



All India Federation of Tax Practitioners

**Price ₹ 5/-**  
(For Members only)

# AIFTP TIMES

**Volume 2 - No. 8 • August, 2011**

<b>FORTHCOMING PROGRAMMES</b>	
<b>Date &amp; Month</b>	<b>Programme</b>
5th August, 2011	One Day Seminar on Taxation at Basar, Andhra Pradesh
19th & 20th August, 2011	Two Day Workshop on Drafting of Agreements, Deeds and Documents at Mumbai (WZ)
13th, 14th & 15th Oct., 2011	8th Nani Palkhivala Memorial National Tax Moot Court Competition at Mumbai
11th November, 2011	Celebration of Foundation Day at Delhi
12th & 13th November, 2011	Two Day National Tax Conference at Delhi (NZ)
16th to 19th November, 2011	AOTCA International Tax Conference at Bali, Indonesia
9th December, 2011	National Executive Committee Meeting at Ranchi
10th & 11th December, 2011	Two Day National Tax Convention at Ranchi (EZ)

## FEDERATION NEWS

J. K. Ranka, Secretary General

### AOTCA INTERNATIONAL TAX CONFERENCE AT BALI, INDONESIA

AOTCA Conference 2011 will be held from 16th to 19th November, 2011 at Hotel Melia, Bali, Indonesia.

The following subjects will be discussed:-

1. "Update on MAP and APA in Indonesia" (Indonesia Tax Officials)
2. "Anti Tax Avoidance Rules from member countries" (Panel Discussion)
3. "Recent Tax Development in Europe" (Mr. Stephen Coleclough, President of CFE)
4. "Recent Developments in Transfer Pricing from member – countries" (Panel Discussion)
5. "Update on Tax Payers' Right" (CFE and AOTCA)

Federation has worked out the cost for 7 days visit to Bali, which will be approx. ₹ 1 lakh for single occupancy at Hotel Melia.

Delegate fee of US \$ 250 will have to be paid separately to AOTCA.

Those who desire to join the delegation, may inform the office of the Federation and also contact for further detailed information.

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

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## **TWO DAYS NATIONAL TAX CONFERENCE**

*Organised by*

**ALL INDIA FEDERATION OF TAX PRACTITIONERS (NORTHERN ZONE)**

on

11th to 13th November, 2011

at

Sathya Sai Centre, Lodhi Road, New Delhi.

**Hon'ble Law Minister Mr. Salman Khurshid  
has kindly consented to grace this occasion.**

### **PROGRAMME**

#### **Friday, 11th November, 2011**

4.00 – 4.30 p.m.	:	Registration & Tea
4.30 – 6.30 p.m.	:	Inaugural Session
6.30 – 7.00 p.m.	:	Tea
7.00 – 8.30 p.m.	:	National Executive Meeting & Hasya Kavi Sammelan
8.30 p.m. onwards	:	Dinner

#### **Saturday, 12th November, 2011**

09.00 – 10.00 a.m.	:	Breakfast & Registration
10.00 – 11.45 a.m.	:	1st Technical Session
11.45 – 01.30 p.m.	:	2nd Technical Session
01.30 – 02.30 p.m.	:	Lunch
02.30 – 04.00 p.m.	:	3rd Technical Session
04.00 – 05.30 p.m.	:	4th Technical Session
05.30 – 06.00 p.m.	:	Tea
06.00 – 08.30 p.m.	:	Cultural programme
8.30 p.m. onwards	:	Dinner

#### **Sunday, 13th November, 2011**

09.00 – 10.00 a.m.	:	Breakfast
10.00 – 12.00 Noon	:	5th Technical Session
12.00 – 01.00 p.m.	:	Valedictory Session
01.00 p.m. onwards	:	Lunch

**Prem Lata Bansal**

*Chairperson, AIFTP (Northern Zone)*

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*Vice President*

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### *Hearty Congratulations*

Hearty congratulations to Shri Ganesh Purohit, Sr. Advocate from Jabalpur has been elected as Vice President of All India Federation of Tax Practitioners (Central Zone).

We wish him all the success.

