



All India Federation of Tax Practitioners

Price ₹ 5/-
(For Members only)

AIFTP TIMES

Volume 3 - No. 10

October, 2012

FORTHCOMING PROGRAMMES

Date & Month	Programme	Place
11, 12 & 13-10-2012	9th Nani Palkhivala Memorial National Tax Moot Court Competition	Mumbai
17, 18, 19 & 20-10-2012	AOTCA Seoul Meeting 2012	Korea
15-12-2012	National Executive Committee Meeting	Udaipur
15 & 16-12-2012	National Tax Conference (CZ)	Udaipur
14 & 15-12-2012	Two Days Seminar on Real Estate Development	Mumbai

FEDERATION NEWS

Narayan P. Jain, Secretary General

NATIONAL TAX CONFERENCE AT BENGALURU POSTPONED

We are sorry to inform you that political parties in Karnataka have called Bandh on 6th October, 2012 (on account of Cauvery water issue).

In view of the chances of disturbances, and considering the suggestion of the Organisers, the National Tax Conference which was scheduled to be held on 6th and 7th October, 2012 at Bangalore is postponed in the interest of protecting the members/ delegates who are specially coming from outside b'lore.

The NEC Meeting which was scheduled to be held on 5th October, 2012 is also postponed.

The new dates will be announced when decided.

The inconvenience caused, is regretted.

Narayan Jain,
Secretary General

REPORT OF ONE DAY REGIONAL TAX CONFERENCE AT NEEMUCH

By Shri Rajesh Joshi, Member, NEC

All India Federation of Tax Practitioners (CZ) together with the Kar Salahkar Parishad, Neemuch has organized one day Regional Tax Conference on 5th May 2012 at Hotel Raj Palace, Station Road, Neemuch, (M.P.). The conference was inaugurated by Shri M.S. Pawar, Commissioner of Income Tax, Ujjain, (M.P.), Shri P.K. Mitra, Additional Commissioner of Income Tax, Ujjain, (M.P.), Shri P.K. Shivhare, Deputy Commissioner of Commercial Tax, M.P. Govt., Shri Jugal Satrawala (Vice Chairman, AIFTP, MP) and Shri Rajesh Joshi (National Executive & Legal Advisor member of Regional Direct Tax Advisory Committee, Region CCIT, Indore).

Shri M.S. Pawar, CIT, Ujjain expressed that looking to very fast changing Tax Laws, it is necessary to organize such tax conference which are beneficiary for the tax professionals as well as for the public. He also advised them to suggest their clients to deposit legitimate tax.

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Another guest Shri P.K. Shivhare, (Deputy Commissioner Commercial Tax, M.P. Govt.) advised professionals to explain new sections of 9-B & 9-C (of M.P. VAT Act) to their clients to understand tax liabilities and penal provisions.

In his welcome speech Shri Naveen Jain, Conference Chairman informed that the Tax Professional has got a great opportunity to increase and update their knowledge in this Regional Tax Conference organized 1st time in Neemuch, (M.P.). Conference convenor & National Executive Advocate Rajesh Joshi in the inaugural session read the message of best wishes received from Shri S.K. Poddar National President, AIFTP and Secretary General Shri N.P. Jain, he also informed about the activities of AIFTP.

Honoured guests were welcomed by Naveen Jain, Harish Patidar, T.C. Airan, Rajesh Joshi, Jugal Satrawala, N.D. Pareekh, P.K. Dass, Shri C.M. Jain, Advocate G.L. Jindani, Vijay Navlakha, Pramod Mathur and other members. Harish Patidar, Secretary of the conference committee delivered the vote of thanks in the inaugural session.

The first technical session was chaired by Advocate C.M. Jain, Mandasaur and co-chaired by Shri Arun Khabia, Senior Advocate, Neemuch, CA. I.M. Sethiya, Chittor, (Vice Chairman, AIFTP, Rajasthan) was the 1st speaker and has effectively presented his paper on "Effective Presentation before tax authorities", CA. Rajesh Mehta (Joint Secretary, AIFTP, M.P.) was the second speaker in the same session and has presented a very comprehensive paper on the two subjects (1) Formation & tax planning of HUF, as per amended Hindu Law under the Income Tax Act and (2) Critical aspect of TDS/TCS under the Income Tax Act, third speaker Advocate Jugal Satrawala (Vice Chairman AIFTP, M.P.) of the same session has presented his paper on "Problem solving approach on E-filing of IT Returns" and has solved various practical problems of the professionals. Shri Arun Khabia (Senior Advocate, Neemuch) has proposed vote of thanks in the first technical session.

The second technical session was chaired by Shri P.K. Shivhare, (Deputy Commissioner of Commercial Tax, Govt. of M.P.) & Co-Chaired by Shri N.D. Pareekh, Mandasaur. Shri R.S. Goyal was the first speaker of the second session and has presented an exhaustive paper on "Real Estate Transaction u/s. 9-B and on Transporters u/s. 9-C under M.P. VAT Act". He also briefly discussed on the various amendments in M.P. budget.

Another speaker of the session was Conference convenor Advocate Rajesh Joshi, Indore, (National Executive AIFTP & Legal Advisor member of Regional Direct Tax Advisory Committee Region C.C.I.T., Indore) presented his paper on "Marriage Related survey u/s. 133A(5) of Income Tax Act". He has discussed about the power of various tax authorities with their jurisdiction and precautions to be taken.

