Tax Litigation in India, an update
India Tax Workshop 2011

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Moderator – Sunil Kapadia
Direct Tax Litigation
An update
India Tax Workshop 2011
10 - 12 November 2011

Vijay Iyer
1. An Overview
2. Corporate Tax Litigation Update
3. Transfer Pricing Litigation Update
An Overview of Direct Tax Litigation in India
Direct Tax Litigation in India

► As per recent report of the CAG (Comptroller and Auditor General of India)
  ► Rs 2.2 lakh crore is locked up in appeals at various levels till the end of 2008-09.
  ► Most of these cases are where the Government is the Appealant

► Based on estimates, the total number of cases in litigation is approximately 60,000 out of which the Government is in appeal in about 50,000 cases and the taxpayers are in appeal in about 10,000 cases

► With the tax authorities getting more and more aggressive, the number of cases going up to the courts is continuously rising

► Most multinationals have some form of tax litigation pending at some forum at any point in time
1. Permanent Establishment issues
2. Tax on sales activities
3. Tax on procurement activities
4. Construction PE
5. Taxation of secondments
6. Other issues
PE taxation continues to occupy significant focus in India

- Spate of rulings from Judicial Authorities (Authority for Advance Rulings, Tribunals and Courts)
- Rulings indicate outcomes are fact specific; although, at times divergent views taken
- Aggressiveness visible where commercial activities / part thereof carried out in India
- Tax surveys an important tool used by tax administration to unearth facts e.g. Rolls Royce

Key issues of importance in PE taxation based on recent pronouncements:

- Sales and distribution activities
- Procurement activities
- Construction activities
- Secondment
Case Study – Sales and distribution activities

F Co has a LO in India for “sales and marketing activities”

Activities of LO:
- Identification of customers and understanding requirements
- Participate in negotiations
- Indian customers place order directly on F Co
- F Co supplies goods directly to Indian customers
- LO assists in logistics

Would activities of LO constitute “Agency PE” of F Co in India

- Bangalore ITAT confirms Korean company’s LO is a PE in India
  - PE activities neither preparatory / auxiliary

- Karnataka High Court confirms ITAT findings
Case Study – Procurement activities

F Co is a wholesaler and retailer of goods with worldwide operations; creates innovative products and does R&D outside India

- F Co purchases manufactured goods from vendors worldwide including India
- F Co has LO in India to support its procurement function. Activities include:
  - Vendor identification/development/recommendation/monitoring
  - Collection of information/samples
  - Quality control and uploading material prices into product data management systems
  - Coordinating and acting as communication channel between vendors and F Co

Would activities of LO constitute PE of F Co in India

- Authority for Advance Rulings held that LO creates fixed place PE of F Co
  - Activities of LO result in PE under Article 5(1); not confined to only purchase of goods in India for exports
  - LO practically involved in all activities except sales
  - Under Article 7, income attributable to LO is taxable in India
Case Study – Construction activities

Several contracts

<table>
<thead>
<tr>
<th>Location</th>
<th>Contract</th>
<th>Duration</th>
</tr>
</thead>
<tbody>
<tr>
<td>Location A</td>
<td>Contract 1</td>
<td>3 Months</td>
</tr>
<tr>
<td>Location B</td>
<td>Contract 3</td>
<td>4 Months</td>
</tr>
<tr>
<td>Location C</td>
<td>Contract 2</td>
<td>4 Months</td>
</tr>
</tbody>
</table>

Sub - contracting

<table>
<thead>
<tr>
<th>Location</th>
<th>Contract</th>
<th>Duration</th>
</tr>
</thead>
<tbody>
<tr>
<td>F Co Contract Site</td>
<td>3 Months</td>
<td></td>
</tr>
<tr>
<td>I Co office</td>
<td>4 Months</td>
<td></td>
</tr>
</tbody>
</table>

Is Construction PE created as aggregate time spent in India exceeds 183 days?

- True test is interconnection and interrelationship, in addition to geographical proximity and commercial nexus
- If the contracts are in different locations and not so inextricably interconnected, there should be no aggregation of time

Should time spent by I Co be aggregated to determine whether F Co has construction PE?

