



All India Federation of Tax Practitioners

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AIFTPTIMES

Volume I - No. 10 • October, 2010

FEDERATION NEWS

J. K. Ranka, Secretary General

| FORTHCOMING PROGRAMMES | |
|-------------------------------|--|
| Date & Month | Programme |
| 7th, 8th & 9th October, 2010 | Nani Palkhivala Memorial National Tax Moot Court Competition at Mumbai |
| 25th & 26th November, 2010 | AOTCA Two days Conference at Sydney, Australia |
| 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 |

Proforma for Members' Directory

The members are requested to check Proforma for Members' Directory which has been published in our AIFTP Times for the month of July & August, 2010 at page No. 11 of both the issues or are requested to download the same from Federation's website i.e., **www.aiftponline.org**.

FOR QUERIES PLEASE CONTACT ANY OF THE FOLLOWING OFFICE BEARERS

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

Theme:

VISION 2020 – CHALLENGES FOR TAX PROFESSIONALS

Conference Secretariat

M.D. Sodani

Conference Chairman

S.N. Ramnani

Co-Chairman Conference

Hitesh Mehta

Conference Secretary

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

Phone:- 0731 – 2436896 / Mob. 09425093888,

0731 – 2541341 / Mob. 09425075654

0731 – 2539051 / Mob. 09301974013

Email: nationaltaxconference2010@gmail.com

murlidharsodani@gmail.com

hitesh_mehta_ca@yahoo.com

snramnani@gmail.com

SUBSCRIPTION RATES UP TO 31-3-2011

| | | | | | |
|----|--|---------------------------|-----------------------------|------------------------------|----------------------|
| 1. | Life Membership of the AIFTP | | | | Rs. 2,500/- |
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Note: Members may download the membership form from the website of AIFTP., i.e., www.aiftponline.org

7th NANI PALKHIVALA MEMORIAL NATIONAL TAX MOOT COURT COMPETITION

Organised by



ALL INDIA FEDERATION OF TAX PRACTITIONERS

jointly with



**INCOME TAX APPELLATE
TRIBUNAL BAR ASSOCIATION,
MUMBAI** in
association
with



**GOVERNMENT LAW COLLEGE,
MUMBAI**

The National Tax Moot Court Competition is scheduled to be held on 7th, 8th & 9th October, 2010. The venue for the above Moot Court Competition is as under:-

- Inauguration at Government Law College on 7th October, 2010 by Judge of Bombay High Court from 5.30 p.m. onwards.
- Preliminary Rounds on 8th October, 2010 at ITAT, Mumbai (Competition will be judged by the Members of ITAT, Mumbai and Professionals)
- Semi-finals on 9th October, 2010 at ITAT, Mumbai (Competition will be judged by the Members of ITAT, Mumbai)
- Final on 9th October, 2010 at Rangaswar Hall, 4th Floor, Y. B. Chavan Pratishthan, Mumbai (Competition will be judged by the Judges of Bombay High Court) from 6.00 p.m. onwards.

Expected colleges across India are around 25.

Research Paper

The topic for this year's Research Paper is:

'Cross-border business reorganization - The Indian Perspective'

- Comparative Study
- Regulatory framework
- Legal structuring
- Reference to Proposed Direct Tax Code
- Tax implications (Direct Tax)

Students may refer to the following Publications as guidelines for the Research Paper:

- International Fiscal Association - Cahier 2010
- Mergers and Acquisitions by Bombay Chartered Accountants Society
- CCH India/Butterworths publications
- Income-tax Act, 1961

Invitation has been sent to around 120 Law Colleges across India

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 -
Three fourth page (in four colour) Rs. 3,500/-

J. K. RANKA
Secretary General

Membership of AIFTP as on 20-9-2010

Life Members

| | Associate | Individual | Association | Corporate | Total |
|--------------|-----------|-------------|-------------|-----------|-------------|
| Central | 1 | 686 | 21 | 2 | 710 |
| Eastern | — | 853 | 33 | 0 | 886 |
| Northern | — | 797 | 17 | 0 | 814 |
| Southern | — | 723 | 13 | 3 | 739 |
| Western | 3 | 1535 | 32 | 14 | 1584 |
| Total | 4 | 4594 | 116 | 19 | 4733 |

