

# Tax & Corporate News Bulletin

Vol. III, No. 3, August - September 2007

**VAISH ASSOCIATES ADVOCATES**  
Corporate, Tax and Business Advisory Law Firm

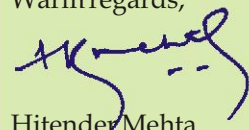
## From the Editor's Desk...

Passing of the Competition (Amendment) Bill, 2007 (the "**Bill**") by both the Houses of the Parliament has paved way for new regulatory framework on competition law in India. Upon notification, it would be mandatory for all mergers and acquisitions (including between two overseas companies) to notify the Competition Commission of India if the combined entity meets specified threshold limit. The Bill has, inter alia, introduced the concept of territorial nexus, being the minimum presence in Indian market for any two globally merging companies. Stricter penal action has been contemplated to curb the anti-competitive practices.

In a move to simplify the service tax law, the Government has made a sincere attempt by issuing two consolidated circulars on service tax in August 2007. These two circulars seek to consolidate the law position and Department's views on service tax matters relating to the technical and the procedural issues. These circulars shall override all earlier circulars and clarifications issued from time to time. However, these circulars are not to be treated as part of law and do not override the legal provisions but are merely the interpretation of the law and the current practice of the Department. Nevertheless, it's indeed a welcome initiative.

I hope, our News Bulletin continues to keep you abreast of the important corporate legal updates. We welcome your suggestions and feedback. Please do let us know.

Warm regards,



Hitender Mehta  
hitender@vaishlaw.com

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For Private Circulation

## SERVICE TAX

### Master Circulars on Service Tax

All previous Circulars / Clarifications withdrawn

✧ The Central Government reviewed all clarifications issued on matters relating to service tax and issued following two consolidated circulars superseding all earlier circulars, clarifications and communications issued from time to time by the Central Board of Excise and Customs ("CBEC"), Director General (Service Tax) and various field formations:

- Circular No. 96/2007-ST, on matters relating to technical issues,
- Circular No.972007-ST, on matters relating to procedures.

For ease of reference, the Department has introduced a Coding System with respect to each taxable service. Under the new Coding System, first three digits of the reference code relates to a specific taxable service, followed by a dot and two digits which indicate the issue clarified under that particular three-digit code. Digit codes are followed by a slash indicating the date of issue of the clarification.

Detailed Master Circulars are available at [www.servicetax.gov.in](http://www.servicetax.gov.in)

#### ✧ Issues arising out of interpretation of Master Circulars

Some of the issues arising out of interpretation of the Master Circulars are highlighted below:

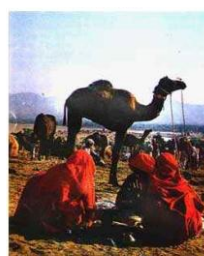
Taxable Service Category & Code	Department clarification	Issue
Authorized Service Station Services [Code: 036.03/23.08.07-]	Service tax is payable by authorized service stations of motor vehicles on value of spare parts used while servicing the vehicles.	The said clarification is disputable in view of the notification No. 12/2003-ST, dated 20.06.2003 read with section 67 of the Finance Act, 1994, which states that service tax is payable only on 'gross value of service provided'

Miscellaneous Services [Code: 999.03/23.08.07]	Sub-contractor is now essentially a taxable service provider. Sub-contractor is liable to pay service tax, even if main contractor is paying service tax. Services provided by sub-contractors are in the nature of input services, accordingly, main contractor can avail CENVAT credit of service tax paid by sub-contractor.	This appears to be an arguable proposition as in certain cases, service is taxable when provided to a customer or client. In such case, there is a scope to argue that the main contractor is not the customer or the client of the sub-contractor.
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The Master Circulars are not to be treated as part of law and do not override the legal provisions but are merely the interpretation of the law and the current practice of the Department.

[Source: Circular no. 96/2007 & 97/ 2007 of S.T. dated 23-8-2007]

### Increase in rate of abatement on taxable services provided by tour operators



✧ The Central Government has issued notification no. 38/2007 ST dated 23-8-2007 amending notification no. 1/2006 ST dated 1-3-2006 to reduce the effective rate of service tax on package tour operator services.