- Place of work of I Co far away from site
- I Co’s facility not at disposal of F Co
- AAR held that I CO time should not be included
Case Study – Secondment – Two Conflicting Views

- Certain key employees of F Co seconded to I Co (a WOS) to carry out day to day business activities of I Co
- Terms of secondment
  - Personnel remain on F Co’s payroll
  - Salary of personnel paid by F Co and cross charged to I Co
  - Personnel work under supervision, control and direction of I Co
- Personnel return to F Co on completion of secondment with I Co

View 1
- Held that arrangement is not secondment but for provision of managerial services
- Cross charge of salary has been held as fees for included services as per India-US treaty

View 2
- Held that seconded personnel are employees of I Co for all practical purposes
- Accordingly, the secondment would not create a service PE as per India-US treaty

Whether potential use of a PE blocker entity can help??
Other Issues

► Implication of Gift of Shares of an Indian company
  ► The transfer of shares held in Indian subsidiary by the applicant to its Singapore subsidiary pursuant to a scheme of business re-organisation without consideration, constitutes ‘gift’, Hence, it would not attract capital gains tax liability in India

► Mauritius Treaty Implications
  ► By virtue of the Mauritian DTAA, the capital gain arising to taxpayer was not taxable in India

► Taxability of discount on promissory notes
  ► Discounting of bill amounts to purchase of negotiable instrument and it does not result into any debtor/creditor or lender/borrower relationship. Thus, discounting cost is not in the nature of interest and hence not taxable in India

► Taxability of data processing fees
  ► Under India-UK Treaty, since there is no transfer of technical skill or know-how while rendering the service, the UK entity is not rendering any managerial or technical services to the Applicant and therefore the payment received is not liable to tax
1. Current Landscape
2. Judicial Precedence on Key TP Issues
3. Litigation Road Ahead
4. MAP & APA Update
5. Concluding Thoughts
Current landscape

► Transfer Pricing and International Tax are focus areas for the tax department
  ▶ Legislative changes to plug potential loopholes
  ▶ Increasingly aggressive positions adopted by the revenue
  ▶ Augmented staffing and training of officers
► TP audits are widening in their scope and are more intrusive
  ▶ Request for higher level of documentation and access to operational personnel
  ▶ Arming of tax officials with greater powers of investigation
► Newer areas of challenge
  ▶ Intangibles, Intra-group services, cross border financing arrangements
► Growing cross-country collaboration
  ▶ Several exchange of information treaties effected
  ▶ Extensive interaction with OECD officials
Current landscape

► Build up of cases at ITAT level
  ► DRP functioning for AY 2006-07 did not achieve stated purpose
  ► Lack of fact finding and investigation by the DRP
  ► Absence of speaking orders at the DRP level

► Experience at ITAT
  ► Initial trend generally in favor of taxpayer
    ► Recent decisions indicate a mixed/ balanced outcome
  ► A number of “reasonable” judgments; but some level of unpredictability/ inconsistency
  ► Efforts invested in understanding the Functional, Asset & Risk analysis of the taxpayer and comparable companies
  ► Focus on strong footprint of evidence from first stage
## Judicial precedence on key TP issues

<table>
<thead>
<tr>
<th>Issues covered</th>
<th>Judgments</th>
<th>Key takeaway</th>
</tr>
</thead>
<tbody>
<tr>
<td>Erosion of tax base</td>
<td>▶️ AAR - Instrumentarium Corporation&lt;br&gt;▶️ Coca Cola Branch Office&lt;br&gt;▶️ Jindal Dyechem Industries (favorable)&lt;br&gt;▶️ Indo American Jewellery (favorable)</td>
<td>Diverse views on the subject</td>
</tr>
<tr>
<td>No taxable income – Non applicability of TP provisions</td>
<td>▶️ AAR - Dana Corporation&lt;br&gt;▶️ AAR - Amiantit International Holding Ltd&lt;br&gt;▶️ Venenburg Group BV&lt;br&gt;▶️ VNU International BV&lt;br&gt;▶️ Whirlpool India Holdings Ltd&lt;br&gt;▶️ Deere &amp; Co.&lt;br&gt;▶️ Praxair Pacific Ltd.</td>
<td>TP provisions were not applicable, where income was not taxable in India</td>
</tr>
<tr>
<td>Importance of FAR analysis emphasised</td>
<td>▶️ Mentor Graphics Pvt Ltd&lt;br&gt;▶️ E-Gain Communications Pvt Ltd&lt;br&gt;▶️ Sony India Pvt Ltd&lt;br&gt;▶️ Philips Software Center Pvt Ltd&lt;br&gt;▶️ Honeywell Automation India Ltd&lt;br&gt;▶️ Quark Systems Pvt. Ltd.&lt;br&gt;▶️ BP India Services Pvt. Ltd.</td>
<td>Robust FAR analysis is critical for defense</td>
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</table>
Judicial precedence on key TP issues (Cont’d…)

