



AIFTP TIMES

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Federation News

Shri Mukul Gupta, Secretary General

FORTHCOMING PROGRAMMES

| Date & Months | Programmes |
|--------------------------|--|
| 15th March, 2008 | National Executive Committee Meeting at Jaipur (evening) |
| 15th & 16th March, 2008 | Two days National Tax Conference at Jaipur |
| 3rd & 4th November, 2008 | Three days International Conference at New Delhi |

FREE BUDGET MEMORANDUM

Detailed representation on Finance Bill is forwarded to Hon'ble Finance Minister on 14th January, 2008.
The full text is available at our website; i.e., www.aiftponline.org

Two Days National Tax Conference at Jaipur

All India Federation of Tax Practitioners – Central Zone in association with Rajasthan Tax Consultants' Association, Jaipur and Tax Consultants Association, Jaipur will be holding Two Days National Tax Conference on (Saturday & Sunday) 15th & 16th March, 2008 at Maharana Pratap Sabhaghar, Vidhya Ashram School, Jawaharlal Nehru Marg, Jaipur – 342 004.

Note: National Executive Committee Meeting will be held on 15th March, 2008 (evening)

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Three Days International Conference at New Delhi

All India Federation of Tax Practitioners in association with Taxation Institute of Australia will be holding Three Days International Conference on 3rd to 5th November, 2008 at Taj Mahal Hotel, New Delhi. About 80 Chartered Accountants from Australia are expected to attend the Conference.

| Theme – Tax and Business – Australia and India |
|--|
| Day One: Monday, 3rd November, 2008 |
| Welcome & Dinner |
| Day Two : Tuesday, 4th November, 2008 |
| Registration |
| Session 1: Inauguration |
| Session 2: Introduction to Indian Tax |
| Session 3: Introduction to Australian Tax |
| Session 4: Doing Business in India |
| Session 5: Doing Business in Australia |
| Session 6: Tax Practice in India |
| Session 7: Commissioners Session |
| Day Three : Wednesday, 5th November, 2008 |
| Session 8: Indian Taxation Disputes |
| Session 9: Hands on Business Implementation |
| Session 10: India and the World (an EEC view, or UN view, CEF, OECD, World Bank, APEC) |
| Session 11: Australia/India Double Tax Agreement |
| Session 12 : Specific Business Case Study in India |
| Concluding session |

Delegates Fees

- For members of the Federation and Professionals delegate fees is Rs. 10,000/- and for others Rs. 12,500/-.
- Cheque or DD may be drawn in favour of "All India Federation of Tax Practitioners", may be sent to 215, Rewa Chambers, 31, New Marine Lines, Mumbai 400 020.

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DIRECT TAXES

Compiled by

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TRIBUNALS

1. Application Rule 27 — ITAT Rules — Question of law

The Department has appealed against the order of the CIT(A) on merits. The assessee had not preferred any appeal on legal ground; i.e., reopening after four years, which was decided against the assessee. During the course of hearing the Assessee moved an application under Rule – 27 of ITAT Rules and pleaded that the order of the learned CIT(A) be upheld on the ground that assessment was wrongly re-opened. Held that, “No doubt this issue has been decided against the assessee by the learned CIT(A) and assessee has not challenged that order but it can take up this issue before the Tribunal with the aid of Rule 27 provided that assessee can agitate any ground, which has been decided against it, but if those arguments are being accepted by the Tribunal then the order of the learned CIT(A) can be upheld even on other issues, because the issue regarding reopening is going to hit the root and the moment it is held that re-opening is bad in law then all other consequent proceedings would become redundant.”

ACIT vs. M/s Triace, Mumbai ITAT, ITA No. 2827/Mum/04, Bench – H, A.Y. 1995-96, dated 26-11-2007.

2. Depreciation — S. 32

Expression “used” in section 32 is to be construed in context of facts and circumstance of each case and would include not only active use of asset, but also passive use of asset for purposes of business. Hiring of asset is one way of establishing user of asset in business; it is not necessary that assessee should receive hire charges to prove user of assets; even an agreement to hire would tantamount to use of asset.

Sanghvi Movers (P.) Ltd. vs. DCIT (2008) 110 ITD 1 (Pune) (TM)

3. Disallowance — S. 14A

It was not disputed that the investment in shares were made by the assessee company in the earlier years. During the current financial year the assessee has not invested in any new shares. It is clear that there is no nexus between the borrowal of funds and investment in shares. Thus on these factual matrix it was clear that no part of the interest expenditure claimed can be attributable or can be said to have a nexus with earning of dividend income by the assessee company.

