



# AIFTP TIMES

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## Federation News

Mukul Gupta, *Secretary General*

### FORTHCOMING PROGRAMMES

| Date & Months                    | Programmes  |
|----------------------------------|---|
| 18th September, 2008             | Annual General Meeting of AIFTP   |
| 16th, 17th & 18th October, 2008  | 5th Nani Palkhivala Memorial National Tax Moot Court Competition organised jointly with ITAT Bar Association, Mumbai and Government Law College, Mumbai |
| 27th & 28th November, 2008       | AOTCA Shanghai Meeting 2008 at Shanghai International Convention Centre at 2727, Riverside Avenue, Pudong, Shanghai, China                              |
| 19th, 20th & 21st November, 2009 | AOTCA International Tax Conference, 2009 at Taj Mahal Hotel, Mumbai.  |

### NOTICE OF ANNUAL GENERAL MEETING

Notice is hereby given that the Annual General Meeting of the All India Federation of Tax Practitioners will be held on Thursday, the 18th September, 2008 at 5.00 p.m. at 215, Rewa Chambers, 31, New Marine Lines, Mumbai – 400 020 to transact the following business:-

#### A G E N D A

1. To read and approve the minutes of last Extraordinary Meeting held on 7th December, 2007
2. To receive and adopt the Annual Report of the National Executive Committee of AIFTP for the years 2007 & 2008.
3. To consider and adopt the Audited Accounts of AIFTP for the year ended 31st March, 2008.
4. To appoint Auditors for the year 2008-09 and to fix their honorarium.
5. To transact any other business with the permission of the Chair.

Place: Mumbai

Date: 1st August, 2008

Mukul Gupta  
*Secretary General*

#### Notes:

1. The Annual Report and the Audited Profit and Loss Account and Balance Sheet will be circulated to the National Executive Committee Members by e-mail.
2. Accounts for the year ended 31st March, 2008 and the report of the National Executive Committee can be collected from the office of the federation from 13th September, 2008 onwards between 11.30 a.m. and 5.00 p.m. The accounts and report can be made available to the members through email on request to the office.
3. If there is no quorum by 5.00 p.m., the meeting will be adjourned by half an hour and the members present at such adjourned meeting shall form the quorum.

#### FOR QUERIES PLEASE CONTACT ANY OF THE FOLLOWING OFFICE BEARERS

| Name  | Tel. (O)        | Fax     | Mobile     | E-mail                      |
|---|-----------------|---------|------------|-----------------------------|
| National President — Bharatji Agrawal, Sr. Adv. | 0532-2260576/77 | 2601389 | 9415235429 | bharatjiagrawal@yahoo.co.in |
| Deputy President — M. L. Patodi, Adv.           | 0744-2361179    | 2363637 | 9829035256 | patodi_jp1@sancharnet.in    |
| Secretary General — Mukul Gupta, Adv.           | 0120-2820380    | 2821407 | 9811023739 | mukuladv@hotmail.com        |
| Treasurer — CA. Janak Vaghani                   | 022-22821978    | —       | 9324680306 | janakvaghani2004@yahoo.com  |

**PRESIDENTIAL ADDRESS**  
**on**  
**TAX PROFESSION – CHALLENGES AND OPPORTUNITIES**  
**at**  
**NATIONAL TAX CONFERENCE – 2008**

(On 12-7-2008 at Hyderabad)

by  
**Bharat Ji Agrawal**, *Senior Advocate*, Allahabad High Court  
Former Chairman U.P. Bar Council & National President, AIFTP

I am extremely grateful to Andhra Pradesh Sales Tax Bar Association and Twin Cities Practitioners Association who have organized this National Tax Conference jointly with All India Federation of Tax Practitioners (South Zone) at Hyderabad.

The theme of the Conference “Tax Profession – Challenges and Opportunities” is a thought provoking theme.

Both Chartered Accountants and Advocates who are in the tax profession have contributed a lot towards the tax profession.

Gentlemen, taxation is a burden we all must share for the development of civilization. We have opted for a welfare State under our Constitution which calls for an honest sharing of the tax burden. The State action as the tax collector has been devising ways and means not only of equitably distributing the incidence of tax but also of ensuring payment of tax for which Tax Professionals have always extended a helping hand.