Brains' Trust was the last session in which Chief co-ordinator Shri Rajesh Joshi, Advocate and other trustees CA Rajesh Mehta and Shri R.S. Goyal, Shri Jugal Satrawala, Advocate, Shri C.M. Jain, Advocate, Shri P.K. Dass, Advocate, Ujjain solved various queries of the members. All the technical sessions were nicely conducted by CA. Pramod Nahar, Ratlam and Shri T.C. Airan, Advocate, Neemuch. Finally Conference co-chairman and senior member of AIFTP Shri T.C. Airan proposed the vote of thanks to the speakers, guests, members of Kar Salahkar Parishad and also to the Federation. He conveyed a special thanks to the Conference Convenor Shri Rajesh Joshi, Advocate for his Bhagirathi Prayas done to make the Conference a grand success.

FELICITATION OF COMMISSIONER OF COMMERCIAL TAX, M.P. GOVT. WITH PROBLEM SOLVING DISCUSSION

On joining of Shri Amit Rathore (IAS) as Commissioner of Commercial Tax, M.P. Govt. various members of All India Federation of Tax Practitioners of M.P. including Shri Jugal Satrawala (Vice Chairman, AIFTP, M.P.), Shri Rajesh Joshi, (NEC Member), Shri R.S. Goyal (Chairman VAT Representation Committee of AIFTP, M.P.), CA Rajesh Mehta (Joint Secretary, AIFTP, M.P.), Shri Shekhar Purandare, Advocate has welcomed him by presenting flower bouquet at head office Moti Bangla, Indore

Hon'ble Commissioner has been informed about the various activities, publications, website and achievements of Federation like filing of various writ petitions in the public interest, Kar Vivad Samadhan Scheme, 1998 including establishment of Tax bench at Indore.

Members attended the felicitation programme has discussed about various problems in VAT & CST.

Shri Rathore assured to solve the problems at earliest

FELICITATION OF RAM JETHMALANI AT INDORE

Shri Ram Jethmalani, Supreme Court Advocate & Member of Parliament was the chief guest and the speaker on subject "Money Laundering Regulation a tool to curb corruption in India" in a national level seminar organized by Indore Institute of Law at ICAI Bhawan, Indore in presence of various professionals of M.P. and on behalf of All India Federation of Tax Practitioners (CZ) Shri Rajesh Joshi (Member NEC), Shri Jugal Satrawala (Vice Chairman, AIFTP, M.P.), CA. Rajesh Mehta (Joint Secretary, AIFTP, M.P.) welcomed him. On this occasion Shri Anand Mohan Mathur (Former Advocate General), Shri Satish Chandra Bagadia, Senior Advocate, Vinay Jhelawat, Ved Pratap Vaidik together with many other dignitaries were also present. Welcome speech was given by Shri Kanti Bom & vote of thanks was proposed by Shri Akshay Bom, Advocate.

OUTSOURCING – A SOLUTION TO VAT COMPLIANCE CHALLENGES

CA. Abhishek Shah

Abhishek Shah of Ernst & Young looks at the benefits of outsourcing VAT compliance, what to look for when outsourcing to an accountancy firm and tips for doing it successfully.

The federal governments across the globe are trying hard to bridge the tax gap i.e. the difference between the tax revenue potential and actual collections so that the spending for economic growth is not hampered given the signs of an economic slowdown.

There is also a significant shift in the tax revenues which have now tilted more significantly towards indirect taxes. Because of this, the policy makers as well as the tax administrations have focused their attention on indirect tax collections, which is becoming more and more central to their tax planning and revenue raising goal.

Among many forms of indirect taxes, VAT has been the most popular tax and over the years, the tax authorities have garnered more revenue either by increasing VAT rates, extending the already larger VAT base by pruning the list of exempted goods/services which were formerly exempt from the tax net and imposing rigorous restrictions on refund of tax credits due to the exporters of goods and services.

The reasons for the soaring popularity of VAT over the last few decades has been its success in the EU and also the advocacy of this scheme of taxation by international agencies such as the IMF, the World Bank, the OECD and other independent economic and tax policy advisers.

Besides the obvious benefits such as elimination of cascading of taxes and transparency, a VAT treats consumption of goods and services alike and inclusion of services in VAT's ambit is very critical as it allows revenues of the economies to grow in line with the growth of GDP, where the services have a major share in certain economies.

Table 1

Country	Prepare	File	Pay	Total
Taiwan	30	2	1	33
Japan	19	8	8	35
Singapore	28	10	2	40
Korea	25	14	6	45
Australia	22	19	13	54
Thailand	44	6	6	56
New Zealand	62	12	6	80
India	56	36	21	113
Philippines	93	27	10	120
China	96	24	12	132

Source: Paying Taxes 2012, A joint publication by PwC with World Bank/IFC

Out of 183 large economies, 151 have a VAT type sales tax system in place. While VAT has been a part of tax landscape in Europe for the past 50 years or so, in Asia, it has been around only for almost 15 years.

Asian VAT

The Asia Pacific region is fairly large and diverse, consisting of highly developed countries such as

Australia to slowly developing ones such as Myanmar economies. It also has two of the fastest growing nations, India and China, elevating the region to become the next economic powerhouse.

In the Asia Pacific region, South Korea was the first country to introduce a VAT way back in 1976. In the 1990s, more and more countries started adopting this system. The journey of VAT in India has been a long one and the federal government introduced a partial or modified VAT system in the central excise duty regime (tax on manufacture of moveable goods) in the year 1986. It took more than a decade for the Indian government to implement a fully integrated central value added tax (CENVAT). The states in India gradually joined the VAT bandwagon starting in 2003 and the last state joined in 2008, replacing its archaic states sales taxation system. India is now gearing itself to introduce a nationwide comprehensive GST (merging VAT and service taxation) in the near future.