DCIT vs. M/s Falak Investments Pvt. Ltd., ITAT Mumbai, Bench “A”, A.Y. 2001-02, ITA No. 7091/Mum/2004, dated 26th December, 2007

4. Export of computer software — S. 80HHC

The assessee was exporting the computer software manufactured in SPZ unit. It was keeping separate accounts. The entire activity of the assessee in this Zone was independent of its other business. There was no overlapping and mingling of the services or any link between

the manufacturing activities of both. Both were exclusive of each other. Section 80HHC speaks of deduction in respect of profits derived by the assessee from export of such goods or merchandise, whereas section 80HHE speaks of such business. “Such business” only could mean the business of export of computer software. The scope of consideration has been narrowed down. In other words, whether the assessee derives income from any other business or not, is not a criteria and it is wholly extraneous while granting deduction under section 80HHE, which is exclusively for computing deduction in respect of profit from export of computer software, etc. Therefore, the turnover for the purpose of computation of deduction u/s 80HHE had to be worked out on the basis of export turnover alone.

Datamatics Ltd. vs. ACIT (2008) 110 ITD 24 (Mum)

HIGH COURTS

1. Deduction — Revised Return — Ss. 80HH and 80J

Assessee can file a revised return and can claim the benefit u/ss. 80HH and 80J even if the said benefits were not claimed in the original return; filing of the audit report is not necessary and can be filed at a later stage

CIT vs. Jagish Ramkrishan Chand (2008) 1 DTR 170 (HP)

2. Depreciation — Actual cost — S. 32

Cost of assets is not to be reduced by the amount of subsidy received by the assessee from the Government for the purpose of working out depreciation.

CIT vs. Himachal Engg. Co. (P) Ltd. (2008) 1 DTR 176 (HP)

3. Income — S. 28

If there is a complete disposal of assets with know how resulting in parting of asset for a lump sum, with no reference to anticipate user consideration received for disposal of such asset would be a capital receipt.

(2008) 166 Taxman 196 (Bom)

4. Non compete agreement — Capital Receipt — S. 28

Consideration for non compete agreement was neither taxable as revenue receipt nor as capital gain. Sec. 28(va) will apply w.e.f. A.Y. 2003-04 and sec. 552(a) will apply only from A.Y. 1998-99. Since the cost of acquisition was nil, receipt was not exigible to capital gains tax.

CIT vs. Narendra D. Desai (2008) 1 DTR 106 (Bom)

5. Objections to reassessment notice — S. 148

Assessing Officer having failed to decide objections raised by the assessee against notice u/s. 148. Matter set aside to Assessing Officer to decide the said objections by a separate speaking order.

SICA Educational Trust (Regd) vs. UOI (2008) 1 DTR 212 (MP)

INDIRECT TAXES

Compiled by
P.C. JOSHI
Advocate

Conversion of Reference into Rectification

Before the Gujarat Sales Tax Tribunal, the interest on an earlier occasion was confirmed by following the ratio of the Supreme Court judgment in the case of M/s A. C. C Ltd. (48 STC 466). Against that judgment, the assessee filed the Reference Application and relied on the later judgment in the case of M/s J. K. Synthetics Ltd. (94 STC 422). Considering the later pronouncement of law by a Larger Bench, the Tribunal followed the Punjab & Haryana High Court judgment in the case of M/s Malik Iron & Steel Rolling Mills (126 STC 220) and converted the Reference Application into Rectification Application and set aside the interest confirmed earlier.

M/s Gujarat Forging Pvt Ltd vs. State of Gujarat.

Source : *Sales Tax Journal, Vol. 46, Part 8, Page 804.*

Demand of security

Before the Gujarat VAT Tribunal, the controversy about the quantum of security for the purpose of granting registration certificate under the Gujarat VAT Act arose. The authority in that case had asked the dealer to furnish the security in excess of the quantum provided in the rule. The Tribunal in that case quashed such a demand and remanded the matter back with the observation that the provisions of section and rules have to be harmoniously construed and the authority cannot ignore a part of the rule which provided for a ceiling of amount of security that can be called for while granting registration certificate.

M/s Bhumi Enterprise vs. State of Gujarat

Source : *Sales Tax Journal, Vol. 46, Part 9, Page 943.*

Entries in Schedule

1. Electronic weighing machine

The Gujarat VAT Tribunal considered the scope of Entry 45 of Schedule II, appended to the Gujarat VAT Act, and held that the Electronic weighing machine was covered by the expression 'digital electronic equipment' mentioned

in that entry. The Tribunal set aside the determination in question wherein it was held that the product in question was covered by residuary entry 87 of Schedule II.