Ordinarily people do not like taxes – left to themselves. They would not pay any tax as it entails parting of money earned by hard labour, but tax is an important instrument in the governance of the country in one form or the other. No government can run administration or provide facilities to the citizens or execute welfare activities without taxation as it is an important source of revenue.

After independence the people of India have given themselves a federal constitution with the object of having a welfare state, through democratic process in the form of Parliamentary system of Government. A developing country like ours has many projects and plans for achieving all round development of the country. In order to implement the plans and projects Government needs revenue, hence taxes.

In the modern state, taxes are necessary for the welfare of the people.

For the proper implementation of the tax laws the society need efficient lawyers, tax consultants and the devoted departmental officials for the proper interpretation of the laws which are quite complex and complicated.

I will like to stress here the increased responsibilities of Tax Professionals in the vast unfolding transformation. Tax Professionals in the industrial and commercial capitals of India are already deeply involved, and indeed often suggest

the direction, tax policy, in order to serve the new ethos. In contrast, the scene seems comparatively quiet here. But I am certain it will not be long, before Tax Bar is also caught up in that vertex. The quality of our service to the citizen has always been significant, but it will have profounder consequences for both the citizen and taxation.

The implementation of the tax laws depends upon the approach of the authorities who are to administer the said laws. The authorities constituted under the Tax Acts are required to act as administrative authorities as well as quasi-judicial authorities.

The requirement of acting judicially is nothing but is requirement to act justifiably and fairly in accordance with law. The rule of law also requires that the administrative bodies should administer law with a judicial approach and it should discharge its function fairly and justly.

Advocates and Tax Professionals have great and important duties to discharge. We have to advise our clients to pay due tax and at the same time we have to save them from undue harassment and protect them from illegal levy and illegal actions of tax authorities by approaching the great judiciary of our country for redress.

For taxes once Mr. N.A. Palkhivala said :

“**Taxes are the life blood of any Government but it cannot be overemphasized that the blood is taken from the arteries of the tax-payers and therefore, the transfusion has to be accomplished in accordance with the principle of justice and fair play.**”

“**Every Government has a right to levy tax but no Government has a right in a process of extracting tax, to cause misery and harassment to the tax- payers and the gnawing feeling that he is made victim of palpable injustice.**”

With the advent of new fields of taxation there is a great opportunity for everyone but the profession has its own challenges also which everyone has to face.

In so far the Sales Tax is concerned the era of VAT has given new opportunities to the younger generation of the Tax Professionals who are going to be the pillars of the coming years.

The tax profession faces various challenges when it is influenced by different reasons and different factors. One has

to resist from allurements which are not reasonable and against the ethics of the profession.

The short-cut methods cannot survive for a long and hard labour and sincerity are the only requirements which one has to adhere and pursue for achieving all success in the profession.

There has been erosion of values in every walk of life and our tax dispensing system could not remain unaffected, at certain levels, from this epidemic.

By "erosion" in this context I mean the decline in the degree of esteem and reverence for the judicial and quasi-judicial authorities on the part of the people and the decrease in the standard of authority and legitimacy over matters legal and constitutional.

Therefore 'erosion' can only be discussed in a relative sense and the emphasis to one or other cause of erosion depends on the value premises of the evaluator and his own understanding of the role of the judicial and quasi judicial authorities in democratic polity.

Under the circumstances the responsibilities of Tax Professionals and Advocates have increased, since the institution is more important than the individuals who occupy it at any given point of time and the deficiencies of individuals should not be allowed to erode the status of the institution.

If the presiding members of Tax Tribunals, quasi-judicial authorities and Judges are clean, competent, devoted and independent, there cannot be any erosion in judiciary and all malicious attacks can be boldly and decisively faced. While

exposing and disciplining them, Tax Consultants and Advocates must strive to adopt such preventive measures to avoid a greater calamity in which the people may be forced to resort to drastic remedies which may be worse than the disease.

One can think of many remedial measures to contain the erring persons and control the decline in judicial standards.