DIRECT TAXES

Ajay R. Singh, Paras Savla, Rahul Hakani & Rangesh Banka
Advocates

Supreme Court

1. Computation of book profits u/s. 115JB – Deduction u/s. 80HHC

S. 115JB is a self-contained Code and taxes deemed income. S. 115JB begins with a non-obstante clause and requires *vide* clause (iv) for the “eligible” profits derived from exports to be excluded from the “book profits”. S. 80HHC operates in a different sphere. S. 80HHC(1B) is concerned with the “extent of deduction”.

If an assessee earns Rs. 100 crores then while for A.Y. 2001-02, the extent of deduction is 80% thereof, for purposes of computation of book profits, 100% of the profits are “eligible profits” and cannot be reduced to 80% by relying on s. 80HHC(1B). The idea is to exclude “export profits” from computation of book profits under s. 115JB which imposes MAT on deemed income;

Ajanta Pharma vs. CIT

Source : www.itatonline.org

2. Depreciation – BSE Card – S. 32(1)(ii)

On the analysis of the Rules of BSE, it is clear that the right of membership allows the non-defaulting member to participate in the trading session on the floor of the Exchange. Thus, the said membership right is a “business or commercial right” conferred by the Rules of BSE on the non-defaulting continuing member. Under Rule 5 of the BSE Rules, membership is a personal permission from the Exchange which is nothing but a “licence” which enables the member to exercise rights and privileges attached thereto. It is this licence which enables the member to trade on the floor of the Exchange and to participate in the trading session on the floor of the Exchange. It is this licence which enables the member to access the market. Therefore, the right of membership, which includes right of nomination, is a “licence” or “akin to a licence” which is one of the items which falls in s. 32(1)(ii). The right to participate in the market has an economic and money value. It is an expense incurred by the assessee which satisfies the test of being a “licence” or “any other business or commercial right of similar nature” in terms of s. 32(1)(ii).

Techno Shares & Stocks vs. CIT

Source : www.itatonline.org

HIGH COURT

3. Power of CBDT to condone delay – S. 119(2)(b)

The assessee a multi state co-operative bank was required to get its audit done by statutory auditor appointed by Commissioner of Corporation and the Registrar Co-operative Societies. Since the statutory auditor were able to complete the audit after due date of filing the return of income, a belated return of income was filed. An application u/s 119(2)(b) was made for condonation of delay to the CBDT which was rejected.

On Writ Petition filed before the High Court the same was allowed holding that the delay in carrying out the audit was not attributable to the assessee. Therefore the delay was condoned and the carry forward of losses was allowed.

M/s Bombay Mercantile Co-op. Bank Ltd. vs. CBDT & Ors. Writ Petition No. 1544 of 2010 dt. 20-9-2010

TRIBUNALS

4. Revision – Non-application of mind (32(1)(ii)) – S. 263

S. 263 Revision only on ground of non-application of mind by AO not proper. Licenses and Approvals are “intangible asset” u/s. 32(1)(ii) and eligible for depreciation.

Piem Hotels vs. DCIT (ITAT Mumbai) (www.itatonline.org)

5. Depreciation – Routers and switches – Computers – S. 32

‘Router’ and ‘Switches’ can be classified as a computer hardware when they are used along with a computer and when their functions are integrated with a computer.

DCIT vs. Datacraft India Ltd. (2010) 40 SOT 295 (Mum.) (SB)

6. Deductions – Close connection – Profits – S. 80-IA

Provisions of section 80-IA(10) can be invoked only when there is a close connection between assessee carrying on eligible business and any other person and, course of business between them is so arranged

that business transacted between them produces more than ordinary profits to assessee.

Reliance Energy Ltd. vs. DCIT (2010) 40 SOT 314 (Mum.)

