

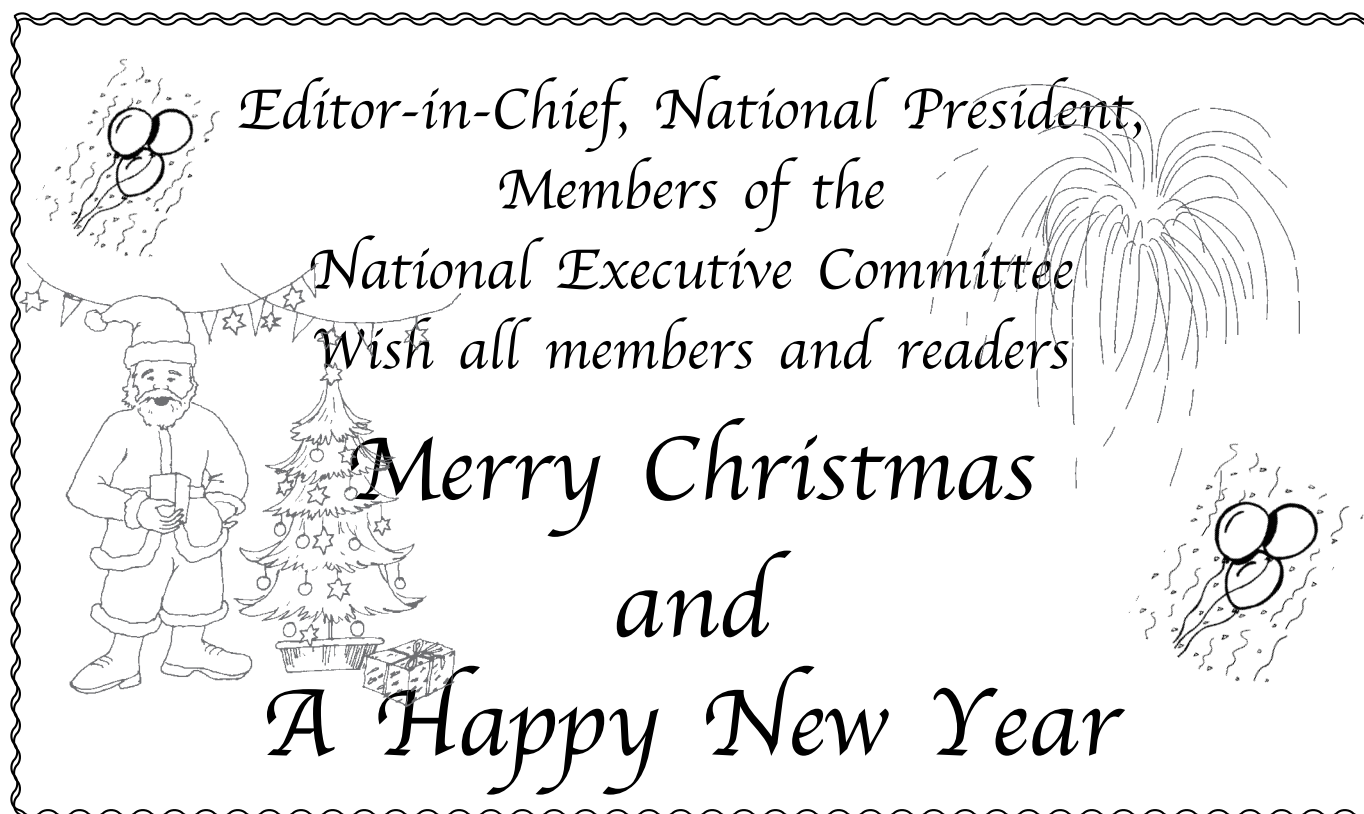


All India Federation of Tax Practitioners

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AIFTP TIMES

Volume 2 - No. 12 • December, 2011



FORTHCOMING PROGRAMMES		
Date & Month	Programme	Place
9th December, 2011	National Executive Committee Meeting and EGM	Ranchi
10th & 11th December, 2011	Two Days National Tax Convention	Ranchi
17th December, 2011	One Day National Seminar on Taxation	Trivandrum

FOR QUERIES PLEASE CONTACT ANY OF THE FOLLOWING OFFICE BEARERS

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16TH NATIONAL CONVENTION 2011 AT RANCHI

Organized by

ALL INDIA FEDERATION OF TAX PRACTITIONERS (EASTERN ZONE)

Jointly with

**JHARKHAND INCOME TAX BAR ASSOCIATION, RANCHI
JHARKHAND COMMERCIAL TAXES BAR ASSOCIATION, RANCHI
FEDERATION OF JHARKHAND COMMERCIAL TAXES BAR ASSOCIATION
RANCHI BRANCH OF CIRC OF ICAI**

on 9th, 10th & 11th December, 2011

at Hotel Radisson Blu, Main Road, Ranchi, Jharkhand

Theme : Professionals' Role in Emerging Tax Laws

PROGRAMME

Friday, 9th December, 2011

Venue : Hotel Capitol Hill, Main Road, Ranchi

3.30 p.m. onwards : Registration
National Executive Committee Meeting 2010 and 2011
Extraordinary General Meeting 2011
Election of National Executive & Office Bearers 2012 and 2013
National Executive Committee Meeting 2012 and 2013. Followed by Dinner.

