

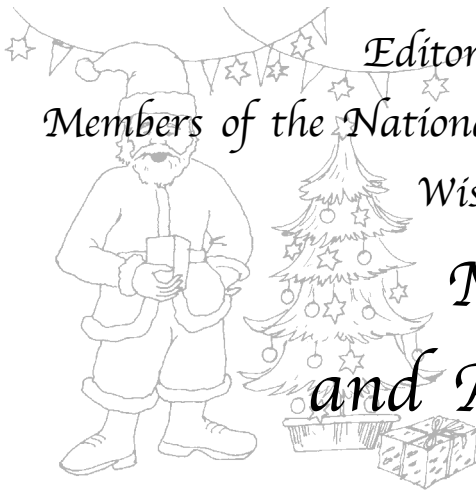


ESTD. 11th NOVEMBER 1976 All India Federation of Tax Practitioners

Price ₹ 5/-  
(For Members only)

# AIFTP TIMES

Volume I - No. 12 • December, 2010



*Editor-in-Chief, National President,  
Members of the National Executive Committee and Journal Committee*

*Wish all members and readers*

*Merry Christmas  
and A Happy New Year*

## FEDERATION NEWS

J. K. Ranka, Secretary General

### FORTHCOMING PROGRAMMES

Date & Month	Programme
11th December, 2010	National Executive Committee Meeting at Indore
11th & 12th December, 2010	Two Days National Tax Conference at Indore
8th & 9th January, 2011	Two Days National Tax Conference at Ahmedabad
15th January, 2011	Full Day Tax Conference at Jalgaon

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

Name	Tel. (O)	Fax	Mobile	E-mail
<b>National President</b> — M. L. Patodi, Adv.	0744-2361179	2363637	9829035256	patodiml@bsnl.in
<b>Deputy President</b> — S. K. Poddar, Adv.	0651-2202787	2309407	9431115265	sheojipoddar@rediffmail.com
<b>Secretary General</b> — J. K. Ranka, Adv.	0141-2379203	2379204	9829010593	ranka@datainfosys.net
<b>Treasurer</b> — Nikita R. Badheka, Adv.	022-22030011	22030012	9821037885	nikita.badheka@gmail.com

## NATIONAL TAX CONFERENCE 2010

Organised by

ALL INDIA FEDERATION OF TAX PRACTITIONERS (CZ)  
TAX PRACTITIONERS ASSOCIATION, INDORE & INDORE BRANCH OF CIRC OF ICAI, INDORE  
December 11th & 12th, 2010

at  
ICAI AUDITORIUM, Scheme No. 78, Part-II, Near Prestige Public School,  
Indore – 452 010 (M.P.)

Theme: VISION 2020 – CHALLENGES FOR TAX PROFESSIONALS

CPE  
12 Hours  
unstructured\*

### DAY 1 – 11TH DECEMBER 2010, SATURDAY

8.30 am to 9.30 am	Registration & Breakfast
9.45 am to 11.15 am	Inaugural Session Chief Guest – Hon'ble Mr. Justice Syed Rafat Alam, Chief Justice of M. P. High Court, Jabalpur
11.15 am to 11.30 am	Tea Break
11.30 am to 1.30 pm	<b>1st Technical Session</b> <b>Direct Tax Code Bill 2010 – Conceptual Issues</b> Chairman : Mr. S. K. Poddar, Advocate, Ranchi Speaker : CA Harish Motiwalla, Mumbai <b>Limited Liability Partnership – Formation &amp; Tax Aspects</b> Chairman : CA Kemisha Soni, Chairman CIRC, Indore Speaker : CA (Mrs.) Ritu G. P. Das, Kota
1.30 pm to 2.15 pm	Lunch
2.15 pm to 3.30 pm	<b>2nd Technical Session</b> <b>Issues under section 56(2)(vii) and taxability of gift</b> Chairman : Mr. N. M. Ranka, Sr. Advocate, Jaipur Speaker : CA Pradip Kapasi, Mumbai
3.30 pm to 4.45 pm	<b>3rd Technical Session</b> <b>Controversial Issues under Service Tax with reference to Builders &amp; Developers</b> Chairman : Mr. Bharatji Agrawal, Sr. Advocate, Allahabad Speaker : CA Rajendra Kumar P., Chennai
4.45 pm to 5.00 pm	Tea Break
5.00 pm to 6.15 pm	<b>4th Technical Session</b> <b>Incidence of VAT and Entry Tax on Builders and Developers and on Special Economic Zone (SEZ) units in M.P.</b> Chairman : Mr. M. L. Patodi, Advocate, Kota Speaker : CA P. D. Nagar, Indore
6.30 pm onwards	National Executive Committee Meeting of AIFTP
7.30 pm to 9.30 pm	Cultural Programme followed by Dinner

### DAY 2 – 12TH DECEMBER 2010, SUNDAY

8.45 am to 9.30 am	Breakfast
9.30 am to 11.15 am	<b>1st Technical Session</b> <b>Special Economic Zone (SEZ) – Tax Aspects</b> Chairman : CA Manoj Fadnis, Indore Speaker : CA Dhinal Shah, Ahmedabad
11.15 am to 12.30 pm	<b>2nd Technical Session</b> <b>Five Burning Issues under Capital Gains Tax</b> Chairman : Mr. V. P. Gupta, Advocate, New Delhi Speaker : CA Aashish Goyal, Indore