**ALL INDIA FEDERATION OF TAX PRACTITIONERS (WZ)**

*Organised*

**TWO DAY**

**WORKSHOP ON DRAFTING OF AGREEMENTS, DEEDS AND DOCUMENTS  
(including Taxation of Real Estate Transaction)**

*Jointly with*

**THE CHAMBER OF TAX CONSULTANTS AND  
BOMBAY CHARTERED ACCOUNTANTS' SOCIETY**

With the Indian economy integrating itself in the Global economies, it has become imperative to be more cautious and careful while entering into agreements at various levels and thus it is of prime importance to understand the do's and dont's and the precautions to be taken care while drafting of such documents.

With a view to help the members, All India Federation of Tax Practitioners (WZ) along with The Chamber of Tax Consultants and Bombay Chartered Accountants' Society has arranged a two day Workshop on Drafting of Agreements, Deeds and Documents on **Friday and Saturday, 19th and 20th August, 2011 from 9.00 a.m. to 5.00 p.m. at Terrace Hall, West End Hotel, New Marine Lines, Mumbai – 400 020.**

<b>Topics</b>	<b>Speakers</b>
<b>DAY 1 (19-8-2011)</b>	
Conveyancing – An Overview	Shri Pravin Veera <i>Advocate &amp; Solicitor</i>
Important Provisions of Bombay Stamp Act, Indian Stamp Act and Registration Act	Shri Pradip Kapadia <i>Advocate &amp; Solicitor</i>
Taxation of Real Estate Transactions	Shri Vipul Joshi, <i>Advocate</i>
Drafting of Agreements for Development and Sale of Immovable Properties (including M.O.U.)	Shri J. S. Solomon <i>Advocate &amp; Solicitor</i>
Drafting of Deed of Partition and Deed of Family Arrangement	Smt. Parimal Y. Golwala <i>Advocate &amp; Solicitor</i>
Drafting of Wills	Ms. Shilpa Thakar, <i>Advocate</i>
<b>DAY 2 (20-8-2011)</b>	
Redevelopments of Properties of Co-operative Housing Societies	Shri Parimal Shroff* <i>Advocate &amp; Solicitor</i>
Drafting of documents relating to Transfer of Flats and Premises in a Co-operative Society	Shri Ankoosh Mehta <i>Advocate &amp; Solicitor</i>
Drafting of Agreements under Maharashtra Ownership Flats Act and Maharashtra Apartment Ownership Act	Shri Mahesh Shah <i>Advocate &amp; Solicitor</i>
Drafting of Agreement for Leave and Licence, Lease Deed, Business Conducting Agreement	Shri Bankim Desai <i>Advocate &amp; Solicitor</i>
Limited Liability Partnership Act and Drafting of documents relating to Limited Liability Partnership	Shri Vijay Kewalramani <i>Chartered Accountant</i>

\* Confirmation awaited

**Delegates fee (including Tea, Coffee, Lunch & Material)**

₹ 2,100/- for Members, ₹ 2,500/- for Others

**Note: Cheque/DD to be drawn in favour of "All India Federation of Tax Practitioners–Western Zone", payable at Mumbai. Outstation members are requested to make payment by DD only.**

**Members are requested to take advantage of this unique opportunity  
and enroll early to avoid disappointment.**

*Members wishing to enroll can contact the following:*

Federation's Office : 022 2200 6342 / 022 2200 6343

**8TH NANI PALKHIVALA MEMORIAL NATIONAL TAX MOOT COURT COMPETITION**

ORGANIZED BY  
**ALL INDIA FEDERATION OF TAX PRACTITIONERS**  
JOINTLY WITH  
**INCOME TAX APPELLATE TRIBUNAL BAR ASSOCIATION**  
IN ASSOCIATION WITH  
**GOVERNMENT LAW COLLEGE, MUMBAI**

The dates for the National Tax Moot Court Competition are 13th, 14th & 15th October, 2011. The venue for the above function is as under:-

- i) Inauguration at Government Law College on 13th October, 2011 by the Hon'ble Judge of Bombay High Court, Hon'ble President and Hon'ble Vice President of ITAT from 5.30 p.m. onwards.
- ii) Preliminary Rounds on 14th October, 2011 at ITAT, Mumbai (Competition will be judged by the Members of the ITAT, Mumbai & Professionals)
- iii) Semi-finals on 15th October, 2011 at ITAT, Mumbai (Competition will be judged by the Member of ITAT, Mumbai)
- iv) Final on 15th October, 2011 in evening at Rangaswar Hall, 4th Floor, Y. B. Chavan Pratisthan, Mumbai (Competition will be judged by the Hon'ble Judges of Bombay High Court) from 6.00 p.m. onwards.