M/s Alexandra Scale Company vs. The State of Gujarat.

Source : *Sales Tax Journal, Vol. 46, Part 8, Page 819.*

2. Refrigeration material

The Allahabad High Court, while referring to the principles of interpretation of entries, held that the finding by lower authorities that the refrigeration material was liable to be taxed @ 15% and not as chemical as contended by the assessee; cannot be termed as perverse simply by relying on the treatment in the earlier assessment. The Court in that connection observed that if the authority was unconsciously wrong in the past, it was no reason for it to continue consciously such a wrong. In such a case, the Doctrine of precedent did not apply.

M/s Navin Fluorine Industries, Ghaziabad vs. Commissioner of Trade Tax, Ghaziabad & Others 2007 NTN (Vol. 35) – 194.

3. Prepaid internet access coupon

The Commissioner of Commercial Taxes, Kerala, held that a prepaid internet access coupon was liable to be taxed @ 4% under Entry 118 of Third Schedule appended to the Kerala VAT Act, dealing with SIM cards including recharge coupons.

Source : *Kerala Tax Reporter, Vol. 15 Part XII, Page 309.*

4. Jaljira

The Rajasthan High Court held that the sale of Jaljira was covered by the entry relating to drink used as appetiser and not that under packed masala..

Source : *Sales Tax Times, Vol. 9 Parts 11 & 12, Page 3.*

5. Liquefied Petroleum Gas (LPG)

The Commissioner of Commercial Taxes, Tamil Nadu, clarified that the LPG sold for commercial use as industrial input was covered by entry 67(a) of Part B of



First Schedule, appended to the Tamil Nadu VAT Act, and therefore liable to be taxed @ 4%. It was also clarified that the use of LPG otherwise than as an input would lead the same as taxable at 12.5%, covered by Part C of First Schedule.

Note from the Editor : It may be noted that the Finance Act, 2006 have amended section 14 of the Central Sales Tax Act, 1956, so as to include LPG for domestic use as declared goods.

Source : *The Tamil Nadu Commercial Taxes Journal, Vol. 13 No. 9, Page 353.*

6. Empty Gas Cylinder – Packing material

The Commissioner of Commercial Taxes reiterated his earlier clarification that empty gas cylinders can be considered as packing material under entry 94 of Part B of First Schedule appended to the Tamil Nadu VAT Act with effect from 1st January, 2007 and therefore taxable at 4%.

Source : *The Tamil Nadu Commercial Taxes Journal, Vol. 13 No. 9, Page 353.*

7. Input Tax Credit

The Commissioner of Commercial Taxes clarified that the inter-State sale of goods purchased on payment of 4% tax, when sold against 'C' Form can result in adjustment of 1% against the output tax or can be refunded at a later stage.

Source : *The Tamil Nadu Commercial Taxes Journal, Vol. 13 No. 9, Page 361.*

8. Telephone Instruments/Handsets

The Commissioner of Commercial Taxes, Tamil Nadu, clarified that the telephone instruments/handsets were goods of Information Technology liable to be taxed at 4% under entry No. 68(3) of Part B of First Schedule appended to the Tamil Nadu VAT Act effective from 1st January 2007.

Source : *The Tamil Nadu Commercial Taxes Journal, Vol. 13 No. 9, Page 361.*

Exemption

1. The Supreme Court considered the object of granting incentives to the Units in backward area and construed the Government Order liberally for the purpose of deciding as to whether the repacking of oil in small

packages amounted to manufacture or not and held that the State cannot be allowed to turn around and take an entirely opposite stand than the one mentioned in the Government Order. For that purpose, it referred to the earlier judgment in the case of *M/s Vadilal Chemicals Limited [(2006) 6 SCC 292]*.

M/s Pondicherry State Co-operative Consumer Federation Ltd vs. Union Territory of Pondicherry (2007) 30 PHT 611 (SC).

2. The Supreme Court held that when the exemption was granted on the turnover of sale of goods in an assessment year in excess of the base production, the same can also be adjusted at the time of finalisation of assessment as well as while submitting the return periodically. Any tax paid along with the return was always subject to adjustment at the time of final assessment.

Commissioner of Trade Tax, U. P. vs. M/s Malviya Chemical & Pharmaceutical Pvt. Ltd., Ghaziabad [(2007) 30 PHT 614 (SC)].