Saturday, 10th December, 2011

Venue : Hotel Radisson Blu, Main Road, Ranchi

8.00 a.m. – 9.30 a.m. : Registration & Breakfast

9.45 a.m. – 12.00 Noon : Inaugural Session

Inauguration by : Hon'ble Mr. Justice S. J. Mukhopadhyay
Judge, Supreme Court of India

Chief Guest : Hon'ble Mr. Justice Deepak Verma,
Judge, Supreme Court of India

Guests of Honour : Hon'ble Mr. Justice Prakash Tantia,
Chief Justice, Jharkhand High Court
Hon'ble Mr. Justice R. K. Agarwal,
Judge, Allahabad High Court,
Hon'ble Mr. Justice I. A. Ansari,
Judge, Guwahati High Court
Hon'ble Mr. Justice Rajesh Bindal,
Judge, Punjab & Haryana High Court

Release of publication dedicated to
Late Shri N. C. Mehta, Founder President of AIFTP.

12.00 Noon – 12.30 p.m. : Tea Break

12.30 p.m. – 1.30 p.m. : Guest Speaker Session

Subject : Corporate Criminal Liability

Speaker : Hon'ble Mr. Justice I. A. Ansari, Judge, Guwahati High Court

Address by Shri G. Ramaswamy, President, ICAI

1.30 p.m. – 2.30 p.m. : Lunch

2.30 p.m. – 4.00 p.m. : **Technical Session – I : Direct Taxes**

Chairman : Hon'ble Mr. Justice R. K. Agarwal., Judge, Allahabad High Court

Expert Comments : Shri N.M. Ranka, Sr. Advocate, Jaipur

Subject : (a) Income Tax on real estate transactions

Speaker : CA. Harish Motiwala

Subject : (b) Disallowance of expenses u/s. 40(a)(ia) for TDS default

Speaker : Shri Narayan Prasad Jain, Advocate, Kolkata High Court

4.00 p.m. – 4.15 p.m. : Tea Break

- 4.15 p.m. – 6.00 p.m. : **Technical Session – II : Direct Tax Code**
Chairman : Hon'ble Mr. Justice Rajesh Bindal, Judge
Punjab & Haryana High Court
Expert Comments : Dr. K. Shivaram, Advocate, Bombay High Court
Subject : Comparative provisions of Income Tax Act and DTC with special
reference to Taxation of Business Income
Speaker : Shri S. R. Wadhwa, Advocate, Delhi
- 8.00 p.m. onwards : *Dinner*: Hosted by Jharkhand Income Tax Bar Association
at Ranchi Club, Main Road, Ranchi

Sunday, 11th December, 2011

Venue : Hotel Radisson Blu, Main Road, Ranchi

- 9.00 a.m. – 10.00 a.m. : Breakfast
- 10.00 a.m. – 11.30 a.m. : **Technical Session – III : Service Tax**
Chairman : Shri M. L. Patodi, President, AIFTP
Expert Comments : Shri Bharatji Agrawal, Senior Advocate,
Allahabad High Court
Subject : (a) Definition of Service Tax along with aspects of
negative list for levy of Service Tax
Speaker : Shri Mukul Gupta, Advocate
Subject : (b) Panel Discussion on Service Tax on advocates
- 11.30 a.m. – 11.45 a.m. : Tea Break
- 11.45 a.m. – 1.30 p.m. : **Technical Session – IV : Indirect Tax**
Chairman : Hon'ble Mr. Justice R. K. Merathia, Judge, Jharkhand High
Court
Expert Comments : Shri P.C. Joshi, Adv., Bombay High Court
Subject : (a) Sale in Transit under CST
Speaker : Smt. Nikita Badheka, Advocate, Bombay High Court
Subject : (b) Discount, Incentives and price adjustment with
reference to Jharkhand VAT Act, 2005
Speaker : Shri Binod Poddar, Sr. Adv., Jharkhand High Court
- 1.30 p.m. – 2.30 p.m. : Lunch
- 2.30 p.m. – 3.30 p.m. : Brains' Trust Session
- 3.30 p.m. – 5.00 p.m. : Valedictory Session
- 5.00 p.m. – 5.30 p.m. : High Tea

Payment Details: Member : ₹ 2,000.00
Spouse : ₹ 1,000.00
Corporate Member : ₹ 3,000.00
Student/Professional : ₹ 1,000.00 (Professional whose practice below
5 years)

Registration fee includes Kit, 2 Breakfasts, 2 Lunches and 1 Dinner)

Cheque/Draft may be drawn in favour of "AIFTP (EZ) Convention 2011" payable at Ranchi.

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Narayan P. Jain, Chairman, AIFTP (EZ) • **C. K. Chatterjee**, Secretary, AIFTP (EZ)
Sajjan Kumar Sultania, Treasurer, AIFTP (EZ)

**Note: List of Hotels near the venue and Contact Members details are available in our
website; i.e., www.aiftponline.org**

REPORT OF NANI PALKHIVALA MEMORIAL NATIONAL TAX MOOT COURT COMPETITION HELD FROM 13TH TO 15TH OCTOBER, 2011

The 8th edition of the Nani Palkhivala Memorial National Tax Moot Court Competition was organised by All India Federation of Tax Practitioners along with ITAT Bar Association, Mumbai in association with Government Law College, Mumbai was held from 13th-15th October, 2011. This year's Competition was dedicated to the Bombay High Court to celebrate 150 glorious years of its existence. The Competition witnessed record participation from twenty six (26) of the best Law Schools in the country and was a successful endeavour this year as well.