✧ The rate of abatement has been increased to 75% from 60% for the purpose of service tax on taxable services provided by tour operators in relation to package tours. As a result, such tour operators are required to pay service tax only on 25% of the gross amount charged on such package tours.

For details, visit [www.servicetax.gov.in](http://www.servicetax.gov.in)

[Source: Notification no. 38/ 2007 of S.T. dated 23- 8-2007]

## Change in Due Date of Payment of Service Tax

- ❖ CBEC has amended the Service Tax Rules, 1994 by introducing the Service Tax (Fifth Amendment) Rules, 2007, thereby extending the due date for deposit of service tax through electronic mode by one day.
- ❖ The revised due dates for payment of service tax shall be as follows:

### For individual or proprietary firm or partnership firm (Quarterly)

If payment made through electronic mode	6th day of the following month immediately following the quarter
If paid through any other mode	5th day of the following month immediately following the quarter

### For all other persons (Monthly)

If payment made through electronic mode	6th day of the following month
If paid through any other mode	5th day of the following month

(Source: Notification no. 39/2007 S.T. dated 12-9-2007)

## Change in Due Date of Payment of Excise Duty

- ❖ The Government has extended the due date for deposit of central excise duty through electronic mode by one day.
- ❖ The revised due dates for payment of central excise duty shall be as follows:

### For SSI Units (Units availing value based exemption)

If payment made through electronic mode	16th day of the following month
If paid through any other mode	15th day of the following month

### For Units other than SSI units

If payment made through electronic mode	6th day of the following month
If paid through any other mode	5th day of the following month

(Source: Notification no. 34/2007 C.E. dated 11-9-2007)

## INCOME TAX

### Due Date for Advance Fringe Benefit Tax Extended

- ❖ The due date for payment of the first and second installment of advance Fringe Benefit Tax (FBT) on Employee Stock Option Plans (ESOPs) has been extended to 15th December, 2007 which is the due date of payment of the third installment.

### Supreme Court decision on Penalty



In a recent decision in the case of *Dilip N. Shroff v. JCIT: 291 ITR 519*, the Supreme Court examined the provisions relating to penalty under section 271(1)(c) of the Income Tax Act, 1961 (the "Act") in detail and laid down the following important propositions:

- ❖ Imposition of penalty is not automatic. **Levy of penalty is a discretionary power** conferred on the assessing officer.
- ❖ Order imposing penalty is quasi-criminal in nature and thus the primary **burden of proof** rests with the Department. The statute requires satisfaction on part of the assessing officer to show that there is primary evidence that the assessee had concealed income or furnished inaccurate particulars thereof.
- ❖ Once the primary burden is discharged, the secondary burden of proof would shift onto the assessee. Explanation 1 appended to section 271(1)(c) is the only exception to this rule as it creates a legal fiction shifting the burden of proof from the Department to the assessee.
- ❖ To invoke Explanation 1, a finding has to be arrived at by the assessing officer that explanation offered by the assessee, if he offers one, was false. Further, the assessee has to be shown to have failed to prove that such explanation was bona fide and that all relevant facts and material have not been disclosed by him.
- ❖ The **expressions 'conceal' and 'inaccurate' signify a deliberate act or omission** on the part of the assessee. Before penalty can be imposed, entirety of the circumstances must reasonably point to the conclusion

that the disputed amount represented income and that the assessee had consciously concealed the particulars or filed inaccurate particulars.

- ✧ It is settled law that the more stringent a law, the more strict is the construction to be placed on it. As the maximum penalty amount has been increased over time, **the penalty provision should be construed more strictly.**
- ✧ There must be **application of mind by the assessing officer.** An adverse inference would be drawn where the assessing authority uses a standard proforma in issuing a notice without deleting inappropriate words and paragraphs of the same and/ or does not specify whether the penalty is being initiated on the basis of concealment or furnishing of inaccurate particulars of income.