With China extending its VAT pilot projects to other provinces, post Shanghai, and Malaysia inching closer to the introduction of GST, the taxation landscape of the region is set for an aggressive transformation, in the years to come.

Use of technology for returns processing and auditing

With the evolution of the indirect taxation system, the tax authorities across many jurisdictions have altered their approach towards the tax payers. A common theme is that of self-assessment, shifting the onus onto the taxpayer, who must demonstrate evidence of effective management of VAT compliance. The authorities would, in turn put a thrust on enforcing compliance by introducing stricter penalties for non-compliance. Simultaneously, tax authorities are intensifying their audit activities to detect tax abuse and avoidance.

Self-assessment systems generally make it possible to collect taxes earlier and reduce the likelihood of disputes over tax assessments. They also lessen the discretionary powers of tax officials. To be effective, however, self-assessment needs to be properly introduced and implemented, with transparent rules, an automated reporting process, and penalties for noncompliance and risk assessment procedures for audit processes.

The aforesaid objective can be achieved only if there is a robust IT infrastructure in place, which enables the governments to automate the mundane, time consuming task of payment of tax and filing of returns through electronic mode, allowing the officers to free their resources to focus their energy and attention on quality audits.

The success of auditing and the feasibility of various auditing strategies depend on the quality of the information available to the auditor, which in turn depends on 3 major factors: viz. the data/information

collected from the taxpayer and third parties (cross-check), the data processing capacity of revenue auditors, and the strategy pursued using the availability of information.

As per the World Bank/IFC publication, in the Asia region, around 14 countries do not have online filing and payment system as compared with 10 countries, which have this system. The time taken for compliance in the first set of countries is 147 hours vis-a-vis 71 hours for the second set.

The time to comply considerably increases in those economies which require submissions of hard copies of returns post uploading of the soft copy, for example some states in India have mandated this procedure. Similarly, in Vietnam; the VAT payers are required to compile a list of invoices for goods/services sold and a list of invoices for goods/services purchased, and the same needs to be submitted with every VAT return.

This collectively goes on to prove that the challenges of VAT compliance are enormous. The question therefore arises is how does the organisation cope with such challenges.

Organisation structure – tax function : planning versus compliance

The industry at large is certainly not immune with the rapidly changing tax landscape across the globe and therefore, roles of tax managers have to be rewritten, redefined and realigned.

Fundamentally, the four key deliverables expected out of a tax function have been:

- Tax planning
- Tax accounting and reporting
- Tax compliance, and
- Audit defence

For tax personnel, one of the performance indicators is to ensure timely and accurate compliance. Post the introduction of the Sarbanes-Oxley Act, 2002 (Sarbox) in the US, there has been an increased attention on the cash flow analysis of an enterprise. This has brought transaction taxes in lime light more than ever before, since transaction taxes impact the cash flow analysis in a big way.

Each year, CEOs and CFOs are mandated to certify the internal controls over tax positions and cash flows, and their independent auditors are required to attest to the sufficiency of these controls and the accuracy of management's assessments.

- Thus, slowly and steadily, compliance has found its way from a tax manager's key performance indicators to the boardroom of C suite executives.

Challenges in VAT compliance

VAT compliance is easier said than done, for there is various challenges, some of which are listed below –

- **Managing deadlines** – There are multiple deadlines to be met across the legislations and any delays into that has interest/penalty ramification.
- **Lack of trained resources** – It is difficult to hire, train and retain quality people to do compliance, hence providing challenging and

rewarding work and career progression option remains a challenge forever.

- **Data and technology** – The input of data has a direct impact on efficiency and quality of the resulting regulatory filing.
- Accessing data either directly or through many accounting and tax system is a challenge by itself generally, as no enterprise resource planning ERP is self sufficient to generate information required for compliance. This requires data massing and in turn requires time.
- **More strain on business to comply** – Because of the volume of efforts required to carry out the compliance, the business has to ensure that necessary records are preserved; systems are made fool proof for correct credits to be claimed, which takes a toll on the business.
- **Keeping tab on the changes in law** – The business dynamics forces governments to bring amendments in law / procedures more frequently than ever before. Any lapses in implementing the changes in real time basis impact the business.

ERPs are not solutions on their own

The industry, to keep pace with the tax authorities' change in approach towards compliance; have started placing heavy reliance on the ERP systems deployed in their organisation for compliance to be on autopilot mode.

However, the reality is far from this, since such ERP system does have varying degrees of native VAT functionality. Although, when any ERP system is implemented in the beginning, its VAT tables are populated with the correct rates of VAT that apply to the company's particular products and services. Thereafter, for any new product introduction or change in supply chain, manual intervention is required. Thus, 100% automation remains a huge challenge.

Moreover, the ERP systems are not geared up to handle more complex transaction processes which have been surfacing as a result of changes in the way the business is done across geographies. Historically, the ERPs have been configured to cope with flows of goods and are not quite strong when handling services, which can often be more complex in their structure.

The aforesaid clearly indicates that human intervention is unavoidable, to ensure the system's ability to achieve VAT compliance. Further, a compliance focused tax team may miss out on exploring critical tax planning avenues and may neglect the risk related aspects, under the voluminous work load.

Ideally therefore, the compliance challenges should be addressed using the four fold approach:

- **People:** right mix of resources to carry out the compliance, either internal and external.
- **Process:** setting up time bound action plans and the means to achieve the same to ensure meeting the deadlines.
- **Technology:** appropriate use of technology especially for establishing nexus between financial accounting systems with tax compliance and reporting system.

