



All India Federation of Tax Practitioners

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(For Members only)

AIFTP TIMES

Volume 4 - No. 9 | September, 2013

FORTHCOMING PROGRAMMES		
Date & Month	Programme	Place
6, 7, 8-9-2013	One Day seminar along with backwater trip at House Boat	Kochi
20-9-2013	Annual General Meeting	Mumbai
3, 4, 5-10-2013	10th Nani Palkhivala National Tax Moot Court Competition	Mumbai
26, 27-10-2013	Two Days Tax Conference	Baroda
8-11-2013	National Executive Meeting	Rishikesh
9, 10-11-2013	National Tax Conference	Rishikesh
25, 26, 27-12-2013	17th National Convention	Mumbai

ONE DAY NATIONAL TAX CONFERENCE

Organised by

ALL INDIA FEDERATION OF TAX PRACTITIONERS (SZ)

Jointly with

INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA – ERNAKULAM BRANCH

on 6th September 2013
at Hotel Emerald, Major Road,
Vytila, Kochi, Kerala

Theme : Professional Excellence for Better Service to Society

In spite of the slowdown in world economy, Indian economy is keeping its growth momentum. This is due to the traditional and inherent strength we have on economic front and our potential cannot be contained. For this our guardians are observing with keen interest the developments which are happening, studying and analysing it to find out the impact in our economy. Required rectification measures are also undertaken. A lot of things are happening in India and abroad which have an impact in our society and our country. We being professionals who are partners in growth of our country have a responsibility to observe the changes and keep pace with the same and also implement those changes for the wellbeing of the society and the country as a whole. This seminar has been organised with a view to enable the members to update their knowledge in the subjects and to excel in the profession and thereby to improve the quality of their service to the society.

FOR QUERIES PLEASE CONTACT ANY OF THE FOLLOWING OFFICE BEARERS

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PROGRAMME

08.30 to 09.30 am : Registration and Breakfast
09.30 to 11.00 am : Inauguration
11.00 to 11.15 am : Tea Break

Technical Sessions

Topic	Timing	Speaker	Chairman
International Transfer Pricing – Current Issues	11.15 to 12.45 pm	CA P. V. S. S. Prasad (Former Chairman AIFTP–SZ)	Adv. S. R. Wadhwa (Former Chairman – Settlement Commission)
LUNCH BREAK – 12.45 to 01.30 pm			
Taxation of Charitable Institutions	01.30 to 03.00 pm	Dr. Anitha Sumanth (Vice Chairperson AIFTP–Tamil Nadu)	Adv. N. P. Jain (Secretary General – AIFTP)
TEA BREAK – 03.00 to 03.15 pm			
Service Tax – CENVAT Credit Rules & Reverse Charge Mechanism	03.15 to 04.45 pm	Adv. Raghuraman FCA, ACS, Grad CWA, LLB	Adv. Mukul Gupta (Former Secretary General – AIFTP)

Delegate Fee : ₹ 900/-

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Non-Receipt of AIFTP Journal and AIFTP Times

AIFTP Journal is posted to all AIFTP Journal subscribers on 23rd of every month.

If the subscriber does not receive the AIFTP Journal on or before 30th of the month please send an e-mail or written intimation to the office of the All India Federation of Tax Practitioners to enable the office to take corrective action.

AIFTP Times is posted on 4th of the month to all members.

If the member does not receive the AIFTP Times on or before 10th of the month please send an e-mail or written intimation to the office of the All India Federation of Tax Practitioners to enable the office to take corrective action. The AIFTP Times can also be downloaded from the website of AIFTP i.e. www.aiftponline.org

Mitesh Kotecha
Chairman, Journal Committee

**ADVERTISEMENT TARIFF
FOR AIFTP JOURNAL
(W.e.f. 15th July, 2013)**

Particulars	Per Insertion
1. Quarter page	₹ 1,500/-
2. Ordinary half page	₹ 2,500/-
3. Ordinary full page	₹ 5,000/-
4. Third cover page	₹ 7,500/-
5. Fourth cover page	₹ 10,000/-

There shall be Discounts on bulk advertisements.

