



All India Federation of Tax Practitioners

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AIFTP TIMES

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FEDERATION NEWS

J. K. Ranka, Secretary General

FORTHCOMING PROGRAMMES	
Date & Month	Programme
10th April, 2010	National Executive Committee Meeting at Baramati Guest House, Baramati Stadium, Gate No. 1, Cuttack – 753 005 at 6.00 p.m.
10th & 11th April, 2010	Two days National Tax Conference at Cuttack

REPORT OF WESTERN ZONE

a) **WORKSHOP ON MVAT & ALLIED LAWS Jointly with BCAS, CTC & STPAM**

A series of workshops on MVAT & Allied Laws were organized jointly with BCAS, CTC & STPAM on 9th, 16th, 23rd, 30th January, 2010 & 6th, 13th, 20th, 27th February, 2010 & 6th March, 2010 at Mumbai. Eminent speakers addressed the workshops.

b) **LECTURE MEETING**

A lecture meeting on Budget 2010 was organized jointly with Senior Citizens' Association, Mumbai on Sunday, 14th March, 2010 at National College, Bandra, Mumbai. CA. Harish N. Motiwalla, Chairman, WZ addressed the meeting.

c) **SEMINAR ON PROCEDURE FOR E-FILING OF RETURN UNDER SERVICE TAX RULES**

Half Day Seminar on Procedure for e-filing of Return under Service Tax Rules was organized jointly with BCAS and CTC on 23rd March, 2010 at Mumbai. Eminent speakers from Department of Service Tax addressed the seminar.

All the above three meetings/seminar were well attended and appreciated by the participants.

Harish N. Motiwalla
Chairman, AIFTP (WZ)

FOR QUERIES PLEASE CONTACT ANY OF THE FOLLOWING OFFICE BEARERS

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Treasurer — Nikita R. Badheka, Adv.	022-22030011	22030012	9821037885	nikita.badheka@gmail.com

DIRECT TAXES

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

SUPREME COURT

1. Penalty cannot be imposed even for making unsustainable claims – S. 271(1)(c)

The assessee claimed deduction under section 36(1)(iii) for interest paid on loan taken for purchase of shares. The Assessing Officer disallowed the interest under section 14A and levied penalty under section 271(1)(c) on the ground that the claim was unsustainable. On appeal the Supreme Court held that section 271(1)(c) applies where the assessee "has concealed the particulars of his income or furnished inaccurate particulars of such income". The present was not a case of concealment of the income. As regards the furnishing of inaccurate particulars, no information given in the return was found to be incorrect or inaccurate. The words "inaccurate particulars" mean that the details supplied in the return are not accurate, not exact or correct, not according to truth or erroneous. In the absence of a finding by the Assessing Officer that any details supplied by the assessee in its Return were found to be incorrect or erroneous or false, there would be no question of inviting penalty under section 271(1)(c).

CIT vs. Reliance Petroproducts (SC) – (Source : www.itatonline.org)

2. Roll-over charges for foreign contracts have to be capitalized – S. 43A

The assessee procured a foreign currency loan for expansion of its existing business. To ensure availability of foreign currency, the assessee booked forward contracts with a bank. The contract was for the entire amount and delivery of foreign currency was obtained from the bank for the installment due from time to time. The balance value of the contract was rolled over for a further period up to the date of the next installment. The assessee paid "roll over premium charges" for the same. The Assessing Officer disallowed the said charges on the ground that as it were incurred for purchase of plant & machinery, it was capital expenditure. It was held by the Apex Court that exchange differences are required to be capitalized if the liabilities are incurred for acquiring fixed assets like plant and machinery. It is the purpose for which the loan is raised that is of prime significance. Roll over charges paid/received in respect of liabilities relating to the acquisition of fixed assets should be debited/credited to the asset in respect of which liability was incurred. However,

roll over charges not relating to fixed assets should be charged to the Profit & Loss Account.