Industry, intelligence and independence, once considered essential traits of yesteryears are slowly replaced by intrigue, cunning and corruption. These things must be avoided by Tax Professionals.

The only silver lining in this depressing exercise in professional suicide is that the number of erring persons are still few and many of them do try to correct themselves when emotion subsides and judicial sense regains.

It is, therefore, essential to adopt preventive steps for redeeming the unity of the bar and the bench and projecting a proper image of the judiciary through the thoughts and actions of every member of the bar.

I congratulate the members of the Federation and every member of all the organizing Associations for arranging the Conference and deliberations on various important subjects, which will enrich the knowledge of every delegates.

I wish a grand success of the Conference.

Thank you,

BHARAT JI AGRAWAL  
Senior Advocate

## REPORT ON THE NATIONAL TAX CONFERENCE HELD ON 12TH & 13TH JULY, 2008 AT HYDERABAD ORGANISED BY ALL INDIA FEDERATION OF TAX PRACTITIONERS – SOUTHERN ZONE

By P. V. Subba Rao, Chairman, AIFTP (Southern Zone)

The Southern Zone of All India Federation of Tax Practitioners, jointly with Andhra Pradesh Sales Tax Bar Association, Andhra Pradesh Tax Bar Association and Twin City's Tax Practitioners Association, Hyderabad organised two-day National Tax Conference at Hyderabad on the 12th and 13th July, 2008. Around 430 delegates attended the Conference all around India which included through professionals, corporate sector and others. The AC auditorium with a capacity of 500 was full and many had to stand on their legs for the inaugural session. For the first time, more than dozen senior Officers of Government of Andhra Pradesh have attended the Conference as paid delegates. The Chief Guest, Hon'ble Chief Justice of Andhra Pradesh High Court Mr. Anil R. Dave was welcomed with 'Poorna Kumbham' by five eminent Vedic Scholars. The Conference commenced with Vedic chantings by the Vedic Pandits. Mr. P. V. Subba Rao, Chairman, Southern Zone welcomed the invitees and delegates. A very senior Officer from Tirumala Tirupati Devasthanams handed over 'prasadam' of Lord Sri Balaji to the dignitaries on the dais. Hon'ble Chief Justice

inaugurated the Conference, released the Souvenir and delivered his message touching the theme of the Conference "Tax Profession – Challenges and Opportunities". Guest of Honour, Hon'ble Justice Mr. B. Prakash Rao, Andhra Pradesh High Court, National President Mr. Bharat Ji Agrawal and Secretary General Mr. Mukul Gupta addressed the Conference. On this occasion, Senior Professionals; i.e., two Chartered Accountants, three Advocates and two Sales Tax Practitioners were honoured with mementos and shawls. Mr. D. Balaji, President, A. P. Tax Bar Association and Mr. T. V. Subba Rao, President, Twin City's Tax Practitioners Association has also participated. Dr. M. V. K. Murthy, President, A.P. Sales Tax Bar Association and Vice President, Southern Zone of AIFTP has proposed vote of thanks.

The First Technical Session on "Recent Controversies under Direct Taxes" was chaired by Hon'ble Mr. Pradeep P. Parikh, Vice President, ITAT, Hyderabad and Mr. Vipul Joshi, Advocate, Mumbai presented his papers on the above topic.

The Second Technical Session "Know Thyself" was addressed by eminent expert in Personality Development matters Mr. Gampa Nageswara Rao.

The Third Technical Session on "Assessments, Appeals and Revisions under APVAT Act vis-a-vis other State enactments" was chaired by Mr. S. Venkataramani, FCA, Bangalore and Mr. M. V. J. K. Kumar, Advocate, Hyderabad presented his paper.

The Fourth and the last Technical Session of the first day on "Implications of Service Tax in Real Estate and Works Contract Transactions" was addressed by Mr. Madhukar N. Hiregange, FCA, Bangalore and the same session was Chaired by Mr. Ashok Chandak, FCA, Nagpur.

In the evening there was exciting cultural programme with two artistes doing "Kuchipudi dance", a classical dance form of Andhra Pradesh. There has also been a mimicry programme in Hindi.