12.30 pm to 1.45 pm

**Certain Issues relating to T.D.S.**

Chairman : CA Rajendra Goyal, Indore

Speaker : CA Rajesh Doshi, Raipur

1.45 pm to 2.45 pm

Lunch

2.45 pm to 4.00 pm

**3rd Technical Session**

Chairman : P.C. Joshi, Advocate, Mumbai

**Road Map of G.S.T.**

Speaker : Mr. Mukul Gupta, Advocate, Ghaziabad

**Equipping Professionals to gear up for GST**

Speaker : CA. Sanjay M. Dhariwal, Bengaluru

4.00 pm to 5.30 pm

**Valedictory Session**

Key Speaker – CA G. Ramaswamy, Vice President, ICAI

**Delegates Fees ₹ 1,250/-; For Spouse ₹ 1,000/-**

**M.D. Sodani**

Conference Chairman

**S.N. Ramnani**

Conference Co-Chairman

**Hitesh Mehta**

Conference Secretary

**\*Unstructured CPE Hours to be claimed on self declaration**

**Conference Secretariat**

319, City Center, 570 M.G. Road, Near High Court Building, Indore – 452 001 (M.P.)

Phone:- 0731 – 2436896 / Mob. 09425093888,

0731 – 2541341 / Mob. 09425075654 • 0731 – 2539051 / Mob. 09301974013

Mr. M. L. Patodi, National President	09829035256	patodiml@bsnl.in
Mr. M. D. Sodani, Vice President	09425093888	murlidharsodani@gmail.com
Mr. P. M. Chopra, Chairman (CZ)	09413523820	chopraassoc@gmail.com
Mr. S. N. Goyal, President, TPA, Indore	09826021279	sngoyal_ca@yahoo.com
Mr. Vijesh Khandelwal, Chairman, Indore Branch of CIRC of ICAI	09826020596	vijesh_shingu@rediffmail.com

**Hotels at Indore**

Name	Distance from Venue	Check out	Tariff		Rooms Available	Phone
			Single	Double		
Infiniti	3 KM	9:00 AM	3000	+770	10-15	0731-2559514
Hotel Paradise	3 KM	10:00 AM	2600	+490	15-20	0731-2309969
Hotel Park	2 KM	9:00 AM	1000	1200	2	0731-4005240
Lemon Tree	8 KM	12:00 PM	4499	5499	5	0731-4423232
Crown Palace	8 KM	9:00 AM	2300	3100	3	0731-2528855
Shreemaya	8 KM	10:00 AM	1850	2500	4	0731-2515555
Omni Palace	8 KM	9:00 AM	1200	1600	5	0731-2528500
Princess Palace	8 KM	9:00 AM	1750	2250	6	0731 2517940
Hotel Surya	8 KM	9:00 AM	1750	2250	10	0731-2517701
Hotel Apna Avenue	6 KM	12:00 PM	800	1000	12	0731-4055560
Athithi Niwas	4 KM	10:00 AM	850	1000	6	0731-2572009
Kumars Atithi Niwas	2 KM	9:00 AM	700	900	25	0731-4213600
Hotel Elegant	3 KM	9:00 AM	1500	1600	11	0731-4041830
Hotel Country Inn	3 KM	12:00 PM	4500	5500	25	0731-4266666
Hotel President	8 KM	10:00 AM	1500	2000	20	0731 2528866
Hotel Sarover Portico	7 KM	10:00 AM	2600	3000	10	0731-3072727
Hotel Sayaji	2 KM	10:00 AM	5500	6500	15	0731-4006666
Hotel Amarvilas	3 KM	10:00 AM	2400	2800	10	0731-4281111
Hotel Shreemaya Res.	3 KM	10:00 AM	2400	2800	12	0731-4700800
Hotel Neelam	9 KM	10:00 AM	-	450/750	5	0731-4046622
Hotel Ashoka	9 KM	10:00 AM	-	450/750	5	0731-4045291
Hotel Surya	8 KM	10:00 AM	1350	1600	10	0731-4079111

\*Rooms are subject to availability at the time of booking.

# NATIONAL CONVENTION ON TAXATION - 2011

Organised by

ALL INDIA FEDERATION OF TAX PRACTITIONERS  
(WESTERN ZONE)

&

ALL GUJARAT FEDERATION OF TAX CONSULTANTS



## SOCIO ECONOMIC GROWTH, ETHICS AND TAXATION

In association with

ITAT Bar Association, Ahmedabad  
Income Tax Bar Association, Ahmedabad  
Chartered Accountants Association, Ahmedabad  
Ahmedabad Branch of WIRC of ICAI  
Tax Advocates Association Gujarat, Ahmedabad  
Gujarat Sales Tax Bar Association, Ahmedabad

Saturday, 8th January & Sunday, 9th January, 2011  
at

J.B. Auditorium, Ahmedabad Management Association,  
Vastrapur, Ahmedabad - 380 015.