ACIT vs. Elecon Engg. (SC) (Source: www.itatonline.org)

HIGH COURT

3. Precedent – Binding nature – One Bench cannot differ from the view of another co-ordinate bench but must refer to a larger Bench

One Bench of the Tribunal decided an appeal in favour of the assessee. However, another Bench refused to follow that decision even though the facts were the same on the ground that the earlier decision did not address the grievance of the Revenue and did not consider all the facts and did not lay down a clear ratio. The assessee filed a writ petition complaining of breach of propriety on the part of the Tribunal by not referring the issue to a larger Bench. The Hon'ble court held that the Judges are bound by precedents and procedure. They could use their discretion only when there is no declared principle to be found, no rule and no authority. The judicial decorum and legal propriety demand that where a learned single Judge or a Division Bench does not agree with the decision of a Bench of co-ordinate jurisdiction, the matter should be referred to a larger Bench. It is a subversion of judicial process not to follow this procedure. If the Tribunal wanted to differ to the earlier view taken by the Tribunal in the identical set of facts, judicial discipline required reference to the larger Bench. One co-ordinate bench finding fault with another co-ordinate bench is not a healthy way of dealing with the matters

Mercedes Benz vs. UOI (Bom.) (Source: www.itatonline.org)

4. Strictures against dept. for disposing stay applications without proper reasons

Pursuant to orders under sections 201(1) & 201(1A), the assessee was liable to make payment of Rs. 59.06 crores for three years. The assessee filed a stay application before the CIT. Of the three years, the CIT granted stay for two years and directed the AO to realize the demand for A.Y. 2010-11 amounting to Rs. 7.69 crores. No reasons were given for the decision. Despite the stay granted by the CIT, the Assessing Officer issued garnishee notices under section 226(3) for the entire amount of Rs. 59.06 crores. The assessee filed a writ petition to challenge the same. The Hon'ble High Court held that the

action of the Assessing Officer in issuing garnishee notices for the entire demand despite the partial stay by the CIT shows defiance and non-application of mind; there is no reasoning in the CIT's order for refusing to stay the demand for A.Y. 2010-11 despite *KEC International vs. B.R. Balakrishnan 251 ITR 158* where parameters have been laid down to govern the manner in which applications for stay should be dealt with. In either view of the matter, the entire approach of the CIT (TDS) is thoroughly misconceived. accordingly, the garnishee notices were stayed and the CIT was directed to pass a fresh order in line with *KEC International*.

Paramount Health Services vs. ACIT (Bom) (Source: www.itatonline.org)

TRIBUNAL

5. **S. 10(23C)(v) benefit cannot be denied merely because there are profits. In computing the profits, capital expenditure has to be deducted**

The assessee was running a school solely for educational purposes and claimed exemption under section 10(23C)(vi). The exemption was denied/withdrawn on the ground that as the assessee had earned substantial profits year after year and had not made efforts to lower its fees, the profits were not incidental and the assessee existed for profits. On a writ petition filed by the assessee, held that to decide whether an institution exists solely for education and not to earn profit the predominant object of the activity has to be seen. The mere fact that an educational institution generates surplus after meeting the expenditure over a period of time does not mean that it ceases to exist 'solely' for

educational. It should be seen whether profit-making is the predominant object of the activity or whether profit is incidental to the carrying of the activity. There is no requirement that the activity must be carried on in such a manner that it does not result in any profit. It would indeed be difficult for persons in charge of a trust or institution to so carry on the activity that the expenditure balances the income and there is no resulting profit. That would not only be difficult of practical realization but would also reflect unsound principle of management.

Pinegrove Int. Charitable Trust vs. UOI (P & H) (Source: www.itatonline.org)

6. **Delayed payment of employees' PF contribution allowable – S. 43B**

The assessee paid the employees' contribution to PF and ESIC after the grace period but before the due date for filing the return. The Assessing Officer disallowed the payment under section 36(1)(va) and held that section 43B had no application. This was confirmed by the CIT(A). On appeal, HELD deciding in favour of the assessee.

In *Alom Extrusion Ltd. 319 ITR 306* the Supreme Court held that the omission of the second proviso to section 43B by the Finance Act, 2003 operated retrospectively w.e.f. 1-4-1988. The Court held that the contribution payable by the employer to the P.F./ Superannuation Fund or any other Fund of welfare of the employees was allowable if paid before the due date of filing the return. Consequently, the issue is covered in favour of the assessee and the deduction is allowable under section 43B.

Pik Pen P. Ltd vs. ITO (Mum.) (Source: www.itatonline.org)

International Study Tour

International Study Tour to Alaskan Cruise with Canadian Rockies from 27th May, 2010 to 13th June, 2010.

We regret to inform you that, we have decided to cancel the International Study Tour with heavy heart, since the required number of minimum 40 participants could not be gathered.

Updation of E-mail Addresses

We request you to please inform/send your latest e-mail addresses to keep update the activities of AIFTP/other developments on info@aiftponline.org.