The Inaugural Ceremony of the Competition was held on 13th October in the Auditorium of the Government Law College, Mumbai. Hon'ble Mr. R. V. Easwar, President of the Income Tax Appellate Tribunal had consented to be the Chief Guest while Hon'ble Mr. D. Manmohan, Vice-President of the Income Tax Appellate Tribunal had graciously consented to be the Guest of Honour. Welcome addresses were given by Mr. R. B. Malik, Principal, Government Law College, Mr. M. L. Patodi, President of the All India Federation of Tax Practitioners, Dr. K. Shivaram, President of the Income Tax Appellate Tribunal Bar Association and Chairman of the Palkhivala Foundation and Research Committee and Mr. Arun Sathe, Vice President of the Income Tax Appellate Tribunal Bar Association. The Function concluded with a Vote of Thanks by Prof. Sanjay V. Kadam, Chairman, Moot Court Association and Ms. Juhi Mathur, Assistant General Secretary, Moot Court Association. The official competition souvenir was also released at the Inaugural Ceremony by Hon'ble Mr. R. V. Easwar.

The Rounds of the Competition were held on 14th and 15th October in the courtrooms of the Income Tax Appellate Tribunal itself. The Preliminary Rounds of Argument were judged by Hon'ble Members of the Tribunal and eminent tax professionals and chartered accountants. Top eight of the 26 participating teams made it through to the Quarter Final Rounds that were held in the morning of 15th October which were judged by tax professionals and senior counsels like Mr. Porus Kaka, Mr. Pradip Kapasi, Mr. Vispi Patel, Mr. Atul Jasani, Mr. Pradeep Parikh, Mr. Keshav Bhujle, Mr. Hiro Rai, Mr. Subramaniam, Mr. B. V. Jhaveri, Mr. Subhash Shetty, Mr. Percy Pardiwala and Mr. Kishore Karia. NLSIU, Bengaluru, Gujarat National Law University, Gandhinagar, Hidayatullah National Law University, Raipur and Dr. Ram Manohar Lohia National Law University, Lucknow were the 4 teams that proceeded to the Semi-Final Rounds of Argument that were judged by the Hon'ble Members of the Tribunal.

The Final Round of Arguments was held in the evening of 15th October at the Y.B. Chavan Centre at Nariman Point, Mumbai. The Final Rounds were presided over by Hon'ble Mr. Justice Mohit S. Shah, Chief Justice, Bombay High Court, Hon'ble Dr. Justice D. Y. Chandrachud, Judge, Bombay High Court and Hon'ble Mr. Justice R. M. Savant, Judge, Bombay High Court. The National Law School of India University, Bengaluru and Dr. Ram Manohar Lohia National Law University, Lucknow were the finalists with the team from the National Law School of India University emerging as the winners by a close margin of 5 marks. The winning team went home with a one-month internship at Nishith Desai Associates and a cash prize of ₹ 12,000. Mr. Nishith Desai was himself present at the Finals to hand over the letter of internship to the team from National Law School of India University, Bengaluru. The 2nd Best Team was awarded an Internship at Economic Law Practices and a cash prize of ₹ 10,000. The Best Speaker and the 2nd Best Speaker were awarded to Mr. Karandeep Makkar and Ms. Divya Soni from the Hidayatullah National Law University, Raipur. Mr. Karandeep Makkar was awarded an internship at the chambers of Mr. Soli Dastur, Senior Counsel, Supreme Court of India. The Best Memorial award went to the team from Symbiosis Law School, Pune while Mr. Dev D. Patel from Gujarat National Law University, Gandhinagar bagged the award for the Best Researcher.

The results of the 7th Nani Palkhivala Memorial Research Paper Competition were also announced at the Valedictory Ceremony. The topic for this year's Research Paper was 'Piercing the Corporate Veil in Taxation Matters' (India & International Transactions with special reference to Direct Tax Codes). This year, we received an overwhelming 63 entries from Law Schools across the country. The judges for the Competition were Mr. Vipul Joshi, Mr. Nishanth Thakkar, Mr. Parag Vyas, Mr. Sanjay Parikh and Mr. K. Gopal. The winning research paper was awarded to Mr. Vipul Agrawal, and Mr. Adhitya Srinivasan of the National Law Institute University, Bhopal. The award of the 2nd Best Research Paper went to Ms. Nirali Sanghavi and Ms. Arunima of the Gujarat National Law University, Gandhinagar and the award for the 3rd Best Research Paper went to Mr. Aayush Agarwala and Mr. Aditya Narair Mathur from Campus Law Centre, Faculty of Law, Delhi University.

The Winning Research Paper will be published in the AIFTP Journal, in the IBFD Journal, and on the ITAT website (www.itatonline.org). The research paper was also published in the Official Souvenir of the 8th Nani Palkhivala Memorial National Tax Moot Court Competition.