The Fifth Technical Session and the first session on the second day on "Works Contracts with Reference to Development Agreements and Liability of Landlord" was chaired by Mr. V. Ramachandran, Senior Advocate, Chennai and the papers were presented by Mr. P. S. Sarin, Advocate, New Delhi.

The Sixth Technical Session on "Registration & Stamp duty-issues in Conveyance and Drafting" was presented by

Mr. J. V. Rao, Advocate, Hyderabad and the session was chaired by Mr. Bharat Ji Agrawal, Senior Advocate, Allahabad.

After lunch, Brains' trustees Mr. N. M. Ranka, Senior Advocate, Jaipur, Mr. P. C. Joshi, Advocate, Mumbai, Mr. P. V. S. S. Prasad, FCA, Hyderabad, Dr. S. R. R. Viswanath, Advocate, Hyderabad and Mr. P. Ramakrishna, Advocate, Hyderabad answered a number of queries on Direct and Indirect Taxes.

In the evening, at the Valedictory Session, Smt. Ranjeev R. Acharya, I.A.S., Commissioner of Commercial Taxes, Andhra Pradesh has addressed the delegates as Chief Guest. Mr. N. M. Ranka and Mr. P. C. Joshi were the guests of honour. Mr. V. Nagendra Prasad, Secretary, AIFTP, Southern Zone proposed a vote of thanks.

The unique feature of the Conference was that all the technical sessions, inaugural and valedictory sessions were commenced and concluded on time. Breakfast and lunch were served on poolside in a very good ambience. There has been wide coverage of the programme in both print and electronic media. Mrs. Hemendra Shah led the lady-delegates to the historical and tourist places and temples on the two days. The delegates felt that the Conference has been a grand success.

Date: 21st July, 2008.



## *Hearty Congratulations*

Hearty Congratulations to newly elected Office Bearers of The Malad Chamber of Tax Consultants for the year 2008-09.

|                 |   |
|-----------------|---|
| President       | : Shri Dilip V. Parekh                    |
| Vice President  | : Shri Manilal Simaria                    |
| Hon. Treasurer  | : Shri Vipin Ladda                        |
| Jt. Secretaries | : Shri Ashwin Tanna, Shri Brijesh Cholera |

Hearty Congratulations to newly elected Office Bearers of The Chamber of Tax Consultants for the year 2008-09.

|                    |                         |
|--------------------|-------------------------|
| President          | : Shri Mahendra Sanghvi |
| Vice President     | : Shri K. Gopal         |
| Hon. Secretary     | : Shri Manoj Shah       |
| Hon. Jt. Secretary | : Shri Yatin Desai      |
| Hon. Treasurer     | : Shri Sujal Shah       |

Hearty Congratulations to newly elected Office Bearers of Bombay Chartered Accountants Society for the year 2008-09.

|                      |   |
|----------------------|---|
| President            | : Shri Anil J. Sathe                        |
| Vice President       | : Shri Ameet N. Patel                       |
| Hon. Jt. Secretaries | : Shri Pradip K. Thanawala & Mayur B. Nayak |
| Hon. Treasurer       | : Shri Deepak R. Shah                       |

## **DIRECT TAXES**

**AJAY R. SINGH, PARAS S. SAVLA & RAHUL K. HAKANI**  
Advocates, KSA Legal

### **I. SUPREME COURT**

#### **1. Conflicting Stands**

Three judge Bench, resolving conflict of opinion amongst other benches of the SC, held that:

- (1) Merely because in some cases the revenue has not preferred appeal that does not operate as a bar for the revenue to prefer an appeal in another case where there is just cause for doing so or it is in public interest to do so or for a pronouncement by the higher Court when divergent views are expressed by the Tribunals or the High Courts.
- (2) If the assessee takes the stand that the revenue acted *mala fide* in not preferring appeal in one case and filing the appeal in other case, it has to establish *mala fides*.