### PROGRAMME

#### SATURDAY, 8th January, 2011

- 8:00 am to 9:00 am : Registration
- 9:00 am to 10:30 am : Inauguration  
**Chief Guest** : Hon'ble Shri Anil R. Dave, Judge, Supreme Court of India.  
**Guest of Honour:** Hon'ble Shri S.J. Mukhopadhaya, Chief Justice,  
Gujarat High Court.\*
- 10:30 am to 11:00 am : Tea Break
- 11:00 am to 12:15 pm : **1st Technical Session: "Precedents, Judicial Discipline & Contempt"**  
Chairman : Shri K. C. Patel, Advocate, Ahmedabad  
Paper Writer : Shri K.H. Kaji, Advocate, Ahmedabad
- 12:15 pm to 1:30 pm : **2nd Technical Session: "Taxation of Real Estate – Some important aspects including project completion method, Section 50C, Development & Redevelopment and Section 80-IB(1)"**  
Chairman : Shri J.P. Shah, Advocate, Ahmedabad.  
Paper Writer : Shri Saurabh N. Soparkar, Sr. Advocate, Ahmedabad
- 1:30 pm to 2:30 pm : Lunch
- 2:30 pm to 3:45 pm : **3rd Technical Session: "TDS Provision under Section 195"**  
Chairman : Shri Mukesh M. Patel, Advocate, Ahmedabad.  
Paper Writer : Shri Dhinal A. Shah, C.A., Ahmedabad
- 3:45 pm to 5:15 pm : **4th Technical Session: "VAT – Controversial Issues in Input Tax Credit" "Intricate Issues of declarations under Central Sales Tax Act"**  
Chairman : Shri P.C. Joshi, Advocate, Mumbai.  
Paper Writer : Shri Nayan Sheth, Advocate, Mumbai.  
Paper Writer : Smt. Nikita Badheka, Advocate, Mumbai.

**SUNDAY, 9th January, 2011**

- 9:00 am to 10:00 am : Breakfast
- 10:00 am to 11:15 am : **5th Technical Session: "Some Aspects of Depreciation"**  
Chairman : Hon'ble Shri G. D. Agarwal, Vice President, ITAT, Ahmedabad\*  
Paper Writer : Shri H. Padamchand Khincha, CA, Bengaluru.
- 11:15 am to 12:30 pm : **6th Technical Session: "Computation of Income under Direct Tax Code Bill"**  
Chairman : Shri N. M. Ranka, Sr. Advocate, Mumbai.  
Paper Writer : Shri Dr. Girish Ahuja, CA, Delhi.
- 12:30 pm to 1:30 pm : Lunch
- 1:30 pm to 2:45 pm : **7th Technical Session: "Construction and Renting Services under Service Tax"**  
Chairman : Shri Bharatji Agrawal, Sr. Advocate, Allahabad.  
Paper Writer : Shri Naresh Thakkar, Advocate, Mumbai.
- 2:45 pm to 4:00 pm : **8th Technical Session: "Controversies under Section 14A of I.T. Act"**  
Chairman : Shri Kaushik D. Shah, CA, Ahmedabad.  
Paper Writer : Shri Keshav Bhujle, Advocate, Mumbai.
- 4:00 pm to 5:30 pm : **Valedictory Session:**  
Chief Guest : Hon'ble Shri R. V. Easwar, President, ITAT\*

\*Subject to confirmation

<b>Delegate Fees:</b>	<b>Members</b>	<b>Non-Members</b>	<b>Spouse</b>
	<b>₹ 1,500/-</b>	<b>₹ 1,600/-</b>	<b>₹ 1,000/-</b>

**Cheque/DD should be in favour of "All Gujarat Federation of Tax Consultants" payable at Ahmedabad.**

**For further details, Please Contact:**

**Convention Secretariat : Ashvin C. Shah**

C/o. Chandulal M. Shah & Co., 601, Samruddhi, Opp. Sakar- III, PO: Navjeevan, Ahmedabad-14.  
Phone: 079-27544430/27540612 Fax: 079-27541883 E-mail: cmshah@cmshah.com

**FOUNDATION DAY CELEBRATION OF AIFTP AT EAST ZONE**

**At Kolkata**

Foundation Day of All India Federation of Tax Practitioners was celebrated in Kolkata on 11th November, 2010 at Calcutta Chamber of Commerce. It was presided over by Shri Narayan Jain, Chairman, AIFTP (East Zone). Shri S.K. Poddar, Deputy President of AIFTP addressed the meeting as Chief Guest and asked the members to introduce their friends as member of AIFTP. They will be immensely benefited by joining the AIFTP. Shri R.D. Sharma also expressed his views. Shri Anup Roy, Advocate spoke on section 6(2) of the CST Act. The meeting was attended by Shri C.K. Chatterjee, Zone Secretary, Shri Achintya Banerjee, Shri S.C. Garg, Shri R.D. Kakra, Smt. Nilima Joshi, Shri Deepak Jain, Shri Gauri Sen, Shri RK Chatterjee; Smt. Neena Maheshwari; Shri Subhashis Malik, Shri Supriyo Gupta and large number of members. The members decided to reach the target of 1,000 members in East Zone.

**At Cuttack**

The meeting of the All Orissa Tax Bar Association was held at 6.00 P.M. in the Bar Hall of Income Tax Appellate Tribunal, Cuttack Bench, Cuttack to observe the Foundation Day of All India Federation of Tax Practitioners. The meeting was presided over by Sr. Member Shri J.P. Agarwalla, Sr. Advocate of Titilagarh. Members discussed about the role of AIFTP vis-a-vis the Tax Practitioners. The various seminars, conferences and monthly magazine published by the Federations are of immense utility and guide to all the members and were highly appreciated. The other important programme pursued by the Federation i.e. Nani Palkhivala Moot Court Competition amongst all students of reputed institutions was highly commended. It was also decided on this day that the steps will be taken to increase the membership of the Federation in our area; i.e., in the State of Orissa and necessary co-operation as and when required shall be given to the Central Committee. Members also expressed their happiness that three members from our Association are in the Central Committee. A few members also expressed their desire that our Association should also organize Moot Court Competition in the State level and all efforts will be made to make it highly meaningful and purposeful. Members expressed their solidarity on this Foundation Day of the Federation to support the cause and programmes of the Federation in future. The meeting was also attended by S/Shri J. P. Agrawala, S. N. Sahu, M. Udaypuria; B. Panda and B. N. Mohapatra.



