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AIFTP TIMES

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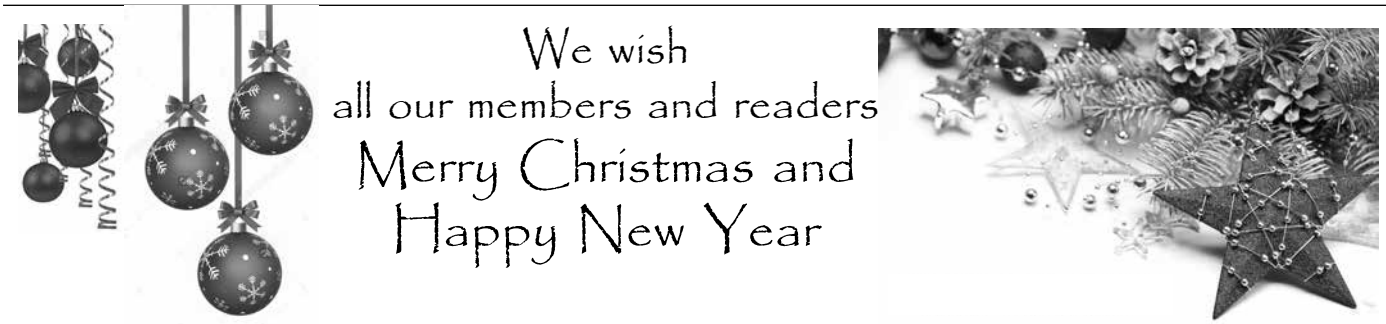

FORTHCOMING PROGRAMMES

Date & Month	Programme	Place
10-12-2016	Full Day Seminar	Nagpur
18-12-2016	Full Day Seminar	Srikakulam, Hyderabad
24-12-2016	Extra Ordinary General Body Meeting	Hyderabad

NOTICE OF EXTRA ORDINARY GENERAL BODY MEETING OF THE FEDERATION TO BE HELD ON 24-12-2016 AT HYDERABAD

26th November, 2016

Dear Members,

An Extra Ordinary General Meeting as provided in Rule 9 of the Rules & Regulations of the Federation read with section 12 of Registration of Societies Act, 1860 will be held on Saturday, the 24th December, 2016 at 12.00 noon at Hotel Amrutha Castle, Near Secretariat, King Arthurs Court Hall, Hyderabad to transact the following agenda:-

A G E N D A

1. Welcome address and opening remarks by the President Dr. M. V. K. Moorthy
2. To confirm the proceedings of the previous OGM held on 25th November, 2016 at Mumbai.
3. To consider and ratify the amendments made to byelaws approved in Ordinary General Meeting held on 25th November, 2016 at Mumbai.
4. To consider suggestions from the members in respect of rendering better service to the members and for overall progress of the AIFTP.
5. To transact any other business that may be raised with the permission of the chair.

For All India Federation of Tax Practitioners

M. Srinivasa Rao
Secretary General

Note: Minutes of OGM held on 25th November, 2016 at Mumbai has been uploaded in our website i.e., www.aiftponline.org

FOR ANY QUERIES MEMBERS MAY CONTACT ANY OF THE FOLLOWING OFFICE BEARERS

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National President – Dr. M. V. K. Moorthy, Adv.	9849004423	040-23228474	23261667	mvkmoorthy59@gmail.com
Deputy President – Smt. Prem Lata Bansal, Sr. Adv.	09811558194	011-23955703	—	plbansal49@gmail.com
Secretary General – Shri M. Srinivasa Rao, TP	09885796999	08812-238898	—	sai9malladi@yahoo.com
Treasurer – CA. S. B. Kabra	09849024732	040-23228854	23228275	ca.sbkbra@gmail.com

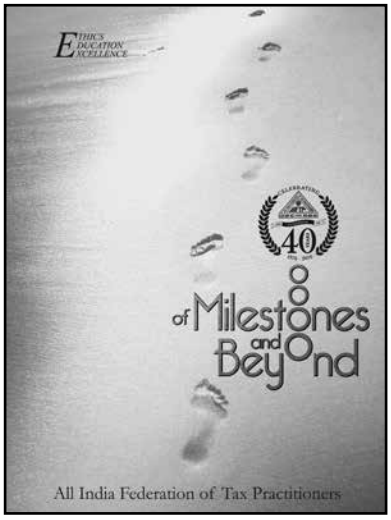
REPORT ON FOUNDATION DAY AT BHUBANESWAR

By B. N. Mahapatra, *Advocate*

On 11-11-2016 the Foundation Day of AIFTP was observed in the Bhubaneswar Tax Bar Association Hall by the members of the AIFTP and members of the Bhubaneswar Tax Bar Association of Bhubaneswar. About 25 members had attended this meeting which was presided by Shri G. Rath, President, Bhubaneswar Tax Bar Association. On this auspicious occasion Past National Vice-President B. N. Mahapatra had spoken elaborately the history of the AIFTP and told that the AIFTP movement came over to Odisha in the year 1988 when the National Tax Conference was held at Cuttack.