*C.K. Gangadharan & Anr. vs. CIT, Civil Appeal Nos. 5210-5216 of 2002, dated July 21, 2008. [Source : www.itatonline.org]*

#### **2. Error in Assessment order**

Where the High Court was satisfied that the assessment order had been back-dated and directed that a fresh order be passed by a different AO and the assessee filed an appeal arguing that the assessment proceedings should have been declared null and void, held:

- (a) All irregular or erroneous or even illegal orders cannot be held to be null and void as there is a fine distinction between the orders which are null and void and orders which are irregular, wrong or illegal. Where an authority making order lacks inherent jurisdiction, such order would be without jurisdiction, null, *non est* and void *ab initio* as defect of jurisdiction of an authority goes to the root of the matter and strikes at its very authority to pass any order and such a defect cannot be cured even by consent of the parties. However, exercise of jurisdiction in a wrongful manner cannot result in a nullity – it is an illegality, capable of being cured in a duly constituted legal proceedings.
- (b) Proceedings for assessment under a fiscal statute are not in the nature of judicial proceedings, like proceedings in a suit inasmuch as the assessing officer does not adjudicate on a lis between an assessee and the State and, therefore, the law on the issue laid down under the civil law may not stricto sensu apply to assessment proceedings.
- (c) Despite scathing observations by the High Court on the conduct of the assessing officer, it was a case of an irregularity in assessment proceedings by the officer, who was not bereft of authority to assess the appellant. At best, it was an illegality, which defect was capable of and has been cured by the High Court by setting aside the orders and by granting consequential relief.

*M/s. Deepak Agro Foods vs. State of Rajasthan & Ors., Civil Appeal Nos. 4327-28 of 2008, (Arising out of SLP (C) Nos. 17346-47 of 2005), with Civil Appeal No. 4329 of 2008, (Arising out of SLP (C) No. 5039 of 2006), dated July 11, 2008. [Source : www.itatonline.org]*

### **II. HIGH COURT**

#### **3. Stay**

Where the returned income was Rs. 7.25 crores but the assessed income was Rs. 58.68 crores and the assessee had filed a stay application before the Addl. CIT but the same was disposed of by the DCIT, a junior functionary, held:

- (i) In accordance with Instruction No. 96 dated 21st August, 1969 issued by the CBDT where the income determined is substantially higher than the returned income, that is, twice the latter amount or more, then the collection of tax in dispute had to be held in abeyance till the decision on the appeal is taken;
  - (ii) The assessee would, in normal course, be entitled to an absolute stay of the demand on the basis of the above Instruction though it voluntarily agreed to pay 15% of the demand;
  - (iii) As the Addl. CIT was the AO, he had the power and duty to deal with a stay petition u/s 220(6). He could not abdicate or relinquish the statutory power nor could he *suo motu* divest himself of this power and confer it upon a junior functionary such as the DCIT;
  - (iv) The fact that the assessee had acquiesced in the power of the DCIT could not confer jurisdiction upon the DCIT;
  - (v) In view of the unreasonable stance of the department, it was directed to pay costs of Rs. 15,000/-
- Valvoline Cummins Limited vs. DCIT Delhi High Court, W.P. (C) 2511/2008 and CM No. 4729/2008 (Stay), dated May 20, 2008. [Source : www.itatonline.org].*

#### **4. Cash Credit – S. 68**

- (1) In a case where it is alleged that persons contributing share application moneys are bogus, it is quite obvious that is very difficult for the assessee-company to show the creditworthiness of strangers. If the Revenue has any doubt with regard to their ability to make the investment, their returns may be re-opened by the department.
- (2) In any case, there is an additional burden on the Revenue. It must show that even if the applicant does not have the means to make the investment, the investment made by the applicant actually emanated from the coffers of the assessee-company so as to

enable it to be treated as the undisclosed income of the assessee-company.

*CIT vs. Value Capital Services P. Ltd, Delhi High Court, ITA. 348/2008, dated 25-4-2008. [Source : www.itatonline.org]*

### III. TRIBUNALS

#### 5. Written down value – S. 43(6)

The assessee had written off certain assets in the books of account. Since some of the assets forming part of the books of assets brought forward from earlier years were discarded during the year under consideration, the A.O. reduced the WDV of the block assets by WDV of the respective assets written off in the year under consideration.

It was held disagreeing with the view of the A.O. that having regard to the scheme of block allowing of depreciation in respect of the block of assets on the WDV thereof, the reduction of the value of any assets which have either been discarded or destroyed or sold can only be made in the manner provided in section 43(6) and not with reference to the individual WDV of each assets that has been sold, discarded or damaged.