- **Risk management:** identifying and monitoring high risk items, assessing the impact for possible outcome and evaluating internal preparedness.

Pros and cons of inhouse compliance versus outsourcing

Given the fact that a right resource mix can never be achieved using wholesome internal resources, the logical choice has been to outsource some of the work of a tax function.

Experience shows that combining the corporate tax executive's knowledge of the business with the specialised skills of external tax consultants yields the greatest benefit to the organisation.

Outsourcing offers the following advantages –

- **Cost saving (including head count issues):** Primarily, it is sometimes one of the factors which lures organisations to opt for out-sourcing if the cost of employing fulltime resources involves payment of their salaries, training, administrative cost such as office space, workstations, benefits, software licence is restricted or higher. The same work, if outsourced to third party qualified people, can lead to cost savings and restricted head count.
- **Quality output:** Hiring outsourcing firms gives the company an access to professional, expert and high quality services with their built in review mechanism. This gives a company reasonable assurance that its tax returns are prepared in accordance with the latest tax rules and regulations, and taxes which are due to the government are paid on time.
- **Flexibility of staffing:** Typically, the finance team in small businesses share additional burden of taxation as compliance work is cyclic in nature. However, when the company faces any stringent audits/assessments or when some organisational changes such as merger/demerger happen, there is a multifold jump in the time required for carrying out the compliance duties. In such events, it is difficult for the organisation to hire/contract people at a short notice. Outsourcing agencies typically have bench strength and can easily ramp up/down their resources on a project based on clients' request.
- **Swift turnaround time:** Compliance involves multiple back and forth activities especially since return preparer and approver is different. If they happen to be located in different geographies, the life cycle gets little longer. This calls for a swift turnaround time and can be easily achieved by having the work done by outsourced agency.
- **Continuity and consistency:** Outsourced service providers ensure that there is consistency in tax positions adopted and also continuity is maintained with respect to meeting the compliance, regardless of the change in organisation structure.
- **One stop shop solution:** Most of the large organisations have multilocational, multi-regional operations. Instead of appointing compliance staff

at all locations, it is always beneficial to outsource the compliance work to a firm with presence in most of the geographies where the organisation operates. For a client, such organisation can also provide assistance on other related aspects such as litigation or planning, thus providing a one stop shop solution.

While outsourcing the tax function certainly leads to cost savings, this should not be perceived as a sole objective behind a decision to outsource the tax function. Instead, the decision should be viewed as a management tool to effectively execute the business strategy.

From the management standpoint, it is very important to identify the roles and responsibilities that can be outsourced and those which cannot be outsourced.

Besides, the dependency on outsiders (consultants) needs to be kept in check as the organisation cannot run the risk of giving the driving seat to outsiders. Clearly, therefore, those functions and activities which either requires strategic decision making process or heavy cross functional interactions continue to remain outside the purview of outsourcing.

As opposed to the above, activities which are routine and recurring and which requires considerable spade work or use of data can potentially be outsourced.

In almost all outsourcing engagements, the effective use of technology continues to be an integral and significant component of the company outsourcer long-term relationship. It is the quality of data that determines how successful and sustainable the outsourcing option would be, for an organisation.

“Slowly and steadily, compliance has found its way from a tax manager's key performance indicators to the boardroom of C-suite executives

Whom to outsource to

Typically, there are a number of service providers available to offer the compliance suite of services and thus the companies are spoilt for choices, when it comes to down selecting the right service provider. However, each service provider has its own uniqueness and therefore it requires a careful analysis of the good and the rest. Following pointers help identifying this.

Compliance function should ideally be performed by personnel who are highly skilled in project management, technology, and have business process skills. These are generally not the same skills found in outstanding tax planners or tax advisory experts. That said, it is imperative that both these groups need to work in tandem, with an ongoing dialogue on what is happening on both fronts. Thus, a service provider with a balanced resource mix should be preferred.

To gain an insight into the client's business operations, it is also necessary to ensure that the team consist of resources with industry insights, which can empathise with the client on the operational issues in more depth.

The service providers also face the challenge of retaining key people on an engagement to minimise disruptions and ensure efficiency standard, however it is not always possible to achieve the same. Changes in teams does impact the ability of the firm to service the client at the same level of quality delivery, however to mitigate such

events and to institutionalised the practice, the service providers should provide a methodology where support for positions taken in tax filings do not just reside with an individual but are systematically recorded.

Work papers are maintained, generally electronically, to support positions taken on tax returns and the documentation with respect to audit findings, orders from the tax authorities are scanned and kept in an orderly manner to facilitate the successor teams to take charge of the situation effectively. From a client's stand point, it would also be desirable to obtain a backup of such data and information available with the service provider, for their own records and risk management.

Traditionally, only spreadsheets were used to support tax compliance, now it is replaced by growing sophistication and therefore the software used for aiding the compliance should consist of the following functions –

- Automation of data from accounting system, including reconciliation with general ledger.
- Building tax intelligence into accounting and tax systems to automate various tax related calculations.
- Enhanced utilisation of work flow tools and web based tracking system.
- System based capture of workings, notes and documents to provide audit trail supporting the figures reported in tax system.

Tips for successful outsourcing

Partnering approach

An outsourcing agency utilises the data/information given by the client, so in order to achieve a top quality output, it requires equally healthy inputs being supplied.

Hence, for successful outsourcing assignments, it is desirable to have a partnering approach.

Clarity in objectives

The objective of outsourcing depends on the need of the organisation and there is no one size fits all approach. For some organisations, the reason to outsource could be to bring in efficiency in the process, while for others; it could be to manage the voluminous work without increasing the headcount.

