



All India Federation of Tax Practitioners

**Price ₹ 5/-**  
(For Members only)

# AIFTP TIMES

**Volume 2 - No. 5 • May, 2011**

<b>FORTHCOMING PROGRAMMES</b>	
<b>Date &amp; Month</b>	<b>Programme</b>
17th June, 2011	National Executive Committee Meeting at Mumbai
17th & 18th June, 2011	Two Days National Tax Conference at Mumbai on Indirect Taxes
19th & 20th August, 2011	Two Days Workshop on Drafting of Agreements, Deeds and Documents at Mumbai
20th August, 2011	National Executive Committee Meeting at Kochi
20th & 21st August, 2011	Two Days National Tax Conference at Kochi
11th November, 2011	Celebration of Foundation Day at Delhi
12th & 13th November, 2011	Two Days National Tax Conference at Delhi
9th December, 2011	National Executive Committee Meeting at Ranchi
10th & 11th December, 2011	Two Days National Tax Convention at Ranchi

## FEDERATION NEWS

J. K. Ranka, Secretary General

### Announcement

The All India Federation of Tax Practitioners - Western Zone with The Sales Tax Practitioners' Association of Maharashtra has organised Two Days' National Tax Conference specially on Indirect Taxes on Friday, 17th June, 2011 and Saturday, 18th June, 2011 at Navinbhai Thakkar Auditorium, Vile Parle (E), Mumbai - 400 057.

The leading faculties from Mumbai and all over India would be discussing and giving their expert views on various important aspects of VAT & Service Tax including Service Tax on Legal Services.

Please register at the earliest.

Registration Fees : Members - ₹ 2,000/-; Non-Members - ₹ 2,500/-.

For more details please visit our website i.e. [www.aiftponline.org/www.stpam.org](http://www.aiftponline.org/www.stpam.org)

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 DD only.

FOR QUERIES PLEASE CONTACT ANY OF THE FOLLOWING OFFICE BEARERS

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

*Organised*

**TWO DAYS**

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

*Jointly with*

**ALLIED LAWS COMMITTEE OF THE CHAMBER OF TAX CONSULTANTS,  
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 Allied Laws Committee of the Chamber of Tax Consultants and Bombay Chartered Accountants' Society has arranged a two days 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

**DIRECT TAXES**Ajay R. Singh, Paras Savla, Rahul Hakani & Renu Choudhari  
Advocates**SUPREME COURT****1) S. 28(va) : Business Income – Capital or Revenue Receipt – Non-compete Receipt – Capital in nature**

Assessee received a fee of ₹ 50 lakhs for agreeing not to compete for 20 years in the Territory of India. The question arose as to the nature of receipt being capital or revenue. It was observed and held by the Hon'ble SC that it is very clear and settled in law that there is a dichotomy between receipt of compensation by an assessee for the loss of agency and receipt of compensation attributable to the negative/restrictive covenant. While the former is a revenue receipt, the latter is a capital receipt. Payment received as non-competition fee under a negative covenant was always treated as a capital receipt till A.Y. 2003-04. It is only by s. 28(va) inserted by F.A. 2002 w.e.f. 1-4-2003 that the said capital receipt is now made taxable. S. 28(va) is mandatory and not clarificatory.

*Guffin Chem. (P.) Ltd. vs. CIT (2011) 239 CTR 225 (SC)*

**HIGH COURTS****2) S. 14A : Business Expenditure – Exempted Income – Borrowed funds – Disallowance of interest on borrowings on ground that assessee ought not to have used own funds for tax-free investments invalid**

It was held by Hon'ble High Court that the assessee has sufficiently explained that a majority of the investment in the tax-free security was made before the borrowing. The assessee had demonstrated that it had other sources of investment and that no part of the borrowed fund could be stated to have been diverted to earn tax free income. As borrowed funds were not used for earning tax-free income, applying s. 14A was not justified.

