Issue – 02 | February 2009

SNK Newsletter

DIRECT TAXES

Judicial Pronouncements

Mustaq Ahmed, In re (2009) 176 TAXMAN 65 (AAR - New Delhi)

Section 5, read with section 9, of the Income-tax Act, 1961 - Accrual of Income

Where income is actually received or has accrued in India, resort to deeming provision under section 9 is not warranted; in such a case provision contained in section 5(2) is sufficient to create a charge in respect of non-resident's income. Applicant is a non-resident in India and is a resident of Singapore. He carries on a proprietorship business in manufacture and sale of gold jewellery in Chennai. Through that concern, he sells jewellery in local market as well as by export, mostly to Singapore. Apart from that proprietary business, he is also engaged in purchasing gold ornaments and exporting same. He maintains separate accounts for his proprietary business and in regard to purchases meant for export. He claims that in terms of clause (b) of Explanation 1 to section 9(1), no income shall be deemed to accrue or arise in India from his operations confined to purchase of gold/gold ornaments in India for purpose of export.

Held that income earned by applicant out of purchase and export activities undertaken by him attracts charge to tax under section 5(2) as income has been received in India and has accrued in India, therefore, clause (b) of Explanation 1 to section 9(1) does not come to aid of applicant and income in question is taxable in India.

It was also held that Explanation 1(b) to section 9 does not exclude income that has otherwise accrued to applicant from ambit of section 5(2)(b) and section 9(1)(i).

IKEA Trading (Hong Kong) Ltd., In Re

Income deemed to accrue or arise in India - Business connection

Purchase of goods in India for the purpose of export. Applicant, a Hong Kong company having a liaison office in India, purchases goods from Indian exporters and sells the same in the course of transit outside India to another group entity and receives the consideration in Hong Kong. Its activities are confined to purchase of goods which are exported by the Indian vendors to the applicant or its nominees. Applicant does not effect any sales in India. No income can be attributed to the purchase operations in India by resorting to the deeming fiction under s. 9(1)(i) because Explanation thereto excludes such attribution. Clause (b) of Expln. 1 acts as an embargo against attributing any income to the purchase operations carried out in India if such purchases are for the purpose of export. Fact that actual export is done by the Indian seller does not detract from the position that the goods purchased by the applicant through the aegis of its liaison office were meant to be exported. Therefore, applicant cannot be brought within the tax net either under s. 5(2) or s. 9(1(i).

CIT v. M/s. Larsen & Toubro Ltd. [2009 - TMI - 32229 - SUPREME COURT]

Section 10(5) - Leave Travel Concession(s)/Conveyance Allowance - Evidence

The question under consideration was that whether the assessee was under statutory obligation under Income Tax Act or the Rules to collect evidence to show that its employee had actually utilized the amount paid towards Leave Travel Concession(s)/ Conveyance Allowance? It was noted that the beneficiary of exemption u/s 10(5) is an individual employee. There is no circular of CBDT requiring the employer u/s 192 to collect & examine the supporting evidence to the Declaration to be submitted by an employee - Revenue's appeal dismissed.

Guru Gobind Singh Education Society v. CIT (ITA No. 189 (ASR)/2006)

Scope for cancellation of registration of a society, inter alia, on ground of irregularities committed by its members

For any irregularity or illegality committed by its members, a Society, which is a juridical entity having independent existence, cannot be held liable; hence, irregularities committed by members in their individual capacity cannot be held against the Society for the purpose of cancellation of registration granted under section 12AA of the Income-tax Act.

CIT v. Indian Visit.com (P.) Ltd. (2009) 176 Taxman 164 (DELHI)

Section 37(1) of the Income-tax Act, 1961 - Allowability of Business expenditure

Assessee, engaged in travel business, made all kinds of arrangements for its clients such as booking of hotel rooms, providing taxi services, booking of air tickets and railway tickets, etc. During relevant assessment year, assessee incurred certain expenditure on development of its website. Assessee's clients could use said website for purpose of availing of services provided by it. Assessing Officer opined that expenditure incurred on development of website was of capital nature inasmuch as assessee had acquired an asset, which would provide it with an enduring benefit. Tribunal, however, concluded that expenditure in question was of revenue nature. Merely because a particular expenditure may result in an enduring benefit would not make such an expenditure of capital nature as what is to be seen is real intent and purpose of expenditure and as to whether there is any accretion to fixed capital of assessee. Since in case of expenditure on website there would be no change in fixed capital of an assessee, even though website might provide enduring benefit to assessee, expenditure incurred was to be regarded as revenue expenditure.