- Komal Modi, General Secretary, Moot Court Association of Government Law College, Mumbai

DIRECT TAXES

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

SUPREME COURT

1. S. 80HHC : Deduction – Export – Profit of Business – For purpose of S. 115JA/JB – Deduction to be computed as per P & L profit and not normal provisions

The deduction u/s 80HHC is to be worked out not on the basis of regular income tax profits but it has to be worked out on the basis of the adjusted book profits in a case where s. 115JA is applicable. Once the law itself declares that the adjusted book profit is amenable for further deductions on specified grounds, in a case where s. 80HHC (80HHE in the present case) is operational, it becomes clear that computation for the deduction under those sections needs to be worked out on the basis of the adjusted book profit. Accordingly, the deduction claimed by the assessee u/ss. 80HHC & 80HHE has to be worked out on the basis of adjusted book profit u/s 115JA and not on the basis of the profits computed under regular provisions of law applicable to computation of profits and gains of business.

CIT vs. Bhari Information Tech Systems (Supreme Court) (www.itatonline.org)

HIGH COURTS

2. S. 10A/B : Exemptions – Free Trade Zone/ Export Oriented Undertaking – Continue to “exempt” profits & so loss of other units (eligible & non-eligible, including B/f loss) not liable for set-off against s. 10A/B profits

Two issues to be considered by High Court for A.Y. 2001-02 and onwards were as to whether (i) the loss incurred by a non-eligible unit and (ii) the brought forward unabsorbed loss and unabsorbed depreciation of the eligible unit has to be set-off against the profits of the eligible unit before allowing deduction u/s 10A/10B.

It was held that s. 10A was amended by the FA 2000 w.e.f. 1-4-2001 to convert it from an “exemption” provision to a “deduction” provision. S. 10A allows deduction “from the total income”. The phrase “total income” in s. 10A means “the total income of the STP unit” and not “total income of the assessee”. Consequently, s. 10A deduction has to be given before computing the “profits & gains of business” under Chapter

IV. This proposition is in line with the form of return. Allowing deduction at the earliest stage of business income computation will blur the difference between “commercial profits” and “tax profits”. Further, though s. 10A was amended to make it a “deduction” provision, it continues to remain in Chapter III and was not moved to Chapter VI-A. The result is that even now s. 10A is in the nature of an “exemption” provision and the profits of the eligible unit have to be deducted at source level and do not enter into the computation of income. Consequently, the losses suffered by non-eligible units cannot be set-off against the eligible profits.

(b) On issue (ii), s. 10A(6) as amended by the FA 2003 w.e.f. 1-4-2001 provides that depreciation and business loss of the eligible unit relating to the A.Y. 2001-02 and onwards is eligible for set-off & carry forward for set-off against income post tax holiday. This amendment does not militate against the proposition that the benefit of relief u/s 10A is in the nature of exemption with reference to commercial profits. However, to give effect to the legislative intention of allowing the carry forward of depreciation and loss suffered in respect of any year during the tax holiday for being set off against income post tax holiday, it is necessary that a notional computation of business income and the depreciation should be made for each year of the tax holiday period. Such loss is eligible to be carried forward. But, as the income of the 10A unit has to be excluded at source itself before arriving at the gross total income, the question of setting off the loss of the current year's or the brought forward business loss (and unabsorbed depreciation) against the s. 10A profits does not arise.

CIT vs. Yokogawa India Ltd. (Karnataka) (High Court) (www.itatonline.org)

3. S. 37 : Business Expenditure – Capital or Revenue Expenditure – Expenditure on ‘Application Software’ – Revenue in nature

The expenditure incurred for the purpose of installation of “Oracle” software for financial accounting, inventory and purchase held to be revenue in nature as it did not result in creation of new asset or a new source of income. The test of enduring benefit is not a certain or a conclusive test. What is required to be seen is the real intent and purpose of the expenditure and whether the expenditure results in creation of fixed capital

for the assessee. Expenditure incurred which enables the profit making structure to work more efficiently leaving the source of the profit making structure untouched is expense in the nature of revenue expenditure. Test of enduring benefit or advantage collapses in such like cases especially in cases which deal with technology and software application which do not in any manner supplant the source of income or added to the fixed capital of the assessee.

CIT vs. Asahi India Safety Class Ltd. (Delhi) (High Court) (www.itatonline.org)

4. S. 40(b)(v): Amount not deductible – Partnership – Partnership Deed – Must quantify or lay down the manner of quantifying remuneration to partners

Ss. 40(b)(i) to (v) which prescribe the conditions for deduction of remuneration paid to a partner require that the payment should be authorized by, and be "in accordance with the terms of the partnership deed". This mandates that the quantum of remuneration or the manner of computing the quantum of remuneration should be stipulated in the partnership deed and should not be left undetermined, undecided or to be determined or decided on a future date;

Sood Brij & Associates vs. CIT (Delhi) (High Court) (www.itatonline.org)

5. S. 68 : Cash credit – Assessee's AO cannot question Creditor's I. T. Return

If the creditor discloses his PAN and claims to be an assessee, the AO cannot himself examine the return and P&L A/c of the creditor and brand the same as unworthy of credence. Instead, he should enquire from the creditor's AO as to the genuineness of the transaction and whether such transaction has been accepted by the creditor's AO. So long it is not established that the return submitted by the creditor has been rejected by the creditor's AO, the assessee's AO is bound to accept the same as genuine when the identity of the creditor and the genuineness of transaction through account payee cheque has been established.