*Yamaha Motor India Pvt. Ltd. vs. ACIT, Delhi Tribunal, Bench 'G', ITA Nos.1986 & 1987 /Del/ 2005 dated 23-5-2008.*

#### 6. Deemed Dividend – S. 2(22)(e)

The issue was whether amount of share premium account can be held to be part of accumulated profits for the purposes of section 2(22)(e). It was observed that not only is there a prohibition on the distribution of the share premium account as dividend under the Companies Act, the same is obliged to be treated as part of the share capital of the company and this is

made clear in section 78(1) of the Companies Act which says that any payment out of the share premium account, except for purposes authorized by sub-section (2), will be treated as reduction of share capital attracting the provisions of the Companies Act in relation thereto. This provision of the Companies Act takes care of the argument of the revenue that section 2(22)(e) of the Income-tax Act does not use the expression 'whether capitalized or not'. These words can have application only where the profits are capable of being capitalized. They are not applicable where the receipt in question forms part of the share capital of the company under the provisions of the Companies Act. Therefore, it was held that the share premium account cannot be stated to be commercial profits in the true sense of the term and hence cannot be considered to be a part of accumulated profits for the purposes of section 2(22)(e).

*DCIT vs. Maipo India Ltd., Delhi Tribunal, Bench – I, ITA No. 2266/Del/2005, dated 7-3-2008*

#### 7. Income from House property – S. 22

The income received from letting out of terrace space for installation of neon-sign would constitute income from house property in the hands of the assessee.

*ITO vs. Cuffe Parade Sainara, Mumbai Tribunal, ITA No. 7225/Mum/2005, Bench – E, A.Y. 2002-03, dated 28th April, 2008*

#### 8. Penalty – S. 272(2)(e)

Since the returns filed by the assessee were non-est, no penalty can be levied u/s 272(2)(e)

*ADIT vs. Shri Vardhaman Sthankvasi Jain Sangh, Mumbai Tribunal, ITA No. 961 – 965/Mum/2006, Bench – G, A.Ys. 1998-99 to 2002-03, dated 16th May, 2008.*



## INDIRECT TAXES – SALES TAX DECISIONS

P. C. JOSHI, Advocate

#### Appeal by department

The Punjab VAT Tribunal, after construing the provisions of Section 20 of the Punjab General Sales Tax Act relating to appeal, held that the said Section 20 did not prohibit an appeal by the State and therefore, such an appeal against the order passed by any revisional or appellate authority can be filed by the State.

*M/s Gwalior Concast Pvt. Ltd, New Delhi & Another vs. State of Punjab & Another (2008) 32 PHT 13 (PVT).*

#### Composite Contract – Works Contract, Service & Skill

The Madras High Court, while disposing of a writ petition by a colour laboratory, undertaking the business of processing and printing of films of the negatives supplied by the customers, reviewed the case law on the point including that of M/s Rainbow Colour Lab., M/s ACC Ltd, M/s BSNL etc. and held that the activity in question was a composite transaction of sale and service, because of the impact of the Fortysixth Amendment to the Constitution of India.

*Tvl. R. Mini Colour Lab., Chennai vs. The Tamil Nadu Taxation Special Tribunal & Others 2008-09 (14) TNCTJ – 81.*

#### 'C' Form at later stage

The Allahabad High Court, after considering the provisions of section 12-B of the U. P. Trade Tax Act, held that the

declarations in Form 'C' obtained by the assessee after passing of the order of assessment should be admitted when produced at a later stage, especially because the law did not permit unnecessary taxation; which should be only in accordance with law.

*M/s Hindon River Mills Ltd vs. Commissioner of Trade Tax, U. P., Lucknow. 2008 (NTN (Vol. 37) – 149.*

#### 'C' Form – Building construction

The Kerala High Court held that a person, engaged in undertaking the works contract of building construction, was in a sense manufacturer and therefore entitled to issue 'C' Form for effecting inter-State purchases of the goods required for the job undertaken by them.