30 law colleges across India are expected to participate in the competition.

**NANI PALKHIVALA 7TH RESEARCH PAPER COMPETITION**

The topic for this year's Research Paper is "Piercing the Corporate Veil in Taxation Matters (Indian & International Transactions with special reference to DTC)"

Invitation will be sent to 125 law colleges for participating in the competition.

**SUBSCRIPTION RATES W.E.F. 1-4-2011**

1.	Life Membership of the AIFTP				₹	2,500/-
	Additional subscription of AIFTP Journal (for 1 year)				₹	600/-
	Additional subscription of AIFTP Journal (for 3 years)				₹	1,500/-
2.	For Non-Members					
	Subscription of AIFTP Journal (for 1 year)				₹	800/-
	Subscription of AIFTP Journal (for 3 years)				₹	2,000/-
	Single copy of the AIFTP Journal				₹	50/-
3.	Corporate Membership					
	Nature of fees	Type I (5 Yrs.)	Type II (10 Yrs.)	Type III (15 Yrs.)	Type IV (20 Yrs.)	
		₹	₹	₹		
	Admission	500/-	500/-	500/-	500/-	
	Subscription	5,000/-	7,500/-	11,500/-	15,000/-	
	Total	5,500/-	8,000/-	12,000/-	15,500/-	

*Note: Members may download the membership form from the website of AIFTP., i.e., [www.aiftponline.org](http://www.aiftponline.org)*

## *Hearty Congratulations*

Hearty Congratulations to the newly elected Office Bearers of the Andhra Pradesh Tax Bar Association, Hyderabad for the term 2011-12.

*President* : Shri M. Poorna Chander Rao      *Vice President* : Shri U.L.N. Sudhakar  
*Secretary* : Shri S.S. Satyanarayana      *Joint Secretary* : Shri K.K. Rao  
*Treasurer* : Shri K. Nagesh

Hearty Congratulations to the newly elected Office Bearers of the Tax Bar Association, Durg for the period 2011-13.

*President* : CA Shrichand Lekhwani      *Vice Presidents* : CA. Padamchand Baradia &  
Shri Satyanarayan Yadu, *Advocate*  
*Secretary* : CA Sanjeev Kumar Jain      *Joint Secretaries* : CA Anand Dixit &  
Shri Prabhank Thakur, *Advocate*  
*Treasurer* : Shri Mohammad Eliyas, *Advocate*

Hearty Congratulations to the newly elected Office Bearers of the Chartered Accountants Association, Ahmedabad for the year 2011-12.

*President* : Shri Chandrakant H. Pamnani      *Vice President* : Shri Gaurang M. Choksi  
*Secretaries* : Shri Kunal A. Shah & Shri Ashok C. Kataria

Hearty Congratulations to the newly elected Office Bearers of the Income Tax Bar Association, Ahmedabad for the year 2011-12.

*President* : Shri Darshan S. Jani      *Vice President* : Shri Asim A. Parikh  
*Secretary* : Shri Dhruven V. Shah      *Joint Secretary* : Shri Rajesh J. Shah  
*Treasurer* : Shri Kartikey B. Shah

Hearty Congratulations to the newly elected Office Bearers of the Income Tax & Sales Tax Bar Association, Chandigarh for the year 2011-12.

*President* : Shri Prem Inder Rattan  
*Sr. Vice President* : Shri Jasjit S. Dhindsa  
*Vice Presidents* : Shri Ranjiv Loomba & Shri Deepak Jain  
*General Secretary* : Shri Ajay Gupta  
*Secretary* : Shri Paramjit S. Jaswal  
*Joint Secretary* : Shri Ajay Kohli  
*Treasurer* : Shri Sanjeev Khurana

**We wish them all the success**

## *Hearty Congratulations*

Hearty Congratulations to the newly elected Office Bearers of the Karnataka State Chartered Accountants Association, Bangalore for the term 2011-12.