## DIRECT TAXES

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

### SUPREME COURT

#### 1. S. 43B – Unutilized MODVAT Credit – Deduction on actual payments

Unutilised MODVAT credit of earlier years cannot be treated as actual payment for the purpose of section 43B. Custom duty paid and allowed as deduction under section 43B is to be taken into account in valuation of the closing stock.

*CIT vs. Maruti Udyog Limited (2010) 218 Taxation 668 (SC)*

#### 2. S. 92C – Transfer Pricing – Transfer Pricing Provisions should be extended to domestic transactions to “reduce litigation”. (S. 40A (2))

The assessee did not have any employee other than a Company Secretary and all administrative services relating to marketing, finance, HR, etc. were provided by GlaxoSmithKline Consumer Healthcare Ltd. The costs towards services provided to the assessee were allocated on the basis suggested by a firm of CAs. The Assessing Officer disallowed a part of the charges reimbursed on the ground that they were excessive and not for business purposes, which was upheld by the CIT(A). However, the Tribunal deleted the disallowance on the ground that there was provision to disallow expenditure on the ground that it was excessive or unreasonable unless the case of the assessee fell within the scope of section 40A(2). HELD dismissing the SLP:

- (i) The Authorities below have recorded a concurrent finding that the said two companies are not related companies under section 40A(2).
- (ii) The larger issue is whether Transfer Pricing Regulations should be limited to cross-border transactions or whether the Transfer Pricing Regulations be extended to domestic transactions. In domestic transactions, the CBDT should examine whether Transfer Pricing Regulations can be applied to domestic transactions between related parties under section 40A(2) by making amendments to the Act. The Assessing Officer can be empowered to make adjustments to the income declared by the assessee having regard to the fair market value of the transactions between the related parties and can apply any of the generally accepted methods of determination of arm's

length price, including the methods provided under Transfer Pricing Regulations.

*CIT vs. GlaxoSmithKline (Asia) (Supreme Court)*  
Source: [www.itat.online.org](http://www.itat.online.org)

### HIGH COURT

#### 3. S. 32 – Depreciation – Assets written off – Used for purpose of business

Actual user of the machinery was not required with respect of discarded machinery and condition for eligibility for depreciation that the machinery being used for the purpose of the business would mean that the discarded machinery was used for the purpose of the business in the earlier years for which depreciation has been allowed.

*CIT vs. Yamaha Motor India Pvt. Ltd. (2010) 328 ITR 297 (Delhi)*

**Editorial Note:** SLP of department rejected (2010) 328 ITR (St) 10

#### 4. S. 37(1) – Business Expenditure – Expenditure on education of Director's son – Not allowable on facts

As there was no documentary evidence with respect to appointment of trainee produced before the Tribunal or before the Assessing Officer, expenditure was not allowed.

*Echjay Forgings Ltd. vs. ACIT (2010) 328 ITR 286 (Bom.)*

#### 5. S. 50 – Capital Gains – Land – Depreciation – Transfer of undertaking

Land is not a depreciable asset. Section 50 deals only with the transfer of depreciable assets. Once land forms part of the assets of the undertaking and the transfer is of the entire undertaking as a whole, it is not possible to bifurcate the sale consideration.

*CIT vs. Coimbatore Lodge (2010) 328 ITR 69 (Mad.)*

#### 6. S. 68 – Cash credits – Share application money – Failure to produce creditor

Substantial evidence was produced by assessee to prove creditworthiness of creditor and genuineness of share application. Mere failure to produce the creditor

not material, hence the money cannot be regarded as undisclosed income.

*CIT vs. Orbital Communication (P) Ltd. (2010) 327 ITR 560 (Delhi)*

**7. S. 147 – Reassessment – Assessment u/s 143 (1). Reopening on mechanical basis void even where section 143(3) assessment not made**

For purpose of reopening of assessment under section 147, AO must form and record reason before issuance of notice under section 148. The reasons so recorded should be clear and unambiguous and must not be vague. There cannot be any reopening of assessment merely on the basis of information received without application of mind to the information and forming opinion.

*Sarthak Securities vs. ITO (Delhi High Court)*  
Source: [www.itatonline.org](http://www.itatonline.org)

**TRIBUNAL DECISIONS**

**8. S. 9(1)(vi) – Income from supply of ‘shrink-wrapped’ software assessable as ‘royalty’ – A tax-treaty can be unilaterally overridden**

Payment made for grant of licence in respect of Copyright by end user is taxable as royalty as per s. 9(1)(vi), domestic tax legislation to override treaty provisions in case of irreconcilable conflict.