**Membership of AIFTP
as on 27-8-2013**

Life Members

	Associate	Individual	Association	Corporate	Total
Central	0	777	23	3	803
Eastern	3	1112	35	3	1153
Northern	0	907	17	0	924
Southern	1	856	13	5	875
Western	4	1663	33	15	1715
Total	8	5315	121	26	5470

NOTICE OF ANNUAL GENERAL MEETING

Notice is hereby given that the Annual General Meeting of the All India Federation of Tax Practitioners will be held on Friday, the 20th September, 2013 at 6.00 p.m. at 215, Rewa Chambers, 31, New Marine Lines, Mumbai – 400 020 to transact the following business:

A G E N D A

1. To read and approve the minutes of last Annual General Meeting and Adjourned Annual General Meeting held on 14th September, 2012 & 21st September, 2012 respectively at Mumbai.
2. To receive and adopt the Annual Report of the National Executive Committee of AIFTP for the year 2013.
3. To consider and adopt the Audited Accounts of AIFTP for the year ended 31st March, 2013.
4. To appoint Auditors for the year 2013-14 and to fix their honorarium.
5. To transact any other business with the permission of the Chair.

Place: Mumbai
Date: August 3, 2013

Narayan P. Jain
Secretary General

Note:

1. The Annual Report and the Audited Profit and Loss Account and Balance Sheet will be circulated to the National Executive Committee Members by e-mail.
2. Accounts for the year ended 31st March, 2013 and the report of the National Executive Committee can be collected from the office of the Federation from 15th September, 2013 onwards between 11.30 a.m. and 5.00 p.m. The accounts and reports can be made available to the members through e-mail on request to the office.
3. If there is no quorum by 5.00 p.m. to 6.00 p.m., the meeting will be adjourned by half an hour and the members present at such adjourned meeting shall form the quorum.

Hearty Congratulations

Hearty Congratulations for the newly elected office bearers of the **Tax Consultants Association, Jaipur** for the period 2013-14.

President : Adv. Siddharth Ranka
Vice Presidents : CA. Abhishek Sharma & Adv. Sandeep Agrawal
Hon. Jt. Secretaries : CA. Avinash Khandelwal & CA. Manish Jain
Hon. Treasurer : Adv. Shrawan Kumar Gupta

We wish them all the success.

DIRECT TAXES

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

SUPREME COURT

Writ jurisdiction – Existence of alternative remedy: Article 226 of Constitution of India

Petitions under writ jurisdiction cannot be entertained by High Court when an alternative remedy is available, unless an exceptional case warranting such interference is made out by assessee. Since the assessee had not described the available alternate remedy as ineffectual and non-efficacious while invoking writ jurisdiction, the writ petition ought not to have been entertained, and assessee was required to file appeal before Commissioner (Appeals). (A.Ys. 1995-96, 1996-97)

CIT v. Chhabil Dass Agarwal [2013] 36 taxmann.com 36 (SC)

HIGH COURTS

S.271(1)(c) : Penalty Disclosure – Onus on assessee

In matters of levying penalty, "bona fides" have to be shown and cannot be assumed. The fact that the claim for deduction under section 80IA was duly supported by the CA Certificate and prescribed forms signed by the CA cannot absolve and protect an assessee who furnishes inaccurate particulars. Merely because the assessee complies with the statutory procedural requirement of filing the prescribed form and certificate of the Chartered Accountant cannot absolve the assessee of its liability if the act or attempt in claiming the deduction was not *bona fide*. On facts, the assessee's claim was not tenable due to the Explanation to Section 80IA(13) which stipulates that benefit is not available to a contractor and the assessee had not shown any tangible material or basis as to why this clear statutory provision was ignored. (A.Y. 2007-08)

CIT v. HCIL Kalindee ARSSPL, ITA 480/2012 dated 29-7-2013 (Source: www.itatonline.org)

S.139A(5B) r.w.s. 223B(1) : Penalty – Reasonable cause – Not mentioning of PAN

Default by contractor-payees in furnishing their PANs to the assessee-deductor as per the requirements of section 139A(5A) is "sufficient cause" within the meaning of section 273B for deductor's contravention of section 139A(5B) i.e. failing to mention PANs of payee-contractors on their TDS certificates in Form 16A. If payee

doesn't furnish his PAN to deductor as required by section 139A(5A), deductor can't be penalised under section 139A(5B) read with section 223B(1) for not mentioning payee's PAN in TDS certificate issued to payee in Form 16A. (A.Y. 2003-04)

CIT v. Gail (India) Limited [2013] 36 taxmann.com 336 (All.) (HC)

TRIBUNALS

S. 92A : Transfer Pricing – Law on adjustment for notional interest on interest-free loan & excess credit period to AE explained