Advocate R. C. Dhal, Joint Secretary AIFTP, East Zone, Advocate Shri Amaresh Mishra, Advocate Shri Debabrata Jena, Advocate Deeptimayee Mohanty had attended the meeting. There was a cake cutting and snacks were also served to the members participating in the meeting. In the meeting Shri Mahapatra and Shri R. C. Dhal appealed members of the Bhubaneswar Tax Bar Association to become members of the AIFTP.

ANNOUNCEMENT



We have great pleasure to inform you all, that a historic publication was released at the gracious hands of Hon'ble Mr. Justice Dilip G. Karnik, Bombay High Court (retired) on 11th November, 2006 to coincide the completion of Glorious 40 Years of useful services to the public at large and the tax practitioners in particular. The sole object of the Federation is to keep all concerned updated with the latest development in direct and indirect taxes by arranging periodical seminars and conferences at various places of the country discussing there at the subjects of topical interest.

2. The publication gives you an insight about the manner and places of all the activities during last four decades. The achievements and the contribution made by the Federation in the development of the law on direct and indirect taxes was possible only because of the help and assistance that it received from all direction of the country.

3. In order to recall such contributions the publication is a must for all connected or otherwise with the tax administration. This Publication was prepared by seasoned and experienced team consisting of Shri P. C. Joshi (Advocate, Mumbai), Shri N, M. Ranka (Sr. Advocate Jaipur) and Dr. K. Shivaram (Sr. Advocate Mumbai) with the Assistance of Shri Kishor Vanjara.

4. A few copies of the publication are available at the concessional payment of ₹ 400/- (published price @ ₹ 500/-) for members of the Federation as well as all other affiliated professional associations. The publication will also be available for non-members again at the concessional price of ₹ 450/-. Those desiring to have the same through courier may kindly add ₹ 80/- while remitting the amount.

Please make all cheques at par / drafts payable to "All India Federation of Tax Practitioners".

The same is uploaded in our website i.e. www.aiftponline.org, members may download the same.

For further details please contact:

ALL INDIA FEDERATION OF TAX PRACTITIONERS
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Tel.: 2200 6342 Telefax: 2200 6343 E-mail: aiftp@vsnl.com

In addition to the publication of the journey of the Federation since last 40 years we have also uploaded the same in audio visual DVD. The historic documents have also been placed at our website as well as YouTube (Journey of AIFTP). All those interested may purchase the same for their permanent record from the office of the Federation at the concessional rate for such DVD.

We hope one and all will gain first-hand informations about the Federation and its activities through length and breadth of the country.

REPORT OF FOUNDATION DAY CELEBRATION AND SEMINAR ON G.S.T. AT ODISHA

By
Rabindra Nath Pal, Advocate, Vice Chairman (E.Z.)

Two day Foundation Day celebration and GST Seminar organised jointly by All India Federation of Tax Practitioners (E.Z) and The Cuttack Tax Bar Association at the Chief Justice Gatikrushna Mishra Auditorium in Orissa Judicial Academy, CDA, Cuttack, Odisha on 11th and 12th November 2016. nearabout 320 delegate attended the Inaugural Session/Foundation Day and seminar. Hon'ble Dr. Justice B. R Sarangi was Chief Guest and Shri Manas Ranjan Mohapatra, Sr, Advocate and Chairman, Bar Council of Odisha was guest of honour. 11th November evening was the Foundation Day Celebration and Inaugural Ceremoney. Dr. Justice B. R. Sarangi details describe about GST law and given emphasis on section 86 and section 2 of Model GST Law. Mr. Manas Ranjan Mohapatra also expressed his opinion on why the law maker has not given emphasis to advocates in GST law even in definition section Advocate/Tax Practitioner was not defined. Souvenir also released on 12th November there was three sessions. Speaker from Mumbai Mr. Abhisek Rastogi, Sourabh Agarwal and his Associates delivered the speech on GST. Mr. Jayanta Das, Former Advocate General said about concept of GST and comment on non inclusion of advocates in definition section and anti advocate attitude of law maker. Mr. Anand Aatpathy, Addl. CCT and Spl. trainee describe about concept of GST and prospective litigation under GST in details. There was also a Brains' Trust/Interaction Session on 12th afternoon.

ACTIVITY OF CENTRAL ZONE

1. We have sent representation to extend the date of filing VAT Return from 14th November to 21st November and same demand was accepted by Principal Secretary, Government of Rajasthan and CCT, Commercial Taxes Department.

2. Our Member of AIFTP (C.Z.) Mr. Dinesh Mehta has been elevated as Additional Judge of Rajasthan High Court on 16-11-2016. So, on behalf of AIFTP Mr. D. C. Mali, Sumer Patwa, Mahesh Gehlot, K.K. Gehlot welcomed them by garlanding and we attended the oath function of Judges elevated as Additional Judges of Rajasthan High Court Shri Pushpendra Singh Bhati, Vineet Kumar Mathur, Dinesh Mehta and Shiv Kumar Sharma.