*Microsoft Corporation vs. ITAT (Delhi)*  
Source: [www.itatonline.org](http://www.itatonline.org)

**9. S. 32(1)(ii) – Depreciation – Brand name – Intellectual Property – Scheme of arrangement**

Where assessee company received brand name under a scheme of arrangement under sections 391 to 394

of Companies Act, 1956, assessee was eligible for depreciation in respect of brand name under section 32(1)(ii) of the Income-tax Act.

*KEC International Ltd. vs. Addl. CIT (2010) 41 SOT 43 (Mum.)*

**10. S. 40(a)(i) – Business disallowance – Under Article 26(3) of India-USA DTAA payments to Non-residents are equated with payments to residents & so S. 40(a)(i) disallowance not valid**

Art. 26(3) of India-US DTAA protects interest of non-resident vis-à-vis residents. Thus payment to residents are equated with payment to non-residents. Thus in light of Article 26(3), no disallowance under section 40(a)(i) can be made even in case of payment to non-resident. Herbal Life International 101 ITD 450 (Delhi) followed.

*Central Bank of India vs. Dy. CIT (ITAT) (Mum.)*  
Source : [www.itatonline.org](http://www.itatonline.org)

**11. S. 195 – Deduction at Source – Though foreign artistes are chargeable to tax in India, their agents are not, in the absence of a PE**

In case where services were rendered outside India and there was no PE, the same was not assessable to tax in India. Even under the Act, by virtue of Carborandum Co 108 ITR 335 (SC), Circular No. 17 of 1953 dated 17-7-1953 & Circular No. 786 dated 7-2-2000, commission paid to agents for services rendered outside India is not chargeable to tax in India and there is no obligation to deduct tax u/s 195.

*ADIT vs. Wizcraft International Entertainment (ITAT-Mum.)* Source: [www.itatonline.org](http://www.itatonline.org)



**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:

- |  |             |
|--|-------------|
| 1. Quarter Page  | Rs. 600/-   |
| 2. Ordinary Half Page  | Rs. 1,000/- |
| 3. Ordinary Full Page  | Rs. 2,000/- |
| 4. Second and Third Cover Page                               | Rs. 2,500/- |
| 5. Fourth Cover Page –<br>Three fourth page (in four colour) | Rs. 3,500/- |

**J. K. RANKA**  
Secretary General

**Membership of AIFTP  
as on 10-11-2010**

*Life Members*

	Associate	Individual	Association	Corporate	Total
Central	1	694	21	2	718
Eastern	—	879	33	0	912
Northern	—	799	17	0	816
Southern	—	736	13	3	752
Western	3	1541	32	14	1590
<b>Total</b>	<b>4</b>	<b>4649</b>	<b>116</b>	<b>19</b>	<b>4788</b>

# INTERNATIONAL TAXATION

CA. Dhanesh Bafna, CA. Madhav Khandelwal & Sujeeth Karkal, Advocate

## SUPREME COURT

### 1. Transfer Pricing provisions to be extended to domestic transactions

The Hon'ble Supreme Court while dismissing the appeal filed by the department by holding it as revenue neutral exercise held as under:

- i. In domestic transactions, the under-invoicing of sales and over-invoicing of expenses ordinarily will be revenue neutral in nature, except in two circumstances having tax arbitrage such as where one of the related entities is (i) loss making or (ii) liable to pay tax at a lower rate and the profits are shifted to such entity.
- ii. In order to reduce litigation occurring in complicated matters, the question of extending Transfer Pricing regulations to domestic transactions require expeditious consideration by the Ministry of Finance and the CBDT may also consider issuing appropriate instructions in this regard.

*CIT vs. GlaxoSmithKline (Asia) (SC)*  
Source: [itatonline.org](http://itatonline.org)

## TRIBUNAL

### 2. Agent not a performer – No PE – Income not taxable – Article 7 – India – UK DTAA

The assessee, an event organizer, had entered into an agreement with "Colin Davie Artiste Services", a UK company, under which the latter agreed to procure renowned foreign entertainers like "Diana King" & "Shaggy" for performances in India. The assessee agreed to pay a fee to the entertainers as well to Colin Davie and to reimburse expenses incurred. On these facts, the Tribunal held as follows:

- i. As Colin Davie was not a performer, his income was not covered under Article 18 of the DTAA but was covered by Article 7 and as the services were rendered outside India and there was no PE, the same was not assessable to tax in India. Even under the Act, commission paid to agents for services rendered outside India is not chargeable to tax in India and there is no obligation to deduct tax u/s 195;

- ii. Further payment made towards reimbursement of expenses, is not chargeable to tax and there was no obligation to deduct tax at source.

*ADIT vs. Wizcraft International Entertainment (ITAT Mumbai)* – Source: [itatonline.org](http://itatonline.org)

### 3. Thin Capitalization Rule – India – Belgium DTAA

The Tribunal held that the argument of the revenue that the abnormal debt-equity ratio attracts the "Thin Capitalization Rule" and that the "debt" should be characterized as "equity" for purposes of considering whether interest is deductible is not acceptable, since, there are no "thin capitalization rules" in India. Though the DTC 2010 has proposed this *vide s. 123(1)(f)*, in the absence of specific "thin capitalization" rules, it is not open to the revenue to characterize 'debt' as 'equity' and disallow the interest. The provisions of domestic law and limitation of Article 7(3) refers to the Source Country and not the Residence Country. Imposing the "thin capitalization rules" on the assessee when domestic companies are not subject to such rules will violate the "non-discrimination" provision in Article 24(5).

