLP to the company, the shareholders of the company should not receive any consideration or benefit (directly or indirectly) other than by way of share in profit and capital contribution in the LLP;

iv. The aggregate of the profit sharing ratio of the shareholders of the predecessor company in the LLP shall not be less than 50 percent immediately after conversion and at the time during the period of five years from the date of conversion;

v. The total sales, turnover or gross receipts in business of the company in any of the three previous years preceding the previous year in which conversion takes place should not be more than Rs. 60 lakhs;

vi. No amount is paid, either directly or indirectly, to any partner out of balance of accumulated profit standing in the accounts of the company on the date of conversion for a period of three years from the date of conversion[Sec. 47(xiiib)]

(23) Any transfer of a membership right by a member of recognised stock exchange in India for acquisition of shares and trading or clearing rights in accordance with a scheme for demutualisation or corporatisation approved by SEBI.

(24) Where a sole proprietary concern is succeeded by a company in the business carried out by it, as a result of which the sole proprietary concern transfers or sells any capital asset or intangible asset to such company.

Conditions – (i) All assets and liabilities of the sole proprietary concern relating to the business immediately before the succession become the assets and liabilities of the company; (ii) the sole proprietor holds not less than 50% of the total voting power in the company, and his shareholding continues in such manner for a period of 5 years from the date of succession; (iii) the sole proprietor does not receive any consideration or benefit in any form, directly or indirectly, other than by way of allotment of shares in the company.

(25) Any transfer in a scheme for lending of any securities under an agreement or arrangement which the assessee has entered into with the

borrower of such securities and which is subject to the guidelines issued by SEBI or the RBI.

(26) Any transfer of a capital asset in a scheme of reverse mortgage under a scheme made and notified by the Central Government.

The aforesaid transactions are not recognised as "transfer" for the purpose of section 45. Therefore, any profit or gain arising on the above-noted transactions is not chargeable to tax under section 45; conversely, any loss arising there from is not liable to be set off against other incomes of the assessee.

MODE OF COMPUTATION OF CAPITAL GAIN

(I) The income chargeable under the head 'capital gains' shall be computed by deducting from the full value of consideration received or accruing as a result of transfer of asset (a) Expenditure incurred wholly and exclusively in connection with such transfer , (b) The indexed cost of acquisition and indexed cost of any improvement thereto.

(II) However, no deduction shall be allowed in respect of any amount paid on account of STT under chapter VII of the Finance Act, 2004

Note – The benefit of indexation will not apply to the long term gains arising from the transfer of bonds or debentures other than capital indexed bonds issued by the Govt.

In case of depreciable assets, there will be no indexation as in such case gains will always be Short Term Capital Gains.

(iii) Cost Inflation Index

Financial Year	Cost Inflation Index	Financial Year	Cost Inflation Index
1981-82	100	1996-97	305
1982-83	109	1997-98	331
1983-84	116	1998-99	351
1984-85	125	1999-00	389
1985-86	133	2000-01	406
1986-87	140	2001-02	426
1987-88	150	2002-03	447
1988-89	161	2003-04	463
1989-90	172	2004-05	480
1990-91	182	2005-06	497
1991-92	199	2006-07	519
1992-93	223	2007-08	551
1993-94	244	2008-09	582
1994-95	259	2009-10	632
1995-96	281	2010-11 2011-12	711 785

(iv) Special provision for Non-residents

In order to give protection to non-residents who invest foreign exchange to acquire capital assets, section 48 contain a proviso. Accordingly, in the case of Non-

residents, capital gains arising from the transfer of shares or debentures of an Indian company is to be computed as follows:

The cost of acquisition, the expenditures incurred wholly and exclusively in connection with the transfer and the full value of the consideration are to be converted into the same foreign currency with which such shares were acquired. The resulting capital gains shall be reconverted into Indian currency. The aforesaid manner of computation of capital gains shall be applied for every purchases and sale of shares or debentures in an Indian company. Rule 115A is relevant for this purpose.

CAPITAL GAINS ON TRANSFER OF SWEAT EQUITY SHARES REFERED TO IN SECTION 17(2)(vi)

Where the capital gain arises from the transfer of specified security or sweat equity shares, the cost of acquisition of such security or shares shall be the fair market value which has been taken into account for perquisite valuation [Section 49(2AA)]

Where the capital gain arises from the transfer of specified security or sweat equity shares, the cost of acquisition of such security or shares shall be the fair market value which has been taken into account for while computing the value of fringe benefits under clause (ba) of sub-section (1) of Section 115WC [Section 49(2AB)]

COMPUTATION OF CAPITAL GAINS IN CASE OF DEPRECIABLE ASSET [SECTION 50]

Section 50 provides for the computation of capital gains in case of depreciable assets. Where the capital asset is an asset forming part of a block of assets in respect of which depreciation has been allowed, the provisions of section 48 & 49 shall be subject to the following modification:

Where the full value of consideration received or accruing for the transfer of the asset plus the full value of such consideration for the transfer of any other capital asset falling with the block of assets during previous year exceeds the aggregate of the following amounts namely:

(1) Expenditure incurred wholly and exclusively in connection with such transfer;
(2) WDV of the block of assets at the beginning of the previous year;
(3) The actual cost of any asset falling within the block of assets acquired during the previous year

Such excess shall be deemed to be the capital gains arising from the transfer of short term capital assets.