7. Business expenditure – Business activity – Foreign Travelling Expenditure – S. 37(1)

Merely because there was no business activity of assessee in foreign countries during assessment year in question, it could not be said that claim of assessee for foreign travelling expenses had to be disallowed and order of Assessing Officer allowing said expenditure was erroneous.

Scindia Investments (P.) Ltd. vs. ACIT (2010) 40 SOT 239 (Mum.)

8. Double Taxation Avoidance Agreement – India & China – Services – S. 9

It is no longer necessary that in order to attract taxability under section 9(1)(vii), services must also be rendered in India; utilisation of these services in India is enough to attract its taxability in India.

Ashapura Minichem Ltd. vs. ADIT (2010) 40 SOT 220 (Mum.)

AOTCA MEETING AT SYDNEY, AUSTRALIA

Two Days International Tax Conference will be held on 25th & 26th November, 2010 at Amora Hotel, Jamison, Sydney, Australia.

Those who desire to participate may contact Federation's office.

J. K. RANKA
Secretary General, AIFTP

Congratulations



The Ministry of Finance, Government of India appointed **CA Anup Prakash Garg**, Indore as Member of the Board of Life Insurance Corporation of India. Shri Garg is the first person in the State of Madhya Pradesh to honour this position. He served earlier as Director on the Board of Canara Bank and Andhra Bank. Shri Garg is practising Chartered Accountant in the field of Project Financing, Audit, Income Tax and Commercial Tax since 1983 and life member of AIFTP.

Hearty Congratulations to the newly elected officer bearers of The Malad Chamber of Tax Consultants for the year 2010-2011.

President : Ashwin R. Tanna
Vice President : Brijesh M. Cholera
Treasurer : Sanjay H. Mehta
Secretaries : Sachin Gandhi & Vishal Shah

Hearty Congratulations to Ms. Gouri Gopalkrishna Chandnani, member of AIFTP has been elected as Member of Regional Direct Tax Advisory Committee (RDTAC), Ahmedabad re-constituted by Central Board of Direct Taxes, New Delhi.

We wish her all the success.

INTERNATIONAL TAXATION

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

SUPREME COURT

1. Sum chargeable to tax – Income-tax Act, 1961 – S. 195

The Supreme Court had held as under:

- i. S. 195(1) uses the expression “sum chargeable under the provisions of the Act”, which means that a person paying interest or any other sum to a non-resident is not liable to deduct tax if such sum is not chargeable to tax.
- ii. Further, section 195 uses the word ‘payer’ and not the word “assessee”. The payer is not an assessee. The payer becomes an assessee-in-default only when he fails to fulfil the statutory obligation under section 195(1). If the payment does not contain the element of income the payer cannot be made liable.
- iii. Section 195(2) is based on the “principle of proportionality”. The said sub-section gets attracted only in cases where the payment made is a composite payment in which a certain proportion of payment has an element of “income” chargeable to tax in India.
- iv. The Karnataka High Court had completely lost sight of the plain words of section 195(1).
- v. Matter remanded to High Court.

GE India Technology Private Ltd. vs. CIT [2010-TII-07-SC-Intl] Source : www.itatonline.org.

HIGH COURT

2. Transfer of shares – Territorial nexus – Income-tax Act, 1961 – S. 195(1) r.w. 201

The High Court dismissing the writ petition filed by the assessee held that:

- i. The commercial and business understanding between the parties postulated that what was being transferred from one non-resident to the other was the controlling interest in Hutchison Essar, an Indian company.
- ii. The object and intent of the parties was to achieve the transfer of control over the Indian company and the transfer of the solitary share of the Cayman Islands company was put into place as a mode of effectuating the goal.
- iii. Moreover, as the consideration was paid for acquisition of a panoply of entitlements including a control premium, use and rights to the Hutch brand in India, non-compete agreement with the Hutch group, etc., it will have to be apportioned

by the AO to determine which portion has a nexus within the Indian taxing jurisdiction and which lies outside.