*CIT vs. Gujarat Power Corporation Ltd. (Gujarat High Court). www.itatonline.org.*

**3) S. 40(b)(v) : Amounts not deductible- Partnership – Remuneration to partners – CBDT Circular, which specifies that for s. 40(b)(v), the partnership deed should specify the remuneration, is invalid**

S. 40(b)(v) allows a deduction of payment of remuneration to a working partner if it authorized by

the partnership deed and not in excess of the limits. S. 40(b)(v) does not lay down any condition that the partnership deed should fix the remuneration or the method of quantifying remuneration. Accordingly, CBDT Circular No. 739 dated 25-3-1996 which requires that either the amount of remuneration payable to each individual should be fixed in the agreement or the partnership agreement deed should lay down the manner of quantifying such remuneration goes beyond s. 40(b)(v). The CBDT cannot issue a circular which goes against the provisions of the Act. The CBDT can only clarify issues but cannot insert terms and conditions which are not part of the main statute. A partnership deed which provides that the remuneration would be as per the provisions of the Act meaning thereby that the remuneration would not exceed the maximum remuneration provided in the Act is valid and deduction is admissible.

*Durga Dass Devki Nandan vs. ITO (HP High Court). www.itatonline.org.*

**4) S. 43(5) : Definitions – Income from Business and Profession – Derivative loss treated as Speculative Transaction**

It was held by the Bombay High Court that transactions in futures contracts like transactions in stocks & shares if settled otherwise than by actual delivery would be speculative transactions u/s 43(5). The argument that s. 43(5) refers to contracts which are capable of settlement by actual delivery whereas the transactions in futures are incapable of settlement and therefore, transactions in futures fall outside the scope of s. 43(5) is not acceptable because the very object of s. 43(5) is to treat transactions which are settled otherwise than by actual delivery as speculative transactions. It was also held that clause (d) to the proviso to s. 43(5) inserted by the FA 1995 w.e.f. 1-4-2006 is not clarificatory and retrospective.

*CIT vs. Bharat R. Ruia (High Court) (Bombay) (www.itatonline.org)*

**5) S. 50B : Capital gains – Sale of entire business as going concern – Slump sale (S. 45)**

Assessee having transferred the assets and liabilities pertaining to its business as one whole unit as a going concern for a lump sum consideration without assigning any separate value to land, building /structure, plant and machinery, office equipment, furniture and fixtures and vehicles, the sale was a

slump sale and therefore, the same is not exigible to tax under the head "Capital Gains".

*CIT vs. Chemical Industries Consulting Bureau (2011) 51 DTR 283 (High) (Kar).*

**6) S.80-IB : Deduction – Industrial Undertakings – Central Excise Duty refund – Transport and interest subsidy**

Central Excise duty refund has inextricable link with manufacturing activity hence eligible for deduction under section 80-IB, however transport and interest subsidies have no direct nexus with the business of industrial undertaking hence not eligible for deduction under section 80-IB.

*CIT vs. Meghalaya Steels Ltd. (2011) 332 ITR 91 /221 Taxation 79 (Guwahati)*

**TRIBUNALS**

**7) S. 45 : Capital gains – Conversion of units of UTI into tax free bonds – Transfer (S. 2(47))**

Assessee claimed capital loss on account of conversion of units of UTI into tax free bonds. The Tribunal held that in the instant case was a simple case of conversion of one asset into another and there was no transfer of asset within the meaning of section 2(47) hence the Assessing officer rightly rejected the claim.

*Asst CIT vs. ABC Bearings Ltd. (2011) 44 SOT 338 (Mumbai).*

**8) S. 54 : Capital gains – Profit on sale of property used for residence – Exemption is available to multiple sales & purchases of residential houses (S. 45)**

Though s. 54 refers to capital gains arising from "transfer of a residential house", it does not provide that the exemption is available only in relation to one house. If an assessee has sold multiple houses, then the exemption u/s 54 is available in respect of all houses if the other conditions are fulfilled. If more than one house is sold and more than one house is bought, a corresponding exemption u/s 54 is available. However, the exemption is not available on an aggregate basis but has to be computed

considering each sale and the corresponding purchase adopting a combination beneficial to the assessee.

The decision of the Special Bench in *ITO vs. Sushila Jhaveri 292 ITR (AT) 1* is distinguishable.

*Rajesh Keshav Pillai vs. ITO ( ITAT, Mumbai). www.itatonline.org.*

**9) S. 56(2)(v) : Income from other sources – Gift from mother (member of HUF) to her son – No addition**

Sec. 56(2)(v) does not apply in case of gift made by mother to her son, though the mother is member of HUF, which was later impressed in the common pool of HUF. Thus addition does not sustain.