3. In Pune, 14 persons have attended the Seminar from Central Zone.

4. Regarding Service Tax, for old demands we have sent representation to the Finance Secretary for introducing Amnesty Scheme and we also sent representation to M.P., Chhattisgarh and Rajasthan for introducing old demands of VAT Amnesty Scheme before introducing GST.

5. GST Conference held at Jodhpur in the Chairmanship of Shri P. S. Mehra, I.A.S. Principal Secretary (Finance), Shri Praveen Gupta, I.A.S., D. S. (Tax) and Shri Alok Gupta I.A.S., Commissioner, Commercial Taxes Department which was attended by more than 40 members in Jodhpur.

6. Same type of GST convension was held at Ajmer, Bikaner and different places of Rajasthan and our members have also attended that programme. We have introduced five new members in this month.

Dated 23-11-2016

CENTRAL EXCISE

Vipin Kumar Jain, *Advocate*

1. Whether the benefit of exemptions under Notification No. 15/2002- C.E. dated 1-3-2002 is available to the manufacturers of knitted garments even when knitted fabric has not suffered any excise duty?

a. Facts

Assessee was manufacturing knitted fabrics, using duty paid yarn purchased from the market. He did not take MODVAT credit of the duty paid on the yarn. The knitted fabric so manufactured was entirely captively consumed in the manufacture of knitted apparels which were thereafter cleared outside the factory by claiming the benefit of exemption Notification No. 15/2002-C.E. dated 1-3-2002.

The said notification granted exemption to knitted garments if they were manufactured out of knitted fabrics on which appropriate excise duty had been paid and no CENVAT credit of the duty paid on inputs or capital goods had been taken. The notification contained an Explanation II which read as under:

"For the purposes of conditions specified below, textile yarns or fabrics shall be deemed to have been duty paid even without production of documents evidencing payment of duty thereon."

b. Issue

Whether the benefit of exemption under Notification No. 15/2002- C.E. dated 1-3-2002, is available to the assessee, when it was an admitted position that no excise duty had in fact been paid on knitted fabric by the assessee?

c. Held

The Supreme Court rejected the Revenue's argument that the Explanation II only dispensed with the production of duty paying documents but did not waive the condition of payment of duty. It was further held that Explanation II to the notifications creates a legal fiction to the effect that textile fabrics shall be deemed to be duty paid even without production of documents evidencing payment of duty. Such an intention was also reflected in Union Budget 2002 Explanatory Notes. It is thus clear that no duty was required to be paid on knitted fabric by the manufacturers of knitted garments. A fiction created by a provision of law had to be given its due play. The judgment of the constitutional bench in the case of *CCE, Vadodara v. Dhiren Chemical Industries (2002) 2 SCC 127* was distinguished by referring to the difference in the language deployed in the Notification involved in the said case.

[Sports & Leisure Apparel Ltd. v. CCE, Noida 2016 (338) Elt 3 (SC)]

2. Whether the explosives used for blasting of mines to obtain zinc ore and not in the manufacture of zinc concentrate, are eligible for exemption under Notification No. 191/7 dated 4-8-1987?

a. Facts

Assessee was engaged in the manufacture of explosives, which were in turn supplied to public sector undertakings for using the same in blasting mines to extract Copper, zinc and Lead ores which were further used in the manufacture of zinc and lead concentrates.

b. Issue

Whether the benefit of the exemption Notification No. 191/87 dated 4-8-1987 was available to the assessee on the ground that activity of mining did not constitute the process of manufacture?

c. Held

Based on the decision of *Union of India v. Hindustan Zinc Ltd. 2002 (142) ELT 289 (Raj.)* which also dealt with the same question of law and was based on the case of *Jaypee Rewa Cement v. CCE, MP 2001 (8) SCC 586,* the Apex Court held that the assessee was entitled to the benefit of the exemption notification. In the Hindustan Zinc case (supra), it was held that extraction of zinc ore was an important and integrated process in the manufacture of zinc concentrate and therefore the explosives used in mining operation were to be treated as used in the manufacture of zinc concentrates for the purpose of satisfying the conditions prescribed in Notification No. 191/87.

It was further held that the Revenue having once accepted the principle laid down in Hindustan Zinc case, could not be allowed to agitate the same question of law and take a different stand in present proceedings.

[IDL Ind Ustries Ltd. v. CCE & C 2016 (337) ELT 496 (SC)]

3. Whether entry tax is leviable on Medikar shampoo and Starch (Revive) under the Madhya Pradesh Entry Tax Act, 1976 (E.T. Act) on the ground that Medikar is a hair shampoo and not a drug; and Starch (Revive) is a chemical?

a. Facts

The respondent was a manufacturer of Mediker shampoo and Starch (Revive) and other products. He was imposed entry tax on Mediker treating it as a hair shampoo and "Revive Instant Starch" as a chemical; and as the tax was not paid, interest and penalty were also levied.

b. Issue

Whether Mediker was a "hair shampoo" and Starch (Revive) was a "chemical" for the purpose of Entry 32 and Entry 55 respectively of Schedule II to the E.T. Act?

c. Held

The Court, after relying upon *Collector of Central Excise v. Pharmasia (P) Ltd. 1990 (47) ELT 658* and *Puma Ayurvedic Herbal (P) Ltd. v. CCE (2006) 3 SCC 266,* amongst various other judgments, held that Mediker shampoo which, in common parlance, is used for anti-lice treatment is a drug because of its medicinal affect. Once it is a drug, it cannot be a shampoo as anti-lice treatment is not subsidiary to its cosmetic function, but is the main function. As a natural corollary, it would not invite the liability of levy of entry tax.