## India signs Tax Treaty with Mexico

- ✧ India has signed a Double Taxation Avoidance Agreement (“DTAA”) with Mexico for the avoidance of double taxation and for the prevention of fiscal evasion with respect to taxes on income. The DTAA shall come into force on a date to be notified in due course.
- ✧ The rate of tax in the country of source shall not exceed ten percent of the gross amount of payment in case the beneficial owner of the payments is a resident of the other Contracting State.
- ✧ The DTAA provides that capital gains from alienation of shares of a company shall be taxable in the country where the company is a resident.
- ✧ The incidence of double taxation shall be avoided by one country giving credit for taxes paid by its residents in the other country. There is also a provision for limitation of benefits under the DTAA to prevent misuse of the provisions of the DTAA.



## CORPORATE LAWS

### Competition (Amendment) Bill, 2007 passed by both Houses of Parliament

The Competition (Amendment) Bill, 2007 (the “Bill”) has been passed by both the Houses of the Parliament. The Bill, inter alia, confers statutory powers on the Competition Commission of India (“CCI”) to prevent practices having adverse effect on competition. CCI has been vested with enhanced powers to regulate mergers and acquisitions meeting specific criterias.

CCI will substitute Monopolies and Restrictive Trade Practices Commission (“MRTPC”). However, MRTPC will continue to deal with pending cases up to two years after the constitution of CCI and will be dissolved thereafter. MRTPC however would not entertain any new cases after the CCI is constituted. Cases pending with MRTPC after two years of constitution of CCI will be transferred to the latter.

Upon notification, it will be mandatory for the enterprises to notify CCI about any combinations in the nature of mergers and acquisitions meeting specified criterias, within 30 days of approval of any such proposals by the board of directors of the concerned enterprises. The Bill also provides for constitution of “Competition Appellate Tribunal”. Stricter penalties have been introduced for non compliances of the Competition Act, so much so, criminal liability may be imposed in case of continuing non compliance of CCI directions.

### Supreme Court Ruling on encashment of LCs and Bank Guarantees

- ✧ In a significant ruling in the case of *Himadri Chemicals Industries Limited v. Coal Tar Refining Company*, the Supreme Court has laid down guidelines for encashment of Bank Guarantee (“BG”) or Letter of Credit (“LC”).
- ✧ First, banks that give such guarantees are duty-bound to honour them as per terms agreed upon between the parties concerned, irrespective of any dispute raised by its customer. In the matter of invocation of a BG or an LC, it is not open for the bank to rely upon the terms of the underlying contract entered into between parties concerned, court said.
- ✧ Second, the existence of any dispute between parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of a BG or LC. The



apex court said that the BG or LC is an independent and a separate contract and absolute in nature.

- ❖ Third, the courts should be slow in granting an order of injunction to restrain the realisation of a BG or LC. However, courts can pass an order, restraining encashment of the BG or LC in two exceptional circumstances. One, Where there is fraud of an egregious nature which would vitiate the very foundation of such a BG or LC and the beneficiaries seek to take advantage of the situation; and two, when allowing encashment of an unconditional BG or an LC would result in irretrievable harm or injustice to one of the parties concerned.

## Notification of revised Form 18, 21 and 23

- ❖ The Ministry of Corporate Affairs (MCA) has vide Notification G.S.R. No. 500 (E) dated 24-7-2007 introduced the Companies (Central Government's) General Rules and Forms (Second Amendment) Rules, 2007. These Rules have modified e-forms 18 (Notice of situation or change of situation of registered office), 21 (Notice of the court or the company law board order, 23 (Registration of resolutions and agreements).
- ❖ The details of the notification and the modified e-Forms can be viewed at [www.mca.gov.in/](http://www.mca.gov.in/)

## New version of e-Form CAR (Cost Audit Report) & Form 1A

- ❖ New version of **e-Form CAR (Cost Audit Report) & Form 1A** is available on the MCA Portal, effective 18th August, 2007. The previous version of these forms has been discontinued. Details available at [www.mca.gov.in/](http://www.mca.gov.in/)

## SEBI/Capital Markets

### SEBI introduces Fast Track Issuance of Securities

- ❖ In an effort to provide a faster and cost effective method of raising capital by listed companies, the Securities and Exchange Board of India ("SEBI") has decided to introduce Fast Track Issuance of Securities ("FTIs"). This mode of issuance will be available to listed companies who satisfy the following requirements:

