



AIFTP TIMES

Price Rs. 5/-
(For Members only)

Volume III - No. 9 • September, 2008

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 at Mumbai |
| 17th October, 2008 | National Executive Committee Meeting at Navin Thakkar Auditorium, Mumbai at 6.00 p.m. |
| 17th & 18th October, 2008 | Two Day National Tax Conference organised jointly with The Sales Tax Practitioners' Association of Maharashtra at 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. 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.
2. 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 |

TWO DAY NATIONAL TAX CONFERENCE

Organised By
ALL INDIA FEDERATION OF TAX PRACTITIONERS – WESTERN ZONE

jointly with

THE SALES TAX PRACTITIONERS' ASSOCIATION OF MAHARASHTRA, MUMBAI

ON FRIDAY, 17TH OCTOBER, 2008 & SATURDAY, 18TH OCTOBER, 2008
 AT NAVIN THAKKAR AUDITORIUM, SHRADDHANAND ROAD, VILE PARLE (W), MUMBAI – 400 057

DAY 1 – FRIDAY, 17TH OCTOBER, 2008

| <i>Timing</i> | <i>Subject</i> | <i>Speakers</i> | <i>Chairmen</i> |
|--------------------------------|---|---|--|
| 9.30 a.m. to 10.00 a.m. | Inauguration | | |
| 10.00 a.m. to 1.15 p.m. | Issues on Real Estate Transactions including Development & Redevelopment | | |
| 10.00 a.m. to 11.00 a.m. | i) Under Income Tax | Mr. J. K. Ranka, Adv., Jaipur | Dr. K. Shivaram, Adv., Mumbai |
| 11.00 a.m. to 11.15 a.m. | Tea Break | | |
| 11.15 a.m. to 1.15 p.m. | ii) Under VAT iii) Under Service Tax | CA. S. Venkatramani, Bangalore CA. Keshav Maloo, Udaipur | Mr. Bharatji Agrawal, Sr. Adv., Allahabad |
| 1.15 p.m. to 2.15 p.m. | Lunch Break | | |
| 2.15 p.m. to 3.45 p.m. | Issues of ITC (Set Off) & Refund under MVAT | CA. Vikram Mehta, Mumbai | Mr. S. S. Gaitonde, Adv., Mumbai |
| 3.45 p.m. to 4.00 p.m. | Tea Break | | |
| 4.00 p.m. to 5.30 p.m. | Service Tax Issues relating to export-import of services | CA. Rajiv Luthia, Mumbai | CA. A. R. Krishnan, Mumbai |

DAY 2 – SATURDAY, 18TH OCTOBER, 2008

| | | | |
|--------------------------|---|--|----------------------------------|
| 9.30 a.m. to 10.30 a.m. | Issues relating to WCT – MVAT & CST (other than Real Estate but including construction) | Mr. Santosh Gupta, Adv., Nagpur | Mr. P. C. Joshi, Adv., Mumbai |
| 10.30 a.m. to 11.30 a.m. | Branch Transfer vs. Interstate Sales | Mr. Nayan Sheth, Adv., Ahmedabad | Mr. M. L. Patodi, Adv., Kota |
| 11.30 a.m. to 12.30 p.m. | Issues under Income Tax on Shares & Securities Transactions | CA. Gautam Nayak, Mumbai | CA. Kishor Karia, Mumbai |
| 12.30 p.m. to 1.30 p.m. | Lunch Break | | |
| 1.30 p.m. to 3.30 p.m. | Brains' Trust Session | Trustees | |
| | Survey, Search, Seizure, Business Audit and Check Post (under Income Tax, Sales Tax, Service Tax and Excise Laws) | Mr. Vikram Nankani, Adv., Mumbai (Excise & Service Tax) Mr. B. C. Joshi, Adv., Mumbai (VAT & Sales Tax) Mr. N. M. Ranka, Sr. Adv., Jaipur (Income Tax) Mr. S. N. Inamdar, Adv., Mumbai (Income Tax) | |
| 3.30 p.m. to 4.30 p.m. | Valedictory Session | Eminent Faculty | |

Delegate Fees : Members : Rs. 2,000/- ; Non-Members : Rs. 2,500/- ; Accompanying spouse : Rs. 1,000/-

Cheque/DD may be drawn in favour of "All India Federation of Tax Practitioners – Western Zone". Outstation members are requested to pay DD payable at Mumbai only.

DIRECT TAXES

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

I. SUPREME COURT

1. Cash Credit – Share Application Money – S. 68

The Hon'ble Supreme Court dismissed the SLP of department observing that if the share application money is received by the assessee company from alleged bogus share holders, whose names are given to the Assessing Officer, then the Dept is free to proceed to re-open their individual assessment in accordance with law and therefore the said amount could not be added u/s. 68 as undisclosed income of the assessee company.