The assessee advanced an interest-free loan to its wholly owned subsidiary called Micro USA. It claimed that the said loan was in the form of equity capital and was advanced to meet the business needs of the subsidiary and that no interest was required to be computed thereon. The assessee also extended credit of 165 days to the said subsidiary in respect of the goods supplied by it which it claimed to be in the normal course of business. The TPO held that the assessee ought to have charged interest on the loans advanced by it and that the credit period should not have exceeded 120 days. He computed notional interest at the rate of 11% on the loan and excess credit period and made an adjustment. The CIT(A) upheld the adjustment in principle though he reduced the interest to LIBOR. On cross appeals, HELD by the Tribunal:

The question which really needs to be adjudicated is whether, in the context of section 92A, but for the management, capital or control being in the same hands, the AE would have entered into the transaction on the same terms. In other words, whether there is such a commercial justification for the values at which transactions have been entered or not, so as not to attract the adjustment in the arm's length price, has to essentially depend on factors other than the factors regarding management, capital or control. In still other words, merely because the entity receiving interest free funds is a subsidiary wholly owned by the assessee cannot be reason enough to justify such loans or advances being interest free and not warranting an arm's length price adjustment, so far as transfer pricing provisions are concerned.

Micro Inks Ltd v. ACIT (ITAT Ahmedabad) (www.itatonline.org)

S. 14A r.w. Rule 8D : Interest expenditure has to be netted against interest income and only the difference, if any, can be considered for disallowance:

No nexus has been established by the AO between the expenditure incurred by the assessee and the tax free income earned by him. Further, as the interest income was more than interest expense and the assessee was having net positive interest income, the interest expenditure cannot be considered for disallowance under section 14A and Rule 8D.

ITO v. Karnavati Petrochem Pvt. Ltd. (ITAT Ahmedabad) (www.itatonline.org)

S. 195 : Deduction at source – Certificate from AO – Nil TDS certificate

Section 195(2) presupposes that the person responsible for making the payment to a non-resident is in no doubt that tax is payable in respect of the some part of the amount to be remitted to a non-resident, but is not sure as to what should be portion so taxable or is not sure as to the amount of tax to be deducted. Consequently, in an application made under section 195(2), the AO cannot assume jurisdiction to hold that the entire payment is not chargeable to tax and the payer need not deduct tax at source. As the AO had no power under section 195(2) to hold that no tax is deductible at source, the order passed by him holding that no tax is deductible at source on the technology transfers is non est in law. (A.Y. 2004-05, 2005-06, 2006-07 & 2007-08)

BIOCON Biopharmaceuticals v. ITO (ITAT Bengaluru) (www.itatonline.org)

INDIRECT TAXES

P. C. Joshi Advocate

I. Double Taxation

The Allahabad High Court held that the levy of tax under the U.P. Trade Tax Act, and the levy of Purchase Tax under the special enactment for molasses, cannot be sustained. The High Court also noted that a Special Leave Petition was pending before the apex court therefore the department was directed not to realise any tax on molasses.

Gogras Indian Feeds Thr. its Prop. Sunil Kumar Tewari v. State of U.P. 2013 NTN (Vol. 52) 157

2. Entry Tax – Dealer

Some of the States under their legislation, have provided for appeal or revision before the High Court by either parties for the controversy affecting them adversely decided by the Tribunal. The question about the scope of the power of the High Court while hearing such matters arose before the Patna High Court vis-a-vis the provisions of Bihar Entry Tax Act. The definition of the term 'dealer' as it prevailed under the Sales Tax Laws was incorporated in the Entry Tax Act. The court held that when the definition in an earlier Act was adopted in a later Act by incorporation; the meaning thereof had to be treated as bodily lifted from the earlier Act so as to make it part and parcel of the later Act, unaffected by any subsequent amendment or repeal. In view of the legal position it was held

that the East Central Railway was a dealer under the Entry Tax Act.

Union of India through General Manager East Central Railway v. The State of Bihar Ors. 2013 NTN (Vol. 52) – 189

3. Entries to Schedule

i) Crystal Glassware

The Madhya Pradesh High Court held that where the entire process right from melting to finishing was done manually and cutting and polishing was done by hand operated machine the product can be regarded as handmade product. For the aforesaid purpose, the judgment of the apex court in the case of *M/s. Padmini Products v. Collector of Central Excise (1989) 43 ELT 195 (SC)* was relied on. The ratio of that judgment was that when the goods were produced partly by machine and partly by hand, it should be treated as handmade if the essential character of the product in its finished form was derived from the 'handmade' aspect of production.