Where all assets in a block are transferred during the previous year, the block itself will cease to exist. In such a situation, the difference between the sale value of the assets and the WDV of the block of assets at the beginning of the previous year together with the actual cost of any asset falling within that block of assets acquired by the assessee during the previous year will be deemed to be the capital gains arising from the transfer of Short term capital gains.

COST OF ACQUISITION IN CASE OF POWER SECTOR ASSETS [SECTION 50A]

With respect to the power sector, in case of depreciable assets referred to in section 32(1)(i), the provisions of sections 48 and 49 shall apply subject to the modification that the WDV of the asset (as Defined in section 43(6), as adjusted, shall be taken to be the cost of acquisition.

CAPITAL GAINS IN RESPECT OF SLUMP SALES [SECTION 50B]

(I) Any profits or gains arising from the slump sale effected in the previous year shall be chargeable to tax as capital gains arising from the transfer of long term capital assets if one or more of such undertaking or division held by the assessee for more than thirty six months, otherwise short term.

(II) The net worth of the undertaking or division shall be deemed to be the cost of acquisition and the cost of improvement for the purposes of section 48 and 49 in relation to capital asset shall be ignored.

(III) Every assessee in the case of slump sale shall furnish in the prescribed Form 3CEA along with the return of income, a report of a chartered accountant indicating the computation of net worth has been correctly arrived at in accordance with the provisions of this section [Sub-section (3)](w.e.f 1-6-2006 Form 3CEA is not required to be furnished along with return but to be submitted to AO on demand.) However any change in the value of assets on account of revaluation of assets shall not be considered for this purpose.

SPECIAL PROVISION FOR FULL VALUE OF CONSIDERATION IN CERTAIN CASES [SECTION 50C]

(I) Where the consideration received or accruing as a result of transfer of a capital asset, being land or building or both, is less than the value adopted or assessed or assessable by any authority (Stamp Valuation Officer) for the purpose of payment of stamp duty, such value adopted or assessed or assessable shall be deemed to be the full value of the consideration.

(II) Where assessee claims before an assessing officer that the value so adopted or assessed by the authority exceeds the fair market value of the property and the value so adopted has not been disputed in any appeal or revision , the assessing officer may refer the valuation of the capital asset to a valuation officer as defined in section 2(r) of the wealth tax Act, 1957.

(III) Where the value ascertained by such valuation officer exceeds the value adopted by the stamp authority, the value adopted or assessed or assessable shall be taken as the full value of consideration.

ADVANCE MONEY RECEIVED [SECTION 51]

It is possible for an assessee to receive some advance in regard to the transfer of capital asset. Due to the break-down of the negotiation, the assessee may have retained the advance. Section 51 provides that while calculating capital gain, the above advance retained by the assessee must go to reduce the cost of acquisition. However, if advance has been received or retained by the previous owner and not the assessee himself, then the same will not go to reduce the cost of acquisition of the assessee.

EXEMPTION OF CAPITAL GAINS:

(i) Exemption of capital gains under various sub-clauses of section 10, section 11(1A) and section 13A

The Act has exempted capital gain in the hands of various categories of persons under sections 10, 11(1A) and 13A. These exemptions are given to the specific categories of persons. However, the following clauses to section 10 have been inserted to allow exemption of capital gain to all categories of persons or more than one person.

(A) Capital gain on transfer of units of US 64 exempt if transfer takes place on or after 1-4-2002: Any income arising from the transfer of a

capital asset, being a unit of the Unit Scheme, 1964 where the transfer of such asset takes place on or after 1-4-2002 shall be exempt. It may however be noted that "income" includes loss and as such, due to the above amendment, capital loss on transfer of such units shall not be allowed to be set off/carried forward.

(B) Long-term capital gain on eligible equity shares exempt if the shares are acquired within a certain period: Any income arising from the transfer of a long-term capital asset, being an eligible equity share in a company shall be exempt provided these are acquired on or after 1-3-2003 but before 1-3-2004 and held for a period of 12 months of more. "Eligible equity share" means,—

(*i*) any equity share in a company being a constituent of BSE-500 Index of the Stock Exchange, Mumbai as on the 1-3-2003 and the transactions of purchase and sale of such equity share are entered into on a recognised stock exchange in India;

(*ii*) any equity share in a company allotted through a public issue on or after the 1-3-2003 and listed in a recognised stock exchange in India before 1-3-2004 and the transaction of sale of such share is entered into on a recognised stock exchange in India.'.

(C) Exemption of capital gains on compensation received on compulsory acquisition of agricultural land situated within specified urban limits: With a view to mitigate the hardship faced by the farmers whose agricultural land situated in specified urban limits has been *compulsorily acquired,* the Finance (No. 2) Act, 2004 has inserted a new clause (37) in section 10 so as to exempt the capital gains (whether short-term or long-term) arising to an *individual or a Hindu undivided family* from transfer of agricultural land by way of *compulsory acquisition* where the compensation or the enhanced compensation or consideration, as the case may be, is received *on or after 1-4-2004*. The exemption is available only when such land has been used for agricultural purposes during the preceding two years *by such individual* or a *parent of his* or by *such* Hindu undivided family.

Where the compulsory acquisition has taken place before 1-4-2004 but the compensation is received after 31-3-2004, it shall be exempt. But if part of the original compensation in the above case has already been received before 1-4-2004, then exemption shall not be available even though balance original compensation is received after 31-3-2004.

However, enhanced compensation received on or after 1-4-2004 against agricultural land compulsory acquired before 1-4-2004 shall be exempt.