CIT vs. Lovely Exports (P) Ltd. (2008) 172 Taxman 44 (Mag)

2. Concealment – Penalty – S. 271 (1) (c) – Explanation 4 to s. 271 (1) (c) is retrospective

(i) "Income" includes "loss" as held in *CIT vs. Harprasad 99 ITR 118 (SC)*. Expl. 4 to s. 271(1) (c) as it stood prior to the amendment by the Finance Act, 2002 has to be understood in this background.

(ii) The recommendations of the Wanchoo Committee and the CBDT Circular make it clear that the amendment to Expl. 4 to s. 271(1)(c) was to make explicit what was otherwise implicit; i.e., that penalty can be imposed even in a case where the assessment results in a loss.

(iii) In interpreting a statute, the circumstances under which the amendment was brought in existence and the consequences of the amendment will have to be taken care of while deciding the issue as to whether the amendment was clarificatory or substantive in nature and, whether it will have retrospective effect or it was not so.

(iv) Applying this test, the amendment to Explanation 4 to s. 271(1)(c), though made with effect from 1st April, 2003, should be treated as clarificatory and retrospective.

(v) Accordingly, *Virtual Soft Systems Ltd. vs. CIT 289 ITR 83* is overruled.

CIT vs. Gold Coin Health (Supreme Court – Larger Bench)

Source : www.itatonline.org

3. Development agreement vis-a-vis Joint venture agreement

(i) A development agreement is one where the land-holder provides the land. The Builder puts up a building. Thereafter, the land owner and builder share the constructed area. The builder delivers the 'owner's share' to the land-holder and retains the 'builder's share'. The land-holder sells/transfers undivided share/s in the land corresponding to the Builder's share of the building to the builder or his nominees. The land-holder will have no say or control in the construction or have any say as to whom and at what cost the builder's share of apartments are to be dealt with or disposed of. Such an agreement is not a "joint venture" in the legal sense. It is a contract for "services".

(ii) On the other hand, an agreement between the owner of a land and a builder, for construction of apartments and sale of those of apartments so as to share the profits in a particular ratio may be a joint venture, if the agreement discloses an intent that both parties shall exercise joint control over the construction/development and be accountable to each other for their respective acts with reference to the project.

(iii) The title of the document is not determinative of the nature and character of the document, though the name may usually give some indication of the nature of the document. The use of the words 'joint venture' or 'collaboration' in the agreement will not make the transaction a joint venture, if there are no provisions for shared control and losses.

Faqir Chand Gulati vs. Uppal (Supreme Court)

Source : www.itatonline.org

II. HIGH COURTS

4. Income: – Accrual – S. 5

Interest on enhanced compensation would not accrue till issue of enhanced compensation is finally decided by the court, and thereafter the interest accrued to the assessee has to be spread over on an annual basis right from the date of deliver of possession till date of order of Court on time basis

CIT vs. Hardwari Lal (HUF) (2008) 172 Taxman 68 (P & H)

5. Mistake apparent on record – Ground not raised/ contended by counsel – Error apparent on record – Tribunal duty to rectify

The appellant contended that point of addition of Rs. 74,37,040/- was not raised before ITAT on account of failure by his counsel to raise the point that would not preclude him from contesting that error as it is an error on the face of record.

It was held that the Tribunal in its jurisdiction ought to have corrected the said error even, if not raised by the counsel for the appellant.

M/s. Kwalty Laminators vs. ACIT, Bombay High Court, ITA No. 91 of 2008, dt. 27-6-2008 (Unreported)

6. Natural Justice – Opportunity to cross examine

The revenue had relied upon the statement of 'M' for holding the transaction of sale of shares to be bogus and made addition u/s. 69 as income from undisclosed source in the income of assessee without providing the assessee the copy of the statement or giving any opportunity to cross examine the person whose statement was used against him. The Hon'ble Court held that principles of natural justice had been violated and the addition was rightly deleted by the Tribunal.

CIT vs. Rajesh Kumar (2008) 172 Taxman 74 (Del.)

7. Penalty – Concealment – Satisfaction – S. 271(1)(c)

The Hon'ble court after considering the decision of *Dilip N. Shroff vs. JCIT (2007) 291 ITR 519* and *T. Ashok Pai vs. CIT (2007) 292 ITR 11 (SC)* observed that where an assessee has filed its returns disclosing all material facts of case, if assessing officer takes a view contrary to that expressed by the assessee, it does not per se mean that the assessee has adopted an illegal device for reducing its tax liability and therefore held that no penalty could be levied in such cases.