CIT vs. Dataware Pvt. Ltd. (Calcutta) (High Court) (www.itatonline.org)

6. S. 194J : Deduction of Tax at Source – "Transaction charges" paid to BSE – "Fees for technical services"

In the instant case, there is direct linkage between the managerial services rendered and

the transaction charges levied by the stock exchange. The BOLT system provided by the BSE is a complete platform for trading in securities. A stock exchange manages the entire trading activity carried on by its members and accordingly renders "managerial services". Consequently, the transaction charges constituted "fees for technical services" u/s 194-J and the assessee ought to have deducted TDS. However, on facts, because from 1995 to 2005 no tax was deducted and no objection was raised by the AO and because from A.Y. 2006-07 onwards the assessee had deducted TDS, no disallowance u/s 40(a)(i) can be made for A.Y. 2005-06.

CIT vs. Kotak Securities Limited (Bombay) (High Court) (www.itatonline.org)

TRIBUNALS

7. S. 9(1) : Income deemed to accrue or arise in India – Payment for "live telecast" of cricket matches – Not "Royalty" nor arising from "Business Connection"

The assessee entered into an agreement with Nimbus, a Singapore entity, for receiving and broadcasting matches that were to be played in Bangladesh. The signals to be broadcast were on account of live matches as well as recorded matches. It was held that Expl. 2 to 9(1)(vi) defines "royalty" to mean consideration for "(v) the transfer of all or any rights in respect of any copyright." There is no copyright in live events as the question of granting exclusive right to do any work can arise only when such "work" has come into existence. The existence of "work" is a precondition and must precede the granting of exclusive right for doing of such work. Unless the work itself is created, there is no question of a copyright of such work. Thus, depicting of the same does not infringe any copyright. Accordingly, the amount paid for broadcast of live matches is not assessable as "royalty" (clause 314 (220) of the Direct Tax Code Bill, 2010 referred to which proposes to define "royalty" to include "live coverage of any event"). It was further held that Nimbus has merely given a licence for the live broadcast of the matches and continues to retain the rights in such broadcast. The mere act of allowing the assessee broadcast the matches for consideration does not constitute a "business connection" in India. In order to constitute a "business connection", it is necessary that some sort of business activity must be done by the non-resident in the taxable territory of India

ADIT vs. Neo Sports Broadcast Pvt. Ltd. (ITAT) (Mumbai) (www.itatonline.org)

8. S. 40(a)(ia) – Amount not deductible – Short Deduction of Tax at Source – No disallowance for short-deduction TDS default

Where it is a case of short deduction of payment as against non-deduction of TDS, disallowance u/s 40(a)(ia) could not be made. Though S. 40(a)(ia) provides for a disallowance it amounts towards rent, etc have been paid without deducting tax at source. It does not apply to a case of short-deduction of tax at source. As the assessee had deducted u/s 194C, it was not a case of "non-deduction" of TDS. If there is a shortfall due to difference of opinion as to which TDS provision would apply, the assessee may be treated as a defaulter u/s 201 but no disallowance can be made u/s 40(a)(ia). (Chandabhoy & Jassobhoy (ITAT Mumbai) followed – included in file)

DCIT vs. M/s. S.K. Tekriwal (Kolkata) (ITAT) (www.itatonline.org)

9. S. 271G : Penalty – Transfer Pricing – No penalty for failure to respond to "omnibus" notice

S. 271G authorizes the levy of penalty if the information/ documents prescribed by s. 92D (3) are not furnished. Rule 10D prescribes a voluminous list of information and documents required to be maintained and it is only in rare cases that all clauses would be attracted. Some of the documents may not be necessary in case of some assesseees. Before issuing a notice u/s 92D(3), the AO has to apply his mind to what information and documents are relevant and necessary for determining ALP. A notice u/s 92D(3) is not routine and cannot be casually issued but requires application of mind to consider the material on record and what further information on specific points is required. The notice cannot be vague or call for unprescribed information.

DCIT vs Leroy Somer & Controls (India) (P) Ltd. (Delhi) (ITAT) (www.itatonline.org)

INDIRECT TAXES

P. C. Joshi, Advocate

1. ENTRY IN SCHEDULE

a) BEVERAGES

The Madhya Pradesh High Court held that the expression beverage as commonly understood meant any liquid other than water that may be consumed neat or after dilution. The food supplements namely GRD Powder and GRD Bix not in liquid form, were not covered by the entry relating to non-alcoholic drink and beverages but were food supplements.

Cadia Health Care Ltd. & Ors vs. Addl. Commissioner, Commercial Tax & Ors (2011) 19 STJ P. 409.

b) ARTIFICIAL LIMBS – WHEEL CHAIR

Considering the primary – main use and as recognised and known in the market, the Punjab and Haryana High Court held that the wheel chair and the wheel chair commode, used by the orthopedically handicapped persons were covered by entry 61 of Schedule B appended to Haryana General Sales Tax Act, 1973 relating to "Artificial limbs/Aids for handicapped persons".

Excise and Taxation Commissioner vs. M/s. Sunbeam Hi-Tech Medicare (2011) 40 PHT 110 (P&H).

c) EQUAL

The Kerala High Court held that the Sugar substitute "equal" in tablet or powder form was liable to be taxed @ 12% under entry 62 relating to all kinds of

food preparations sold in air tight container and food colours, essences, etc., and not under the residuary entry under the Kerala General Sales Tax Act, 1963.

State of Kerala vs. Glaxo SmithKline Pharmaceuticals Ltd. (2011) 19 KTR 546 (Ker).

d) GALVANISED TUBE FITTINGS

The Kerala High Court held that the tube fittings when galvanised became a different commercial commodity and therefore was covered by the entry 148 of the First Schedule to the Kerala General Sales Tax Act, 1963 as sanitary items GI Pipe fittings, etc., and not as steel tube under entry 2(k) of the Second Schedule.