(D) Exemption of long-term capital gain arising from sale of shares and units: Any income arising on or after 1-10-2004 from the transfer of a long-term capital asset, being an equity share in a company or a unit of an equity oriented fund shall be exempt provided—

(*a*) such equity shares are sold through recognised stock exchange, whereas units of an equity oriented fund may either be sold though the recognised stock exchange or may be sold to the mutual fund.

(*b*) such transaction is chargeable to securities transaction tax (STT).

"Equity oriented fund" means a fund—

(*i*) where the investible funds are invested by way of equity shares in domestic companies to the extent of more than 50% of the total proceeds of such fund; and

(*ii*) which has been set up under a scheme of a Mutual Fund specified under clause (23D):

The percentage of equity share holding of the fund shall be computed with reference to the annual average of the monthly averages of the opening and closing figures.

(ii) Exemption of capital gains under sections 54, 54B, 54D, 54EC, 54F, 54G and 54GA

(A) Profit on transfer of house property used for residence [Section 54]: Benefit of section 54 is confined to sale of a residential house after 36 months and reinvestment in a residential house. Reinvestment benefits is available both for purchase and construction of the house. Purchase has to be either one year before or two years later. Construction has to be completed within three years of the sale of the asset in respect of which benefit of reinvestment is claimed. There have been many decisions on purchase/ construction of the house.

(B) Capital gain on transfer of land used for agricultural purposes [Section 54B]: Any capital gain (short-term or long-term), arising to an assessee (only individuals), from the transfer of any agricultural land which has been used by the assessee or his parents for at least a period of 2 years immediately preceding the date of transfer, for agricultural purposes, shall be exempt to the extent such capital gain is invested in the purchase of another agricultural land within a period of 2 years after the date of transfer to be used for agricultural purpose, provided the new agricultural land purchased, is not transferred within a period of 3 years from the date of its acquisition. Section 54B is applicable only to individuals and not to any other assessee this is because the section uses the expression used by "his or a parent of his" which clearly indicate that the "assessee" refers to an individual. [*CIT* v *Devarajalu* (*G.K.*)
(1991) 191 ITR 211 (Mad)].

(C) Capital Gain on compulsory acquisition of land and building, forming part of Industrial Undertaking [Section 54D]: Capital Gain whether short term or long term arising on compulsory acquisition of any land or building forming part of an Industrial Undertaking is exempt from tax if such land or building was used by the assessee for the purpose of Industrial Undertaking for at least two years preceding the date of compulsory acquisition, the assessee has purchased any other land or building within a period of 3 years from the date of receipt of compensation or constructed a building within such period and Newly acquired land or building should be used for the purpose of shifting or re-establishing the said undertaking or setting up another industrial undertaking.

(D) Capital gain on transfer of long-term capital assets not to be charged on investment in certain bonds [Section 54EC]: Any long-term capital gain, arising to any assessee, from the transfer of any capital asset on or after 1-4-2000 shall be exempt to the extent such capital gain is

invested within a period of 6 months after the date of such transfer in the long-term specified asset provided such specified asset is not transferred or converted into money within a period of 3 years from the date of its acquisition.

Exemption under section 54EC not available in respect of deemed capital gains on amount received on liquidation of a company: Section 54E (now section 54EC) permits reinvestment benefit, if the sale proceeds/capital gains on sale of long-term capital assets are invested in the manner required by the section. Where a shareholder is made liable for deemed capital gains on amount received on liquidation of a company, is he eligible for reinvestment benefit under section 54E (now 54EC)? It was held that section 54E (now 54EC) would have application only where there is an actual transfer and not in a case, where there is only a deemed transfer. [*CIT* v *Ruby Trading Co. Pvt. Ltd.* (2003) 259 ITR 54 (Raj)].

Benefit under section 54EC, etc. available even on transfer of depreciable assets: Although as per section 50 the profit arising from the transfer of depreciable asset shall be a gain arising from the transfer of short term capital asset, hence short-term capital gain but section 50 nowhere says that depreciable asset shall be treated as short-term capital asset. Section 54E [or say 54EC or 54F, etc.] is in independent provision which is not controlled by section 50. If the conditions necessary under section 54E are complied with by the assessee, he will be entitled to the benefit envisaged in section 54E, even on transfer of depreciable assets held for more than 36 months. [*CIT* v *Assam Petroleum Industries* (*P.*) *Ltd.* (2003) 131 Taxman 699 (Gau). See also *CIT* v *ACE Builders Pvt. Ltd.* (2005) 144 Taxman 855 (Bom)].

On the same analogy benefit under section 54EC or 54F shall be available in the case of depreciate asset if these are held for more than 36 months.

(E) Capital Gain on transfer of asset, other than a residential house [Section 54F]: Any long-term capital gain, arising to an individual or HUF, from the transfer of any capital asset, *other than residential house property*, shall be exempt in full, if the entire net sales consideration is invested in purchase of one residential house within one year *before* or two years *after* the date of transfer of such an asset or in the construction of one residential house within three years after the date of such transfer. Where part of the net sales consideration is invested, it will be exempt proportionately. The above exemption shall be available only when the assessee does not own *more than one residential* house property *on the date of transfer* of such asset exclusive of the one which he has bought for claiming exemption under section 54F. Section 54 and 54F are comparable in many respects. Hence, the law and precedents relating to section 54 as to whether the house property on which investment is made is residential or not, the law relating to time limits, the precedent that construction could start earlier though completed within three years are all equally applicable for section 54F. Hence, for judicial decisions for section 54F, refer to the judicial decisions given under section 54.