Thus, while in the former, a service provider which can provide better consulting and process oriented knowledge should be approached, in the latter, a service provider with resources who are good in execution capabilities needs to be shortlisted. It is therefore essential to have clarity on the objective at the inception itself as it helps selecting the right outsourced service provider.

Internal readiness

Since a tax department in an organisation is a nucleus function, it invariably deals with many cross functional divisions, such as distribution, pricing, and procurement. Since the outsourced service provider would also have extended interactions with such departments, it is advisable to take a buy-in from such other divisions as well, before short listing.

Given the fact that the dependency on internal accounting/reporting system, for outsourcing clients would be huge, the service provider must get a sufficient understanding of the IT systems. Therefore it makes sense to take a look at the existing IT infrastructure support for the tax compliance to see if at all there exists a need for modifying before commencement of outsourcing assignments.

Shortlisting the service provider

As explained above, it is imperative to select the service providers which are focused on providing the outsourcing solutions on a long term sustainable basis as the outsourcing assignments are of longer durations and if the service provider lacks the vision to be in the compliance space for a longer duration, may not attract the right talent pool, which in turn will result into poor servicing of the clients in the years to come.

Moreover, the service provider's dependency on software tools, which are used to aid the outsourcing assignments is equally important as this could be single largest differentiator in the service provider's ability to be in the business for a long run as compared to its peers. Compliance and technology walk hand in hand and for a service provider to reach to a decent size and scale of compliance clientele, technological support is a inevitable.

Critical contractual terms

Outsourcing engagements are no different than any other contractual arrangements with independent service providers, further, given the longer duration of the contracts; it makes utmost sense to pay attention to the contracting terms, to set the expectation right from the beginning.

The pointers below can help in agreeing to some of the important contractual terms:

- Ownership of data and intellectual property generated during the assignment;
- Periodic performance reviews;
- Escalation matrix and resolution mechanism;
- Remedies for lapses;
- Indemnities against major losses/liabilities;
- Termination rights;
- Wind down/ transition back mechanism;
- Annual fee enhancement limits.

It is often said that there needs to be a dividing line between outsiders and in house people; in VAT outsourcing assignments, this line becomes very thin as the service delivery is intense and duration is far longer than any other assignments. Thus, only an internal risk assessment and external due diligence of selecting the right service provider, can yield optimum results for a successful outsourcing.

This is a reproduction of the Article, originally published in the September 2012 edition of the International Tax Review Journal. "Views are personal"





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The publication titled "Digest of Case Laws Direct Taxes including Allied Laws – Tax Companion (2003-2011)" was released by Hon'ble Mr. D. Manmohan, Vice President, ITAT (Mumbai Zone) on 12th September, 2012 in Court Room No.1, ITAT, Mumbai in the presence of Hon'ble Members of ITAT, Shri Y.P. Trivedi, Senior Advocate and Member of Parliament and members of Bar Association.

The Hon'ble Vice President presented the publication to the members of Editorial Team and Research Team. A short film on publication was also shown which explains the contents of the publication.

DIRECT TAXES

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

SUPREME COURT

S. 271(1)(c) : Penalty – Concealment of Income – No penalty for a “bona fide/inadvertent/human error”

The assessee filed a ROI together with the Tax Audit Report. In the Tax Audit Report, it was disclosed that an amount of ₹ 23 lakhs towards provision for gratuity was not allowable u/s 40A(7). However, in the computation of income, the said amount was not disallowed. The AO also overlooked the item and omitted to make a disallowance. Subsequently, the assessment was reopened u/s 147, and the expenditure was disallowed as also levied penalty u/s 271(1)(c).

It was held by the Hon'ble Supreme Court that through a bona fide and inadvertent error the assessee failed to add the provision for gratuity to its total income, this can only be described as a human error which we are all prone to make. The calibre and expertise of the assessee has little or nothing to do with the inadvertent error. That the assessee should have been careful cannot be doubted, but the absence of due care, in a case such as the present, does not mean that the assessee is guilty of either furnishing inaccurate particulars or attempting to conceal its income. Consequently, given the peculiar facts of this case, the imposition of penalty on the assessee is not justified.

Price Waterhouse Coopers Pvt. Ltd. v. CIT (Supreme Court) (www.itatonline.org)

HIGH COURTS

S.4 : Income – Chargeability – Excess cash in possession of bank – Excess cash found of relevant year which was transferred to suspense account cannot be treated as income of relevant year. The excess arrears brought forward from earlier years is liable to be taxed as income.

The court held that when there is no possibility of any one claiming any amount against surplus in the suspense account maintained by the assessee, the assessee cannot treat it as liability or provision for liability, further as and when the claim is made the appellant has to make any payment the same is allowable as a deduction in the year in which the claim is made, therefore the Tribunal is right in rejecting the claim of the assessee in respect of arrears carried over for several years. However in respect of excess found during the previous year need not be treated as income. The High Court confirmed the order of Tribunal in respect of arrears brought forward except Rs 95000 which is the excess found in the previous year.