- Listed on Bombay Stock Exchange ("BSE") or National Stock Exchange ("NSE"), for at least three years.
- Excellent track record in redressing shareholders/ investor grievances.
- Average free float market capitalization of at least Rs.10,000-crore or more during last one year.
- Compliant with the listing agreement.
- Promoter group shares are necessarily held in dematerialized form.
- Trading on the stock exchanges constitute at least 2% of total listed shares during the previous one year.
- Impact of Auditors' qualifications in the audited accounts, if any, do not exceed 5% of the net profit/ net loss after tax.
- No prosecution proceedings or show cause notice issued by SEBI is pending against the company/ its promoters/ whole time directors. The listed companies meeting the requirements as stated above shall be eligible for rationalized disclosures as well as simplified procedural requirements as follows:

- ❖ The Stock Exchanges shall give in principle approval based on the board resolution/ shareholders' resolution approving the raising of capital/ making of the issue.
- ❖ Necessary amendments are being made to the SEBI (DIP) Guidelines. For further details, please visit [www.sebi.gov.in](http://www.sebi.gov.in)

(Source: PR 242/2007 dated 24-8-2007)

### Dissemination of Information on Debentures



- ❖ SEBI has decided that the listed companies issuing debentures and the respective debenture trustees/stock exchanges shall disseminate all information regarding

the debentures to the investors and the general public. Debenture trustee(s) shall disclose the information to the investors and the general public by issuing a press release in any of the following events, namely;

- (a) default by issuer company to pay interest on debentures or redemption amount;
- (b) failure to create a charge on the assets; and
- (c) revision of rating assigned to the debentures.

✧ The said information/reports including compliance reports filed by the companies must also be placed on the website of the debenture trustee, the issuer company and the respective stock exchanges, where the securities of such company are listed.

For further details, please visit [www.sebi.gov.in](http://www.sebi.gov.in)

(Source: Circular No. MIRSD/DPS III//Cir 11/07 dated 6-8-2007)

## FEMA/RBI/Foreign Trade Policy

### Review of External Commercial Borrowing (ECB) Policy

✧ The Reserve Bank of India ("RBI") has modified some aspects of the ECB policy to modulate the capital inflows through ECB to keep it in tune with evolving macroeconomic situation, changing market conditions, sectoral requirements and the external sector.

#### Key Features

Amount of Borrowing	Details
ECB exceeding USD 20 million per borrowing per financial year (under Automatic as well Approval route)	<ul style="list-style-type: none"> <li>• Such borrowings are permitted only for foreign currency expenditures for permissible end-uses of ECB</li> <li>• This amount will be parked overseas</li> </ul>
ECB up to USD 20 million per borrowing (under Automatic route)	<ul style="list-style-type: none"> <li>• Such borrowings are permitted for foreign currency expenditures for permissible end-uses of ECB</li> <li>• These funds will be parked overseas and not remitted to India</li> </ul>

- Borrowers will require prior approval of RBI under Approval Route for incurring rupee expenditure for rupee expenditure although such funds will continue to be parked overseas until actual requirement in India

For details please visit [www.rbi.gov.in](http://www.rbi.gov.in)

[Source: RBI/2007-2008/112 A.P. (DIR Series) Circular No. 4 dated 7-8-2007]

### Banks to furnish a copy of the Loan Agreement



✧ It was observed by the RBI that some banks were furnishing copy of the loan agreement only on request made by the borrowers. In this context, RBI had

advised that not furnishing a copy of the loan agreement or enclosures quoted in the loan agreement is an unfair practice and this could lead to disputes between the bank and the borrower with regard to the terms and conditions on which the loan is granted.

✧ Therefore, RBI has advised that terms and conditions and other caveats governing credit facilities given by banks/ financial institutions arrived at after negotiations by lending institution and the borrower should be reduced in writing and duly certified by the authorized official. Banks/ Financial Institutions are further advised that a copy of the loan agreement along with a copy of each of the enclosures quoted in the loan agreement should be furnished to the borrower.