*Amit P. Dhingra (HUF) vs. ITO (ITA No.3886/M/2009, dated 30-3-2011)*

**10) S. 92C : Avoidance of tax – Transfer Pricing – International Taxation – Arm's Length Price. (Rule 10B (1)(e))**

Under Chapter X of the Income-tax Act, 1961, the determination of the arm's length price of an international transaction has to be only at the transaction level or at a class of transactions. The law does not permit determination of the arm's length price of international transactions, by comparing margins at entry level, or by taking overall industry level averages. The matter was set aside.

*Dy. CIT vs. Ankit Diamonds (2011) 8 ITR (Trib.) 487 (Mumbai).*

**11) S. 201(1) : Assessee in default – Consequences of failure to deduct or pay – Deduction of tax at source – Time limit**

Time limit for treating deductor as in default, is maximum time limit available for initiating and completing reassessment. On the facts as the order passed by the Assessing Officer was within six years from the end of the relevant assessment year, the order passed by the Assessing Officer was not time barred.

*Asst. CIT vs. Merchant Shipping Services (2011) 8 ITR (Trib.) 1 (Mumbai).*



**Stop Press – Report of 29-4-2011**

**Service Tax on Lawyers Stayed by Delhi High Court & Guwahati High Court**

The Delhi Bar Association has filed a Writ Petition in the Delhi High Court bearing WP No. 2792 of 2011 to challenge the levy of service tax on "Legal Consultancy Services". The High Court on 29th April, 2011 issued notice on the Writ Petition and stayed the application of the impugned provision till the next date of hearing being 23rd May, 2011.

Guwahati High Court Bar Association has also filed Writ Petition in the Guwahati High Court bearing WP No. 2293 of 2011. Guwahati High Court also passed the similar order on 29th April, 2011 staying the applicability of Service Tax to Legal Profession.

**INTERNATIONAL TAXATION**

CA Dhanesh Bafna, CA Madhav Khandelwal, Advocate Sujeeth Karkal

**HIGH COURT****1. Transfer of shares held in India and lifting of corporate veil – S. 195 – Income-tax Act, 1956**

The assessee, a company based in Cyprus, bought shares (100% together with another company) of a UK company named Finsider International ('Finsider UK'), from another UK company named Early Guard Ltd. Finsider, UK, in turn holds 51% shares of Sesa Goa Ltd., India. The AO took the view that the transfer of the shares of Finsider amounted to transfer of the said 51% shares of Sesa Goa and that the assessee was liable to deduct tax at source u/s 195 when it bought the shares of Finsider, UK. The High Court dismissing the writ petition filed by the assessee held that the mere production of agreement between assessee and Early Guard Ltd. is not sufficient to know as to the nature of transaction between Finsider, UK and Sesa Goa. Further, it may be necessary for the fact finding authority to lift the corporate veil to look into the real nature of transaction and to ascertain the virtual facts. It is also to be ascertained whether the assessee, as a majority shareholder, enjoys the power by way of interest and capital gains in the assets of Sesa Goa and whether the transfer of shares includes indirect transfer of assets and interest in Sesa Goa. Thus, the assessee was directed to appear before the revenue authorities, who on consideration of the facts of the case would pass appropriate orders.

*Richter Holding Ltd. vs. ACIT (2011-TII-14-HC-Kar-Intl)*

**2. Reopening valid despite tax certificate u/s. 197 – Ss. 147, 195 and 197 – Income-tax Act, 1956**

The assessee was awarded contracts for on-shore supply, on-shore services and off-shore supply by Power Grid Corporation of India Ltd ('PGCIL'). PGCIL filed an application u/s 195(2) and obtained an order from the

AO that tax had to be deducted @ 10% on certain payments and at Nil rate on other payments. The High Court, dismissing the writ petition filed by the assessee challenging the notice u/s. 148, held that on a conjoint reading of ss. 195 and 197, if any opinion is expressed at the time of grant of certificate, it is tentative or provisional or interim in nature and does not debar the AO from initiating proceeding u/s 147 on the ground that there has been a change of opinion.

*Areva T & D vs. ADIT (Del. HC) (Source: itatonline.org)*

**AUTHORITY FOR ADVANCE RULING****3. Capital Gain taxable in state of residence – Article 13(4) – India-Mauritius DTAA**

The Authority ruled that Article 13(4) of the India-Mauritius DTAA confers the power of taxation of the gains derived by a resident of a contracting state from the alienation of shares held in Indian company only in the state of residence i.e. in Mauritius. The fact that the capital asset is situated in India is immaterial and therefore, the applicant is not liable to pay capital gain tax in India in respect of transfer of shares held in Indian company.