(F) Capital Gain arising on transfer of assets in cases of Shifting of Industrial Undertaking from Urban area [Section 54G]: Section 54G

provides exemption on transfer of assets in the case of shifting of Industrial Undertaking from an urban area provided the transfer is effected in the course of, the shifting of such industrial undertaking to any area other than urban area and the assessee has within a period of one year before or 3 years after the date on which the transfer took place purchased a new Plant or Machinery for the purpose of business of Industrial undertaking, acquired land and building or constructed building and shifted the original asset and transferred the establishment of such undertaking to such area and, incurred expenses on such other purposes as may be specified in a scheme framed by the Central Govt. for the purpose of this section.

AMOUNT OF EXEMPTION: If the amount of the capital is greater than cost and expenses incurred in relation to all or any purposes, the difference between the amount of the capital gain and the cost of new asset shall be charged under section 45 as the income, if the amount of the capital gain is equal or less than the cost of new asset, the capital gain shall not be charged under section 45.

(G) Capital Gain on transfer of Assets in cases of shifting of Industrial undertaking from urban area to any Special Economic Zone (SEZ)[Section 54GA]: Section 54GA has been inserted to give exemption in case of shifting of an Industrial undertaking from urban area to a Special Economic Zone if the following conditions are satisfied:

1. A capital asset (being plant, machinery, land or building or any right in land or building) used for the purpose of an industrial undertaking situated in an urban area is transferred.

2. The transfer is effected in the course of or in the consequence of, the shifting of such undertaking to any Special Economic Zone may be situated in urban area or any other area

3. The assessee has within a period of one year before or three years after the date on which the transfer took place Purchased machinery or plant, acquired building or land or constructed building, shifted the original asset and transferred the establishment to SEZ and incurred expenses on such other purposes as may be specified in a scheme framed by the Central Govt for the purpose of this Section.

AMOUNT OF EXEMPTION: the amount of capital gain generated on transfer of capital assets in case of shifting of an industrial undertaking or the cost and expenses incurred in relation to all or any of the purposes mentioned whichever is lower.

SET OFF CAPITAL LOSS UNDER THE SAME HEAD OF INCOME – SECTION 70:

Short term capital loss can be set off against capital gain whether short term or long term

Long term capital loss can be set off only against long term Capital Gain

SET OFF LOSS FROM ONE HEAD AGAINST INCOME FROM ANOTHER HEAD – SECTION 71

Loss under the head “Capital Gain” cannot be set off against income under other heads of Income

Losses under the other heads can be set off against Income under the head Capital Gain except some specified losses like Speculation Business Loss etc.

CARRY FORWARD AND SET-OFF OF LOSS UNDER THE HEAD "CAPITAL GAIN" – Section 74

In case there is unabsorbed short term or long term loss under the head 'Capital Gain' for any assessment year, such loss shall be carried forward and set off as follows [Subject to filing of Return of Income within the time limit of Section 139(1)]:

Short Term Capital Loss can be carried forward for 8 assessment years and can be set off under the head Capital Gains whether Short term or Long Term.

Long Term Capital Loss can be carried forward for 8 assessment years and can be set off only against Long Term Capital Gain.

Long term capital gain on sale of any listed shares in stock exchange is exempt u/s. 10(38), therefore, any loss from such transactions shall not be eligible for set off or carry forward.

TAX ON SHORT-TERM CAPITAL GAINS [SECTION 111A]

(i) Any short term capital gain arising from the transfer of an equity share in a company or a unit of an equity oriented fund shall be liable to tax @15% if the following conditions are satisfied:
   a) The transaction of sale should take place through a recognised Stock Exchange; and
   b) Such transaction is chargeable to securities transaction tax (STT)

(ii) If the total income of an assessee includes such short term capital gain and other income, the tax payable by the assessee in such a case shall be the aggregate of-
   a) The amount of income-tax calculated on such short term capital gains @15% and
   b) The amount of income-tax payable on the balance amount of the total income as if such balance amount were the total income of the assessee.

(iii) In the case of an individual or a HUF, being a resident, where the total income as reduced by such short term capital gain is below the basic exemption limit, then the short term capital gain shall be reduced by the amount of basic exemption limit not exhausted by any other income and only the balance short term capital gain shall be chargeable to tax @15%. For a non-resident assessee adjusting of basic exemption limit against short term capital gains not be applicable, hence the entire amount of short term capital gain shall be subject to tax @15%. Where assessee paying special rate of tax then he is not entitled to claim any deduction provided under Chapter VI-A in respect of such capital gain.

(iv) The short term capital gain other than above shall be chargeable as per Normal Slab of Income of the Assessee.

TAX ON LONG-TERM CAPITAL GAINS [SECTION 112]

a) Where the total income of an assessee includes long term capital gains, tax are payable by the assessee @20% on such long term capital gains. However, where the total income as reduced by such long term capital gains is below the maximum amount which is not chargeable to income tax in case of Resident Individual and HUF then such long term capital gains shall be reduced by the amount by which the total income as so reduced falls short of the maximum amount which is not chargeable to income tax and the tax on Balance of such long term will be calculated @20%.

b) The proviso to section 112 states that where the tax payable in respect of any income arising from the transfer of listed securities or units or zero coupon bonds, being long term capital assets, exceeds 10% of the amount of capital gains before indexation, then such excess shall be ignored by the assessee.

c) The proviso of section 112 make it clear that the deduction under chapter VIA cannot be availed in respect of the long-term capital gains included in the total income of the assessee.