J. K. Ranka
Secretary General, AIFTP

INTERNATIONAL TAXATION

CA. DHANESH BAFNA, CA. MADHAV KHANDELWAL, SUJEETH KARKAL, Advocate

AUTHORITY OF ADVANCE RULING

1. Fixed place of business – Article 5.1 – India-Singapore DTAA

The Authority observed that the applicant and the warehouse/service provider act in cohesion to ensure the product delivery to the customers promptly and by merely outsourcing the operations leading to supplies of product, it could not be said that the applicant did not carry on any business in India from a fixed place. Accordingly, the authority ruled that the demarcated space in the warehouse of Independent Service Providers constituted the fixed place of the business of the applicant within the meaning of Article 5.1 of India-Singapore DTAA.

M/s. Seagate Singapore International Headquarters Pvt. Ltd. [2010-TIOL-08-ARA-IT]

2. Capital gain of transfer of shares in Indian subsidiary – Article 13(5) – Indo-Netherlands Treaty

The Authority ruled that the beneficial ownership in the capital gains arising on the transfer of the shares of the 100% subsidiary company of the applicant could not be held to be vested with the ultimate holding company of the applicant, moreover, where the applicant was having its own board of directors and management systems. Thus, the applicant was entitled to take benefit of the beneficial provisions of Article 13(5) of the Indo-Netherlands Treaty and the gains should not be liable to tax in India.

KSPG Netherlands Holding BV [2010-TIOL-09-ARA-IT]

3. Tax avoidance – Azadi Bachao Andolan

The Authority considering Supreme Court decision in the case of Azadi Bachao Andolan (263 ITR 706), ruled that if a resident of a third country, in order to take advantage of the tax reliefs etc., sets up a conduit in a third country, the legal transactions entered into by that conduit entity could not be declared to be invalid. Though a colourable device adopted through dishonest methods was one of

the areas which could be looked into in judging a legal transaction from the tax angle, the design of tax avoidance itself was not objectionable if it was within the framework of law and was not prohibited by law.

*E*Trade Mauritius Ltd. [2010-TIOL-20-ARA-IT]*

4. Capital gain on transfer of shares held in Indian company – Article 13(4) – Indo-Mauritius DTAA

The Authority observed that the fact that the holding company exercised acts of control over its subsidiary did not in the absence of compelling reasons dilute the separate legal identity of the subsidiary. It was unrealistic to expect that a subsidiary should keep off the clutches of the holding company and conduct its business independent of any control and assistance by the parent company. In the light of the Article 13(4) of India-Mauritius Tax Treaty, Circular 789, the law laid down by the Supreme Court in Azadi Bachao Andolan and the legal incidents of corporate personality, it was ruled that the capital gain arising to the applicant, incorporated in Mauritius, on transfer of share held in Indian company to a non-resident outside India was not taxable in the India.

*E*Trade Mauritius Ltd. [2010-TIOL-20-ARA-IT]*

TRIBUNAL

5. Offshore supplies – Circular 7 of 2009 and Section 9 – Income-tax Act, 1961

The Tribunal held that, Circular No. 7 of 2009 withdrawing the Circular No. 23 of 1969, 163 of 1975 and 786 of 2000 would be operative only from 22-10-2009 and not prior to that date. Thus, the withdrawal of earlier Circulars with effect from 22-10-2009 has no bearing in the instant assessment years i.e., 1998-99 and 1999-00 and therefore, the income relatable to the offshore supplies by the assessee could not be said to have deemed to accrue or arise to the assessee in India within the meaning of section 9 of the Income-tax Act, 1961.

DDIT (International Taxation) vs. M/s Siemens Aktiengesellschaft [2010-TIOL-102-ITAT-MUM]

INDIRECT TAXES

SALES TAX DECISIONS

P. C. JOSHI, Advocate

Appellate Authority – Penalty

The Bombay High Court held that the provisions of section 55 of the Bombay Sales Tax Act, 1959 did not empower an Appellate Authority to impose penalty for the first time in exercise of his appellate powers, since the power to enhance, vary or reduce did not cover the power of imposing the same for the first time, if not imposed by the lower officer.

M/s Shree Ambika Trading Corpn. vs. The State of Maharashtra & Others (Judgment dated 25th February, 2010).