*President* : Shri Anant Mutalik                      *Vice President* : Shri Maddanaswamy  
*Secretary* : Shri Basavaraja H.M.                      *Joint Secretary* : Shri Gururaj S.  
*Treasurer* : Ms. Geetha A. B.

Hearty Congratulations to the newly elected Office Bearers of The Baroda Tax Bar Association, Baroda for the period 2011-13.

*President* : Shri Amit H. Nagarsheth                      *Vice President* : Shri Rajesh R. Sheth  
*Secretary* : Shri Rajesh B. Shah                      *Joint Secretary* : Shri Hitendra R. Upadhyay  
*Treasurer* : Shri Vipin C. Patel

Hearty Congratulations to the newly elected Office Bearers of The Chamber of Tax Consultants, Mumbai for the year 2011-12.

*President* : Shri Parimal B. Parikh                      *Vice President* : Shri Manoj C. Shah  
*Secretaries* : Shri Yatin K. Desai & Shri Paras K. Savla  
*Treasurer* : Shri Hitesh R. Shah

Hearty Congratulations to the newly elected Office Bearers of the Bombay Chartered Accountants' Society, Mumbai for the year 2011-12.

*President* : Shri Pradip K. Thanawala                      *Vice President* : Shri Deepak R. Shah  
*Secretaries* : Shri Nitin P. Shingala & Shri Chetan M. Shah  
*Treasurer* : Shri Raman H. Jokhakar

Hearty Congratulations to the newly elected Office Bearers of The Sales Tax Practitioners' Association of Maharashtra, Mumbai for the year 2011-12.

*President* : Shri Hiten S. Shah  
*Vice President* : Shri Kishor T. Lulla  
*Jt. Secretaries* : Shri Vijay Sachiv & Shri Sachin Gandhi  
*Treasurer* : Shri Pankaj K. Parekh

**We wish them all the success**

## DIRECT TAXES

**Ajay R. Singh, Paras Savla, Rahul Hakani & Renu Choudhari**  
*Advocates*

### SUPREME COURT

**1. S. 143 : Assessment – Opportunity for cross examination – Entire order cannot be set aside**

Where an order has been passed by the AO without granting the assessee an opportunity to cross examine and the assessee preferred a writ petition. The Apex Court held that the High Court ought not to have set aside the order of assessment but to have only granted the assessee an opportunity to cross examine the witness.

*ITO vs. M. Pirai Choodi (2011) 334 ITR 262 (SC)*

**2. S. 254(2) : Appellate Tribunal – Rectification of Mistake – Business loss (S. 28)**

Loss was allowed for earlier and subsequent year. Appellate Tribunal refused to rectify the order. The Apex Court remanded the matter to Tribunal for consideration afresh in light of *CIT vs. Woodward Governor India (P.) Ltd. (2009) 312 ITR 254 (SC) [A.Y. 1998-99]*

*Perfetti Van Melle India (P.) Ltd. vs. CIT (2011) 334 ITR 259 (SC)*

### HIGH COURTS

**3. S. 11 : Charitable Trust – Application of income – Legal expenses to defend member of society in contempt proceedings [Ss. 12, 37(1)]**

Legal expenses incurred by the assessee society to defend its member in contempt of Court Proceedings cannot be said to be for promoting the objects of the association nor for the benefit of the association, therefore, could not be allowed as deduction. (Asst years 2004-05, 2005-06 and 2006-07).

*CIT vs. IAS Officers Association (2011) 56 DTR 239 (Kar.) (High Court).*

**4. S. 23 : Income from house property – Annual Letting value – Maintenance and other charges**

Maintenance and other charges are deductible from rent while calculating annual letting value. (Asst. years 1996-97-200-01).