ACIT v. Ashina Syntex Ltd. (ITA Nos. 2001 & 2002/ Ahd./2001)

Allowability of deferred revenue expenditure under section 37(1) of IT Act

The nature of the expenditure treated as a “deferred revenue expenditure” in the books needs to be properly analysed before taking a view on its allowability or otherwise under the provisions of the Act; where such expenditure results in the creation of any capital asset - tangible or intangible – a case can be made out to treat the same as a capital expenditure with corresponding allowability of depreciation in accordance with law; in cases where the nature of the revenue expenditure is such that the same can be clearly and unambiguously identified over specified future time periods (e.g. discount on issue of debentures) akin to prepaid expenses, the same would be allowable over the period to which these relate proportionately, applying the matching principle.

CIT v. Gujarat Guardian Limited (2009 - TMI - 32231 - HIGH COURT DELHI)

Section 37(1)

Tribunal allowing deduction of "export commission" to the assessee u/s 37 (1), allowing depreciation to the assessee on "training fee", allowing deduction of lump sum "prepayment premium" paid by the assessee to IDBI. Once it is held that services had been rendered by the agent the quantum of commission that has to be paid is purely the discretion of the assessee over which the Revenue cannot sit on judgment. In all aspects, Tribunal has returned pure findings of fact which are not perverse.

Judicial pronouncements

CIT v. Triveni Engineering and Industries Ltd. [2009 - TMI - 32225 - HIGH COURT DELHI]

Section 37(1) – Capital or Revenue Expenditure

Expenses on modernization of units - administrative expenses – tribunal hold that though the expenses had been capitalized in the books of accounts, this would not be conclusive of the nature as to whether the expenditure was of a capital nature or revenue nature – tribunal's decision that as the new unit was part of the existing business and there was unity of control and interlacing of the units, the expenses incurred for the setting up of a new unit, would be of a revenue nature, is correct.

New Shailaja CHS vs. ITO (ITAT Mumbai) (ITA No. 512/Mum/2007)

Gains on sale of TDR are not chargeable to tax if cost of acquisition is not ascertainable

Where the assessee, a Co.op Housing Society became entitled, by virtue of the Development Control Regulations, to Transferable Development Rights (TDR) and the same were sold by it for a price to a builder and the question arose whether the transaction of sale receipt could be taxed, HELD that though the TDR was a 'capital asset', there being no 'cost of acquisition' for the same, the consideration could not be taxed.

DIT v. Jindal Drilling and Industries Ltd. (2009) 17 DTR (Del) 402

Business of exploration etc. of mineral oil vis-à-vis fees for technical services of non-resident

Services provided by non-resident in connection with movement of offsore rigs set up by assessee on high seas for exploration, prospecting and production of mineral oil from the sea bad was part and parcel of assessee's said activities, hence assessable u/s 44BB and not as fees for technical services u/s 9(1)(vii). Such activities are specifically excluded by Expln. 2 to Section 9 (1)(vii) and thus no substantial question of law arises.

CIT v. Kerala Chemicals & Proteins Ltd. (2009) 176 TAXMAN 195 (KER.)

Deductions u/s 80-IA of the Income-tax Act, 1961 - Profits and gains from infrastructure undertakings

Assessee-company claimed deduction under section 80-IA in respect of third series of plant put up for production of ossein. In course of assessment, Assessing Officer conducted an inspection of said plant and found that plant was not a distinct and separate industrial unit inasmuch as certain common facilities were used for that plant. Accordingly, he disallowed its claim. On appeal, Tribunal allowed assessee's claim on ground that investment attributable to common facilities of old plant utilized in new plant was very insignificant as compared to total investment in new plant and, therefore, new plant set up by assessee was separate and distinct plant. Held that though in normal course, finding of facts recorded by Tribunal pertaining to set up of new industry should be accepted if it is based on cogent and acceptable evidence, but in instant case since Assessing Officer had conducted an inspection and made disallowance based on findings, it was desirable for Tribunal also to have verified facts by itself by conducting an inspection, therefore, order of Tribunal was to be set aside and it was to be directed to conduct an inspection with notice to parties.

Section 43B of the Income-tax Act, 1961 - Certain deductions to be allowed only on actual payment

Where assessee had paid research and development cess to Central Government during relevant previous year, it could not be disallowed under section 43B merely because assessee had shown such payment as 'expenditure pending allocation' in its accounts.

Section 35AB of the Income-tax Act, 1961 - Technical know-how expenditure

Technical know-how fees paid by assessee for expansion of its project by setting up a new plant would be allowable as deduction.