'C' form – Contractor

The Uttarakhand High Court confirmed the decision of the Tribunal and held that a Civil contractor engaged in the construction of tunnel and registered under section 7(2) of the Central Sales Tax Act was entitled to get the items required to be used in the construction, included in his Certificate under section 8(3)(b), enabling him to issue the declaration in Form 'C' for such purchases.

Commissioner, Commercial Tax, Uttarakhand, Dehradun vs. M/s Patel Engineering Ltd., Uttarkashi. 2010 NTN (Vol. 42) – 122.

Charge of rent – Liability

The Punjab & Haryana High Court, following the Supreme Court judgment in the case of M/s BSNL, held that mere charging of the rent as per measured rate system or message rate system by a telephone company cannot lead to a conclusion that there was a transfer of right to use the telephone within the meaning of section 2(h) of the Punjab General Sales Tax Act.

M/s BSNL Ltd. vs. State of Punjab & Others (2010) 35 PHT 37 (P&H).

Declared goods

The West Bengal Commercial Tax Appellate & Revisional Board held that manufacture of C.I. casting, rough and unmachined, continued to be declared goods and therefore tax can be levied only subject to the constitutional restrictions.

M/s Friends Casting vs. A.C.C.T., Howrah Circle (2010) 55 S.T.A. – (Board – 31).

Double taxation

The Karnataka High Court held that the payment made by the contractor to the sub-contractor cannot form part of the total turnover of the contractor in view of the fact that the sub-contractor having completed the entire job, the transfer of property takes place directly from sub-contractor to the contractee. The interpretation placed by the Revenue to tax both the transactions was disapproved as that would lead to double taxation.

M/s Skyline Constructions & Housing (P) Ltd. vs. Authority for Clarification and Advance Rulings, Bengaluru (Judgment dated 17th November 2009) Source : Sales Tax Journal, Vol. 48, Part : 11, Feb. 2010, Page : 1012.

Entries in Schedule

1. Electronic goods

The Allahabad High Court held that Xerox Photo Copier was an electronic goods up to 27th June, 2002, whereafter a separate entry specifically including it in the entry of duplicating machine was inserted.

M/s Xerox Medicorp. Ltd., Rampur vs. State of U. P. & Others 2010 NTN (Vol. 42) – 130.

2. Chlorofluoro Hydrocarbon

The West Bengal Commercial Tax Appellate & Revisional Board held that Chlorofluoro Hydrocarbon was not the component of refrigerator or Air Conditioner, but was covered by entry relating to chemical.

M/s Navin Fluorine Industries vs. D.C.C.T. Corporate Division (2010) S. T. A. – (Board – 36).

3. Hydraulic cutter

In determination proceedings under section 80 of the Gujarat VAT Act, it has been held that Hydraulic cutter used by carpenters and blacksmiths were covered by entry 76(b) of 2nd Schedule relating to tools, but would not be covered by entry 43 of the said Schedule 2 which pertain to Iron & Steel – declared goods.

In the case of M/s Rescue Technology, Ahmedabad. Source : Sales Tax Journal, Vol. 48, Part : 11, Feb. 2010, Page : 986.

Export

The West Bengal Taxation Tribunal held that export to Bhutan was allowable by production of documents with proof of despatch and the certificate from the Indian Custom Authorities. The Tribunal also held that such a claim cannot be disallowed without properly verifying the documents produced by the assessee.

M/s Hindustan Unilever Ltd vs. Deputy Commissioner, Corporate Division, Kolkata & Others (2010) 55 S. T. A. - 82.

Exemption

1. The Allahabad High Court held that while computing the Fixed Capital Investment, the purchase price for the goods purchased, such as Plant and Machinery, cannot be adversely affected by the grant of MODVAT under excise law and such reduction has also to be included as fixed capital investment.

M/s Bhushan Steel & Strips Ltd vs. Commissioner, Trade Tax, U. P., Lucknow. 2010 NTN (Vol. 42) - 153.

2. The Haryana Tax Tribunal held that the exemption under Entry 67 of Schedule B appended to the Haryana General Sales Tax Act, 1963 was only to the 'cattle feed' that was defined as a mixture of ten different items. However, any one single item like 'Deoiled rice bran' when sold separately cannot be exempt under the said entry.

M/s Mahabir Solvent Oils Mills, Karnal & Others vs. State of Haryana (2010) 35 PHT 389 (HTT) (FB).