ISSUES IN CAPITAL GAINS

1) **Whether In case of Family Arrangement Assessee transfer of assets to other members will attract the Capital Gains?**

2) **Mr.A hold shares in Private Ltd Company since last 32 months and sold the same with profit, whether Gains would be taxable as Short term or a Long Term ?**

3) **Whether Share in a Firm is a capital assets ?**

4) **Mr. A , practicing CA sold his office premises after holding it for 20 years for 1 Crore on 31-12-2011. He has claimed depreciation on the same and WDV as on 01-04-2011 is Rs.5 lakhs. He has not purchased any new asset during the year and block ceases to exist. Please advise the on calculation of Capital Gains .Whether Mr. A can avail benefits of Investment U/s 54 EC in Investments in Bonds & Sec.54F ?**

5) **M/s ABC Pvt ltd has carried forward long term loss of Rs. 1 Crore and Business losses of Rs. 2 crore as on 31-03-2011. The Company sold Factory Building during 2011-12 for Rs.4 crore. WDV as on 01-04-2011 is Rs. 50 lakhs . Please advise on Tax calculation of the Company ?**

6) **Whether Silver utensils of the type which were used in the kitchen or in the dining room of the assessee were held to be personal effects and not capital assets ?**

7) **Whether Silver bars, sovereign, bullion and silver coins were held to be effects meant for personal use even if they are placed before Goddess Lakshmi at the time of Puja ?.**

8) **Whether Items of silverware including dinner plates of different sizes, finger bowls, jugs were held to be personal effects ?**

9) **Whether a large number of the same type of silver articles be treated as having been held for personal use ?**

10) What happens when business in shares was commenced by converting the shares into stock in trade of the business and subsequently the assessee sold these shares at profit?

11) **What happens when there is a transfer of an immovable property comprising of land and building where land is held for more than 36 months but the super structure is held for not more than 36 months?**

12) In Business of Professional for more than 36 months old, where Books are treated as plant & Machinery and depreciation is charged, leaving WDV as Nil, if sold subsequently what will be profit and how taxable?

13) **Whether redemption of mutual funds scheme on maturity constitutes transfer?**

14) **Whether redemption of bonds constitute transfer?**

15) Will mere delivery on the sale of motor vehicle is a transfer?

16) Will conversion of one currency into another currency constitute a transfer ?

17) **Will conversion of preference shares into equity shares constitute transfer?**

18) **Whether redemption of preference shares by a company is a transfer in the hands of shareholders?**

19) Where an assessee gives up the right to claim specific performance for purchase of immovable property will it be transfer:

20) If in pursuance to an agreement to sale, which is not registered as now required under the Registration Act, possession is handed and the consideration is received, will it be a transfer as defined under clause (v) of sub-section 47 of section 2?

21) **An owner of a property hands over the property to a developer without a written agreement. The AO contends that the contract is in the nature of a contract referred to in section 53A of the Transfer of Property Act and taxes it as income. Is the owner likely to succeed in appeal.**

22) **Can a reference be made where the assessee has maintained proper books of accounts?**

23) Having made a reference is the AO prevented from estimating the value on his own?

24) **Can a reference be made after the assessment is over**

25) **What is the effect of a Valuation Report received after the assessment is over**

26) Can a reference to a Valuation Officer be made without giving opportunity of hearing to the assesee?

27) **In January 2009, a listed company allots Compulsory Convertible Preference Shares (CCPS). CCPS are unlisted. In March 2010, these CCPS are converted into equity shares which are listed on BSE. What are the tax implications on conversion of**

preference shares into equity and subsequent sale of equity shares assuming they are sold in April 2010?

28) Whether on the death of one of the two partners, if the firm was not dissolved as contemplated under section 2(47) of the Act, will there be capital gains chargeable to Tax ?

29) Whether encashment of Indira Vikas Patras on their maturity is taxable under capital Gain, whether indexation is allowed?

30) Assessee, being a co-owner of land and building, sold out his right to construct three floors to different parties, Whether share of sale proceeds was liable for taxation as capital gains or as income from other sources?

31) Whether amount credited in capital account of retired partner upon revaluation of assets of firm is liable to be taxed as capital gain?

32) If assessee recd compensation in one year and enhanced compensation in next year whether AO can levy tax on enhanced compensation in the year of Compensation on accrual basis?

33) If a assessee-company gave land on lease for 72 years to a hotel for a lease rent fixed under agreement, together with refundable deposit of 2.5 crores received by assessee at 9 percent interest, Whether AO can treat the Deposit as sale consideration as lease is for a long period and possession is given?

34) Assessee recd advance towards compensation in August 2009 and the award for compensation was made in December 2010, in which year the same is taxable?

35) If a Society has constructed additional area on the existing building and allotted to the existing member by taking certain construction deposit and certain donation to the Common Amenity Fund on the principles of mutuality, whether there will be tax liability, if yes whether assessable as Capital Gain or Business or profession?.

36) A share Broker sold shares which are held as personal investment and showed the same in his Wealth Tax return as investment, whether AO is justify to Assess the gain as Business Income ?

37) Whether Insurance Claim received against destruction is liable to Capital Gain ?

38) In case of Cost of acquisition is 5 Lac, Advance Recd. Rs. 25 Lakh and forfeited Whether Liable as Capital Gain?

In this if Subsequently assets sold then what will be cost of Acquisition Whether Negative?