The details of the circular may be had from [www.rbi.gov.in](http://www.rbi.gov.in)

(Source: RBI/2007-2008/119 DBOD. No. Leg. BC. 28/09.07.005/2007-08 dated 22-8-2007)

## COMPLIANCE CHECKLIST IMPORTANT DATES WITH REGULATOR(S)

September - October 2007

Sr. No	PARTICULARS	Sections/ Rules Clauses, etc	Acts/Regulations, etc.	Compliance Due Date	To whom to be submitted
<b>A. INCOME TAX</b>					
1	Payment of advance income tax to the extent of 45% of advance tax payable (for corporate assessee) and 30% of advance tax payable (in case of non-corporate assessee)	Section 211	Income-tax Act, 1961	15th September	Income-tax Authorities
2	TDS from Salaries for the previous	Section 192	Income-tax Act, 1961	7th October	Income-tax Authorities
3	Contractor's Bill/ Advertising/ Professional service Bill TDS collected in the previous month	Section 194C Section 194J	Income-tax Act, 1961	7th October	Income-tax Authorities
4	Quarterly TDS return in Form No. 24Q (Salaries)	Rule 31A	Income-tax Rules	15th October	Income-tax Authorities
5	Quarterly TDS return in Form No. 26Q (Other than salaries)	Rule 31A	Income-tax Rules	15th October	Income-tax Authorities
6	Quarterly TDS return in Form No. 27Q (Payment to non-residents)	Rule 37A	Income-tax Act, 1961 Income-tax Rules, 1962	15th October	Income-tax Authorities
7	Annual Return of Fringe Benefit Tax (FBT) for Companies & certain	Rule 12	Income-tax Rules	31st October	Income-tax Authorities
8	Income-tax return along with Tax Audit Report	Section 139	Income-tax Act, 1961	31st October	Income-tax Authorities
<b>B. EXCISE &amp; SERVICE TAX</b>					
9	Pay Service Tax in Challan TR-6 collected during the previous month by persons other than individuals, proprietors and partnership firms	Rule 6	Service Tax Rules, 1994	5th October	Service Tax Authorities
10	Submission of CENVAT Return	Rule 9(7)	CENVAT Rules, 2002	10th October	Excise/ Service tax Authorities
11	Submission of monthly return of production and removal of goods	Rule 12	Central Excise Rules, 2002	10th October	Excise Authorities

12	Submission of quarterly return of production and removal of goods	Rule 12	Central Excise Rules, 2002	20th October	Excise Authorities
13	Half yearly return in Form ST-3 or ST-3A for the previous half year from	Rule 7	Service Tax Rules, 1994	25th October	Service tax Authorities
14	Submission of monthly return of production and removal of goods	Rule 9(9)	CENVAT Credit Rules, 2004	31st October	Service tax Authorities
<b>C. SEBI/ STOCK EXCHANGES/ CORPORATE LAWS</b>					
15	Submission of Shareholding Pattern as at the end of the previous quarter	Clause 35	Listing Agreement	15th October	Stock Exchanges
16	Corporate Governance Compliance Certificate	SEBI Circular No. SMDRP/Policy/DIR-03/01 dated 22.1.2001	Listing Agreement	15th October	Stock Exchanges
17	Intimation of date of Board Meeting for taking on record quarterly results	Clause 41	Listing Agreement	7 days in advance	Stock Exchanges
18	Issue of press release about Board Meeting to take on record un-audited quarterly results	Clause 41	Listing Agreement	Immediately on informing the Stock Exchanges	One national newspaper and one regional newspaper
19	Announcement of Quarterly Results along with limited Audit Review of the same by the Auditors	Clause 41	Listing Agreement	Within 15 minutes of closure of Board Meeting in which the results	Stock Exchanges
20	Publication of the unaudited quarterly results	Clause 41	Listing Agreement	Within 48 hours of the conclusion of the board meeting	One national newspaper and one regional newspaper
21	Submission of half yearly Compliance Certificate from the Company Secretary	Clause 47(c)	Listing Agreement	Within 24 hours of receipt of certificate by the Company	Stock Exchanges
22	Filing of Balance Sheet and Profit & Loss Account for the year ended 31st March 2007	Section 220	Companies Act, 1956	31st October	Registrar of Companies



## ACCOLADES

### PHDCCI International Tax Conference

A two day International Tax Conference on "Recent Global Trends and Strategies" was organized by the PHD Chamber of Commerce and Industry (PDHCCI) in New Delhi on 31st August and 1st September, 2007. Vaish Associates (the "Firm") was one of the knowledge partners for the aforesaid conference. Ajay Vohra, Managing Partner of the Firm, also the Chairman of the Direct Tax Committee of PHDCCI, along with several other Associates in the firm were actively involved in the organization of the aforesaid conference.