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<th>Issues covered</th>
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<tr>
<td>TNMM analysis at transactional level</td>
<td>► UCB India Pvt Ltd&lt;br&gt;► Global Vantedge&lt;br&gt;► Development Consultants Pvt Ltd&lt;br&gt;► Twinkle Diamonds&lt;br&gt;► Starlite&lt;br&gt;► Indo-American Jewellery&lt;br&gt;► Ranbaxy Laboratories Ltd&lt;br&gt;► Star India Ltd&lt;br&gt;► Symantec Software Solutions Private Ltd&lt;br&gt;► Exxon Mobil</td>
<td>Judgments in favor of transactional level comparability. However at times, aggregated approach may give a far reasonable result</td>
</tr>
<tr>
<td>TP adjustment to be restricted to AE transactions only</td>
<td>► Il Jin Electronics (I) Pvt Ltd&lt;br&gt;► T Two International Pvt Ltd</td>
<td>ITAT judgments currently support this proposition</td>
</tr>
<tr>
<td>Adjustment on account of differences in accounting practices</td>
<td>► Schefenacker Motherson Ltd&lt;br&gt;► E-Gain Communications Pvt Ltd</td>
<td>Upfront evaluation of various comparability criteria is recommended</td>
</tr>
<tr>
<td>Use of comparables having related party transactions</td>
<td>► Sony India Pvt Ltd (10-15%)&lt;br&gt;► Philips Software Center Pvt Ltd (Re. 1)&lt;br&gt;► Global Logic India Pvt Ltd (25%)&lt;br&gt;► Avaya India Pvt Ltd (15%)</td>
<td>Diverse views on threshold for RPT computation</td>
</tr>
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<tr>
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<tr>
<td>Applicability of +/-5% range in case of one price</td>
<td>► Perot Systems TSI</td>
<td>Relief of +/-5% is available only when more than one price is determined by the most appropriate method</td>
</tr>
<tr>
<td></td>
<td>► Essar Steel Ltd</td>
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<tr>
<td>Whether +/-5% range is a standard deduction</td>
<td>► Development Consultants</td>
<td>Diverse views on the subject</td>
</tr>
<tr>
<td></td>
<td>► Skoda Auto India Pvt Ltd</td>
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<tr>
<td></td>
<td>► Sony India Pvt Ltd.</td>
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<tr>
<td></td>
<td>► Philips Software Centre P. Ltd</td>
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<tr>
<td></td>
<td>► Schefenacker Motherson Ltd</td>
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<td>► Toshiba India Ltd</td>
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<td>► UE Trade Corporation (India) Pvt Ltd</td>
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<td>► Cummins India Ltd</td>
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<td>► SAP Labs India Pvt Ltd</td>
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<td>► BASF India Ltd</td>
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<td>► Technimount Icb Pvt Ltd</td>
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<td></td>
<td>► Marubeni India Pvt Ltd (not allowed)</td>
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<tr>
<td></td>
<td>► Global Vantedge (not allowed)</td>
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<td></td>
<td>► ST Microelectronics (not allowed)</td>
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<tr>
<td>Whether +/-5% benefit is applicable in case ALP is determined using only one method</td>
<td>▶ ADP Pvt Ltd (+/-5% benefit not allowed if ALP determined using one method)</td>
<td>Diverse views on the subject.</td>
</tr>
<tr>
<td></td>
<td>▶ Electrobug Technologies Ltd (+/-5% benefit allowed even if ALP determined using one method)</td>
<td></td>
</tr>
<tr>
<td>Use of multi-year data</td>
<td>▶ Aztec Software and Technology</td>
<td>Mandatory requirement of law for use of current FY data, cannot be dispensed with, unless use of multiple year data adds value to the TP analysis. Burden of proof on taxpayer</td>
</tr>
<tr>
<td></td>
<td>▶ Honeywell Automation India Ltd</td>
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<td></td>
<td>▶ Customer Services India (P) Ltd</td>
<td></td>
</tr>
<tr>
<td></td>
<td>▶ Skoda Auto India Ltd</td>
<td></td>
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<tr>
<td></td>
<td>▶ Panasonic India Pvt Ltd (use of single year data allowed)</td>
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<tr>
<td></td>
<td>▶ ST Microelectronics Pvt. Ltd.</td>
<td></td>
</tr>
<tr>
<td>CUP is the most preferred method</td>
<td>▶ Clearplus India Pvt Ltd</td>
<td>CUP is the most direct method for determining ALP, provided product comparability is established</td>
</tr>
<tr>
<td></td>
<td>▶ Serdia Pharmaceuticals</td>
<td></td>
</tr>
<tr>
<td>Interest free loan -AAR</td>
<td>▶ Instrumentarium Corporation</td>
<td>Determining the effect of interest free loan is outside the ambit , AAR- directed to comply with TP provision.</td>
</tr>
</tbody>
</table>
## Judicial precedence on key TP issues (Cont’d…)