Point Of Taxation Under Service Tax Act

CA Akhil Kedia

POINT OF TAXATION RULES, 2011 [as amended by Finance Bill 2012]

G.S.R. (E).- In exercise of the powers conferred under clause (a) and clause (hhh) of subsection (2) of section 94 of the Finance Act, 1994, the Central Government hereby makes the following rules for the purpose of collection of service tax and determination of rate of service tax, namely,-

1. Short title and commencement.

(1) These rules shall be called the Point of Taxation Rules, 2011.

(2) They shall come into force on the 1st day of April, 2011.

2. Definitions.- In these rules, unless the context otherwise requires,-

(a) "Act" means the Finance Act, 1994 (32 of 1994);

(b) "associated enterprises" shall have the meaning assigned to it in section 92A of the Income Tax Act, 1961 (43 of 1961);

(ba) "change in effective rate of tax" shall include a change in the portion of value on which tax is payable in terms of a notification issued in the Official Gazette under the provisions of the Act, or rules made thereunder;

(c) "continuous supply of service" means any service which is provided, ***or to be provided continuously or on a recurrent basis, under a contract, for a period exceeding three months with the obligation for payment periodically or from time to time***, or where the Central Government, by a notification in the Official Gazette, prescribes provision of a particular service to be a continuous supply of service, whether or not subject to any condition;

(d) "invoice" means the invoice referred to in rule 4A of the Service Tax Rules, 1994 and shall include any document as referred to in the said rule;

(e) "point of taxation" means the point in time when a service shall be deemed to have been provided;

(f) "taxable service" means a service which is subjected to service tax, whether or not the same is fully exempt by the Central Government under Section 93 of the Act;

2A. Date of payment.-

For the purposes of these rules, "date of payment" shall be the earlier of the dates on which the payment is entered in the books of accounts or is credited to the bank account of the person liable to pay tax:

Provided that —

(A) the date of payment shall be the date of credit in the bank account when —

(i) there is a change in effective rate of tax or when a service is taxed for the first time during the period between such entry in books of accounts and its credit in the bank account; and

(ii) the credit in the bank account is after four working days from the date when there is change in effective rate of tax or a service is taxed for the first time; and

(iii) the payment is made by way of an instrument which is credited to a bank account,

(B) ***if any rule requires determination of the time or date of payment received, the expression "date of payment" shall be construed to mean such date on which the payment is received***;

3. Determination of point of taxation.-

For the purposes of these rules, unless otherwise provided, 'point of taxation' shall be,-

(a) the time when the invoice for the service provided or to be provided is issued:

Provided that where the invoice is not issued within the time specified in rule 4A of the Service Tax Rules, 1994, the point of taxation shall be date of such completion of provision of the service.

(b) in a case, where the person providing the service, receives a payment before the time specified in clause (a), the time, when he receives such payment, to the extent of such payment.

Provided that for the purposes of clauses (a) and (b), —

(i) ***in case of continuous supply of service where the provision of the whole or part of the service is determined periodically on the completion of an event in terms of a***

contract, which requires the receiver of service to make any payment to service provider, the date of completion of each such event as specified in the contract shall be deemed to be the date of completion of provision of service;

(ii) ***wherever the provider of taxable service receives a payment up to rupees one thousand in excess of the amount indicated in the invoice, the point of taxation to the extent of such excess amount, at the option of the provider of taxable service, shall be determined in accordance with the provisions of clause (a).***

Explanation .- For the purpose of this rule, wherever any advance by whatever name known, is received by the service provider towards the provision of taxable service, the point of taxation shall be the date of receipt of each such advance.

4. Determination of point of taxation in case of change of rate of tax.-

Notwithstanding anything contained in rule 3, the point of taxation in cases where there is a change in effective rate of tax in respect of a service, shall be determined in the following manner, namely:-

(a) in case a taxable service has been provided before the change of rate,-

(i) where the invoice for the same has been issued and the payment received after the change in effective rate of tax, the point of taxation shall be date of payment or issuing of invoice, whichever is earlier; or

(ii) where the invoice has also been issued prior to change in effective rate of tax but the payment is received after the change in effective rate of tax, the point of taxation shall be the date of issuing of invoice; or

(iii) where the payment is also received before the change in effective rate of tax, but the invoice for the same has been issued after the change in effective rate of tax, the point of taxation shall be the date of payment;

(b) in case a taxable service has been provided after the change in effective rate of tax,-

(i) where the payment for the invoice is also made after the change in effective rate of tax but the invoice has been issued prior to the change in effective rate of tax, the point of taxation shall be the date of payment; or

(ii) where the invoice has been issued and the payment for the invoice received before the change in effective rate of tax, the point of taxation shall be the date of receipt of payment or date of issuance of invoice, whichever is earlier; or

(iii) where the invoice has also been raised after the change in effective rate of tax, but the payment has been received before the change in effective rate of tax, the point of taxation shall be date of issuing of invoice.