Limitation

The Punjab & Haryana High Court, after considering the language of section 68 of the Punjab VAT Act, held that the delay caused in submission of appeal beyond a period of sixty days cannot be condoned by application of section 5 of the Limitation Act, similar to the power of condoning the delay in submission of appeal before the First Appellate Authority.

State of Punjab vs. M/s Shreyans Industries Ltd., Ahmedgarh and Others (2010) 35 PHT 2 (P&H) (JS).

Recovery - First charge

1. The Supreme Court, after considering the provisions of section 13(B) of the Orissa Sales Tax Act, 1947, held that the first charge created under the Act was in favour of the State in respect of the Sales Tax dues and therefore the same would prevail over the

charge created in favour of the bank while taking loan from it.

M/s Orissa State Financial Corpn. vs. Commissioner of Commercial Taxes (2010) 35 PHT - 1 (SC).

2. The Punjab & Haryana High Court, while considering the provisions of sections 34, 26 & 61 of the Haryana General Sales Tax Act, 1973, held that none of the provisions created charge on the property and assets of the defaulter who had mortgaged its property with the bank much prior to the dues taken out under the Sales Tax law.

Punjab National Bank vs. State of Haryana & Others (2010) 35 PHT 50 (P&H).

Rectification

The Supreme Court held that the word 'rectification' and 'amendment' were conceptually different. Therefore, when an item was contended to have been included in the Recognition Certificate by mistake, that cannot be deleted on the ground of mistake, because when a Recognition Certificate was issued, the benefit of concessional rate of tax was given to the dealer who may have arranged his business affairs accordingly. Therefore, such a benefit cannot be withdrawn retrospectively, but only from the date of issue of show cause notice with the proposal of deleting the item in question.

State of Uttar Pradesh & Others vs. M/s Vam Organic Chemicals Ltd. 2010 NTN (Vol. 42) - 137.

Reassessment

The Allahabad High Court held that approval for the initiation of reassessment proceeding cannot be granted mechanically. In the instant case, the Additional Commissioner had granted permission under section 21(2) under the U. P. Trade Tax Act after expiry of four years without referring or considering the submissions made by the assessee.

M/s Shri Mahalaxmi Gramodyog Sansthan, Kidwai Nagar vs. State of U. P. & Others 2010 NTN (Vol. 42) - 146.

Works Contract

The Commissioner of Commercial Taxes, Kerala, while deciding an application for clarification under section 94 of the Kerala VAT Act, held that the fabric processing unit engaged in washing, bleaching, softening and drying of cotton knitted fabrics did not involve any transfer of materials and therefore there was no liability under VAT Act.

Source : Kerala Tax Reporter, Vol. 18, Part III, Page 4.

Date : 6th April, 2010

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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, 2010. Members are requested to send the DD or Cheque in favour of "All India Federation of Tax Practitioners" payable at Mumbai on or before 15th April, 2010.

Members can also download the subscription and an appeal from our website; i.e., www.aiftponline.org and send us the subscription.

Thanking you,

For All India Federation of Tax Practitioners

J. K. RANKA
Secretary General

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Dear Members,

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J. K. RANKA
Secretary General

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as on 20-3-2010**

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Central	1	644	21	2	668
Eastern	—	811	33	0	844
Northern	—	776	17	0	793
Southern	—	682	13	2	697
Western	3	1507	32	11	1553
Total	4	4420	116	15	4555

LIST OF PUBLICATIONS

Sr. No.	Name of Publication	Edition	Price		Courier Charges
			Members	Non-Members	
1.	Media & Entertainment Industry (Normal Bound)	Dec., 2009	280.00	315.00	70.00
2.	Media & Entertainment Industry (Hard Bound)	Dec., 2009	360.00	405.00	90.00
3.	A Handbook on FEMA – Taxation – Frequently Asked Questions	Mar., 2009	240.00	270.00	70.00
Western Zone					
4.	Co-operative Housing Society	Oct., 2006	160.00	180.00	40.00
5.	Tax Professionals' Manual	Dec., 2005	280.00	315.00	70.00

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1. The above publications are available for sale; those who desire to buy may contact the office of the Federation.
2. Outstation members are requested to add courier charges, as mentioned above.
3. Please draw separate Cheque/Draft in favour of "All India Federation of Tax Practitioners" payable at Mumbai for publications at Sr. Nos. 1 to 3 and separate Cheque/Draft in favour of "All India Federation of Tax Practitioners – Western Zone" payable at Mumbai for publications at Sr. Nos. 4 & 5

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

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