Note : The above judgment have been given without noticing the Supreme Court Judgments reported at (1989) 42 ELT 513, 135 STC 219 and 74 STC 176. The judgment therefore needs reconsideration. – Editor

Haru Adhikari vs. State of Kerala (2011) 19 KTR 556 (Ker).

2. FIRST SALE

The Kerala High Court after considering the provisions of section 5(2) of the Kerala General Sales Tax Act, 1963 held that if the subsidiary company had purchased the goods under brand name and sold it with unusually high margin, the claim of second sale cannot be allowed.

State of Kerala vs. Kitchen Appliances India Ltd. (2011) 19 KTR 535 (Ker).

3. GOODS

The A.P. High Court held that in order to qualify as an immovable property attached to the earth, it must be imbedded to the earth and not attached to the house for beneficial enjoyment of the house. So holding the court observed that the articles such as window blinds and other ornamental articles cannot be treated as attached to the house. On the same analogy, it was held that the electricity meters installed in the building for the purpose of measuring the consumption of electricity, cannot be treated as the immovable property.

A.P. State Electricity Board vs. State of Andhra Pradesh (2011) 19 STJ 414 (AP).

4. INPUT TAX CREDIT

The larger Bench of the Punjab and Haryana High Court after considering the provisions of section 8 (3) of the Haryana VAT Act, 2003 and rules 20(1) and (4) thereunder held that the input tax credit claimed by the purchasing dealer cannot be denied on the ground that the seller did not deposit the full tax into the Government treasury. The Court also held that no liability can be fastened on the purchasing dealer on account of non-payment of tax by the selling dealer.

M/s. Gheru Lal Bal Chand vs. The State of Haryana & Anr. (2011) 40 PHT 145 (P&H).

5. LOCAL OR INTERSTATE SALE

The assessee before the Kerala High Court was enjoying exemption on local sales on the basis of a certificate issued by the Industries Dept., however no such exemption was available for inter-State sale. Despite the above position, the assessee went on filing returns without payment of tax under the CST Act. When the tax was levied; a claim was preferred that there were no inter-State sale because the agent of the purchaser came from other State, took delivery and transported the goods to their place of business.

In absence of any evidence about the agency transaction or transportation of the goods, the High Court held that the later change in the submissions contrary to the returns submitted earlier, were nothing but twisting the facts solely for the purpose of getting over the CST liability. Since the goods moved out of the State pursuant to the contract of sale, the transactions were held to be in the nature of inter-State and not local.

State of Kerala vs. Thanikudam Bhagavathi Mills (P) Ltd. (2011) 19 KTR 549 (Ker).

6. PLANT

The Supreme Court after considering the provisions of Central Excise Act, 1944 held that Asphalt Drum

Mix Plant set up out of duty paid components; amounted to manufacture, within the meaning of section 2(d) of the Central Excise Act, 1944 and cannot be termed as immovable property for the reasons as under:

- (i) The plants in question are not *per se* immovable property.
- (ii) Such plants cannot be said to be 'attached to the earth' within the meaning of that expression as defined in section 3 of the Transfer of Property Act.
- (iii) The fixing of the plants to a foundation was meant only to give stability to the plant and keep its operation vibration free.
- (iv) The setting up of the plant itself was not intended to be permanent at a given place.

Commissioner of Central Excise vs. Solid & Correct Engineering Works & Ors. (2011) 19 STJ 428 (SC).

7. i) PENALTY – FOR FAILURE TO SUBMIT RETURNS

The Karnataka High Court upheld the constitutional validity of section 72(1) of the Karnataka Valued Added Tax Act, 2003 for imposition of penalty on the assessee's failure to submit the return within the prescribed period. The court however held that though section 72 did not expressly provide for issue of a show cause notice and hearing the assessee before imposing the penalty; it cannot be concluded by implication that the applicability of the principles of natural justice was excluded. The court therefore read the principles of natural justice as forming part of the section as a pragmatic requirement of fair play in action. The court also specified as many as eight causes or circumstances under which the discretion of not imposing the penalty was required to be favourably exercised.

The Asst. Commissioner of Commercial Taxes vs. M/s. Pink City. 2011-12 (16) KCTJ P.201.

ii) PENALTY FOR LATE SUBMISSION OF AUDIT REPORT

The Bombay High Court reiterated its earlier judgment that the penalty u/s. 61(2) of the Maharashtra Value Added Tax Act, 2002 for late submission of VAT audit report, was not automatic but a discretionary one and the quantum of penalty need not necessarily be on the basis of percentage mentioned in the Act. The Appellate Authority have also power to reduce the quantum upon considering the cause for the delay shown by the assessee.

Additional Commissioner of Sales Tax VAT III, Mumbai vs. Ankit International (STA No. 9 of 2011 decided on 15th Sept., 2011). (Source : Sales Tax Review Oct, 2011 P. 63).

iii) PENALTY – LATE FILING OF RETURN

The Bombay High Court held that the penalty u/s. 29 (8) of the Maharashtra Value Added Tax Act, 2002 cannot be imposed without giving opportunity of hearing to the assessee. The authority concerned was required to pass a reasoned order after considering the explanation for the delay given by the assessee.