*Besix Kier Dabhol SA vs. DDIT (ITAT Mumbai)*  
Source: [itatonline.org](http://itatonline.org)

### 4. Royalty – Article 12(3) of Indo – US DTAA

The Mumbai Tribunal held that it is now well settled that Computer software after being put on to a media becomes goods like any other Audio Cassette or painting on canvas or a book. The payment for use of computer software, thus, cannot be termed as "Royalty". Further, since the assessee had purchased a copyrighted article and not the copyright itself, there is no transfer of any part of copyright. Since, the payment was not a "royalty" under the Indo-US DTAA, and as it is covered under Article 7, which deals with "Business Profit" and as the foreign party does not have PE in India, the same is not taxable in India and hence, no liability to deduct tax at source.

*DDIT (International Taxation) vs. Reliance Industries Ltd. (2010-TII-154-ITAT-Mum-Intl)*

*(Also refer the Delhi Tribunal decision in the case of Gracemac Corporation vs. ADIT (2010-TII-141-ITAT-Del-Intl), wherein the Delhi Tribunal had taken a contrary view)*





## INDIRECT TAXES

### SALES TAX DECISIONS

P. C. JOSHI, Advocate

#### Deduction of Tax at Source

The Karnataka High Court held that section 18A of the Karnataka VAT Act, 2003 was ULTRA VIRES ARTICLE 19(1)(g) of the Constitution of India as well as the provisions of the Act. Consequently the Hon'ble Court also quashed the notification dated 28.07.2008 as violating Articles 14 & 19(1)(g)

*M/s. Suman Enterprises vs. The State of Karnataka 2010-11 (15) KCTJ P. 1.*

In proceedings under SECTION 18-A of the Karnataka VAT Act a notification dated 5-10-2010 was issued by the Commissioner of Commercial taxes, withdrawing several notifications mentioned therein with immediate effect.

*Source: Karnataka Commercial Taxes Journal P. 226*

#### Entries in Schedule

##### i) CD-ROM

The Supreme Court while considering an appeal arising out of the Custom Tariff Act, 1975 held that CD-ROM containing images, drawing and design of engineering goods were not covered by heading 49.06 relating to printed books, newspaper, menu script, etc. The plans and drawings mentioned therein have to be original, drawn by hand while the images loaded on CD-ROM were not so. The apex court also held that the item in question was not covered by heading 49.11 which was a residuary entry for printed matters not covered by any other heading of Chapter 49.

The Supreme Court also rejected the submission of the assessee in regard to Chapter 85 which covered blank CD-ROM and not the one containing the plans, drawings etc. The court dismissed the appeal filed by the assessee.

*LLM Ltd. vs. Commissioner of Customs 2010 (1) GSTJ p. 97.*

##### ii) 'Whipping Top'

The Uttarakhand High Court held that the item whipping top was not expressly mentioned in the schedule relating to the tax @ 4%. The ingredients of the said item were water, edible vegetable fat, hydrogenated edible oil and emulsifier. The court therefore held that item was taxable @ 12.5% under the provisions of Uttarakhand VAT Act, 2005.

*Sarva Shri Sagar Sons vs. The Commissioner, Commercial Tax, Uttarakhand, Dehradun. 2010 NTN (Vol. 44) - 179*

##### iii) IT Products – Dish Antenna

The commissioner of Commercial Taxes while deciding an application u/s. 84 of the Kerala Value Added Tax Act held that "Dish Antenna" was covered by the entry 69 of the 3rd Schedule relating to IT product.

*Source: Kerala Tax Reporter Vol.18 P. 116.*

##### (iv) "Masala Powder"

The Karnataka Appellate Tribunal after considering the impact of notification dated 19-12-2006 in respect of "Masala Powder" reducing the rate of tax to 4%, was applicable to the powder sold after grinding spices along with non-spicy material as well.

*Eastern Condiments (Pvt) Ltd., Bengaluru vs. State of Karnataka. P. 493*

##### (v) HDPE Granules

The Punjab & Haryana High Court held that HDPE and LDPE granules were covered by Entry 35-B of the notification dated 31-3-1996 as 'plastic goods'.

*Excise and Taxation Commissioner, Haryana, Chandigarh vs. M/s. S. K. & Co. Pvt. Ltd., Faridabad (2010) 37 PHT 383 (P&H)*

#### Inter-State Sale

The Central Sales Tax appellate authority held that where the goods were initially mentioned for delivery to the buyer, who failed to take delivery and seller was obliged to sell the goods to another party, the transaction was not an inter-state sale.

*Siddharth Apparels (Pvt) Ltd. vs. Secretary, Commercial Tax Deptt., Chennai & Ors. (2010) 18 KTR 429 (CSTAA) P. 429.*

#### Input Tax Credit – Refund

The Madras High Court rejected the submission of the State that the refund on account of input tax credit can be availed of only by the seller who had remitted the amount to the Government treasury. In that regard the scheme of the Act was held to be relevant.

*Sara Leathers vs. Commercial Tax Officer, Tambaram I Assessment Circle, Chennai (2010) 37 PHT 387 (Mad.).*

#### Interest/Amnesty Scheme

The larger Bench of the Kerala High Court overruled the earlier Judgment in the case of P. K. Damodaran

(138 STC 442) and directed the authorities to grant the benefit of amnesty to the assessee when he did not collect the tax. The liabilities towards interest can be waived under the amnesty scheme, because of the favourable order by the Tribunal, though later on that was found to be wrong by the High Court.