*CIT vs. R.J. Wood P. Ltd. (2011) 334 ITR 358 (Delhi) (High Court)*

**5. S. 43 (i) : Actual Cost – Depreciation – Assets acquired from franchisees – Valuation on the basis of valuation report – Ss. 32, 43(6)**

Assessee company engaged in the business of manufacture of soft drinks acquired manufacturing assets and other assets, land and building of its franchisees on the basis of valuation done by the approved valuer. Assessing Officer increased the value of land by 50% on estimated basis and value of bottles and crates was reduced by 50% and plant and machinery by 25%. The Court held that Tribunal was justified in direction the Assessing Officer to accept the valuation of assets acquired by the assessee from five vendor companies on the basis of report of the registered valuer when there was no basis to discard the valuation report. (Asst. Year 1996-97).

*CIT vs. Pepsico India Holdings (P) Ltd. (2011) 56 DTR 137 (Delhi) (High Court).*

**6. S. 147 : Reassessment – Full and True Disclosure – Beyond four years – EOU (S. 10B)**

Where there was no failure to disclose fully and truly all material facts by assessee presumption on the part of the AO that the assessee has failed to achieve 82% value addition in order to be treated as 100% EOU required for availing deduction u/s 10B was incorrect and reopening of the assessment beyond four years was bad in law. (A.Y. 2003-04)

*Jayant Agro Chemicals Ltd. vs. ITO (2011) 241 CTR 242/55 DTR 361 (Bom.)*

### TRIBUNALS

**7. S. 14A : Business Expenditure – No disallowance if assessee has no tax-free income – Exempted income**

S. 14A uses the words “for the purpose of computing the total income under this Chapter ..... expenditure incurred in relation to income which does not form part of the total income under this Act”. Thus for the applicability of s. 14A there must be (a) taxable income and (b) tax-free income. If either one is absent, s. 14A has no applicability. If there is no claim for tax-free income, there cannot be any disallowance u/s 14A. If the transaction of lending monies between the assessee and the AE is in foreign currency and the transaction is an

international transaction, it has to be evaluated by applying the commercial principles applicable to international transaction.

*Siva Industries & Holdings Ltd. vs. ACIT (ITAT) (Chennai) (www.itatonline.org)*

**8. S. 28 (1) : Capital gains – Business income – Shares PMS transaction gains are STCG and not business profits (S. 45)**

- (i) Given the definitions of the term “business” and “capital asset” in Ss. 2(13) and 2(14), shares, if held for more than 12 months, will be a long-term capital asset, in spite of continued and systematic dealings;
- (ii) On facts, as the assessee had engaged a portfolio manager to look after its investments and all decisions to buy and sell were taken by the portfolio manager and not by the assessee, the assessee cannot be called a “dealer”;
- (iii) The object of the PMS was to maximize the value of the portfolio. It was “wealth maximization” and not “profit maximization”;

- (iv) In the balance sheet, the shares were valued at cost and not at lower of cost or market value.

*ARA Trading & Investment Pvt. Ltd. vs. DCIT (Pune)(ITAT) www.itatonline.org.*

**9. S. 54EC : Capital gains – Deduction allowable before set-off of brought-forward loss**

While s. 54EC is an exemption provision which exempts capital gains and takes them outside the purview of chargeable “capital gains”, s. 74 deals with the carry forward and set off of loss under the head “capital gains”. The stage at which set off of carried forward long term capital loss is to be given is subsequent to the stage at which income under the head Capital gains is computed and deduction u/s. 54EC is to be given in the course of the latter. Accordingly, s. 54EC deduction has to be given before set-off of losses.

*The Tata Power Co. Ltd. vs. ACIT ((Mumbai) (ITAT) www.itatonline.org.*

## INDIRECT TAXES

**P. C. Joshi, Advocate**

### 1. BIFR Scheme Final

The Board for Industrial and Financial Reconstruction by its order dated 31st October, 2007 sanctioned the Rehabilitation Scheme with a cut off date of 31st March, 2007. The Scheme *inter alia* provided for certain concessions that were directed to be given by the State of Maharashtra in realising the outstanding dues, granting moratorium in that regard and write off the interest and penalty portion in entirety. The Sales Tax Tribunal however remitted the interest at certain percentage and not in full. That Judgment was successfully challenged before the Bombay High Court. The Hon'ble High Court by its judgment 24th July, 2009 reversed the Tribunal decision and held that the Scheme of rehabilitation sanctioned by BIFR was binding on the Tribunal.