~~***Explanation***.- For the purposes of this rule, "change in effective rate of tax" shall include a change in the portion of value on which tax is payable in terms of a notification issued under the provisions of Finance Act, 1994 or rules made thereunder.".~~

5. Payment of tax in cases of new services.-

Where a service is taxed for the first time, then, –

(a) no tax shall be payable to the extent the invoice has been issued and the payment received against such invoice before such service became taxable;

(b) no tax shall be payable if the payment has been received before the service becomes taxable and invoice has been issued ***within fourteen days of the date when the service is taxed for the first time.***

~~*6. Determination of point of taxation in case of continuous supply of service.-*~~

~~Notwithstanding anything contained in rules 3, 4 or 8, in case of continuous supply of service, the `point of taxation' shall be,-~~

~~(a) the time when the invoice for the service provided or to be provided is issued:~~

~~Provided that where the invoice is not issued within fourteen days of the completion of the provision of the service, the point of taxation shall be date of such completion.~~

~~(b) in a case, where the person providing the service, receives a payment before the time specified in clause (a), the time, when he receives such payment, to the extent of such payment.~~

~~***Explanation 1. –*** For the purpose of this rule, where the provision of the whole or part of the service is determined periodically on the completion of an event in terms of a contract, which requires the service receiver to make any payment to service provider, the date of completion of~~

each such event as specified in the contract shall be deemed to be the date of completion of provision of service.

Explanation 2.- For the purpose of this rule, wherever any advance, by whatever name known, is received by the service provider towards the provision of taxable service, the point of taxation shall be the date of receipt of each such advance.

7. Determination of point of taxation in case of specified services or persons.-

Notwithstanding anything contained in these rules, the point of taxation in respect of the persons required to pay tax as recipients of service under the rules made in this regard in respect of services notified under sub-section (2) of section 68 of the Act, shall be the date on which payment is made:

Provided that, where the payment is not made within a period of six months of the date of invoice, the point of taxation shall be determined as if this rule does not exist:

Provided further that in case of "associated enterprises", where the person providing the service is located outside India, the point of taxation shall be the date of debit in the books of account of the person receiving the service or date of making the payment whichever is earlier.

Notwithstanding anything contained in these rules, the point of taxation in respect of,-

(a) the services covered by sub-rule (1) of rule 3 of Export of Services Rules, 2005;

(b) the persons required to pay tax as recipients under the rules made in this regard in respect of services notified under sub-section (2) of section 68 of the Finance Act, 1994;

(c) individuals or proprietary firms or partnership firms providing taxable services referred to in sub-clauses (p), (q), (s), (t), (u), (za), (zzzzm) of clause (105) of section 65 of the Finance Act, 1994, shall be the date on which payment is received or made, as the case may be:

Provided that in case of services referred to in clause (a), where payment is not received within the period specified by the Reserve Bank of India, the point of taxation shall be determined, as if this rule does not exist.

Provided further that in case of services referred to in clause (b) where the payment is not made within a period of six months of the date of invoice, the point of taxation shall be determined as if this rule does not exist.

~~Provided also that in case of "associated enterprises", where the person providing the service is located outside India, the point of taxation shall be the date of credit in the books of account of the person receiving the service or date of making the payment whichever is earlier.~~

8. Determination of point of taxation in case of copyrights, etc. .-

In respect of royalties and payments pertaining to copyrights, trademarks, designs or patents, where the whole amount of the consideration for the provision of service is not ascertainable at the time when service was performed, and subsequently the use or the benefit of these services by a person other than the provider gives rise to any payment of consideration, the service shall be treated as having been provided each time when a payment in respect of such use or the benefit is received by the provider in respect thereof, or an invoice is issued by the provider, whichever is earlier.

8A. Determination of point of taxation in other cases.-

Where the point of taxation cannot be determined as per these rules as the date of invoice or the date of payment or both are not available, the Central Excise officer, may, require the concerned person to produce such accounts, documents or other evidence as he may deem necessary and after taking into account such material and the effective rate of tax prevalent at different points of time, shall, by an order in writing, after giving an opportunity of being heard, determine the point of taxation to the best of his judgment.

9. Transitional Provisions.-

Nothing contained in these rules shall be applicable,-

(i) where the provision of service is completed; or

(ii) where invoices are issued prior to the date on which these rules come into force.

Provided that services for which provision is completed on or before 30th day of June, 2011 or where the invoices are issued upto the 30th day of June, 2011, the point of taxation shall, at the option of the taxpayer, be the date on which the payment is received or made as the case may be.

Changes in Service Tax Rules, 1994, visa-a-vis POT Rules

[as amended by Finance Bill 2012]

1. Rule 4A is amended whereby the time limit for issuance of invoice is extended from 14 days to 30 days from the date of completion of service or receipt of payment whichever is earlier. (In case of Banking and Financial services time limit for issuance of invoice is 45 days).

2. 6th proviso to Rule 4A is inserted whereby no invoice is required to be issued where the service provider receives an amount upto Rs.1,000/- in excess of the amount indicated in the invoice & such service provider has opted to determine the point of taxation as per the POTR, 2011. Corresponding amendments are made in Rule 3 of the POTR, 2011.

   (As clarified by CBEC vide Letter DOF No.334/1/2012-TRU dated 16/03/2012 in Para D.10, the above said provision is expected to address the accounting problems faced by service providers in telecommunications, credit card businesses who regularly receive minor excess payments from their customers).

3. 3rd proviso to Rule 6(1) inserted whereby in case the service provider does not receive the payment in convertible foreign exchange within the time limit prescribed by RBI (including the extended period), he is required to pay service tax in respect of the taxable services exported. Corresponding amendments are made in Rule 7 in the Point of Taxation Rules, 2011

4. 4th proviso to Rule 6(1) is inserted whereby individuals & partnership firms whose aggregate value of taxable services provided from all the registered premises is Rs.50 Lacs or less in the previous financial year are granted an option to pay service tax on receipt basis in respect of value of taxable services provided or to be provided upto Rs.50 Lacs in current financial year.