*D. B. Zwirn Mauritius Trading (2011-TII-04-ARA-Intl)*

**4. Filing of return of income despite income not taxable in India – Section 139 – Income-tax Act, 1956**

The Authority ruled that wherever it is not necessary for a non-resident to furnish return under section 139(1) of the Act, it has been specifically provided in the Act itself. Therefore, the applicant should file the return of income irrespective of the fact that the income is taxable in India or not.

*VNU International (2011-TII-05-ARA-Intl.)*

**Renewal Subscription to AIFTP Journal and Voluntary Contribution to Palkhivala National Tax Moot Court Competition and Research on Tax**

Dear Members,

We have posted bill for renewal subscription of AIFTP Journal and Palkhivala Foundation on 24th March, 2011. Members are requested to send the DD or Cheque in favour of "All India Federation of Tax Practitioners" payable at Mumbai as early as possible.

Members can also download the subscription and an appeal from our website; i.e., [www.aiftponline.org](http://www.aiftponline.org) and send us the subscription.

Thanking you,

**For All India Federation of Tax Practitioners**

**J. K. RANKA**  
Secretary General

## INDIRECT TAXES

P. C. Joshi, Advocate

### 1. Rectification

The Madras High Court after considering the provisions of sec. 7-C(2) of the Tamil Nadu General Sales Tax Act held that the rectification of the order passed earlier cannot be sought by the assessee, on the basis of the acceptance of the composition scheme in the subsequent year, even though the contract commenced in the earlier year continued in the later year as an ongoing contract.

*Taherali Industries & Projects (P) Ltd. vs. Appellate Deputy Commissioner (CT) & Ors. Thanjavur 2010-11 (16) TNCTJ - 221*

### 2. Recovery of tax

The Madras High Court (Madurai Bench) held that the property of the defaulter sold by auction by the Bank after invoking sec. 29 of the State Financial Corporation Act, 1951, cannot be attached by the Commercial Tax Dept. for the recovery of their dues under the provisions of Revenue Recovery Act.

*J T. Manikandan vs. The Commercial Tax Officer, Dindigul & Ors. 2010-11 (16) TNCTJ-227*

### 3. Reference – High Court returned unanswered – See under Declared Goods

### 4. Right of Appeal

The Kerala High Court on interpretation of the provisions of sec. 62 of the Kerala VAT Act, held that the right of appeal to High Court was conferred on any person objecting to an order affecting him. Therefore, an assessee affected by the order of clarification issued by the Commissioner u/s 94(1) of the said Act, can as well approach the High Court as the 'person aggrieved'. For the said purpose the limits of 90 days would run from the date on which the assessee came to know about the order of clarification in other dealer's case.

*Procter & Gamble Hygiene, Thiruvananthapuram vs. Commissioner of Commercial Taxes (2011) 18 CTJ 238 (Ker.)*

### 5. Recovery

The Allahabad High Court held that when the Reference before the BIFR was under consideration and the dues related to the period prior to cut off date provided in the Rehabilitation Scheme, it did not partake the character of current dues though the Reassessment Order for an earlier period was passed after the cut off date on remand.

*Modi Industries Ltd. vs. State of U.P. & Ors. 2011 NTN (Vol. 45) 93*

### 6. Res Judicata – Finality of litigation

The Supreme Court held that when the earlier decision in regard to the classification of a product was not questioned before the higher forum, the State cannot take different stand on the same set of facts

*Jai Vijai Metal Udyog Pvt. Ltd. (2011)-19 KTR 166 SC*

### 7. Sale from SEZ to DTA

The Allahabad High Court while dismissing the Writ Petition held that the sales from SEZ to DTA was not a sale in the course of import in the territory of India and therefore was not exempt under sec. 5(2) of the CST Act. In that connection the Court observed that the SEZ unit was deemed to be territory outside the territory of India u/ss. 51 & 53(1) of SEZ Act only for a limited purpose and the fiction in law cannot be extended beyond its purpose.

*M/s. India Exports vs. State of U.P. & Ors. 2011 NTN (Vol. 45) - 96*

### 8. Sale in the course of import

The assessee before the Supreme Court had imported M.S. Pipes in accordance with the terms of agreement with the local contractee. The pipes so imported were used in the works contract of the contractee for erection and commissioning of the plant. The Supreme Court held that the import of M.S. Pipes was covered by sec. 5(2) of the CST Act, 1956 and cannot be taxed under the local sales tax law. In regard to the nature of works contract, the Supreme Court observed that the supply of pipes so imported and utilized in the erection of the plant constituted an integral and inseparable part of the contract with the contractee and therefore such a contract was exempt from tax.