Catholic Syrin Bank Ltd v. Addl. CIT (2012) 251 CTR 40 (Ker.)(High Court)

S. 80-IB(10)(d) : Deduction – Developing and building housing – ceiling on commercial area inserted w.e.f. 1-4-2005 does not apply to projects approved before that date

The assessee's housing project was commenced pre 1-4-2005 when s. 80-IB(10) did not impose any ceiling on the commercial area that could be embedded in the project. S. 80-IB(10)(d) was inserted by the Finance (No.2) Act, 2004 to impose a ceiling on the extent of commercial area that could be contained in the housing project. It was held that as per the judgment of the Bombay High Court in Brahma Associates 333 ITR 289 (Bom) w.e.f. 1-4-2005, deduction u/s 80-IB(10) would be governed by the restriction on commercial area imposed by clause (d) does not mean that even projects approved prior to 1-4-2005 would be governed by the said restriction. Neither the assessee nor the local authority responsible to approve the construction projects are expected to contemplate future amendment in the statute and approve and/or carry out constructions maintaining the ratio of residential housing and commercial construction as provided by the amended Act. The entire object of s. 80-IB(10) is to facilitate the construction of residential housing project and if at the stage of approving the project, there was no such restriction in the Act, the restriction subsequently imposed has to be necessarily construed on a prospective basis and as applying to projects approved after that date

Manan Corporation v. ACIT (Gujarat) (High Court) (www.itatonline.org)

S.147 : Reassessment – Recorded reasons – Reasons for reopening not communicated, notice held to be invalid and quashed. (S.148)

The Assessing Officer issued the notice under section 148 after four years without disclosing the reasons and an opportunity to file an objections for reopening of reassessment. The assessee challenged the said notice by filing a writ petition. High Court allowed the writ petition and held that there was a complete violation of applicability of law by the Assessing Officer. He was required to communicate the reasons for reopening the assessment which he had failed to do. As there is violation of the governing principles of natural justice the order was quashed and set-aside. (A.Y. 2004-05)

Agarwal Metals and Alloys v. ACIT (2012) 346 ITR 64 (Bom.) (High Court)

S. 254(2) : Rectification – Tribunal – Tribunal cannot recall its order & substitute by new order

The power to rectify an order u/s 254 (2) is extremely limited. It does not extend to correcting errors of law, or re-appreciating factual findings as that would amount to a review. The amendment of an order does not

mean obliteration of the order originally passed and its substitution by a new order. The Tribunal's order that it had not considered a decision in the assessee's own case for an earlier year where the facts & circumstances were the same and that this was an "apparent mistake" cannot be sustained.

CIT v. Maruti Insurance Distribution Services (Delhi) (High Court) (www.itatonline.org)

TRIBUNALS

S.5 : Scope of total income – Accrual – Guarantee commission – Income should be spread over period to which it is related and should be assessed proportionately

Assessee received certain guarantee commission and offered the same to tax on accrual basis which was consistently followed by it. It was held that such income should be spread over period to which it is related and should be assessed proportionately. (AY 2002-03 & 2003-04)

BNP Paribas SA v. Dy. DIT (IT) (2012) 137 ITD 322 (Mum.)(Trib.)

S. 32 : Depreciation – Goodwill – Land and building- Primary asset transferred was land hence the depreciation is not allowable on goodwill as there was no goodwill in the nature of commercial rights.

CGEL, a wholly owned subsidiary of the assessee company got amalgamated with the assessee during the year. The subsidiary company earned income by lease of property. It was held that primary asset which was transferred was land and not goodwill. The market value of the primary asset i.e. land and building thereon, should have been considered. If the assessee had paid more than the fair market value of assets minus fair market value of liabilities, then the company would have a case to claim that certain amounts were incurred for goodwill. In the absence of such a claim, there was no goodwill in the nature of commercial rights purchase by

assessee. This being only book entry and it was only another way of disclosing the intrinsic value of the fixed asset of the company. Depreciation was not allowable on goodwill. (A.Y.2003-04)

Dy.CIT v. Toyo Engineering India Ltd. (2012) 18 ITR 159 (Mum.)(Trib.)

S.37(i) : Business expenditure – Capital or revenue – Software expenses – Purchase of computer software was held to be revenue in nature

The assessee treated the computer software as revenue expenditure. The Assessing Officer treated the said expenditure as capital in nature and allowed the depreciation. The Claim of assessee was allowed by Tribunal. On appeal by revenue to High Court, the court affirmed the view of Tribunal and held that it would be a unrealistic to ignore rapid advances and to attribute a degree of endurability and permanence to the technical –know how at any particular stage in fast changing area of science. Thus the expenses incurred by assessee on purchase of computer software was revenue in nature. *CCIT v. O.K.Play India Ltd. (2012) 346 ITR 57 (P&H) (High Court)*

S.153A : Assessment – Search or requisition – Addition deleted of earlier year – Addition made in earlier proceeding for same AY deleted in appeal hence the proceedings cannot be revived and added over again in AY.

The additions made in the earlier proceedings for the same assessment years which have been already deleted in appeal cannot be revived and added over again in the assessment year u/s 153A. The scheme of the Act does not permit matters that have become final between the assessee and the IT authorities to be reopened and reargued except by process known to law.(AY 2001-02 & 2002-03)

ACIT v. Uttara S. Shorewala (Mrs) (2012) 147 TTJ 716 (Mum.)(Trib.)

Hearty Congratulations

Hearty Congratulations to our National Executive Committee member Shri Rajesh Joshi who has been nominated as Secretary & Legal Advisor Member of Regional Direct Taxes Advisory Committee constituted by, CBDT, New Delhi under the chairmanship of Shri Surendra Mishra, Hon'ble CCIT, Indore for the term of 2011-14.

We wish him all the success.

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INTERNATIONAL TAXATION

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

HIGH COURT

1. Offshore Supply of Equipment – Section 9(1) (i) – Income Tax Act, 1961

The High Court held that even in cases where the contract is a composite contract, the supply of equipment has to be segregated from the installation, and only then would the question of apportionment arise to determine the extent to which it arises in India u/s 9 (1) (i). Hence, in the present case, as the goods were manufactured and sold outside India, the offshore supply of equipment was not taxable in India.