In order to avoid such repetitive litigation on the same issue the Hon'ble High Court directed the department to honour the statement of their counsel before the court by following the principles of natural justice in all future cases.

Mukesh R. Bhayani Prop., of M/s. Vasu Enterprises vs. The State of Maharashtra & Ors., Writ Petition No. 1451 of 2011 decided on 8th Sept., 2011.

(Source : Sales Tax Review Oct, 2011 P.62).

8. i) PROVISIONAL ASSESSMENTS

The Rajasthan High Court at Jodhpur held that the final assessment order prevail over the provisional assessment therefore once the final order was passed, the provisional one cannot be given effect to; because the same got merged with the final order of assessment.

M/s. Luna Trading vs. Assistant Commissioner Circle Tax World Vol. XLVI, P.35.

ii) PROVISIONAL ASSESSMENT

The Madras High Court held that no provisional assessment can be framed when the returns were filed by the assessee in the prescribed form and the assessment year itself was over.

M/s. Joy Alukkas Traders (India) Pvt Ltd., vs. The Joint Commissioner (CT). Sales Tax Journal, Vol. 50, Part 7, October, 2011 P. 745.

9. RECOVERY – MISUSE OF POWER

Before the Allahabad High Court, the Appellate Authority rejected the appeal on a Saturday. On Monday the departmental authorities issued a notice of recovery by attaching the bank account before even serving the copy of the appeal order on the assessee. The petitioner came to know about the recovery action and disposal of appeal from the bankers. Thereafter the copy of the appeal order came to be served. Considering the manner in which the authority proceeded; to be an arbitrary action, the court directed the Additional Commissioner to remain present in the court on the next date of hearing. After hearing him, the High Court directed the Commissioner to issue a circular to all his subordinates to grant time at of least ten days after disposal of appeal for obtaining the stay from the Tribunal and till then not to proceed with the recovery of dues in accordance with the order in appeal.

M/s. Hamdard (Wakf) Laboratories Thru' Auth. Signatory vs. State of U.P. & Ors. (2011) NTN (Vol.47) P.31.

10. WORKS CONTRACT

The Karnataka High Court after considering the ratio of the Supreme Court judgment in the case of *M/s. Larsen & Toubro Ltd. (17 VST P.1)* held that the main contractor was not liable on the portion of the works executed by the sub-contractor therefore both of them cannot be held liable to pay tax.

Skyline Constructions and Housing Pvt. Ltd. vs. Authority for Clarification and Advance Rulings & Anr. (2011) 19 KTR 512 (Kar).



Dear Members,

We are proposing to send a pre-budget memorandum to the Ministry of Finance, Government of India on direct taxes like last year. You are requested to send your suggestions on or before 15th December, 2011 by email with a copy to the office of the Federation.

We are also taking up the issues and problems of general interest being faced by our members with the Central Board of Direct Taxes. They may also be sent to the undersigned by email.

As you are aware, the Income Tax Appellate Tribunal Rules are being amended. Suggestions have been invited by the Tribunal in this regard. Proposal for specific amendment of these rules may also be sent to the undersigned.

With my best wishes and warm regards,

S.R. Wadhwa

Chairman, Direct Tax Representation Committee
 Email: wadhwars@hotmail.com / aiftp@vsnl.com

20-11-2011

INTERNATIONAL TAXATION

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

AUTHORITY FOR ADVANCE RULING

1. Sale of shares – Beneficial ownership – Article 13(4) – Indo-Mauritius DTAA

The applicant is a resident of Mauritius and a wholly owned subsidiary of Ardex Holdings U.K. Ltd. The applicant proposed to sell its holding in Ardex Endura (India) Pvt. Ltd ('Ardex India'), an Indian company, to another non-resident group company known as Ardex Beteiligungs – GmbH Germany ('Ardex Germany') at fair market value prevailing at the time of proposed sale. The authority ruled as follows:

- i. The first shares of Ardex India were purchased almost 10 years before the application and the shareholding has steadily increased. Perhaps the formation of this subsidiary in Mauritius was made with the India-Mauritius Treaty in mind. At worst it might be interpreted as an attempt to take an advantage of the Treaty. But that by itself cannot be viewed or characterized as objectionable treaty-shopping. The decision in Azadi Bachao Andolan has even gone to the extent of holding that treaty-shopping in itself does not constitute a taboo.
- ii. It is difficult to conclude that the proposed transaction would be governed by the India-UK Treaty.
- iii. This is not a gift or transfer without consideration of shares but a sale at market rate.
- iv. The capital gains on the proposed sale of shares by the applicant to Ardex Germany are not chargeable to tax on capital gains in India in view of Article 13(4) of the India-Mauritius Tax Treaty.
- v. The applicant is bound to file an income tax return in India with respect to the income from the proposed transfer of the shares.

Ardex Investment Mauritius Ltd. (2011-TII-27-ARA-Intl)

HIGH COURTS

2. Composite contract – Section 9 – Income-tax Act, 1961 – India-Australia DTAA

The High Court held that if the composite contract specifically records the consideration for goods to be supplied outside India and if the payment is made outside India, then no fault can be found with the Tribunal's decision in ruling that income arising from offshore supplies is not taxable in India. If the amounts in question are not taxable in India, the question of applying the Double Taxation Avoidance Agreement between India and Australia does not arise at all. Accordingly, the Revenue's appeal was dismissed.