*The Indure Ltd. and Anr. vs. Commercial Tax Officer and Others (2011) 57 STA 89*

### 9. Sale price – Trade discount

The Kerala High Court after considering Rule 9(a) under the Kerala Sales Tax law held that the trade discount allowable as a deduction from the taxable turnover, was the amount deducted while issuing the invoice. In other words the incentive given by the seller through the credit note at the end of the year, was not trade discount as contemplated under the said rule.

*I.F.B. Industries Ltd. vs. State of Kerala (2011) 19 KTR 112 (Ker.)*

### 10. Second sale

The Supreme Court while dismissing the appeal by the State of Tamil Nadu against the judgment of the Madras High Court in the case of *Govindan & Co. (18 STJ 262) and Raman & Co. (1974) (33 STC 1)* held that for claiming deduction of second sale, the assessee was not required to show that their seller had in fact paid the tax on the earlier transaction. It was enough if the assessee showed that the earlier sales were taxable sales and that tax was really payable by their seller. In the case before the Supreme Court, the assessee had purchased condemned railway coaches and after dismantling the same, sold as scrap. For such transactions, the assessee had claimed the sale to be second sale not liable to tax again. The Supreme Court affirmed the judgment of the Madras High Court.

*State of Tamil Nadu vs. Govindan & Co. (2011) 18 STJ 264 (SC)*

### 11. Stay of recovery

In the case before the Allahabad High Court, the Tribunal had issued a stay of recovery of 90% in case of penalty and 80% of the tax dues after considering the fact that the truck carrying the goods for which the transit pass that was collected at entry point could not be surrendered at the exit check post because the entire truck was taken away by the dacoits while in transit in the State. The Allahabad

High Court approved the stay order observing that there was no reason to interfere with such an order of the Tribunal.

*Budhiraja Goods Transport Co. vs. Commissioner, Commercial Tax 2011 NTN (Vol. 45) – 63*

### 12. Supply to SEZ – No Custom duty

The Karnataka High Court held that as per SEZ Act, the supply of goods from domestic tariff area (DTA) to SEZ units was deemed exports but such a fiction was only for a limited purpose of giving incentive to SEZ units. Since SEZ units were part of the country, the levy of export duty under the Customs Act was not legal. The Court noted that the SEZ Act did not contain the definition of the term 'exports' and the Custom Act defined Export as export out of India. The Court therefore held that the levy of custom duty on such transactions was without jurisdiction.

*Shyamaraju & Co. (India) Pvt. Ltd. Bengaluru vs. Union of India & Ors. (2011) 18 STJ 311 Kar.*

### 13. Works Contract – Nature

#### Water pipeline

The Kerala High Court after considering the relevant entries to 4th Schedule of the Kerala General Sales Tax Act, 1963 held that the work of erection of pipeline for water was covered by Entry 15 of the said Schedule relating to laying of pipe for pumping, drainage, sewage and not under Residuary Entry 22. *Novel Constructions vs. State of Kerala (2011) 19 KTR 94*



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

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	Additional subscription of AIFTP Journal (for 3 years)				Rs. 1,500/-
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	Admission	500/-	500/-	500/-	500/-
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	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)

## heartly congratulations

Heartly Congratulations to the newly elected office bearers of Income Tax Bar Association, Varanasi, for the period 2011-12.

*President* : Shri Arvind Shukla *Vice President* : Shri Kausha Narain Singh

*Secretary* : Shri Goparh Jain *Joint Secretary* : Om Prakash Shukla

*Library Secretary* : Shri Ravi Shankar Jaiswal *Treasurer* : Shri Saurabh Srivastava

We wish them all the success.

### 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:

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**J. K. RANKA**  
*Secretary General*

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	Life Members				Total
	Associate	Individual	Association	Corporate	
Central	0	707	21	3	731
Eastern	2	898	33	0	933
Northern	0	821	17	0	838
Southern	0	745	13	3	761
Western	3	1559	32	14	1608
<b>Total</b>	<b>5</b>	<b>4730</b>	<b>116</b>	<b>20</b>	<b>4871</b>

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### Associate Editors of AIFTP Times : Mr. Kishor Vanjara & Mr. Deepak R. Shah

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