The Hon'ble Court also imposed cost of Rs. 5,000/- on the Dept. for filing these sorts of appeal for no apparent reasons.

CIT vs. Virgo Marketing (P) Ltd. (2008) 172 Taxman 83 (Del.)

8. Penalty – Concealment – S. 271(1)(c), Explanation 5

For being entitled to immunity against levy of penalty under Explanation 5 to sec. 271(1)(c) the basic requirement is disclosure in statement made u/s. 132(4). The court observed that there is no requirement in Expl. 5 as to point of time when tax has to be paid qua amount of income declared in statement made u/s. 132(4), there would be sufficient compliance of provision if tax is shown to have been paid before assessment was completed.

CIT vs. Mahendu C. Shah (2008) 172 Taxman 58 (Guj)

9. Permanent Establishment – Taxability of foreign enterprise with p/e – Nothing to be taxed if correct arm's length price is applied and paid

Where the assessee had a 'Dependent Agency Permanent Establishment' ('DAPE') ("SET India") in India and it was admitted by the Revenue that the assessee had paid 'arm's length' remuneration to the said dependent agent but the Tribunal still held (106 ITD 75) that notwithstanding the taxability of the said dependent agent in accordance with domestic law, the assessee had to be assessed in respect of the profits attributable to the said DAPE, held, reversing the judgment of the Tribunal that:

(a) In Circular No. 23 dated 23-7-1969, the CBDT had clearly laid down that where a non-resident's sales to Indian customers was rendered through the services of an agent in India, the assessment in India of the income arising out of the transaction shall be limited to the profit attributable to the agent's services. This Circular was binding on the Revenue.

(b) The effect of Article 7 (1) of the DTAA and Circular No. 23 dated 23-7-1969 is that the income of a non-resident which is neither directly nor indirectly attributable to the PE cannot be brought to tax.

(c) As the Tribunal had not considered the findings of the CIT(A) based on Circular No. 23, it's entire rational and reasoning had to be set aside.

(d) The effect of the judgment of the Supreme Court in *DIT vs. Morgan Stanley 292 ITR 416* is that if the correct arm's length price is applied and paid nothing further would be left to be taxed in the hands of the foreign enterprise.

SET Satellite (Singapore) vs. DDIT (Bombay High Court)

Source : www.itatonline.org

10. Power of Tribunal – Additional Ground – Effect of Goetze – Does not apply to appellate authority

In *Goetze vs. CIT 284 ITR 323 (SC)* the Supreme Court held that the assessee was not entitled to claim a deduction by way of a letter filed before the AO without filing a revised return. However, this judgment is limited to the power of the AO to entertain a claim for deduction otherwise than by revised return and does not impinge on the power of the Tribunal to entertain the claim by way of an additional ground.

CIT vs. Jai Parabolic Springs (Delhi High Court)

Source : www.itatonline.org

III. TRIBUNALS

11. Derivative – Dealings in derivatives products prior to the amendment to s. 43(5) – Not speculation loss

Even prior to the amendment to s. 43(5) by the Finance Act 2005 w.e.f 1-4-2006, dealings in Futures & Options and other derivatives products cannot be treated as speculative transactions as they are special kind of transactions, not involving purchase and sale of shares and consequently the loss arising therefrom cannot be treated as a speculation loss.

R. B. K. Securities vs. ITO (ITAT Mumbai)

Source : www.itatonline.org

12. Freight income through slot charter – Profit from operation of ships

Where the assessee had earned freight income by transporting cargo in international traffic through 'slot charter' arrangements on ships owned by other enterprises and the question arose whether such profits arose from "operation of ships", held: that in view of the OECD Commentary, Article 9 of the India-UK DTAA must be interpreted as applying not only to income arising directly from the operation of ships but also to income

arising from ancillary operations such as transportation of cargo through ships owned by other enterprises.

DCIT vs. Balaji Shipping (ITAT Mumbai)

Source : www.itatonline.org

13. Sale of TDR By member of co.op society – Not taxable

Where the assessee was a co.op society and it and its members entered into a development agreement with a builder pursuant to which Transferable Development Rights (TDRs) entitled to be received under the Development Control Regulations was assigned to the developer for the repairs and redevelopment of the building and the construction of additional floors, held that the TDRs were owned by the flat owners individually and as no consideration for the transfer of the TDRs was received by the assessee society nor any area in the constructed portion was allocated to the assessee society, it was not chargeable to tax. Noted that even in the case of flat owners the Mumbai Bench had held in *Jethalal D. Mehta vs. DCIT (2005) 2 SOT 422* that the receipts on sale of TDRs were not chargeable to tax in their hands.