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</table>
| Grant of interest free loan / use of RBI or Govt. of India approval to conform arm’s length condition | ► Perot Systems TSI  
► VVF Limited                                                                 | Both judgments against taxpayers. Robust economic analysis necessary for financing transactions |
| Corporate Guarantee – Not an international transaction                          | ► Four Soft Ltd. (favorable)                                               | Not an international transaction, notional commission is deleted.           |
| Tax holiday benefit – if taxpayer does voluntary TP adjustment                | ► I-Gate Global Solutions Ltd                                              | Unlike the adjustment made by the revenue, a suo-moto adjustment by taxpayer would not prejudice the tax holiday benefit |
| DRP should provide cogent reasons/ speaking order                              | ► Geodis Overseas (P) Ltd  
► Agilent Technologies India Pvt Ltd  
► Vodafone Essar Ltd  
► Colt Technology Services India Pvt Ltd  
► India Gypsum Limited  
► FIS Global Business Solutions India P. Ltd                                    | DRP should provide cogent reasons/ pass speaking order                      |
| Management fees                                                                | ► Gemplus India Pvt Ltd                                                    | Documentation to support benefit derived/ services received is essential   |
## Judicial precedence on key TP issues (Cont’d…)

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<tr>
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<th>Key takeaway</th>
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<tbody>
<tr>
<td>Marketing intangibles</td>
<td>Maruti Suzuki India Ltd</td>
<td>Bright-line approach</td>
</tr>
<tr>
<td>Abnormal/ supernormal profitability of comparables</td>
<td>Agnity India Technologies Pvt Ltd, Adobe Systems India Pvt Ltd, Quark Systems Pvt Ltd, Sapient Corporation Pvt Ltd, Exxon Mobil (no automatic exclusion of supernormal profit companies)</td>
<td>Diverse views but generally companies earning abnormal profits should not be treated as comparables.</td>
</tr>
<tr>
<td>Whether assessee making losses reflect incorrect TP policy</td>
<td>Ekla Appliances, MSS India, Carraro India Ltd</td>
<td>Presence of losses does not imply incorrect TP policy</td>
</tr>
<tr>
<td>Use of foreign tested party / comparables</td>
<td>Development Consultants Pvt Ltd (allowed use of foreign tested party), Ranbaxy Laboratories Ltd (not allowed), Global Vantedge Pvt Ltd (not allowed)</td>
<td>Diverse views on the subject – further development to be seen Globally accepted view – Tested party should be the lesser complex entity</td>
</tr>
</tbody>
</table>
### Judicial precedence on key TP issues (Cont’d…)

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<thead>
<tr>
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</table>
| Interest on outstanding receivables              | ► Logix Micro Systems Ltd (unfavorable)  
► Nimbus Communications Ltd (favorable)                                                                                       | Diverse views on the subject                                                                      |
| Start-up / Idle capacity and working capital adjustment | ► Global Vantedge Pvt. Ltd.  
► Vertex Customer Services  
► Sony India Pvt Ltd  
► Fiat India Pvt Ltd  
► E.I. Dupont India P. Ltd                                                                                   | All judgments in favour of taxpayers. Upfront evaluation of such adjustments is recommended    |
| Applicability of turnover filter                  | ► E-Gain Communications Pvt Ltd  
► Indo American Jewellery  
► Symantec Software Solutions Private Ltd (rejected use of turnover filter)  
► DHL express (India) Pvt Ltd (rejection of companies with turnover < 20% of assessee’s turnover) | Diverse views on the subject                                                                      |
| Cost contribution arrangement                     | ► Dresser Rand India Pvt. Ltd. (favorable)                                                                           | TPO has no authority to question the commercial wisdom of the assessee.                           |
**Judicial precedence on key TP issues (Cont’d…)**