CIT v. Coats of India Ltd. (2009) 176 taxman 438 (Cal.)

Capital Gains – Section 47(iv)

Transactions not regarded as transfer - Where under an approved scheme of arrangement, assessee-company transferred its entire packing coating unit to its wholly subsidiary company and for such transfer, consideration was not determined with reference to individual asset but with reference to capitalized value of said business, transfer of undertaking was squarely covered by provisions of section 47(iv) and, therefore, no income under head 'Capital gain' was assessable in respect of said transaction.

CIT v. Chetak Enterprises (P.) Ltd. (2009) 176 Taxman 217 (RAJ.)

Deductions u/s 80-IA of the Income-tax Act, 1961 - Profits and gains from infrastructure undertakings

A partnership firm was converted into a private limited company, i.e., assessee-company, which claimed deduction under section 80-IA. Claim was rejected by Assessing Officer on ground that work of construction of roads was granted to erstwhile firm and mere fact that firm got itself registered as company, it could not be said that it fulfilled requirements of section 80-IA(4)(i). Facts revealed that right from day one, while replying to notice inviting tender itself, firm had made it clear that it would be converted into a limited company; that it had requested chief engineer to allow change in constitution and change of name in agreement after conversion of firm into company with existing partners as its directors and such request had been accepted; and that such acceptance formed part of agreement. Held that on facts, it could be said that firm stood in shoes of promoter and assessee-company took over its all assets and liabilities statutorily, therefore, assessee would be entitled to benefit of deduction under section 80-IA(4).

Brahamputra Capital & Financial Services Ltd. v. ITO (ITA No. 4284/Del/06)

Chargeability of interest income to tax when same is only technically accrued

The provisions of section 145 of IT Act cannot override section 5 of the Act; if income has neither actually accrued nor received within the meaning of section 5; whatever section 145 may say, such income cannot be charged to tax even though a book keeping entry may have been made recognizing such hypothetical income.

Kabir Leathers v. Addl. CIT (IT A No. 3041/Del/2007)

A low profit by itself cannot be a ground for rejection of book results

In case there is neither any instance of inflated expenditure nor any instance of sale out of books except a general remark by the AO that the assessee does not seem to be maintaining a stock register, the tax authorities would not be justified in rejecting the books of accounts merely on account of fall in gross profit rate.

TDI Marketing Pvt. Ltd. v. ACI (ITA No. 1069/Del/2007)

Sustainability of addition made under section 69 of it act solely on basis of statement given on oath during survey

Section 133A does not compel an assessee to give statement on oath; if the survey officials have recorded the statement on oath, it is an excessive exercise of power; an addition under section 69 is possible provided the assessee has made investments which are not recorded in the books of account, if any maintained and the assessee offers no explanation about the nature and source of investment; however, when the assessee denies the fact of having made any investment and there is no other material except the statement of assessee that any investment has been made, no addition can be made under section 69 without actually finding that investments are made.

Export Credit Guarantee Corp vs. ITO (ITAT Bombay) (ITA No. 6076/Mum/2005)

The assessee is entitled to take advantage of reassessment proceedings to re-raise issues that have not attained finality

Where the AO reopened the assessment to rework the book profits u/s 115JA and in an appeal against such order the assessee raised other issues unconnected with the reassessment and the preliminary point arose as to whether in the light of the judgement of the Supreme Court in **CIT vs. Sun Engineering** 198 ITR 297, the assessee was entitled to raise such issues, HELD that:

(i) The judgement in **Sun Engineering** had to be confined to a case where the issue had attained finality in the original proceedings. Such an issue could not be permitted to be agitated by the assessee in reassessment proceedings. However, as the facts showed that the issue had not attained finality in the original proceedings, there was no bar in the assessee raising such issues in the reassessment proceedings.

(ii) In an appeal by the assessee, the respondent-department, having not filed any appeal or cross-objection against the order of the CIT (A), is not permitted to raise a ground which will work adversely to the assessee.

CIT v. Rajesh Kumar Dinesh Kumar (2009) 221 CTR (Raj) 78

Computation of Interest under s. 220(2) - Date from which chargeable

Assessments set aside by Tribunal twice. Order of the Tribunal became final and fresh assessment order was passed pursuant thereto. Therefore, matter is squarely covered by the later part of sub-para (i) of Circular No. 334, dt. 3rd April, 1982 and interest under s. 220(2) can be charged only from the due date of demand notice issued for the fresh assessment order and not from the date of original assessment order.