*M/s DLF Laing O'Rourke (India) Ltd vs. State of Kerala. Source : Sales Tax Matters, July 2008, Vol. 11, Part 7, Page 781.*

#### Dealer

In determination proceedings under section 80 of the Gujarat VAT Act, it was held that the applicant, a Co-operative Society and also a Charitable Trust with the object of upgrading and educating the ladies and providing them with self-employment, were not dealers for their disposal of cotton bags prepared by the ladies in the course of their training.

*M/s Avad Ekta Industrial Co-op. Society Ltd (Determination Order dated 20th February, 2008). Source : Sales Tax Journal, Vol. 47, Part : 3, June 2008, Page 254.*

### Duty Entitlement Pass Book (DEPB) – Goods

The Supreme Court held that the decision of the Constitution bench in the case of *M/s Sunrise Associates* did not alter the position in regard to levy of tax on the sale of Replenishment (REP) Licence. The 3-Judge bench decision in the case of *M/s Vikas Sales Corporation* continued to hold the field. The Apex Court, therefore, held that DEPB like REP Licence was covered by the term 'goods' and therefore liable to be taxed. In that connection, it was observed that DEPB had an intrinsic value that made it a marketable commodity.

*M/s Yasha Overseas & Others vs. Commissioner of Sales Tax & Others (2008) 31 PHT 574 (SC).*

### Entries in Schedule

#### 1. Digital Still Video Cameras, Data Projectors, Audiovisual Equipments – IT products

The Commissioner of Commercial Taxes, Gujarat, in a proceeding under section 80 of the Gujarat VAT Act, held that a Digital Still Video Camera and Digital Electronic Camera were both IT products liable to be taxed @ 4% under entry 45 of the Schedule appended to the said Act under the category of Digital Electronic Equipments.

*Source : Sales Tax Journal, Vol. 47, Part 3, June 2008, Page 280.*

#### 2. Frequency Inverter – Plant & Machinery

The Commissioner of Commercial Taxes, in determination proceeding under section 80 of the Gujarat VAT Act, held that Frequency inverter which automatically controls the speed of the electric motor of the textile machine were covered by the phrase 'Plant & Machinery' under entry 58A of the IIInd Schedule appended to the said Act and therefore, was liable to be taxed @ 4%.

*Source : Sales Tax Journal, Vol. 47, Part 3, June 2008, Page 289.*

#### 3. Imported fabric

The Commissioner of VAT under Haryana Act, while answering a question under section 56 of the Haryana VAT Act, clarified that cotton, woollen or silken textiles including rayon, artificial silk or nylon were covered under the entry 51 only when additional excise duty was leviable on those goods. However, since the imported fabrics from abroad did not bear additional excise duty, the same were outside the purview of the said entry and therefore not exempt from levy of VAT.

*Querist – M/s Jiwnani, Mehrauli-Gurgaon Road, Gurgaon (2008) 31 PHT 137 (JS).*

#### 4. Diesel Engine

The Commissioner of U. P., while deciding a petition under Section 59 of the U. P. VAT Act, 2008, held that the diesel engine was taxable @ 4% under entry relating to machinery.

*Commissioner, Trade Tax, U. P. vs. M/s Taife Motors & Tractors Ltd., Lucknow (Decision dated 5th March, 2008).*

#### 5. Insulating Varnish

The Allahabad High Court, while considering the entries relating to electrical goods, paint and varnish, held that insulating varnish should be treated as electrical goods taxable @ 8% under the provisions of U. P. Trade Tax Act. The court in that connection observed that when an item was capable of being covered by two different entries having different rates of tax, the one with lower rate of tax should be preferred.

*Commissioner, Trade Tax, U. P., Lucknow vs. M/s R. L. Kanhaiya Lal, Kanpur (VSTI 2008 ... B-291).*

### Input Tax Credit

The Kerala High Court, while considering the provisions of Kerala VAT Act, 2003, held that the discount allowed as deduction in the turnover as trade discount shown separately in the Invoice, would result in the purchaser paying lesser amount. However, where the discount is passed on through credit notes periodically, after the transactions were completed by the supplier, cannot be eligible for any deduction from the turnover. Such an eventuality would lead to the purchaser being entitled to full input tax credit.