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<th>Key takeaway</th>
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<tr>
<td><strong>Penalty for concealment of income [271(1)(c)] – TP addition</strong></td>
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<td></td>
</tr>
</tbody>
</table>
| ► Change in method | ► Firmenich Aromatics India P. Ltd.  
| | ► RBS Equities India P. Ltd.  
| | (for Change in method)  
| | (favorable) | A bonafide difference of opinion, cannot constitute furnishing inaccurate particulars of income, hence no concealment of penalty on such TP addition. |
| ► Reducing rate of commission from 20% to 12% | ► Hinduja Ventures Ltd. (Commission rate from 20% to 12%) (favorable) | Since the treatment of same is debatable issue and TP study is being review by a reputed consultant, hence no penalty as ALP is determined in good faith and with due diligence. |
| ► Extraordinary item - provision for doubtful debt (As AE went in to winding up) – part of operating cost? | ► Vertex Customer Services (favorable) | |
# Judicial precedence on key TP issues (Cont’d…)

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<tr>
<th>Issues covered</th>
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<th>Key takeaway</th>
</tr>
</thead>
<tbody>
<tr>
<td>Penalty for non-filing of Form 3CEB</td>
<td>► Open Technologies India Pvt Ltd ► JJ Exporters Ltd ► G I Systems Org (India) Pvt. Ltd (penalty sustained on account of failure to furnish reasonable reason)</td>
<td>No penalty if reasonable cause for not furnishing Form 3CEB on time</td>
</tr>
<tr>
<td>Penalty for non maintenance of documentation</td>
<td>► Cargill India Pvt Ltd ► Philips Software Centre Pvt Ltd ► UCB India Pvt Ltd</td>
<td>Substantive compliance should be the criteria and if the deficiency in maintenance does not materially impact the ALP, then penalty should not be levied</td>
</tr>
<tr>
<td>Reimbursement</td>
<td>► British Gas India (favorable)</td>
<td>Before adding any mark up, nature and purpose of expense vis-à-vis nature of services rendered, remanded the matter back to AO.</td>
</tr>
<tr>
<td>TP adjustment based on the assumption of accrual benefit to AE</td>
<td>► Patni Computer System Ltd (favorable)</td>
<td>Since no evidence of any tangible benefit accrued to AE, consultancy fees cannot be allocated to the AE.</td>
</tr>
</tbody>
</table>
Litigation road ahead

► Use of writ against non-speaking orders
► Use of Miscellaneous Applications (MAs) to correct adverse / incorrect observations by the Tribunal
► Appeal to High Court against ITAT orders
  ► Typically only ‘matter of law’ is admitted
  ► Requires careful consideration of issues, evidence already on record and framing of grounds
MAP & APA update

**MAP**

- Two rounds concluded between India-US Competent Authority for technology/BPO companies
  - First round: around 18-24 percent, depending upon year, nature of service
  - Second round: attempts to negotiate higher mark-ups for “high value” services
- Engagement expected soon with Japanese & UK Cas
- Indian position on availability of MAP for TP disputes in the absence of Article 9(2) in the tax treaty

**APAs**

- Government working on guidelines for APAs envisaged in DTC
  - TPOs involved in the process
  - Knowledge & experience assimilation meeting with Canadian tax authorities
  - Focus area during recent Government of India & OECD seminar in Delhi
Concluding thoughts

► Aggravation of uncertain TP environment
  ► Removal of tolerance range of +/- 5 percent
  ► Absence of any safe harbour provisions so far
  ► Enhanced investigative powers of TPOs

► TP controversy to continue unabated
  ► Legal issues to be settled only at the higher court levels
  ► New areas of challenge like intangibles
  ► Interplay with PEs and Indirect taxes

► Need for a proactive approach to documentation and audit defense

► APAs could be a game changer
Thank you
Emerging trends in Indirect tax law and litigation