DIT v. Nokia Networks OY (25 taxmann.com 225) (Del)(HC)

2. Retrospective Amendment - Software Royalty – Explanation 4 to Sec. 9(1)(vi) and Article 13 – Income Tax Act, 1961 and India Finland DTAA respectively

The High Court held that though Explanation 4 was added to s. 9(1)(vi) by the Finance Act 2012, with retrospective effect from 1.6.1976, to provide that all consideration for use of software shall be assessable as royalty, the definition in the Double Tax Avoidance Agreement ('DTAA') has been left unchanged. The amendments brought into the Income Tax Act cannot be read into the treaty. As the assessee has opted to be assessed by Article 13 of the India Finland DTAA, the consideration cannot be assessed as royalty despite the retrospective amendments the Act.

DIT v. Nokia Networks OY (25 taxmann.com 225) (Del)(HC)

AUTHORITY FOR ADVANCE RULING

3. Fees for Technical Services – Make Available –Article 12(3)(g) – India Australia DTAA

In the present case, the applicant was an Indian company dealing in development and export of computer software and related services. It had sub contracted work in Australia to its wholly owned subsidiary Infosys Technologies (Australia) Pty. Ltd

('Infosys Australia'), who performed all services in Australia. The authority ruled that income to Infosys Australia arises from a source in India, i.e. the agreement between Infosys Australia and the applicant and is Fees for Technical Services ('FTS') under Section 9(1)(vii) of the Income Tax Act. However, in absence of the services being made available to the applicant, the amount paid is not royalties, as per Article 12(3)(g) of the India Australia DTAA. Furthermore, in the absence of any permanent establishment of Infosys Australia in India, the amount cannot be taxed in India and the applicant is not required to deduct tax at source under Section 195.

Infosys Technologies Ltd., In re (24 taxmann.com 314)(AAR)

TRIBUNAL

4. Use of transponder capacity – India Thailand DTAA

The Tribunal, while dealing with the taxability of the payment made by the assessee for the facility of uplinking and telecasting programme to a Thai company, held that in absence of control and possession of the user (assessee) of the equipment it cannot be held that the amount paid by assessee to the Thai company is for the use or right to use any industrial, commercial or scientific equipment as envisaged in clause (via) of Explanation 2 to Section 9(1)(vi) w.e.f. 01.04.2002. Therefore, the amount is not royalties or fees for technical services, but it certainly constitutes business income of the Thai company under Article 7 of India Thailand DTAA.

The Tribunal further held that the liability to deduct tax at source needs to be determined according to the legal position prevalent at the relevant time, and not on the basis of retrospective amendments. Since the amount is not taxable according to the provisions at the time of making the payment, the provisions of Section 40(a)(i) cannot be invoked and no disallowance can be made.

Channel Guide India Ltd. v. ACIT (25 Taxmann.com 25)(Mum)

Announcement

We are pleased to announce a Two Day Seminar on "Real Estate Transactions – Legal, Taxation and Accounting Aspects" jointly with AIFTP (WZ) and STPAM on 14th and 15th December, 2012 at 9.30 a.m. to 5.30 p.m. at West End Hotel, New Marine Lines, Mumbai – 400 020. The **fees for Members** are ₹ 2,750/- (Enrolment upto 31st October, 2012) and ₹ 3,000/- (Enrolment after 31st October, 2012). For **Non Members** ₹ 3,250/- (Enrolment upto 31st October, 2012) and ₹ 3,500/- (Enrolment after 31st October, 2012) (Including service tax, tea, breakfast, lunch and course material). The detailed circular will be uploaded in our website www.aiftponline.org.

INDIRECT TAXES

Nikita R. Badheka
Advocate & Notary

1. Component – Meaning of

The Supreme Court held that in common parlance component is a part of an article, an integral part necessary to the constitution of the whole article and without it the article will not be complete. The steel structural used for installation of equipment in sugar mill are not essential requirement of sugar manufacturing unit and therefore not component.

Saraswati Sugar mills v. CCE –New Delhi ((2012) 59 Sales Tax Advice 156 (SC)

2. Effect of breach of contract on nature of transaction

The Tribunal disallowed the claim of the appellant for subsequent sale as the transfer of title during transit was in breach of terms and conditions of the agreement between the parties. The Allahabad HC held even if for the sake of argument it is accepted that the assessee has breached any terms and conditions of the contract entered into with another person, then also it cannot be the basis to deny the benefit which flows from Sec. 26(2) of U.P. Trade Tax Act & Sec. 6(2) of the CST Act. Breach of contract entered into with another person may lead to other civil consequences but cannot be the basis for denying exemption u/s 26(2) to the assessee if all other conditions are satisfied.

Darbari Engineering Industries Pvt. Ltd. v. Commissioner of Trade Tax, U.P. 2012) 20 STJ 462 (All)

3. Entries – Medicated tooth paste

The WBTT held that under the earlier West Bengal Sales Tax Act, 1994 there was a separate entry for 'tooth paste (whether medicated or not), and therefore medicated tooth paste was covered in that entry and was not treated as covered in the entry relating to drugs and medicines, but under West Bengal VAT Act, 2003, there is no separate entry for medicated tooth paste, nor there is any definition of drugs and medicine – therefore, medicated tooth paste shall come under the purview of drugs and medicine in view of the fact that – (i) they are manufactured under drug licence, (ii) under Central Excise Tariff they are liable to duty as medicament, and (iii) they are covered in the definition of drugs given under Drugs & Cosmetics Act.