*State of Kerala vs. Western India Cosmetic & Health Product Ltd & Ors. (2010) 18 KTR 414 (Ker.) P. 414*

### Items for section 8(3)(b) of Central Sales Tax Act

The amendment by Finance Act, 2002 made in section 8(3)(b) of the Central Sales Tax Act, 1956 provided for the concessional rate of tax on goods required for use in the telecommunication network. Consequent to that amendment, rule 13 of the Central Sales Tax (Registration and Turnover) Rules, 1957 ought to have been amended, but in absence thereof, the authorities in West Bengal rejected the application for including the goods required to be used in establishing telecommunication network. The Calcutta High Court in the above circumstances issued directions to the Secretary, Ministry of Finance, New Delhi to suitably amend the rule so as to bring it in conformity with the amended section 8(3)(b).

*Transcend Infrastructure Ltd. vs. Deputy Commissioner of Commercial Taxes, Bhowanipore Charge & Ors. (2010) 56 S.T.A. P. 167*

### Jurisdiction of Civil Courts

The Punjab & Haryana High Court after considering the provision of section 62 of the Haryana General Sales Tax Act, 1973, held that the civil courts cannot entertain a suit against the department challenging the action of recovery against the surety submitted at the time of registration. The assessee was advised to seek appropriate remedy under the provisions of the Act.

*Braham Raj vs. State of Haryana & Ors. (2010) 37 PHT 391 (P&H)*

### Jurisdiction/Reference – Revision

The Supreme Court held that while hearing the Tax Revision Cases, the High Court had a limited Jurisdiction to consider the questions of law arising from the orders of the Tribunal; it cannot interfere the orders of the Tribunal on facts.

*Commissioner of Trade Tax Uttar Pradesh vs. J.U. Pesticides & Chemical Pvt. Ltd. (2010) 18 KTR 420 (SC) P. 420*

### Limitation

The Bombay High Court after considering the provision of the section 33 of the Bombay Sales Tax Act, 1959 in entirety, held that while considering the time limit of three years by the proviso inserted

below Explanation II of section 33(4A) did not mean that it applied only to section 33(4A). Considering the language used by the said section, the Hon'ble Court also held that the proviso did not refer to furnishing or non-furnishing of returns within the prescribed time limit. Following the Supreme Court Judgment in the case of *State of Orissa vs. Devkidevi & Ors. 1964 (15 STC 153) (SC)* the court held that the limitation of three years under the said proviso covered all orders passed under section 33.

*The Commissioner of Sales Tax vs. Lucas (I) Services Ltd., Sales Tax reference 19 of 2006 decided on 12-8-2010*

### Order of Cost : No appeal

The Division Bench of the High Court of Karnataka upheld the order passed by single Judge and held that the single Judge was justified in directing the Commissioner to grant refund to the assessee within the specified time and also in awarding cost in favour of the dealer after recovering it, from the officer who withheld the refund wilfully. The court also held that no appeal lay against the award of cost as per the provisions of Civil Procedure Code.

*B.A. Harish Gowda vs. Greenply Industries Ltd., Bengaluru 2010 (69) Kar. L.J. 446 (HC) (DB) P.446*

### Purchase on concession

Before the Supreme Court, the assessee purchased diesel oil at concessional rate for use in generating electricity captively consumed in the factory, for the manufacture of taxable goods.

The assessing authorities issued a show cause notice for deleting HSD mentioned in the recognition certificate. After considering the provisions of sections 4B(ii) & 4B(4)(ii) of the Uttar Pradesh Trade Tax Act, the apex court found that the same Authority had distinct power to amend the recognition certificate on his own motion or on application; for sufficient reason; never contemplated its cancellation. The court observed that the benefit of concessional rate of tax, was given by issuance of the recognition certificate and accordingly the assessee arranged his business affairs therefore the court held that such benefit cannot be withdrawn retrospectively.

*State of Uttar Pradesh & Ors. vs. Vam Organic Chemicals Ltd. (2010) 18 KTR (SC) P.No.405.*

### Rectification

The change of opinion based on the later Judgment of the Supreme Court, cannot be the base for rectifying the earlier order passed by Commissioner of Income Tax. The Supreme Court also held that the decision on a debatable point of law cannot be treated as "mistake apparent from the record" for the purpose of exercising the power of rectification.

*Mepco Industries Ltd., Madurai vs. Commissioner of Income Tax & Another (2010) 56 S.T.A. P. 161.*

### Refund

The West Bengal Taxation Tribunal held that even when the proceedings were pending before the Tribunal, the refund due to the assessee, cannot be withheld. The Tribunal therefore directed the refund to assessee within a specified time.

*Usha Corporation Ltd vs. S.T.O. Park Street Charge & Ors (2010) 56 S.T.A. P. 181.*

### Sale in the course of export

The Madras High Court after considering the provision of Tamil Nadu General Sales Tax Act and the Central Sales Tax Act held that section 3(4) of the CST Act, had no application in the case of the export sale simply because the situs was the State of Tamilnadu. In view of the above position, the High Court held that no tax can be levied on the basis of provisions of Local Act.

*Tube Investments of India Ltd. vs. The State of Tamil Nadu 2010-11 (16) TNCTJ Page 81*

### Sale

The Delhi High Court held that providing foods & beverages to the passengers while travelling in the train, was a transaction of sale of goods and not a composite contract involving supply of goods as well as providing services as defined u/s. 65(105)(zzt) of Finance Act, 1994 for Service Tax.