*M/s Priya Agencies vs. Commercial Tax Officer (2008) 16 KTR 287 (Ker).*

### Judicial discipline

The Supreme Court set aside the judgment of the Division Bench of the Orissa High Court allowing the writ petition without referring to an earlier judgment of the Division Bench of the same court, in regard to exhaustion of alternative remedy. The Supreme Court also referred to the large number of cases in that regard and regretted non-observance of the judicial discipline.

*C. C. T., Orissa vs. M/s Indian Explosives Ltd. Source : Sales Tax Matters, July 2008, Vol. 11, Part 7, Page 779.*

### Legislative power

The Punjab & Haryana High Court held that no statute can be construed to have retrospective operation, unless such a provision was made expressly. When the competent authority was not authorised by the statute to exercise its power of issuing the notification with retrospective effect, any notification so issued was beyond jurisdiction and therefore the same was quashed.

*M/s Kumar Brothers (Chemists) Pvt. Ltd vs. Union Territory of Chandigarh & Others (2008) 31 PHT 567 (P&H).*

### Notice – Whether proper

The West Bengal Commercial Tax Appellate & Revisional Board held that the notice issued on 28th June, 1999, fixing the date of hearing on 30th June, 1999 was not a proper notice and amounted to virtual denial of reasonable opportunity. The Board, therefore, set aside the revisional order so passed in haste.

*M/s Bengal Aluminium Stores (P) Ltd vs. D. C. C. T., Dharamtalla Circle (2008) 51 S. T. A. – 38.*

### Nature of amendment and its impact

The Supreme Court, while considering the amendment made in the definition of the term 'dealer' with effect from 1st August, 1996 under the Andhra Pradesh General Sales Tax Act, 1957, held that insertion of the Explanation under the definition of the term 'dealer' was not for the purpose of clarifying any doubt, but it expanded the scope of the term 'dealer' to cover certain entities as deemed dealers for their transaction of selling any goods. In such a situation, the amendment cannot have any retrospective effect and therefore the explanation would be applicable only prospectively from the date of its insertion.

*Govt. of Andhra Pradesh & Another vs. Corporation Bank (2008) 16 KTR 296 (SC).*

### Penalty – Fake or fictitious transactions

The Punjab VAT Tribunal disapproved the imposition of penalty on the mere fact that the purchase bill did not bear serial number or date thereof. According to the Tribunal, such a technical omission did not render the transaction to be non genuine, fake or fictitious. The penalty, therefore, was quashed.

*M/s Ankita Industries, Kapurthala vs. State of Punjab. Source : Sales Tax Matters, July 2008, Vol. 11, Part 7, Page 735.*



**Refund – Absence of departmental record**

In the case before the Punjab & Haryana High Court, the department was unable to pass an order after remand, because the files of the assessing authority as well as the appellate authority were not traceable. The High Court directed the refund of the amount paid as deposit in appeal, along with interest due thereon for the delay, as according to the Hon'ble Court, the department was not entitled to retain the amount. For the negligence of the departmental personnel, the assessee should not suffer.

*M/s Kashmir South Roadways (Regd.) vs. Excise & Taxation Commissioner, UT, Chandigarh. Source : Sales Tax Matters, July 2008, Vol. 11, Part 7, Page 756.*

**Waiver & Estoppel – Res judicata**

The Supreme Court, while deciding a civil appeal against the judgment of the Punjab & Haryana High Court, held that the

• principle of estoppel, waiver and res judicata were procedural in nature. It will have no application in a case where earlier judgment was rendered without jurisdiction or the issues involved were only questions of law. However, once the issues which arose in the subsequent matter were directly and substantially dealt with in the earlier case, Section 11 of the Civil Procedure Code will be applicable.

• The Supreme Court also reiterated the well established principle in regard to the ingredients required for applicability of section 11 of the Civil Procedure Code. One of the ingredients which was quite often overlooked was that the matter directly and substantially in issue in the later matter, should have been heard and finally decided by the court in the earlier matter.

• *M/s Dadu Dayalu Mahasabha, Jaipur vs. M/s Mahant Ram Niwas & Another JT 2008 (6) SC 440.*



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