Bhattacharjee Pharmaceuticals & Co. Ltd. & Another v ACST, Corporate Division, Kolkata & Others (2012) 29 STJ 638 (WBTT)

4. Interest on part payment in appeal

The penalty order levied on the assessee was set aside. He claimed interest on the amount paid

as part payment in Stay as the refund itself was granted belated after order of the Court. The Court directed interest to be paid.

Rayalaseema Concrete Sleepers (P) Limited, Hyderabad v. CTO Hyderabad & Another (APHC) (2012) 54 APSTJ 159 (AP)

5. Inter-state Sale

The MPHC held that an inter-State sale is said to take place when there is an inter-State movement of goods for the purpose of or in the course of sale. When the title to the goods passes before the inter-State movement, it will be an intra-State sale or sale within the State. Once the sale is complete with the title to the goods having passed to the purchaser, thereafter even if the purchaser takes the said goods.

DCM Shriram Consolidated Ltd. & Others v. Addl. Commissioner, Commercial Tax, Jabalpur & Others (2012) 20 STJ 440 (MP)

6. Input Tax credit – DEPB licence

The AP Appellate Tribunal held that Section 13 of the APVAT Act, 2005, does not restrict the claim of Input Tax Credit only if the input results in the output. Goods must be used in the business for claiming Input Tax Credit. DEPB Licences are considered as "goods" liable to tax under the provisions of the APVAT Act and therefore the taxes paid on the purchase of such licences are eligible for claiming Input Tax Credit, more so when the said item is not in the negative list contained in Section 13(4) read with Rule 20(2) of the Act and Rules.

Andhra Organics Ltd. v. State of AP (2012) 54 APSTJ 185 (AP Tribunal)

7. Input tax rebate (Credit)

The assessee had maintained separate accounts showing quantity of sunflower seeds purchased in inter-State sales, and showing the supplies of sunflower oil produced therefrom outside the State by way of consignment sales against Form F as also separate records showing sales and purchases within the State. Despite that ITR was allowed proportionately. The Karnataka High Court held that when the assessee has produced all the records, and the assessing authority did not find fault with the said records or Form C or F produced by assessee, it is not justified to deny ITR for which the assessee is entitled.

State of Karnataka v. Sree Saphthagiri Industries (2012) 20 STJ 445 (Kar.)

8. Natural justice

An assessee sought time for obtaining and furnishing of the declaration forms under the CST Act in reply to the assessment show cause notice. The assessing authority did not accept or reject the said application and passed an assessment order and failed to communicate such decision prior to the order of assessment. The AP HC held that natural justice is denied to the assessee.

Recon Oil Industries HYD v. CTO Hyd (2012) 54 APSTJ 167 (AP)

9.1 Refund

ITC The Assessee an EOU, Input tax credit was denied on allegation that the some of the URD dealers were fake and fictitious. No ITC was claimed on such URD purchase, yet the other valid claim was denied and refund was withheld. The WBTT held that the refund of ITC was blocked on totally baseless and imaginary allegation.

Industrial Safety Products v. STO ((2012) 59 Sales Tax Advice 197 (WBTT)

9.2 Refund – Forfeiture

The assessee, a trader, did not show sales tax separately in his sale bills of gutkha nor in his books of account, but deposited the same at the rate applicable at the time of sale; i.e., @ 15%. The Court observed that the sachet of gutkha sold by assessee contained an express statement that the price was inclusive of all taxes. Therefore, the price

paid by the purchaser is inclusive of tax, even if in the bill the tax is not mentioned separately, or even if the books did not contain bifurcation of tax. The order of forfeiture was confirmed.

Suresh Agencies. v. Commissioner of Commercial Taxes, (2012) 20 STJ 630 (Kar)

10. Revision – Powers

An assessment order which is set aside in an earlier revision by remanding the case for reassessment gets merged in the revision order, and therefore such assessment order cannot be taken in *suo motu* revision as it non est in the eye of law. Moreover, for taking an order in *suo motu* revision, the said order must be erroneous as well as prejudicial to the interest of Revenue. If an order is merely prejudicial to interest of Revenue, it cannot be taken in *suo motu* revision

Lloyd Finance Ltd., Indore v. Commissioner, Commercial Tax, M.P. ((2012) 20 STJ 659 (MP-Bd)

11. Recovery

Garnishee proceeding arrears of tax due from a shareholder who conducted business operations as a sole proprietary concern cannot be recovered by garnishee proceedings u/s. 17 of the APGST Act from the bank account of the company as company is a separate legal entity distinct from the shareholders.

Bans Constructions Ltd. v. CTO Chittoor (AP) (2012) 54 APSTJ 165 (AP)



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

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

Printed by Kotecha Mitesh Ashwin Published by Kotecha Mitesh Ashwin on behalf of All India Federation of Tax Practitioners (name of owner) and Printed at Finesse Graphics & Prints Pvt. Ltd., 309, Parvati Industrial Premises, Sun Mill Compound, Lower Parel, Mumbai – 400 013. (name of the printing press with address) and published at All India Federation of Tax Practitioners, 215 Rewa Chambers, 31, New Marine Lines, Mumbai – 400 020 (full address of the place of publication). Editor: Karkala Shivaram Kittanna.

To

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

Date of Publishing : Third week of every month.

Date of Posting : 3rd & 4th October, 2012

If undelivered, please return to :



ALL INDIA FEDERATION OF TAX PRACTITIONERS
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