With regard to starch (revive), it was held that in common parlance, the product is not regarded and treated as a chemical or a bleaching powder. If the very substance or product had a chemical composition, then only it would make the said substance a chemical. The purpose and use of a product are to be taken note of, in order to determine the correct category of the same.

[State of M.P. v. Marico Industries Ltd. 2016 (338) ELT 335 (SC)]

4. Whether "packing materials" which is used for packing tea, can be said to be raw material, components, or inputs used in the manufacture of tea?

a. Facts

Appellant was a tea manufacturing unit at Dharwad and was manufacturing three types of tea, namely, packet tea, tea in tea bags, and quick brewing black tea. The appellant claimed that the Dharwad Unit was a new unit and was, therefore, exempted altogether from the payment of entry tax on packing material of tea under a notification dated 31-3-1993 issued under section 11A of the Karnataka Tax on Entry of Goods Act, 1979 ("E.T. Act").

The said notification exempts entry tax on raw material, components, or inputs into a local area for use in the manufacture of an intermediate or finished product by new industrial units.

b. Issue

Whether packing material can be said to be "raw material, components, or inputs" within the meaning of the Notification dated 31-3-1993?

c. Held

Section 3 of the E.T. Act empowers the State Govt. to levy entry tax on goods specified in the First Schedule into a local area for consumption, use or sale therein not exceeding 5% of the value of the goods. The 1st Schedule, in turn, provides for "packing material" and "raw materials, component parts or inputs" under separate entries, i.e., Entry 66 and Entry 80 respectively. On this ground the Court held that the context of the E.T. Act is very clear.

When raw materials, component parts and inputs are spoken of, they refer to materials, components and things which go into the finished product, namely, tea in the present case, and cannot be extended to cover packing materials of the said tea which is separately provided for in Entry 66. The notification being issued under the E.T. Act, it was held that the notification cannot be read to include packing material" as "raw materials, component parts or inputs used in the manufacture" of tea.

[Hindustan Lever Ltd. v. State of Karnataka 2016 (339) ELT 339 (SC)]

5. Whether the benefit of the exemption from payment of CVD equivalent to Central Excise Duty under Notification No. 6/2006 – C.E. dated 1-3-2006 is available to spectacle lenses?

a. Facts

Appellant imported certain spectacle lenses and classified the same under customs tariff heading 9001.40.90 & 9001.50.00 depending upon the nature of material of the said lenses and sought exemption under Notification dated 1-3-2006. The Department however denied the benefit of the said exemption on the ground that spectacle lenses are semi-finished spectacle lenses whereas the notification was available only in respect of finished spectacle lenses.

b. Issue

Whether spectacle lenses were semi-finished or finished spectacle lenses?

c. Held

The Court held that the appellant in the present case imported power lenses. The same were treated semi-finished spectacle lenses by the adjudicating authority as well as the CESTAT only because of the reason that while fitting these lenses for a particular customer, i.e. before customising according to the prescription, they were to be finished lenses. For the aforesaid reason, the Apex Court held that the goods could not be treated as "semi-finished" and could be appropriately described as "to be finished spectacle lenses". Accordingly, exemption under the notification in question was allowed to the appellant-assessee.

[Essilor India Pvt. Ltd. v. CC, Bengaluru 2016 (335) ELT 584 (SC)]

6. Whether Free Delivery Zone charges are includible in the assessable value of excisable goods?

a. Facts

The respondent was engaged in the manufacture of petroleum products. It was storing the excisable goods at Panewadi Terminal, Manmad District. At the time of clearance from the said terminal, the respondent was collecting ₹ 44/- per KL over and above the assessable value declared as Free Delivery Zone (FDZ) charges. The Revenue alleged that the amount of ₹ 44/- per KL collected by the respondent for sale within FDZ was includible in the assessable value as the said charge was leviable for delivery just outside the factory gate also, where no transportation was involved. The said amount was therefore not related to transportation but was an additional consideration.

b. Issue

Whether the amount of ₹ 44/- per KL collected, within FDZ was includible in the assessable value?

c. Held

The Tribunal held that the charges of ₹ 44 KL are freight charges on the ground of appeal clearly recognised that the said charge was freight charge. It further observed that a large number of decisions of the Tribunal had allowed deduction of such charges collected for delivery of goods within the FDZ. In the present case, the freight recovered is less than the actual expenditure by the respondent on freight for delivery within the FDZ, and that the Tribunal and superior Courts in number of cases, especially that in the case of *Indian Oil Corporation Ltd. v. Commissioner (IOCL case) — 2013 (291) E.L.T. 449 (Tribunal),* held that any amount of freight which is collected in excess of actual freight is not includible in the assessable value.