India Tax Workshop 2011
10 - 12 November 2011

Prasad Paranjape
Inside

- Indirect Tax litigation: Future
- Export of Services
- Goods vs. Service
- Availment of Cenvat Credit on angles, channel, beams etc
- Customs Exemption Notification
- Renting of Immovable Property
- Managing Indirect Tax Litigation
- Harmonization of Indirect Tax Litigation in GST regime
Indirect Tax Litigation: Future
Indirect税 Litigation: Future

Indirect tax target/ collection
(approx. numbers)*

<table>
<thead>
<tr>
<th>F.Y.</th>
<th>Centre (INR)</th>
<th>State (INR)</th>
<th>Total (INR)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009-10</td>
<td>2,45,000</td>
<td>2,10,000</td>
<td>4,55,000</td>
</tr>
<tr>
<td>2010-11</td>
<td>3,40,000</td>
<td>2,50,000</td>
<td>6,00,000</td>
</tr>
<tr>
<td>2011-12 (Target)</td>
<td>4,00,000</td>
<td>3,00,000</td>
<td>7,00,000</td>
</tr>
</tbody>
</table>

* Based on secondary sources of information such as internet, articles, newspapers etc
IDT Litigation: Future (Contd.)

► Status of tax disputes
  ► Over 30,000* direct and indirect tax disputes pending before High Courts and Supreme Courts involving tax dispute of USD 40,000* million
  ► Over 40,000* indirect tax appeals pending before CESTAT
  ► Additionally, numerous Sales Tax/ VAT cases pending in Courts/ Tribunals

► Measures to reduce the disputes/ faster dispute resolution:
  ► Recently, circular issued to enhance the monetary limit of tax demanded for filing appeals by Revenue (Supreme Court Rs. 5 lakh, High Court Rs. 2 lakh, Tribunal Rs. 1 lakh) to reduce number of cases
  ► Establishment of National Tax Tribunal – future uncertain!!
  ► Another Tax Dispute Settlement Scheme before GST?

* Based on secondary sources of information such as internet, articles, newspapers etc
Export of Services
Export of Services

► Various amendments (in relation to Export of Service Rules, 2005) to clarify the meaning ‘export of service’
  ► Endeavour of the legislature to give tax benefit to exporters of service

► However, on account of disputes raised by Tax Authorities, the issues surrounding ‘export of service’ is subject to serious litigation
  ► In the recent case of Paul Merchants Ltd vs CCE, Ludhiana 2011-TIOL-1448-CESTAT- Del, the matter has been referred to Third Member;
  ► Microsoft Corporation India Pvt Ltd vs Commissioner Service tax, matter was heard by the Tribunal (New Delhi), however decision pending
Goods vs. Service
Goods vs. Service

► Supply of goods by Service provider
  ► Favorable judgments for service provider where Courts relied on ‘dominant intention test’ and held that supply of goods incidental to service becomes part of service and not liable to VAT
    ► Idea Mobile Communication Ltd vs CCE [2011-VIL-17-SC-ST];
    ► Bharti Airtel Limited vs State (In the matter of light energy)
    ► CST vs SKY Gourmet Catering Pvt Ltd (Karnataka High Court)
    ► Bharti Airtel & Another vs ACST [2010-34 VST202(WBTT)]; State vs BSNL [2011-VIL-49-AP]

► Supply of software whether goods or service
  ► Issue is still open due to divergent views of the Courts
    ► Microsoft case - Settlement Commission (in Customs matter)
    ► Infotech Software Dealers’s Association vs UOI [2010 (20) STR 289 (Mad)]
    ► Infosys Technologies Limited vs State [2011 (71) Kar. L.J41 Tri]
Availment of Cenvat Credit on angles, channel, beams etc
Availment of Cenvat Credit on angles, channel, beams etc

► Cenvat Credit on angle, beams, channels etc used in fabricating structural support
  ► Vandana Global Ltd [2010-TIOL-624 CESTAT-DEL-LB] - held that supporting structure for a machinery cannot be treated as part or accessory of machinery. Cenvat credit on steel items etc used for constructing such support structure disallowed
  ► Rajasthan Spinning & Weaving Mills Ltd [2010-TIOL-51-SC-CX] - SC allowed Cenvat credit on angles, beams etc used for fabrication of the structural support for machinery
  ► Apps Mills Ltd [2011-TIOL-1378-CESTAT- Bang] – The Tribunal allowing cenvat credit on such items held that Vandana Global decision is no longer valid as it runs contrary to subsequent ruling of Apex Court in Rajasthan Spinning & Weaving Mills Ltd