After the said judgment, the Sales Tax Department submitted a Miscellaneous Application before BIFR with a request to set aside/recall/review its order to the extent it directed the Sales Tax Department to grant exemption from payment of sales tax for a specified period from the cut off date and remission of interest/penalty fully on the footing

that the Commissioner of Sales Tax who had the power to grant remission under the provisions of the Bombay Sales Tax Act, was not at all served with any notice.

The BIFR after perusing the records, directed the applicant to file an affidavit that no notice was ever received though in fact the sales tax department was duly served as mentioned in the order sanctioning the Scheme. The Advocate representing the Commissioner of Sales Tax, however submitted that the applicant did not desire to file the affidavit as directed. The Board therefore rejected the Miscellaneous Application.

*The Commissioner of Sales Tax Maharashtra vs. M/s. Vadillal Dairy International Ltd. Miscellaneous Application No. 660 decided on 8th March, 2011.*

### 2. Entries in Schedule

#### Plastic Footwear

Entry C-74 of the Maharashtra Value Added Tax Act provided for levy of tax @ 4% on the sale of plastic footwear (moulded). The product in dispute was plastic moulded footwear with upper portion of plastic coated with cloth. The sole however was

of purely plastic. The assessee claimed the same to be covered by the said entry C-74 however the Bombay High Court negated the same since the product in question cannot be said to be made entirely of plastic.

Certain opinions and certificates brought on record by assessee were based on the notes appended to section XII of Chapter 64 of the Central Excise Tariff Act. The Hon'ble Court held that the State of Maharashtra while framing the Value Added Tax legislation did not adopt the treatment to the products given under heading under Central Excise Tariff Act or Harmonised System of Nomenclature (HSN) and therefore such certificates were held to be of no relevance to the construction of entries under MVAT Act.

*The Commissioner of Sales Tax vs. M/s. Dev Enterprises Ltd. Sales Tax Appeal No. 23 of 2010 decided on 24th June, 2011.*

### **3. Interstate sale**

After the consignment was booked through rail, the Manager of the Andhra Pradesh Branch endorsed the R/R in favour of the Tamil Nadu customers who claimed the transaction as inter-State sale from the State of Andhra Pradesh. The R/R was self to the branch at Madras and the consignor was the factory in Andhra Pradesh. The date of selling the goods was prior to the date of the purchase order. After considering the provisions of sections 3(a) and (b) of the CST Act, the Madras High Court held that the documents of title to the goods were transferred when the goods were in movement from one State to another, the case was covered by section 3(b) of the said Act.

*Sri Vishnu Cement Ltd. vs. The State of Tamil Nadu 2011-12 (17) TNCTJ P 31.*

### **4. Lease Tax**

#### **a) Audio Visual Equipment**

Before the Andhra Pradesh High Court, audio visual equipment was taken on hire by the Petitioner, for a specified programme and the same was operated by the technically skilled personnel of the owner. On the above facts, the court held that the effective control having being transferred to the petitioner, payment of rental charges for the transaction was in reality covered by section 4(8) of the AP VAT Act and therefore liable to be taxed.

*Viceroy Hotels Ltd vs. The Commercial Tax Officer & Ors. (2011) 52 APSTJ Pg 147*

#### **b) Cellular Tower Sites**

The assessee before the Karnataka High Court had erected and constructed tower sites and leased

out the space on such sites to various cellular operators on rent. The assessing authority held them liable to pay tax as deemed sale u/s. 2(29)(d) read with sections 3 and 4(1)(b) of the VAT Act, 2003. According to the assessee it was a service provider liable to service tax under the provisions of Finance Act, 1994. The towers in question were also stated to be part of immovable property and therefore outside the purview of the Act. For the above purpose various judgments of the Supreme Court were relied upon. The Hon'ble Court referred to the finding of fact that the equipments used in the tower were fixed with nut and bolt for its proper functioning, and held that there was a transfer of right to use the goods as contemplated under Article 366(29A)(d) of the Constitution.

*M/s. Essar Telecom Infrastructure Pvt. Ltd. vs. Union of India 2011-12 (16) KCTJ Pg. 56.*

### **5. Limitation for Assessment**

The Punjab & Haryana High Court held that the limitation of three years provided in section 11(3) of the Punjab General Sales Tax Act, 1948 would be applicable even where the extension of time was granted after the lapse of the statutory period.