In the IOCL case, supra, it was held that any amount in excess collected from the buyer was not required to be added in the transaction value, and in the case of excessive freight, if any, the same was a profit on transportation and not an additional consideration.

Thus, by applying the judgment of the IOCL case on the present case, the Tribunal held that charges of ₹ 44/KL collected within FDZ was includible in the assessable value. The said amount was not an additional consideration.

[CCE, Nashik v. Bharat Petroleum Corporation Ltd. 2016 (339) ELT 585 (Tri. - Mumbai)]

7. What will be the comparable value for the purpose of determining the assessable value of excisable goods in terms of Section 4(1)(b) of the Central Excise Act, 1944 read with Rule 6(b)(i) of the Central Excise (Valuation) Rules, 1975?

a. Facts

The appellants were engaged in the manufacture of industrial and medical gases which were liable to Central Excise duty. They were supplying specified quantity of gases on stock transfer basis to their unit at Faridabad. Revenue felt that the appellants were not discharging correct excise duty on such clearances to their Faridabad unit. Accordingly the proceedings

were initiated resulting in confirmation of demand for differential duty and imposition of equal penalties.

b. Issue

Whether highest value of comparable prices at which goods were sold to independent buyers, was to be taken for valuation of goods cleared by the assessee to its own unit?

c. Held

The Tribunal, held that for the purpose of comparing the price for valuation purposes, it was necessary to have comparable volume and proximity of time and comparable class of buyers. Revenue's stand that the highest of value is a comparable price is not supported by the provisions of law. Applying the aforesaid principle of law as well as the judgment of *Somaiya Organics (India) Ltd. – 2009 (244) E.L.T. 115 (Tri.–Del.),* on the facts of the present case, the Tribunal held that the price of gases sold to independent buyers of similar class should be considered for valuation of gases cleared by the appellants on stock transfer basis.

[Inox Air Products Ltd. v. CCE, Chandigarh 2016 (340) ELT 260 (Tri. – Del.)]

8. Whether the clearance value of M/s. Accurate Engineers be clubbed with that of M/s. Libra Engineering Works for the purpose of extending the benefit of SSI exemption Notification No. 8/2003-C.E., dated 1-3-2003 or otherwise?

a. Facts

The appellant's unit and the Unit of M/s. Accurate Engineers, were engaged in the manufacture of "Industrial valves" and clearing the same without payment of duty by availing value based SSI exemption Notification No. 08/2003-C.E., dated 1-3-2003. Revenue alleged that both units were managed and controlled by the Proprietor of the appellant Mr. Asgarali A. Siddiqui, therefore, these units were one and the same. Therefore in computing the total clearance value of excisable goods of the Appellant's Unit, the clearance value of M/s. Accurate Engineers, be clubbed for the purpose of determining the eligibility of SSI exemption Notification No. 08/2003-C.E., dated 1-3-2003.

b. Issue

Whether the clearance value of M/s. Accurate Engineers be clubbed with that of M/s. Libra Engineering Works for the purpose of extending the benefit of SSI exemption Notification No. 8/2003-C.E., dated 1-3-2003 or otherwise?

c. Held

The Tribunal observed that both the appellant firm as well as M/s. Accurate Engineers, in which Mr. Siddiqui's wife was the proprietress, were being handled/controlled by Mr. Siddiqui. The statements of buyers also revealed, that for the purpose of purchase of finished goods, invariably they contact Shri Asgarali A. Siddiqui, and the goods were sent in the invoices of M/s. Accurate Engineers. The proprietress Mrs. Siddiqui admitted that she was a housewife and not involved in the management of the business of manufacturing/selling of industrial valves. The Tribunal therefore held that even though M/s. Accurate Engineers, on record, a separate unit, but, its day-to-day function and management was handled by Shri Asgarali A. Siddiqui, proprietor of M/s. Libra Engineering Works. For all practical purposes, the management/control of the business of manufacture and sale had been handled by Mr. Asgarali A. Siddiqui, proprietor of the appellant firm. In these circumstances, the Revenue had rightly clubbed the clearance value of both the units in computing the eligible limit of 100 lakhs for the Appellant Unit prescribed under Notification No. 08/2003-C.E., dated 1-3-2003.

[Libra Engineering Works vs. CCE, Ahmedabad-I 2016 (339) ELT 610 (Tri. - Ahmd.)]

Membership of AIFTP as on 28-11-2016
Life Members

	Associate	Individual	Association	Corporate	Total
Central	0	882	23	3	908
Eastern	3	1301	36	3	1343
Northern	0	1032	17	0	1049
Southern	1	1111	19	8	1139
Western	4	2182	37	18	2241
Total	8	6508	132	32	6680

FEW IMPORTANT CASE LAWS IN SERVICE TAX, CENTRAL EXCISE

- S. S. Satyanarayana, Tax Practitioner, Hyderabad.