ITO vs. Lotia Co.op. Hsg. Soc. (ITAT Mumbai)

Source : www.itatonline.org



Report on Half-day Seminar held on 17th August, 2008 at Raipur

Central Zone of All India Federation of Tax Practitioners jointly with Raipur Branch of Central India Regional Council of the Institute of Chartered Accountants of India and Income Tax Bar Association, Raipur organized a Half-day Seminar at Raipur on 17th of August, 2008.

Past President of AIFTP Shri N. M. Ranka, Sr. Advocate discussed the salient features under the Wealth Tax Act. He also discussed the various assets liable to Wealth Tax. He made a fine distinction whether a building under construction can be equated with a building liable to Wealth Tax. He further discussed various case laws concerning agricultural land, residential properties, jewellery, bullion and urban land. "Debt owed", inclusion of certain assets u/s 4 of the Wealth Tax Act and exemption contained in sec. 5 of Wealth Tax Act was elaborately discussed. Shri N. M. Ranka also discussed the provisions contained u/s 54B of the Income-tax Act with regard to deduction for re-investment. He also chaired "Brain Trust" session.

Considering the unprecedented growth in Real Estate sector, the above subject was selected by the organizers for discussion.

Shri Ravi Agarwal, Past Chairman of Raipur Branch of CIRC discussed recent judgments of the Hon'ble Apex Court concerning penalty provisions u/s 271 (1) (c). He also discussed the nature of burden of proof and element of *mens-rea* under the penalty proceedings u/s 271(1) (c). Case laws from *Anwar Ali, Hindustan Estate – 83 ITR 26, Dilip N. Shrof – 291 ITR 519, Ashok Pai – 292 ITR 11, Dharmendra Textile Processors – 212 CTR 432 and Shriram Mutual Fund – 5 STC 361* delivered by Division Benches of the Hon'ble Apex Court, were also discussed.

CA S. G. Agrawal, Chairman of Raipur Branch of ICAI and Dr. R. K. Agrawal welcomed the faculty and the participants. Shri Parakh, Secretary of Raipur Branch and Shri Devendra Agrawal, Secretary of Income Tax Bar Association proposed vote of thanks.

CA G.S. Agrawal, Member – National Executive Committee co-ordinated the above programme.

The Seminar was well attended by the participants and there was warm participation from the floor.





Hearty Congratulations

Hearty Congratulations to Shri Sunil H. Kocheta on being nominated by the Ministry of Finance, Government of India as the Director on the Board of Bank of Maharashtra for the period of 3 years.

APPEAL TO MEMBERS

Dear Members,

The journal has become monthly from January, 2002. We desire that the journal should become self-sufficient. Hence, we request you to send us advertisements for the journal. The rates of advertisement are as under:

- | | |
|--|-------------|
| 1. Quarter Page | Rs. 600/- |
| 2. Ordinary Half Page | Rs. 1,000/- |
| 3. Ordinary Full Page | Rs. 2,000/- |
| 4. Second and Third Cover Page | Rs. 2,500/- |
| 5. Fourth Cover Page – Three fourth page (in four colour) | Rs. 3,500/- |

MUKUL GUPTA
Secretary General

Membership of AIFTP as on 10-8-2008

Life Members

| | Associate | Individual | Association | Died | Corporate | Total |
|--------------|-----------|-------------|-------------|-----------|-----------|-------------|
| Central | — | 587 | 20 | 2 | 0 | 605 |
| Eastern | — | 708 | 31 | 4 | 0 | 735 |
| Northern | — | 556 | 15 | 1 | 0 | 570 |
| Southern | — | 617 | 12 | 1 | 1 | 629 |
| Western | 03 | 1429 | 31 | 7 | 8 | 1464 |
| Total | 03 | 3897 | 109 | 15 | 9 | 4003 |

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

Printed & Published by Mitesh Kotecha on behalf of All India Federation of Tax Practitioners (name of owner) and printed at Finesse Graphics & Prints Pvt. Ltd., 309, Parvati Industrial Premises, Sun Mill Compound, Lower Parel, Mumbai 400 013, Tel.: 24961605/85 • Fax: 24962297 (name of printing press) and published at 215, Rewa Chambers, 31, New Marine Lines, Mumbai 400 020, Tel.: 22006342 • Fax: 22006343 (place of publication) • Editor : Dr. K. Shivaram

To

**Posted at Mumbai Patrika Channel Sorting
Office – Mumbai 400 001.**

Date of Posting : 1st & 2nd September, 2008

If undelivered, please return to :



ALL INDIA FEDERATION OF TAX PRACTITIONERS
215, Rewa Chambers, 31, New Marine Lines, Mumbai 400 020. • Tel.: 22006342
Telefax: 22006343 • E-mail: aiftp@vsnl.com • Website: www.aiftponline.org