DCIT vs. Xelo Pty Ltd. (2011-TII-42-HC-Mum-Intl)

3. Construction site PE – Article 5(3) – India Netherlands DTAA

The assessee, a Dutch company, obtained a contract for dredging a trench. It opened an office at Mumbai and the contract was completed in two months. The High Court observed that Article 5(3) of the India-Netherlands treaty provided that in order to constitute a permanent establishment ('PE') such a site or project should exist for more than six months. Since the Appellate Authority has given categorical finding that the contract was under six months, the High Court held that the assessee did not have a PE in India under Article 5(3). Since, Article 5(3) is a specific provision and Article 5(2) is a general provision, Article 5(3) will prevail over Article 5(2) and hence, in the absence of any PE in India in terms of Article 5(3), no part of revenue earned by the assessee was taxable in India.

CIT vs. M/s. BKI/HAM v.o.f (Source: itatonline.org)



**MEMBERS OF THE NATIONAL EXECUTIVE COMMITTEE 2010 & 2011
DETAILS OF MEETING ATTENDED**

Sr. No.	Name	Grand Total out of 10 Meetings	Sr. No.	Name	Grand Total out of 10 Meetings	Sr. No.	Name	Grand Total out of 10 Meetings
1	M. L. Patodi.....	10	22	H. Padamchand Khincha ..	3	43	S. C. Goyal	6
2	S. K. Poddar.....	8	23	Hemendra V. Shah	4	44	S. R. Wadhwa.....	5
3	J. K. Ranka	9	24	J. V. Rao	3	45	Sarbeswar Sahoo	3
4	Nikita R. Badheka	9	25	Janak K. Vaghani	6	46	Satya Narayan Sahu.....	5
5	Dr. Ashok Saraf	4	26	K. G. Vyas	5	47	Sudhir Bhansali.....	2
6	H. C. Bhatia	5	27	K. L. Goyal.....	4	48	Suresh Chandra Garg	3
7	J. D. Nankani	9	28	Dr. K. Shivaram	7	49	Vikram S. Nankani	1
8	P. V. Subba Rao	4	29	Kishor Vanjara	6	ZONAL CHAIRMEN		
9	Basudev Panda	4	30	L. N. Rastogi	0	50	Harish N. Motiwalla	8
10	B. S. Rawat.....	1	31	Dr. M. V. K. Moorthy	9	51	Narayan Prasad Jain.....	5
11	Ramesh M. Shah.....	5	32	M. Srinivasa Rao.....	9	52	P. M. Chopra.....	7
12	Suresh Ramnani.....	5	33	Mitesh Kotecha	3	53	P. V. S. S. Prasad	2
13	K. Sankaranarayanan.....	5	34	Mukul Gupta.....	5	54	Premlata Bansal.....	6
14	Bharatji Agrawal.....	6	35	N. M. Ranka	7	New Co-option after 1st NEC		
15	Achintya Bhattacharjee ...	6	36	P. C. Joshi.....	9	Grand Total out of 9 Meetings		
16	Amit Nagarsheth	3	37	Pankaj Ghiya	4	55	P. Purushottam	1
17	Arvind Shukla	4	38	P. S. Sarin.....	2	56	Ritam Aggarwal.....	0
18	Ashwin C. Shah	7	39	Piyush Agrawal	6	57	Ritu G. P. Das	4
19	C. K. Chatterjee.....	7	40	R. D. Sharma	4	58	U. M. Loonawat	6
20	G. S. Agrawal	2	41	Raj K. Batra	3			
21	Ganesh Purohit	4	42	Rajesh B. Shah	4			

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Central	0	729	22	3	754
Eastern	2	945	34	3	984
Northern	0	839	17	0	856
Southern	0	757	13	3	773
Western	3	1588	32	15	1638
Total	5	4858	118	24	5005

ONE DAY NATIONAL SEMINAR ON TAXATION

A full day seminar on Taxation is organised by All India Federation of Tax Practitioners – Southern Zone jointly with Institute of Chartered Accountants of India (Trivandrum Branch) on Saturday, 17th December, 2011 at Hotel SP Grand Days, Panavila, Trivandrum from 8.30 a.m. to 5.30 p.m. The theme of the conference is "**Emerging Trends in Taxation**".

Topics and Speakers are as under:-

Topics	Speaker
Real Estate – Recent Development in Direct Taxes	CA Ramnath, Coimbatore
Transfer Pricing Regulations – Basic Law & Issues	CA P. V. S. S. Prasad, Hyderabad
Service Tax – Issues in Compliance in Point to Taxation Rules	CA Veeramani, Kochi
Business Deductions – Income Tax – Recent Developments	CA K. C. Devdas, Hyderabad

For further details, please contact

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CA A. Retnakumar, Vice Chairman, AIFTP (SZ) – 09447153745
CA Santhosh Cherian, Chairman, Trivandrum Branch of ICAI – 09846106228

**Homage to our revered
Shri V. Ramachandran
who has left for his heavenly abode
on 14-11-2011**



We pay our respectful homage to
Shri V. Ramachandran, Sr. Advocate & Past President.

A legal luminary in his own right, an Institution by himself and above all a noble human being. In his passing away, our Association has lost its guiding spirit.

We pray to the almighty to rest the departed soul in eternal peace.

Non-receipt of the Times must be notified within one month from the date of publication, which is 4th of every month.

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