*State of Punjab & Anr vs. M/s. Annapurna Impex Pvt Ltd. (2011) 39 PHT 238 (P&H).*

### **6. Luxury Tax**

The Karnataka High Court while allowing the Writ Petition by the Commissioner of Commercial Taxes held that the insertion of section 3(D) by Act 3 of 2004 to the Karnataka Tax on Luxury Act, the consumption or utilisation of the luxury provided by a club to its members; was not condition precedent for levying the tax on luxury. The fiscal policy of the Government was not open to judicial review by the courts. The Hon'ble Court followed the judgment of the Supreme Court in the case of Godfrey Philips for affirming the levy.

*The Commissioner, for Commercial Taxes vs. Hennur - Banaswadi Cosmopolitan Club. 2011-12 (16) KCTJ Pg. 43.*

### **7. Purchase Tax**

The Andhra Pradesh High Court held that under section 6A of the APGST Act can be levied only when the raw materials purchased from unregistered dealer, were consumed and did not form part of the goods manufactured. So long as the raw material in the form of raw agarbatti continued to retain its identity even after application of scent, no purchase tax was payable.

*State of Andhra Pradesh vs. Mysore-I Agarbathi Works (2011) 52 APSTJ P. 141.*

## **8. Penalty**

The Madhya Pradesh High Court held that in absence of omission, error or default, on the part of the assessee; who in original assessment received refund, no penalty can be imposed in reassessment that resulted in balance dues.

*Bhanu Pratap Singh vs. State of Madhya Pradesh & Ors. (2011) 18 STJ 611 (MP)*

## **9. Registration – Partnership Firm**

The Gujarat Value Added Tax Tribunal after considering the provisions of section 14 read with section 26 of the Gujarat Sales Tax Act and the impact of the provisions of the Indian Partnership Act held that when there were two partners in a firm, out of which one retired, the other partner became the proprietor of the proprietary concern and therefore a fresh registration certificate was required to be granted to the said applicant.

*M/s. Jayvandan Traders vs. The State of Gujarat Sales Tax Journal Vol. 50, Part 3, P. 332.*

## **10. Recovery**

The Allahabad High Court held that section 55(6) provided for the grant of stay of recovery of dues by the Tribunal during the pendency of appeal before it. For deciding the application the Tribunal was required to look into *prima facie* merits of the case as well as the financial hardships that may be suffered by the appellant and other relevant factors.

*M/s. Durga Trading Company vs. Commissioner of Commercial Tax 2011 NTN (Vol. 46) – 119.*

## **11. Rule held to be bad In law**

Like all other States, the State of Maharashtra also have in the past, provided for incentives to units established in industrially backward areas. The Scheme provided for a specific manner in which the quantum of benefits enjoyed periodically were to be calculated. On 24th March, 1995, the State Government by introducing rule 31AA under the Bombay Sales Tax Rules, 1959 provided for a different mechanism for calculating such benefits and that too with retrospective effect from 1st January, 1980. Some of the provisions were in

conflict with the manner of calculation specified in the Scheme. The Bombay High Court while allowing the Writ Petition by the assessee held that the manner cannot be altered retrospectively by introduction of the said rule on 24th March, 1995.

Applying the ratio of Supreme Court Judgment in the case of *Suprabhat Steel Ltd. (112 STC 258)* the High Court also held that rule 31AA framed by the State Government was repugnant to the industrial policy contained in the Government Resolution and therefore the same was bad in law to the extent it sought to take away the rights conferred upon the assessee under the concerned Government Resolution.

*M/s. Prasad Power Control Pvt. Ltd & Ors. vs. Commissioner of Sales Tax & Ors. Writ Petition No. 842 of 2000 decided on 8th June, 2011.*

## **12. Undue delay in grant of refund**

The Maharashtra Sales Tax Tribunal having found that the refund due to the assessee as per the order of Tribunal was being denied for no justifiable reason, held the state of affairs to be totally unsatisfactory with indifferent approach while considering the compliance of the orders of the Tribunal. The Tribunal therefore directed all the concerned officers to appear before it on the specified date and file affidavit explaining their conduct. The Dy. Commissioner (legal) was directed to apprise of the present development to the Commissioner of Sales Tax.