- iv. Lastly, since the transaction between the assessee and Hutchison Telecommunications had sufficient nexus with Indian fiscal jurisdiction, the AO did have jurisdiction to initiate proceedings under section 201, against the assessee for failure to deduct tax at source under section 195(1).

Vodafone International Holdings B.V. vs. UOI [2010-TII-13-HC-Mum-Intl]

TRIBUNAL

3. Arm's Length Price – Income-tax Act, 1961 – S. 92(1)

The Tribunal held that as per section 92(1), the arm's length price in relation to international transaction is to be determined by any of the most appropriate methods prescribed therein. When the nature of transaction is such that the arm's length price can be determined by applying only one of the most appropriate methods then it need not to be determined by applying 2 or more methods. In such a situation even the price determined by applying only one of the most appropriate methods will become the arithmetical mean price. Further, as the difference between the arm's length price determined by the assessee and by the Assessing Officer, are not varying more than 5 per cent, no further adjustments are desirable.

Electrobug Technologies Ltd. vs. ACIT [2010-TII-39-ITAT-Del-TP]

4. Law applicable – DTAA between India and Austria

The Tribunal held that on perusal of the DTAA entered into between India and Austria clearly showed that the DTAA entered into between India and Austria on 5-9-2001 would be applicable in respect of the assessment year 2003-04. The DTAA entered into between India and Austria in April, 1965 would be the DTAA which is applicable till the assessment year 2003-04. The assessment year in appeal before us is the assessment year 2002-03. Also, Article 7 of the DTAA entered into between India and Austria relevant to the assessment year 2002-03 clearly held that the income of the Austrian enterprise is not taxable in India in view of the fact that no portion of the activities were performed by Austrian enterprise in India. Hence provisions of s. 195 are not applicable and no disallowance can be made u/s. 40(a)(i).

VA Tech Wabag Ltd. vs. ACIT [2010-TII-109-ITAT-Mad-Intl]

INDIRECT TAXES

SALES TAX DECISIONS

P. C. JOSHI, Advocate

Branch Transfer u/s 6A of CST Act

The Madras High Court held that the claim of movement of goods to be otherwise than on account of interstate sales, cannot be disallowed solely due to the default of the assessee's inability to produce the declaration in Form 'F'. The transferee branch concerned could not forward the declaration in question because of non-availability of the stock of the declarations with the sales tax authorities concerned at that end.

2010-11 (16) TNCTJ Page 45 Esjyapee Impex P. Ltd. vs. The Commercial Tax Officer, Sowcarpet-1, Ass. Circle, Chennai.

Doctrine of unjust enrichment

The Kerala High Court applied Doctrine of unjust enrichment for approving the rejection of the claim of refund on the basis of the later revised Return showing the gross amount as the consideration inclusive of the amount of taxes that was shown in the earlier original Return to have been collected separately; in addition to the cost of goods sold. The Court therefore approved the rejection of the refund claimed, holding the submission of the revised return to be that of an afterthought so as to enrich oneself in an unjust manner.

(2010) NTN (Vol.) 43 - 347 M/s. Electronics & Controls Power Systems Pvt. Ltd., vs. State of Karnataka

Entries in Schedule

a) Paints and enamels, dyes for leather Industry

The Madras High Court while disposing of several tax cases held that the dyes, colours sold for the purpose of using it on leather; were not pigment and therefore was squarely covered by Entry 49 of Part 'C' and not 16(iii) of Part 'E' of the First Schedule during the periods 1993-94 and 1994-95 for the aforesaid purpose the Hon'ble Court, not only referred to dictionary meanings of word "dyes" and "pigments", also referred to the judgment of the Supreme Court in the case of A.V. Fernandes and Other similar cases as well as the principle that the general entry should yield to a specific entry.

2010-11 (16) TNCTJ Page 51 M/s Solvents Trading Co. vs. State of Tamil Nadu.

b) Electronics equipment

The Madras High Court after considering the language used in entry 33 of Part D of the First Schedule

and Entry 44 of Part B of the said schedule as it prevailed during the relevant period, held that the desktop projector was covered by the category of an electronically operated equipment and not by the category of cinematographic equipment.