Central Excise: Department clubbed clearances of dummy units/job-workers and since resultant total exceeded SSI-turnover limit and confirmed the demand denying SSI-exemption. On appeal, Supreme Court upheld findings that a majority of job-workers/units were dummy and rejected assessee's request for exclusion of independent/genuine job-workers/units on ground that tax effect thereon was minimal. Assessee filed review petition before Supreme Court. Held : In computing turnover limits for SSI-exemption purposes, clearances of dummy units/job-workers would be included and clearances by independent/genuine job-workers/units cannot be included. *[Satyam Technocast v. CCE Rajkot - [2016] 72 taxmann.com 49 (SC)]*

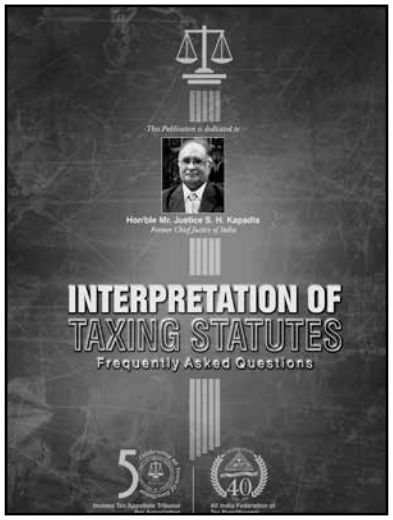
Central Excise : This appeal has been filed by the Revenue against the order of the Commissioner (Appeals) of Central Excise, Allahabad, where-under deductions for freight element incurred after the point of removal of goods from the factory gate, have been allowed by setting aside the Order-in-Original passed by the Joint Commissioner. Held : When there are separate contracts for sale of goods and for transportation etc., it is held that the said transportation charges cannot be included in the assessable value of the goods for the purposes of computation of Central Excise duty. Revenue's appeal dismissed. *[CCE, Allahabad v. Sarthek Enterprises Ltd. – 2016 (8) TMI 443 – CESTAT, Allahabad]*

CENVAT Credit: The appellant is a Public Limited Company engaged in the manufacture of pistons, piston rings etc. falling under Chapter Heading 8409 of Central Excise Tariff Act, 1985 and are availing the facility of CENVAT Credit under CENVAT Credit Rules, 2004. During the course of audit of the records of the appellant during April 2007 for the period 2004-05 to 2006-07, the Accountant General Audit Party made observation that the appellant was receiving Management Consultancy Services from M/s Federal Mogul Goetze (India) Ltd. hereinafter referred to as (FMGIL) during the period from 2004-05 to 2006-07 for which they were paying management fee and sole selling commission to FMGIL and were availing CENVAT Credit of service tax paid on the above services under the provisions of CENVAT Credit Rules 2004 but the service provider has not paid the service tax to the Government. Thereafter a show cause notice was issued calling upon the appellant to show cause as to why the CENVAT credit of service tax amounting to availed by them irregularly during the periods from 2004-05 to 2006-07 should not be demanded and recovered under Rule 14 of CENVAT Credit Rules, 2004 read with proviso to section 73 of Finance Act and penalty was proposed under Rule 15(4) of CENVAT Credit Rules 2004 read with section 78 of Finance Act and interest was also demanded. Held: It is neither possible nor practical for any service recipient to verify the fact of payment of service tax by the service provider. Remedy of the Revenue lies at the hands of the service provider and not at the hands of the service recipient. *[Federal Mogul TPR India Ltd. v. CCE, – 2016 (8) TMI 895 – CESTAT, Bengaluru]*

Service Tax: Assessee was engaged in erection, commissioning and installation of electrification works of PWD Department. Department demanded service tax levying penalties under sections 76 and 78. Assessee filed appeal before Commissioner (Appeals) beyond his condonation power. Pending appeal, assessee filed writ against adjudication order arguing that : (a) services to Government department were exempt under Notification 25/2012-ST for 2012-13 and 2013-14; (b) despite specific request, no hearing was granted; and (c) penalty cannot be levied under both sections 76 and 78. Held: Normally, writ is not available if alternate appeal-remedy is not exercised within specified time. However, if challenge is made based on adjudication order being passed in violation of principles of natural justice, then, writ is maintainable despite appeal-remedy becoming time-barred. (Biju Daniel – July 5, 2016). *[Biju Daniel v. Commissioner of Central Excise (Appeals) - [2016] 71 taxmann.com 294 (Kerala)]*

Service Tax: The case of the Petitioners in short is that after Constitution (Forty-Sixth Amendment) Act, 1982 which inserted clause 29A(f) in Article 366 defining 'tax on sale or purchase of goods' to include 'a tax on the supply, by way of or as part of any service, of food or any drink for cash, deferred payment or other valuable consideration', all aspects of the transaction of sale of food and beverages by the members of Petitioner No.1 to their customers fell within the meaning of 'sale of goods' amenable to sales tax i.e. value added tax ('VAT') levied by taxing statutes of the States. It is submitted that the provision of food and beverages in a restaurant, even where it forms part of a hotel which provides lodging and meals is covered entirely by Entry 54 of List II read with Article 366(29A)(f) and, therefore, it is only the State legislature that has the exclusive competence to legislate in respect of levy of tax on such sale or purchase of goods. It is contended that no part of the transaction of supply of food in a restaurant or hotel is now left out for being made amenable to service tax levied by a statute enacted by Parliament. Thus it is submitted that section 65(105)(zzzzv) of the FA is beyond the legislative competence of Parliament. Held: When the State Government has exclusive power to levy luxury tax on short-term accommodation in hotel, levy of service tax is unconstitutional. *[Federation of Hotels and Restaurants Association of India and Others v. Union of India – 2016 (8) TMI 502 – Delhi High Court]*

BOOK RELEASE ANNOUNCEMENT



We are pleased to make the announcement, that All India Federation of Tax Practitioners will be releasing its publication titled "Interpretation of Taxing Statutes – Frequently Asked Questions" dedicated in fond memory of Hon'ble Mr. Justice S. H. Kapadia, Former Chief Justice of India.