*M/s. Ultra Tech Cement vs. State of Maharashtra Miscellaneous Application Nos. 112 to 116 of 2010 dated 18th July, 2011.*

## **13. News from Tamil Nadu**

Having considered the issuance of various forms online by other States, the Commissioner of Commercial Taxes by his circular dated 1st June, 2011, directed the lower authorities to accept such forms, even though the forms do not carry the signature in ink and the official seal manually. He also clarified that in case of doubt the facility, provided under TINXSYS website of the State concerned or by sending sms on mobile phone be availed of.

*Source : 2011-12 (17) TNCTJ P. 21 (Statutes)*



## INTERNATIONAL TAXATION

CA Dhanesh Bafna, CA Madhav Khandelwal, Sujeeth Karkal, *Advocate*

### SUPREME COURT

#### **1. Information – Article 26 – India-Germany DTAA**

In response to a Writ Petition alleging inaction by the Government regarding unaccounted money, the Supreme Court observed that:

- i. The India-Germany DTAA, by itself, does not proscribe the disclosure of the relevant documents and their details, including the names of various bank account holders in Liechtenstein.
- ii. The “information” referred to in Article 26 is that which is “necessary for carrying out the purposes of this agreement”. Therefore, the information sought does not fall within the ambit of this provision.
- iii. It is disingenuous for the Union of India to claim that it was unable to reveal the documents and names sought by the Petitioners on the grounds that this was proscribed by the agreement.
- iv. It does not matter that Germany itself might have asked India to treat the information shared as being subject to the confidentiality and secrecy clause of the DTAA. It is for the Union of India, and the courts, through the appropriate processes, to determine whether such information concerns matters that are covered by the double taxation agreement or not.

*Ram Jethmalani vs. UOI (SC)(2011-TII-05-SC-Intl)*

### HIGH COURT

#### **2. Constitution of DRP – S. 147 – Income-tax Act, 1961**

In the present case, the assessee filed objections before the Dispute Resolution Panel (‘DRP’) against the draft assessment order by the AO in an reopening proceedings. However, the Director of Income Tax (‘DIT’) who had granted approval to the reopening and had supervised the passing of the draft assessment order was also a member of the DRP. The High Court held that as the DIT was exercising supervisory functions over the AO, the real likelihood of “official bias” cannot be ruled out. Even if the officer is impartial and there is no personal bias or malice, nonetheless, a right minded

person would think that in the circumstances, there could be a likelihood of bias on his part. In order to ensure that no person should think that there is a real likelihood of bias on the part of the officer concerned, the CBDT is directed to ensure that a jurisdictional Commissioner is not nominated as a member of the DRP under Rule 3(2) of the Rules. By doing this, the principle that justice must not only be done but seen to be done would be ensured.

*Hyundai Heavy Industries Ltd. vs. UOI (2011-TII-28-HC-Ukhand-Intl)*

### TRIBUNAL

#### **3. +/- 5% Variation – 92C(2) – Income-tax Act, 1961**

In respect of A.Y. 2006-07, the assessee claimed that its transfer pricing adjustment was within +/- 5% of the arm’s length price (‘ALP’) and therefore, no adjustment could be made under the proviso to S. 92C(2) as it stood before amendment by the Finance Act, 2009. The Tribunal held that:

- i. The retrospective applicability of a provision is to be seen purely in the light of the statutory provisions and the parameters laid down by the principles of interpretation. It cannot be decided simply on the basis of the view taken by CBDT ignoring the plain statutory language. The view expressed by the CBDT in the explanatory notes may in some circumstances work as a guidance, but they are not final words.
- ii. A procedural provision resulting in the creation of a new disability, or which imposes a new duty in respect of transactions already completed, cannot be applied retrospectively.
- iii. As the amended proviso brings about a substantial change in the relief available to an assessee, it thus cannot be applied retrospectively.
- iv. Since the difference in the ALP determined by the Transfer Pricing Officer and charged by the assessee is less than 5%, no transfer pricing adjustment could be made.

*iPolicy Network Pvt. Ltd. vs. ITO (2011-TII-73-ITAT-Del.-TP)*

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