   [Under the existing POTR, 2011, the option to pay service tax on receipt basis was allowed only to individuals/proprietary firms/partnership firms providing following 8 prescribed services which is now extended to individuals/partnership firms rendering any taxable services whose aggregate value of taxable services provided from all the registered premises is Rs.50 Lacs or less in the previous financial year. Corresponding amendments are made in Rule 7 in the POTR, 2011.]

Other Provisions under service tax visa-a-vis POT Rules

1. **Cenvat Credit Rules, 2004 :** In alignment with POT rules, where service tax liability arises on accrual basis, It is now permissible to take Cenvat credit on the basis of invoice received from Input service provider / or others for the purpose of taking CENVAT credit. Erstwhile pre-requisite of payment to be made to service provider is now not required w.e.f 01.04.2011.

   However care is to be taken that payment to these input service providers is to be made within 90 days from the date of Invoice, failing which the CENVAT credit so taken has to be reversed. This Cenvat can be latter taken on actual payment been made to input service provider.

2. **Threshold exemption benefit** : w.e.f. 01.04.2012, the explanation in Notification No. 6/2005-Service tax dated 01.03.2005 providing the benefit of threshold exemption limit has been aligned with the taxable service definition as provided in the POT Rules. Now the said explanation provides that

   "aggregate value" means the sum total of value of taxable services charged in the first consecutive invoices issued or required to be issued, as the case may be, during a financial year but does not include value charged in invoices issued towards such services which are exempt from w hole of service tax leviable thereon under section 66 of the said Finance Act or under any other notification.

Circular No.154/5/ 2012 – ST

FNo 334/1/2012- TRU
Government of India
Ministry of Finance
Department of Revenue
Central Board of Excise and Customs
Tax Research Unit
Room No 146, North Block, New Delhi

Dated: 28th March 2012

To

Chief Commissioner of Customs and Central Excise (All)
Chief Commissioner of Central Excise & Service Tax (All)
Director General of Service Tax
Director General of Central Excise Intelligence
Director General of Audit

Madam/Sir,

Subject: - Clarification on Point of Taxation Rules - regarding.

1. Notification No.4/2012 - Service Tax dated the 17th March 2012 has amended the Point of Taxation Rules 2011 w.e.f. 1st April 2012, inter- alia, amending Rule 7 which applied to individuals or proprietary firms or partnership firms providing taxable services referred to in sub-clauses (g), (p), (q), (s), (t), (u), (za) and (zzzzm) of clause (105) of section 65 of the Finance Act, 1994. Rule 7 determined the point of taxation in such cases as the date of receipt of payment. The provisions have been amended both in the Point of Taxation Rules 2011 and the Service Tax Rules 1994 such that from 1st April 2012 the payment of tax shall be allowed to be deferred till the receipt of payment upto a value of Rs 50 lakhs of taxable services. The facility has been granted to all individuals and partnership firms, irrespective of the description of service, whose turnover of taxable services is fifty lakh rupees or less in the previous financial year.

2. Representations have been received, in respect of the specified eight services, requesting clarification on determination of point of taxation in respect of invoices issued on or before 31st March 2012 where the payment has not been received before 1st April 2012.

3. The issue has been examined. For invoices issued on or before 31st March 2012, the point of taxation shall continue to be governed by the Rule 7 as it stands till the said date. Thus in respect of invoices issued on or before 31st March 2012 the point of taxation shall be the date of payment.

4. Trade Notice/Public Notice may be issued to the field formations accordingly.

5. Please acknowledge the receipt of this circular. Hindi version to follow.

(Shobhit Jain)
OSD, TRU
Fax: 011-23092037

CIRCULAR NO

158/9/ 2012-ST, Dated: May 8, 2012

Subject : - Clarification on Rate of Tax - regarding.

1. The rate of service tax has been restored to 12% wef 1st April 2012. Representations have been received requesting clarification on the rate of tax applicable wherein invoices were raised before 1st April 2012 and the payments shall be after 1st April 2012. Clarification has been requested in case of the 8 specified services provided by individuals or proprietary firms or partnership firms, to which Rule 7 of Point of Taxation Rules 2011 was applicable and services on which tax is paid under reverse charge.

2. The rate of service tax prevalent on the date when the point of taxation occurs is rate of service tax applicable on any taxable service. In case of the 8 specified services and services wherein tax is required to be paid on reverse charge by the service receiver the point of taxation is the date of payment. Circular No 154/5/2012–ST dated 28th March 2012 has also clarified the same. Thus in case of such 8 specified services provided by individuals or proprietary firms or partnership firms and in case of services wherein tax is required to be paid on reverse charge by the service receiver, if the payment is received or made, as the case maybe, on or after 1st April 2012, the service tax needs to be paid @12%.

3. The invoices issued before 1st April 2012 may reflect the previous rate of tax (10% and cess). In case of need, supplementary invoices may be issued to reflect the new rate of tax (12% and cess) and recover the differential amount. In case of reverse charge the service receiver pays the tax and takes the credit on the basis of the tax payment challan. Cenvat credit can be availed on such supplementary invoices and tax payment challans, subject to other restrictions and conditions as provided in the Cenvat Credit Rules 2004.

4. Trade Notice/Public Notice may be issued to the field formations accordingly.

5. Please acknowledge the receipt of this circular. Hindi version to follow.

F.No 354/69/2012- TRU

(Dr Shobhit Jain)

OSD, TRU