Diamond Crystal Pvt Ltd. v. State of M.P. & Ors. (2013) 23 STJ 64 (MP)

ii) Ice-cream

The Allahabad High Court held that the Entry No.81 of Schedule II, Part A relating to milk food,

milk product etc., was wide enough to take in its scope, ice cream. For the said purpose the court referred to its earlier judgment in the case of Indodan Milk Products (48 STC 197).

Commissioner, Commercial Tax v. Mother Dairy Fruit & Vegetable Pvt Ltd. (2013) NTN (Vol. 52) 275

iii) **Ujala Supreme**

The Kerala High Court held that the a laundry brightener was not the same as acid violet paste - an Industrial raw material; used in the manufacture of new different commercial commodity having distinct identity and sold under the name 'Ujala Supreme' therefore the rate of tax would be under the residuary entry 103 under Kerala VAT Act.

State of Kerala v. Jyothi Laboratories Ltd. (2013) 21 KTR 366 (Ker.)

4. **F form for more than one month**

The Calcutta High Court held that the disallowance of an F form on the ground that it covered transactions for more than one month was not correct. According to the High Court, the proviso to Rule 12(5) of CST (R&T) Rules nowhere provided for treating a declaration to be vitiated only because it covered transactions for more than one month. The rule only provided that the single declaration may cover transfer of goods during one calendar month.

Cipla Ltd v. Dy. Commissioner, Commercial Tax & Ors. (2013) 23 STJ 75 (Cal.)

5. **Input Tax Credit**

The Karnataka High Court held that the fertilisers, pesticides, etc., used in tea and coffee cultivation and agricultural machinery, pump sets used for growing tea leaves and coffee leaves cannot be said to have been used in the course of production of tea and coffee for sale; therefore the assessee was not entitled to any input tax credit for the taxes paid on such purchases.

Balanoor Plantations and Industries Ltd v. State of Karnataka & Ors. 2013 NTN (Vol. 52) P 220

6. **Interest on Refund**

The Allahabad High Court held that when the amount was found refundable it has to

be refunded without any application from the assessee. In case of delay, the assessee was entitled to interest for which also no application was required.

Sunway Construction v. State of UP & Ors. (2013) NTN Vol. 52 - 259.

7. **Limitation**

Section 48(2) of the MPGST Act provided for a period of three months for filing any suit against the officer of department from the date of act complained of. The assessee had proceeded against the officer for illegal auction of the property for recovery of tax. The department opposed the suit as barred by limitation however the MP High Court held that in an auction sale, even if bid was finalised and sales certificate issued; unless such a document was registered with the Registrar, the certificate etc., had no legal value. At the most, the sale certificates can be treated as an agreement to sale but the limitation of three months would commence only from the date of the document being registered.

Shahjahan Iqbal v. State of Madhya Pradesh & Ors.(2013) 23 STJ 127 (MP)

8. **Liability to tax**

Following the judgment of the Supreme Court in the case of *BSNL 145 STC 91 (SC)*, the Allahabad High Court held that the cable TV Operators, were not liable for any trade tax for transmission of electronic magnetic waves to customers. The court also held that such a transaction of transmission did not involve the use of any kind of goods and therefore it cannot be regarded as a transfer of right to use the goods.

Ram Kishore Viswakarma & Ors. v. State of UP & Ors. 2013 NTN (Vol. 52) - 266.

9. **Package Scheme of Incentives**

i) **Eligibility Certificate**

The West Bengal Taxation Tribunal held that the repeal of West Bengal Sale Tax Act, 1994 by the West Bengal VAT Act, 2003 cannot come in the way of continuing the benefits flowing from the Eligibility Certificate under the said Act, for the unexpired period; by grant of remission of output tax. The action of the authorities in

denying the required certificate was held to be the result of overlooking the relevant statutory provisions.