Hon'ble Mr. Justice T. S. Thakur, Chief Justice of India along with Hon'ble Mr. Justice A. K. Sikri, Judge, Supreme Court of India, and Hon'ble Mr. Justice R. K. Agrawal, Judge, Supreme Court of India will be releasing the publication on 2nd December, 2016 in New Delhi at the 19th National Convention organised by the AIFTP (Northern Zone) jointly with Sales Tax Bar Association, New Delhi.

This is a unique publication in a questions-answers format explaining the provisions and various controversies relating to interpretation. This scholarly publication will be a useful reference to Lawyers, Chartered Accountants, Tax Practitioners as well as Members of the ITAT to understand the Basic Principles of Interpretation of Taxing Statutes. The publication having 334 Questions & Answers and is divided into 20 chapters viz. General Principles of Interpretation, Binding Precedents on Direct Taxes, Subsidiary Rules and Special Maxims Aiding Interpretation, Aids to Interpretation (Internal and External) of Statute, Interpretation of Statutes – Exemptions, Deductions and Benefits, Operations, Expiry and Repeal of Statutes, Concepts & Principles of Interpretation of Double Taxation Avoidance Agreements (DTAAs)/ Tax Treaties, The Income Tax and The Constitution of India, Principles of Natural Justice, Interpretation of Penal Provisions in Taxing Statutes, Interpretation of Statutes – Prosecutions under the Income Tax Act, Principles of Interpretation of other Laws Applicable to Direct Tax Laws, Interpretation of Deeds, Documents and Wills, Interpretation of Taxing Statutes – Sales Tax, Interpretation of Indirect Tax Laws, Application of the General Clauses Act, 1897 to the Interpretation of Income-tax Act, 1961, Legal Maxims, Interpretation of Words and Phrases, Wielding The Gavel: Justice – S. H. Kapadia and His Landmark Judgments, Articles for Reference – Interpretation of Taxing Statutes.

This publication is a must and an unavoidable equipment in the library of tax professionals.

This publication is authored by 24 lawyers; viz., *Advocates* S/Shri Aditya Ajgaonkar, Ajay Singh, Arati Sathe (Ms.), B. V. Jhaveri, C. B. Thakar, Deepak J. Tralshawala, Dharan Gandhi, Dr. P Daniel, Gautam Thacker, Jitendra Singh, K. C. Singhal, K. Gopal, Keerthiga Sharma (Mrs.), Mandar M. Vaidya, Neelam Jadhav (Ms.), Niyati Mankand (Mrs.), Pankaj R. Toprani, Parag A. Vyas, Paras S. Savla Pradeep P. Parikh, Rahul K. Hakani, Rahul R. Sarda, S. Sriram and Sunil Moti Lala which include two Former Members of the ITAT and edited by 10 senior lawyers, viz., *Senior Advocates* S/Shri Dinesh Vyas, Firoz B. Andhyarujina, Jehangir Mistry, Dr. K. Shivaram, N. M. Ranka, Percy J. Pardiwalla, Porus F. Kaka, R. V. Desai, S. N. Inamdar and Y. P. Trivedi. Foreword for the publication is given by Hon'ble Mr. Justice S. P. Bharucha, Former Chief Justice of India and Mr. S. E. Dastur, Sr. Advocate. Messages for the said publication are received from Hon'ble Mr. Justice Ranjan Gogoi, Judge, Supreme Court of India; Hon'ble Mr. Justice Kurian Joseph, Judge, Supreme Court of India; Hon'ble Mr. Justice R. K. Agrawal, Judge, Supreme Court of India; Hon'ble Dr. Justice D. Y. Chandrachud, Judge, Supreme Court of India; Hon'ble Mr. Justice Ashok Bhushan, Judge, Supreme Court of India; Hon'ble Mr. Justice Shiva Kirti Singh, Former Judge, Supreme Court of India; Hon'ble Dr. Justice Manjula Chellur, Chief Justice, Bombay High Court; Hon'ble Mr. Justice S. J. Vazifdar, Chief Justice, Punjab & Haryana High Court; Hon'ble Mr. Justice S. C. Dharmadhikari, Judge, Bombay High Court; Hon'ble Mr. Justice M. S. Sanklecha, Judge, Bombay High Court and Hon'ble Mr. Justice Dev Darshan Sud (Retd.), President, ITAT. This publication has been jointly brought out by the ITAT Bar Association, Mumbai on the occasion of completion of its Golden Jubilee and All India Federation of Tax Practitioners celebrating 40 years.