2010-11 (16) TNCTJ Page 68 State of Tamil Nadu vs. M/s. Hansa Cine Equipment Pr. Ltd.

c) Declared Goods – Elastic rail clips

The Allahabad High Court held that the elastic rail clips were in the nature of "forging" specified u/ss. 14(iv & viii) in the category of discs, rings, forgings and steel castings. For the aforesaid purpose the Allahabad High Court followed the Supreme Court judgment in the case of *Vee Kay Industries vs. Collector, Central Excise, New Delhi 1997 ELT Vol. 94-95.*

(2010) NTN (Vol. 43) - 321 R.R. Industries vs. State of U.P. & Others

Effect of repeal – Repealed Act amendment

The Punjab and Haryana High Court held that after the repeal of the earlier Punjab General Sales Tax Act, 1948 by the new Punjab VAT Act, 2005 with effect from 1st April, 2005 the repealed Act cannot be amended thereafter on the basis of Saving clause so as to extend the period of limitation provided under the repealed Act. Consequently it was held that revenue cannot reopen the time barred assessment on the basis of later amendment to the statute extending time of assessment.

(2010) 36 PHT 435 (P&H) Rattan Coach Builders vs. State of Punjab & Another.

Purchase tax on sugarcane

The Punjab and Haryana High Court confirmed the levy of purchase tax on sugarcane as agricultural food u/s 4(1) of the Punjab General Sales Tax Act, 2010.

(2010) 36 PHT 443 (P&H) Indian Sucrose Ltd. vs. State of Punjab & Others

Revision – Limitation

The Haryana Tax Tribunal, Chandigarh held that the action of revision initiated after the repeal of the Haryana General Sales Tax Act by the new Haryana VAT Act, 2003, was barred by the limitation in view of the fact that the new enactment did not save the power of revision. In that regard the Tribunal also observed that there cannot be any waiver where



the action was outside the period of limitation. The revision was quashed.

(2010) 36 PHT 474 H.M. Mehra & Co. G.T. Road, Kundli Sonapat vs. State of Haryana.

Recovery

Before the Kerala High Court, were partners of a defaulting firm against whom recovery process were initiated but sought the protection under section 32 of insolvency Act, from arrest and detention. The Court observed that the tax collected by the assessee was due to be paid to the Government and upon his failure to pay the tax he can be proceeded against under the provisions of the concerned Sales Tax Act including penal action. Such Sales Tax dues were 'State debt' dues as understood in the definition of the term "debt" under the Insolvency Act. The Court held that the proceedings under the Insolvency Act was maintainable at the instance of the individuals concerned against whom the recovery proceedings were initiated. It was also held that in insolvency proceedings the assessment of tax dues under the provision of the Sales Tax Act cannot be modified or quashed.

(2010) 18 KTR 320 (Ker.) Shahabudeen P.A. & Rahim P.A. vs. District Collector, Ernakulam, Kochi & Others

Sale

Following the judgment of the Supreme Court in the case of *Builders Association of India 73 STC 370 (SC)*, the Allahabad High Court held that the value of the goods used in the execution of a works contract was deemed sale.

(2010) 36 PHT 465 Triveni Structural Ltd. vs. Commissioner of Trade Tax, U.P. Lucknow

The scope of determination proceedings

After considering the provisions of sec. 57 read with ss.25 & 26 of the Uttarakhand VAT Act, the Uttarakhand High Court held that the dispute about the rate of tax having already been adjudicated upon in the assessment proceedings; cannot be raised by invoking the provisions of determination provided under the said Act.

2010 NTN (Vol. 43) – 351 Doon Valley Brewers Ltd. vs. Commissioner of Commercial Tax, Uttarakhand.

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

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

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215, Rewa Chambers, 31, New Marine Lines, Mumbai 400 020. • Tel.: 22006342
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