'Exempt Generally' – Section 8(2A) of Central Sales Tax Act

The Allahabad High Court held that the exemption granted to an Institution certified by U. P. Khadi Village & Industries Board, cannot be said to be general exemption for the purpose of section 8(2A). However, since the departmental circular treated the same as one of 'exemption generally' through public circular, it was binding upon it and no different stand can be taken up contrary to the version in the circular even when such a version was contrary to the statute.

M/s Shakti Gramodyog Sansthan, Saharanpur vs. Commissioner of Trade Tax, U. P., Lucknow 2007 NTN (Vol. 35) – 183.

Format of Audit Report

The West Bengal Taxation Tribunal considered the provisions of West Bengal VAT Rules, 2005 and the relevant Rule 44(3) prescribing the Audit Report to be in Form No. 88 and held that the West Bengal VAT Act did not provide for audit of the accounts by Chartered Accountant and the rule cannot be contrary to the provisions of law. Such a Rule was held to be *ultra vires*.

M/s G. K. Engineering Works & Stores Pvt. Ltd. vs. Government of West Bengal & Others (2007) 50 S. T. A.– 320.

Interest

The Punjab & Haryana High Court held that the assessee cannot be asked to pay interest for the intervening period from the date of order of assessment to the date of revision order, since the order of assessment did not result in dues.

M/s Chowdhary Tractor Company, Tohana vs. State of Haryana (2007) 30 PHT 659 (P&H).

Inter-State sale vis-à-vis branch transfer

The Supreme Court, after following the judgments in the case of *M/s K.G. Khosla & Co. Ltd. and Others, M/s English Electric Company of India Ltd. and M/s Sahney Steel & Press Works Ltd. and Another*, held that when the goods moved from factory in Tamil Nadu to the buyers in Gujarat and Maharashtra, pursuant to the direct contract, it amounted to inter-State sale and there was no case for intra-State sale at destination.

M/s I. D. L. Chemicals Ltd vs. State of Orissa (2007) 30 PHT 623 (SC).

Luxury Tax

The Kerala High Court, after considering the definition of the term 'luxury', under section 2(ee) of the Kerala Tax on Luxuries Act, held that both, the commodity and services that lead to comforts or pleasure, was liable to tax. Therefore the charges collected by the hotel for ayurvedic treatment, laundry services as also for boating facility arranged by the hotel, was liable to luxury tax. According to the High Court, the expression 'luxury provided in a hotel' included not only the amenities in the hotel, but also the services arranged by the hotel outside the hotel premises.

M/s Casino Hotel vs. State of Kerala (2007) 15 KTR 485 (Ker).

Manufacture

The Rajasthan High Court at its Jodhpur bench, while deciding an appeal under the Income Tax law, held that the expression 'production' had a wider connotation than the expression 'manufacture'. After considering the case law on the point, the Hon'ble court held that cutting of granite/marble stone into usable slabs or tiles was a manufacturing activity as contemplated under the provisions of sections 80-IA & 80-IB of the Income-tax Act, 1961.

Source : *Sales Tax Times, Vol. 9 Parts 11 & 12, Page 13.*

• Promissory estoppel

• The Haryana Tax Tribunal held that its powers were limited to the ones provided in the Act. Therefore it cannot adjudicate about the application of principle of promissory estoppel made by way of statute.

• *M/s Belmaks Pvt. Ltd., Faridabad vs. State of Haryana (2007) 30 PHT 639 (HTT)*

• Penalty

• The Supreme Court considered the relevant provisions that was applicable on the date of default and the amendment made thereafter, in Rajasthan Entertainment & Advertisement Tax Act, 1957 and held that on analysing the scheme of the Act, the stress for imposing penalty was on the contravention and therefore the quantum of penalty that prevailed on the date of default was applicable, especially when the later amendment was not retrospective nor clarificatory.

• *M/s Jaswant Talkies vs. Commercial Taxes Officer, Bhilwara (2007) 30 PHT 634 (SC).*

• Purchases by Export Oriented Unit (EOU)

• The Commissioner of Commercial Taxes, Tamil Nadu, clarified that the purchases by 100% EOU were exempt as notified under the Tamil Nadu Sales Tax Act, 1959 and the said exemption continued even after 1st January, 2007 on introduction of VAT system.

• **Source :** *The Tamil Nadu Commercial Taxes Journal, Vol. 13 No. 9, Page 361.*

• Printed notice

• The West Bengal Taxation Tribunal, while considering an application by the assessee in regard to demand of security for proper payment of tax and safe custody of waybill, held that the whole purpose of issuing the notice was frustrated by the officer mechanically issuing a printed notice without application of mind, duly supported by specific and definite ground. According to the Hon'ble Tribunal, such a notice was not a proper notice. It was also held that no order can be passed based on some allegation not mentioned in the notice.