All pending matters should be argued in the light of Bangalore Tribunal decision as the matter has now been settled by the SC
Customs Exemption Notification
Customs Exemption Notification

- Import by JV partner not import by JV to avail benefit of exemption notification
  - Gammons India Limited vs CC [2011-TIOL-60-SC-CUS]
    - SC held an exception or an exemption provision exempting a person from tax liability must establish clearly that such person is covered by the said provision;
    - in case any doubt or ambiguity the benefit must always got to Revenue

- However, there are Cases where the benefit of the Exemption was granted:
  - IVRCL Infrastructures & Projects Ltd. vs CC and Techini Bharathi Ltd. vs CC, Mumbai.

Judgments were fact specific. Clear and unambiguous drafting of the terms of the JV contract recommended to establish that import by partner was on behalf of JV.
Renting of Immovable Property
Renting of Immovable Property

► High Courts have upheld the constitutional validity of "renting of immovable property"
  ► Shubh Timb Steels Limited vs UOI [AIT-2010-539 HC]
  ► Retailers Association of India vs UOI [AIT-2011-368-BOM HC]

► Matter is pending before SC in the case of Retailers Association of India (BOM HC) and Home Solutions Retails (India) Ltd (DEL HC) [2011-TIOL-103-SC-ST]

All assessee are collecting and depositing Service tax on a conservative basis
Managing Indirect Tax Litigation
Managing Indirect Tax Litigation

- Rise in judicial decisions contrary to well established principles of law resulting in ‘unsettling of settled positions’. For example:
  - Steel Strips vs CCE [2011 (269) ELT 0257 Tri-LB]; Instrumentation Ltd vs CCE [2011(023) STR 0221 Tri-Del]; CCE vs BSBK Pvt Ltd [2010 (18) STR 555 (Tri-LB)]; Obeetee Textiles Pvt Ltd vs CCE 2011 (272) ELT 11 (ALL)
Managing Indirect Tax Litigation

► Alternate dispute resolution mechanism under Indirect tax laws should be explored:

► Option to approach Settlement Commission on Excise and Customs related matters (though there is a proposal to include matters relating to Service tax as well)

► Forum for self surrender and seeking relief – not for challenging legality of orders

► Immunity from prosecution, imposition of penalty/ fine can be granted subject to conditions:

► bill of entry/ shipping bill/ return is filed and show-cause notice is issued;
► matter is pending for adjudication;
► additional amount of duty accepted by applicant exceeds Rs 3 lakh and
► applicant has paid additional amount of duty accepted along with interest
Managing Indirect Tax Litigation

► Alternate Dispute Mechanism (cont’d)…
  ► ‘Advance ruling’ for Customs, Excise and Service tax matters
    ► Involves determination of specified questions of law or facts in relation to duty/tax liability
    ► Should be for proposed business activity in India
  ► Advance ruling’ in favor of assessee not ‘high’; Can be explored to avoid litigation

► Advance ruling and order by Settlement commission is conclusive – only remedy is writ petition
Managing Indirect Tax Litigation

- Conservative approach to be followed in light of the following developments in Cenvat Law
  - Amendment in the Cenvat law to disallow credit of tax recovered on account of non-levy or non-payment or short payment by reason of fraud etc or contravention of provisions of Finance Act with an intent to evade tax (Rule 9 of CCR)
  - SC in UOI vs Ind-Swift Laboratories Ltd (2011-TIOL-21-SC-CX) held that interest on availment of irregular CENVAT credit payable from the date of taking credit and not from the date of utilizing such credit
Harmonization of Indirect Tax litigation in GST regime
Harmonization of Indirect Tax Litigation in GST regime

► Requirement of Harmonization of litigation system under the proposed GST regime (currently, diverse litigation system for different indirect tax legislations)

► Challenges involved in unifying the present diverse litigation system:
  ► Shifting pending cases to GST regime
  ► Unifying tax litigation policies and processes under it. For instance:
    ► Applicability of territorial jurisdiction;
    ► Unification and simplification of diverse appellate process existing under Central and State laws
  ► Procedural harmonization with respect to various appeal forms, fees, pre-deposit requirements etc
Thank you

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