*Indian Railways Catering & Tourism Corporation Limited vs. Government of NCT of Delhi & Ors. 2010 NTN (Vol. 44) - 184.*

### Sale price

Before the Karnataka Appellate Tribunal the assessee was an hotel undertaking services to customers for organising social functions in the Banquet Hall of the Hotel wherein he supplied foods and beverages for an agreed consideration. The assessee also charged 10% service charge on the value of foods and beverages. The Tribunal held that such service charge was neither expenditure prior to sale nor expenditure prior to rendering of services prior to sale therefore such an amount though charged in the invoice separately, cannot be subject matter of taxation under the VAT Act especially when service tax was levied on it as per the provisions of Finance Act, 1994.

*Hotel Leela Venture Limited, Bengaluru vs. State of Karnataka 2010 (69) Kar. L.J. 453 (Tri.) (DB)*

### Turnover

The Uttarakhand High Court after considering the provisions of sec.2(ii) of the U.P. Trade Tax Act as applicable in Uttarakhand State held that the freight and Trade Tax charged separately in the sale bills did not form part of the turnover.

*Sanjay Agarwal vs. The Commissioner of Trade Tax, Uttarakhand 2010 NTN (Vol. 44) - 163.*

### Unjust enrichment – Forfeiture

The question about refund of the tax or the liability to pay tax arose before the Supreme Court under the provisions of Haryana Rice Procurement Levy Order, 1985. The assessee had collected purchase tax on paddy from the Government along with the procurement price of levy fixed under the levy order. The assessee however, was entitled to have exemption from both sales tax as well as purchase tax under the provisions of Haryana VAT Tax Act, 2003 for a period of 7 years. In the course of assessment under the Sales Tax law, though no purchase tax was levied, it was observed that the price being inclusive of purchase tax, have to be deposited in the Government Treasury though authorities did not decide the statutory liability of payment of purchase tax in view of the exemption, the assessee was directed to pay up the amount collected while effecting the purchases from Government as part of the purchase price.

*M/s. Jay Vee Rice & General Mills vs. State of Haryana & Ors. JT 2010 (10) SC 559.*

### Work Contract – Sale – Rolling shutters

The Kerala High Court followed the Judgment of the Supreme Court in the case of Kone Elevators and held that the contract providing for fabrication and installation of rolling shutters was in the nature of pure and simple sale of goods; and not of works contract.

*Ernakulam District Rolling Shutter Fabricators Association vs. Commissioner, Department of Commercial Taxes (2010) 18 KTR 425 (Ker).*

*Editor's Note :* The earlier direct Judgments in the case of *M/s. Vanguard Rolling Shutters and Steel Works (39 STC 372 S.C.)* and *M/s. Sentinel Rolling Shutters & Engg. Co. Pvt. Ltd (42 STC 409 S.C.)* seems to have not been referred to.



## Announcement

All India Federation of Tax Practitioners (WZ) jointly with Jalgaon District Tax Practitioners Association and The Sales Tax Practitioners Association of Maharashtra will be organising a Full Day Conference on Direct and Indirect Taxes on Saturday, 15th January, 2011 at Jalgaon. The detailed programme will be hosted at aiftp's website, i.e. **www.aiftponline.org** and also will be published in next issue of AIFTP Journal and AIFTP Times.



**HIGH COURT SUMMONS – REVENUE SECRETARY AND CHAIRMAN, CBDT**

S R Wadhwa, Advocate, Chairman, AIFTP's Direct Taxes Representation Committee

The Hon'ble Delhi High Court vide its order dated 11-11-2010 in a Department's appeal in the case of *CIT vs. Preeti N. Aggarwala [ITA No. 456/2007]* summoned the Secretary Revenue of the Ministry of Finance of the Central Government, New Delhi as well as the Chairman, CBDT to appear before it on 1st December, 2010 expressing anguish at the "repeated oral instructions given to the Department from time to time to set its house in order" having "fallen into deaf ears".

The matter concerned inordinate delay in filing the departmental appeal and question of its condonation. The appeal was filed in January, 2007 against the order of the Tribunal of December, 2001 i.e. after more than 5 years. The Department's case was that it received the impugned order only in September, 2006 and on that basis, the appeal was within the limitation period.

The respondent assessee obtained information from the Tribunal under the Right to Information Act, 2005 according to which the attested copy of the order was first sent to the Department in January, 2002 but was not received. It was sent again more than once but was not received every time though from the bunch of orders sent, a few were received and the remaining returned. It was only in September, 2006 that the Department received the copy of the order. Apart from the delay, the High Court also expressed its displeasure for the fact that most of the Department's appeals filed before it are incomplete and the defects have to be removed by needless correspondence between the Registry of the High Court and the Department.

The respondent assessee urged the High Court to hold the appeal as barred by time. The date of refusal to receive the order in January'2002 should be taken as the date of its service and since there was a delay of about 5 years, it should not be condoned and the appeal should be dismissed.

Let us hope the High Court will hold the scales of justice even. If the date of refusal to receive the order is taken as the date of its service it needs to be so held both for the taxpayer and the Income-tax Department. Besides, it is a good use of the Right to Information Act, 2005 to bring about accountability in the functioning of the Government.



*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 Posting : 3rd & 4th December, 2010**

*If undelivered, please return to :*



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