• *M/s Shashi Kumar Choudhari vs. Additional C. C. T., West Bengal & Others (2007) 50 S. T. A. – 312.*

• Reference

• Where the law, in regard to the controversy sought to be raised in direct Reference Application, is settled, the



Punjab & Haryana High Court held that the High Court, instead of issuing direction to the Tribunal to state the statement of the case, it can straightaway answer the question.

M/s Chowdhary Tractor Company, Tohana vs. State of Haryana (2007) 30 PHT 659 (P&H).

Revision

The Supreme Court, while construing the provisions under the Punjab General Sales Tax Act, held that where the period of limitation was not provided for an action in revision, the same should be exercised within a reasonable period, depending on the nature of the statute, rights and liabilities thereunder as well as other relevant factors.

State of Punjab & Others vs. M/s Bhatinda District Co-op. Milk P. Union Ltd. 2007 NTN (Vol. 35) – 177.

Reference/Revisional jurisdiction of High Court

The Supreme Court, setting aside the order of the High Court and remitting the matter back to it, held that the jurisdiction of the High Court in revision/reference would come into play only if a question of law arose in the matter.

M/s Rashtriya Audyogik Sansthan vs. Commissioner of Trade Tax, U. P. (2007) 50 S.T.A. – 307.

Refund

The West Bengal Taxation Tribunal disapproved the manner in which the Commissioner dealt with the application for refund submitted by the assessee and held that the amount deposited as tax under the interim order

was refundable when no tax was found leviable on final assessment. The Tribunal therefore directed the Commissioner to dispose of the application on merit within a period of 30 days from the date of the order.

M/s Jalan Hi-Mech Ltd. & Another vs. C. C. T., West Bengal & Others (2007) 50 S. T. A. – 317.

Sales by Special Economic Zone (SEZ) developers

The Commissioner of Commercial Taxes, Kerala, rectified his earlier order dated 31st August, 2006 on the above point and clarified that in relation to developers of SEZ, only sale of building materials, industrial inputs, plants and machinery including components, spares, tools and consumables in relation thereto, situated in any SEZ; was exempt by virtue of section 6(7)(b) of the Kerala VAT Act.

Source : *Kerala Tax Reporter, Vol. 15 Part XII, Page 315.*

Technical know-how

The Kerala High Court held that the transfer of technical know-how through technical personnel was liable to be taxed under the provisions of Kerala General Sales Tax Act, on the footing that the technical know-how was goods.

Note by Editor: This judgment being dated 5th December, 2005, though published recently, was pronounced without having the benefit of the later development of law in the cases of *M/s BSNL and M/s Sunrise Associates.*

M/s Mechanical Assembly Systems (India) Pvt. Ltd. vs. State of Kerala (2007) 15 KTR 497 (Ker).

○○

Hearty Congratulations

Hearty Congratulations to the newly elected Office Bearers of Chhotanagpur Commercial Taxes Bar Association for the year 2008-09.

President : **Shri Ram Gopal Agarwal**

Vice President : **Shri Vijay Kumar Verma**

Secretary : **Shri Ashok Kumar**

Joint Secretary : **Shri Subrata Das Gupta**

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Notes:

1. The above publications are available for sale; those who desire to buy may contact the office of the Federation.
2. Outstation members are requested to add Rs. 40/- per publication as courier charges, **except for Tax Professionals' Manual** whereas Courier charges is Rs. 50/- per copy.
3. Please draw separate Cheque/Draft in favour of "All India Federation of Tax Practitioners" payable at Mumbai for publications at **Sr. No. 1** and separate Cheque/Draft in favour of "All India Federation of Tax Practitioners (Western Zone)" payable at Mumbai for publications at **Sr. Nos. 2 and 3.**

Membership of AIFTP as on 10-1-2008

Life Members

| | Associate | Individual | Association | Died | Corporate | Total |
|--------------|-----------|-------------|-------------|-----------|-----------|-------------|
| Central | — | 553 | 19 | 2 | 0 | 570 |
| Eastern | — | 696 | 31 | 4 | 0 | 723 |
| Northern | — | 521 | 14 | 1 | 0 | 534 |
| Southern | — | 596 | 12 | 1 | 0 | 607 |
| Western | 03 | 1400 | 31 | 6 | 8 | 1436 |
| Total | 03 | 3766 | 107 | 14 | 8 | 3870 |

Members of Editorial Team of AIFTP Times : Mr. Kishor Vanjara & Mr. Deepak R. Shah

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