Many topical issues relating to cross border transactions were discussed at the conference which was attended by delegates from India and abroad and included tax professionals, corporate executives, industrialists, senior Revenue officials, etc.



A panel discussion on "Treaty Abuse and Limitation of Benefits" was moderated by Ajay Vohra. Another panel discussion on "Mutual Agreement Procedure in terms of Double Taxation Treaties" was moderated by O.P. Vaish, Senior Advocate, the Founder of the Firm.

Rupesh Jain, Senior Associate with the Firm, was one of the panelists who discussed the issue relating to "Attribution of Business Profits to Permanent Establishments." The panel discussion was moderated by Ajay Vohra.

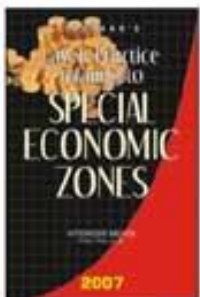
A compendium of articles was also brought out by the PHD CCI which included article on "Taxability of Transactions between Foreign Head Office and Indian Branch" by Anurag Jain, and another article on "Transfer Pricing Implications relating to Provisions of Goods and Services Free of Cost", by Neeraj Jain, both Senior Associates with the Firm.

### ASSOCHAM Independent Directors' Course for Senior Defence Officials

**Hitender Mehta**, Head, Vaish Associates, Gurgaon was invited to address the participants on the topic "*Constitution of a Company*" on 20th August 2007. Mr. Mehta explained in detail various requirements relating to constitution of a company under the Companies Act, 1956. Besides, he explained the corporate governance issues that an independent director ought to know.



## Taxmann's Latest Book Release: "Law & Practice relating to Special Economic Zones"



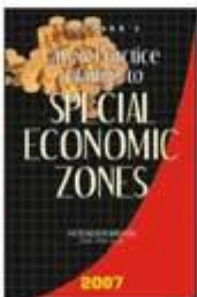
**TAXMANN'S**  
Law & Practice relating to  
**SPECIAL ECONOMIC ZONES**  
HITENDER MEHTA  
2007

**You'll wonder how you managed without it**

Have you ever wished there was one up-to-date source covering the essential information relating to Special Economic Zones in India? Taxmann's brand new publication titled "Law & Practice relating to Special Economic Zones" contains comprehensive coverage of practical aspects and related legal issues on (i) Setting up SEZ; (ii) Setting up Units (iii) Fiscal and other incentives to Developers and Entrepreneurs. Besides, it dwells light on the ideology behind Special Economic Zones in India and salient features of the scheme of SEZ in a crisp and pointed manner followed by comprehensive section-by-section commentary on SEZ Act, 2005 read with SEZ Rules 2006. Flow charts have been used at places to make it fairly easy to understand for the readers.

In addition, the book contains special write-ups on:-

- Organic perspective
- FEMA perspective
- Direct-tax related issues
- Indirect tax related issues
- Stamp duty issues
- Petroleum, Chemicals and Petrochemical Investment Regions (Super SEZs!!!)



**TAXMANN'S**  
Law & Practice relating to  
**SPECIAL ECONOMIC ZONES**  
HITENDER MEHTA  
2007


**Have Your Own Counsel**

This book is an ideal reference and practical user manual for the companies (desirous of setting up SEZs or Units therein), business managers, legal and management consultants, Chartered Accountants, Company Secretaries, Cost & Works Accountants and students pursuing related professional courses. In the book, the complicated issues have been explained with an analytical approach.

Besides clearing doubts on various issues, this book will help the Developers and the Entrepreneurs as a guide navigating them right from business structure planning, agreements, filing of applications, appearance before the Authorities to compliance management under various applicable laws as well as statutory requirements relating to quarterly/ annual filing of information with the Authorities and other post setting-up issues.

Using this book will certainly prove to be a time and cost saving effort. This book gives you the complete picture of the SEZ Act and the corresponding statutory enactments in India and comprehensive analysis of the relevant legal provisions at one place.

The carefully done index allows rapid and accurate access to precise information.



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### Disclaimer:

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