The price of publication is ₹ 750/-.

For members of the Federation, ITAT Bar Association and subscribers of www.itatonline.org, the same is available at a price of ₹ 600/- and for others, the same is for ₹ 675/-.

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Please make all drafts payable to "All India Federation of Tax Practitioners".

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S.40(a)(ia) : Amount not deductible – Expenditure has not been claimed at all in profit and loss account, same cannot be disallowed

The issue involved is as to whether the services given by the doctors to the patients were on principle to principle basis i.e. the services were given by the doctors directly to the patients or the services of doctors were obtained by the hospital. If the services were given by the doctors directly to the patients and the same cannot be said to be obtained by the hospital from the doctors and further provided to the patients, then the amount collected by the hospital cannot be termed as the income of the hospital, nor the said remittance of payment by the hospital to the doctors can be said to be an expenditure at the hands of hospital.

However, if the services were said to be obtained by the hospital from the doctors and pathology laboratory and further provided to the patients by the hospital, in that event any payment collected by the hospital from the patients will be the income of the hospital and any payment made by the hospital to the doctors or the lab will be the expenditure at the hands of the hospital and the hospital will be liable to deduct TDS. Here neither the AO nor the learned CIT(A) have added the amount collected by the hospital from the patients on behalf of the doctors as income of the hospital.

What has been disallowed is the expenditure; that too on account of non-deduction of TDS as per the prov. s. 194J. The disallowance has been made accordingly u/s. 40(a)(ia). Admittedly, the assessee hospital has not debited the said expenditure to its P & L account. Once the amount paid has not been claimed as expenditure, there cannot be any question of disallowance of the same. When expenditure has not been claimed at all, how can the same be disallowed. Without going into further aspects of the matter, the disallowance in this case under section 40(a)(ia) is not attracted at all. (A.Y. 2008–09)

M/s. Fauzia Hospital vs. ACIT ITA No. 826/M/2013, dt. 18-11-2016 Source : www.itat.nic.in

S.147 : Reopening – No new material was unearthed by the A.O. while reopening the case for the second time and if there is a failure on the part of the A.O. to examine the documents during the original assessment that cannot be the basis to reopen the assessment.

The assessee sold a property, jointly owned by him with two other family members. The share of the assessee, after claiming stamp duty comes to ₹ 50,08,295/-. The assessee advanced ₹ 50 lakh with Developers by making the investment in a flat. The assessee declared total income by making a long term capital gain claim of ₹ 50 lakh as exempt u/s. 54 of the Act.

The A.O. issued notice u/s. 142(1) raising a query on the claimed capital gain/claimed exemption. The assessee submitted its working/reply for capital gains and furnished a copy of the sale agreement. The assessee invested the amount of ₹ 50 lakh in a flat with Developers, against which exemption was claimed. Since, the developer was unable to complete the building in time, he refunded the amount and thus the amount was invested with another Developer However, due to some dispute, this amount was refunded to the assessee. The assessment was completed u/s. 143(3) of the Act, allowing the capital gain but no discussion was made in the assessment order.

The notice u/s. 148 was issued to the assessee, pursuant to notice u/s. 148, the assessee filed the same return along with the purchase agreement and details of claimed exemption and further explaining the factual matrix by narrating that the assessee has again invested the proceeds in another flat. The assessee duly submitted the copy of the bank statements, cancellation of allotment letters. The A.O. *vide* assessment order dt. 23-12-2010 disallowed the claimed exemption of ₹ 50 lakh u/s. 54. The CIT(A) allowed the claimed exemption of ₹ 50 lakh. This order was accepted by the assessee as well as by the Department.

Again on 9-9-2011, show cause notice was issued to the assessee of second reopening *vide* letter dated 7-10-2011, the assessee asked the reason of reopening. The assessee filed reply before the A.O. stating that facts, available on record, clearly indicates that during original assessment proceedings as well as on first reopening of assessment, the assessee duly furnished the complete details of capital gains, investment so made for the exemption, and CIT(A) allowed the claim of the assessee made u/s. 54.

The ITAT held that no new material was unearthed by the A.O. while reopening the case for the second time. The first assessment order completed u/s. 143(3) merged with the appellate order, therefore, the reopening is bad in law, because, there was no failure on the part of the assessee to disclose material facts.

Further held that as far as, second reopening it is merely on the basis of change of opinion, more so when the assessment was completed u/ss. 143(3) and 143 r.w.s 147 of the Act after due application of mind. The material facts were duly made available by the assessee to the A.O. even assuming that the learned A.O. failed to apply his mind, assessment cannot be reopened u/s. 147 of the Act merely on the basis of change of opinion. Further, if there is a failure on the part of the A.O. to examine the documents during the original assessment proceedings that cannot be the basis to reopen the assessment as it was not fault of the assesse the reopening was not valid. (A.Y. 2006-07)

Smt. Basanti Jeevanlal Jain, v. ITO ITA No. 909/Mum. 2014 dtd. 8-9-2016, Source : www.itat.nic.in

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