PCM Tea Processing Pvt. Ltd. v. A.C.S.T. Special Cell, Bellaghata Road & Ors.(2013) 62 S.T.A. P 29.

ii) Exemption Certificate – Cancellation

For industrial development in the State of Haryana, the State Government had announced the Scheme of Exemption subject to the conditions that may be prescribed. The relevant Rule was Rule 28A of the Haryana General Sales Tax Rules, 1975. One of the conditions specified therein provided that the unit enjoying the benefit of exemption, shall not make during the first five years, any sale outside the State by way of transfer on consignment basis. The assessee in question violated that conditions with the result the exemption certificate was cancelled by the appropriate authority. The Punjab and Haryana High Court proceeded on the assumption that the assessing authority had levied tax on consignment transfers which was beyond the power of the State Legislature. The State of Haryana challenged the said judgment of the High Court before the Supreme Court. The Supreme Court quashed the impugned judgment and held that the Rule was self-explanatory and the condition precedent for enjoying the benefit of tax exemption having been violated the action of cancelling the certificate was in accordance with the rules.

State of Haryana & Anr. v. Rubber Reclaim Co. of India (2013) 45 PHT 434 (SC)

iii) Subordinate Legislation

The Kerala High Court held that the concession granted by the earlier notification to rubber based SSI Units, would continue till the same was specifically withdrawn by another notification. The court also held that it had no jurisdiction to consider the legality of a notification while deciding a revision under the provision of Kerala VAT Act, 2003.

State of Kerala v. M/s. LEO Rubbers (2013) 21 KTR 329 (Ker.)

10. Recovery

The Allahabad High Court held that while considering the grant of interim relief in pending appeal, *prima facie* merit of the case would play an important role which is required to be considered in such a manner that the purpose of

the appeal was not frustrated or right of appeal rendered nugatory.

Shiv Durga Trading Company v. Commissioner, Commercial Tax (Lucknow) 2013 NTN (Vol. 52) – 169.

11. Security

The West Bengal Taxation Tribunal after referring to section 26 of West Bengal VAT Act, and the corresponding Rule 195 thereunder, held that the demand of security can be made only for good or sufficient reason recorded in writing. Simply referring to the interest of the State Revenue and the officer treating the case to be fit for demanding security without any supporting reason, cannot be sustained.

Dharmendra Singh v. Dy. Comm. of C.T. Howrah Circle & Ors. (2013) 62 S.T.A. P 11.

12. Service of Notice

The notice cannot be affixed on an open plot. The stage of serving by affixture can arise only after the service by other methods fail or the addressee refuse to take notice or was not found at the address given by him.

Shahjahan Iqbal v. State of Madhya Pradesh & Ors. (2013) 23 STJ 127 (MP)

13. Tribunal – Power of Enhancement

The Punjab and Haryana High Court after considering the provisions of Section 33 of the Haryana VAT Act read with Rule 65 framed thereunder held that the power of enhancement have to be construed as relatable to an appeal or cross objections filed by the department. In other words the party not filing an appeal must be deemed to have been satisfied with the order of the lower authority and must be taken to have acquiesced therewith and therefore was bound by it. Such party cannot seek relief in an appeal filed by the rival party.

Global Business India Pvt Ltd. & Anr. v. State of Haryana & Anr. (2013) 45 PHT 439 (P & H).

14. Works Contract – TDS

Finding that the contractee Department a Government of Gujarat, did not make the payment of tax in the Government treasury even after the amount was deducted from the payments to the

contractor on the pretext that the contractor had advised them to keep the TDS amount as Deposit. The Tribunal directed the engineer concerned by calling him personally to make the payment for which the contractor – appellant was before the Tribunal. The contractee thereafter produced the TDS certificate showing the payment made consequently the interest and penalty levied for non-payment of said amount was also set aside in the hands of the contractor appellant.

M/s. Sai Krupa Construction v. The State of Gujarat (2013) Sales Tax Journal Vol. 52, Page 392.

15. Works Contract – Service Tax

The assessee before the Supreme Court had paid service tax on the basis of classification of works contract prior to 1st July, 2007. The assessee had not exercised the option in regard to the mode of payment, after the said date by considering

the re-classification. The assessee challenged the validity of circular without challenging the relevant rule. The apex court confirmed the views of the High Court that non-availing of CENVAT credit was not relevant for deciding the validity of the circular.

Nagarjuna Construction Co. Ltd. v. Government of India & Anr. 2013 NTN (Vol. 52) – 206

16. Writ Jurisdiction

The Allahabad High Court held that the Writ Jurisdiction of the court cannot be availed of for prohibiting a person from correcting a legal mistake. The High Court also observed that the said jurisdiction was meant for doing justice and not to perpetuate injustice or technicalities.

Balaji Foods & Ors. v. State of UP (2013) 45 PHT 525 (All).



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

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