DIT vs. NGC Network Asia LLC (Bombay High Court) (IT Appeal No. 1037 OF 2008)

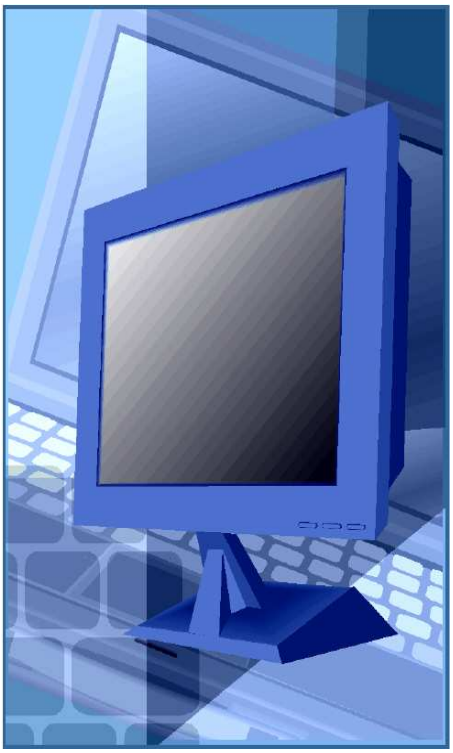
Non-residents are not liable to pay interest u/s 234B and 234C for shortfall/deferment in advance-tax

A non-resident whose income is liable to deduction of tax at source under s. 195 is not liable to pay advance tax u/s 209 (1)(d). Consequently, there can be no liability on such assessee u/s 234B for shortfall in advance tax.

Krishna Mohan Agrawal v. ITO (ITA No. 811/Luc/05)

Pre-requisites of a genuine gift transaction

Merely because assessee has been able to file documents showing the form of the transactions such as affidavits, deeds, statements and transactions of gift through banking channels, it cannot be said that in substance, the gifts are acceptable; for a gift to be genuine, surrounding circumstances, human probabilities and reality of human life are to be considered for determining genuineness of the gifts; the realities of human life in which a person would be motivated to give gift to another include the relationship between the donors and the donees, and emotional bondages, reciprocity showing that the two sides, one that of donor and the other that of donee are, in normal course, exchanging gifts of similar amounts on different occasions.



Smt. Nasreen Yusuf Dhanani v. ACIT (2009) 120 TTJ (Mumbai) 320

Validity of Search and seizure

Search warrant having been issued in the name of assessee's husband, proceedings under s. 158BC could not have been initiated against the assessee. In respect of the bank lockers the Panchnama is in the names of husband and the assessee for the simple reason that the bank lockers were in joint names of husband and wife. During the search of assessee's husband, some incriminating material was found against the assessee, the proper course was to proceed against the assessee under s. 158BD. Search u/s. 132 is person specific and not premises specific. Contention of the Revenue that as the premises searched belonged to the assessee, proceedings against her under s. 158BC were valid, could not be accepted.

Gujarat State Petroleum Corporation Ltd. v. *JCIT* (2009) 120 TTJ (Ahd) 256

Company - Book profit u/s. 115JA & Deduction u/s. 42

Deduction u/s. 42 is available insofar as computation of business income is concerned. Sec. 42 cannot override sec. 115JA because sec. 115JA does not levy tax on the business income of the assessee but on its total income. Legal fiction created in s. 42 is relevant only so far as computation of business income is concerned. If the legal fiction created in s. 42 is to be extended and telescoped into the provisions of s. 115JA, then the entire purpose of introducing minimum alternate tax under s. 115JA would be defeated. Claim of the assessee that the book profit should be reduced by the deduction under s. 42 allowable to it for the purpose of computing book profit under s. 115JA is misconceived. Explanation to s. 115JA leaves no scope for further interpretation with a view to introduce from the backdoor such deduction or concession which are otherwise not available. Further, assessee placed before the AO the accounts which were not laid before the AGM of the company and were not approved by the auditors and the ROC. AO was well within his rights to accept only the accounts which were approved by the AGM and by the auditors as well as ROC.

Don't go through life, *grow* through life

Judicial pronouncements (International Taxation)

Clifford Chance v. DCIT (2009) 221 CTR (Bom) 1

Double taxation relief - Fees for professional services rendered in India

Assessee, a firm of solicitors resident of UK, was appointed as English law legal advisors for four infrastructure projects in India. Partners of assessee visited India for rendering services from time to time aggregating to more than 90 days in the relevant fiscal year. Assessee returned income for services rendered in India to the clients to the exclusion of services rendered from abroad.

It was held that AO was not justified in assessing the entire income from the four clients. As the test of 90 days as laid down in art. 15 of the DTAA between India and UK was satisfied, it virtually took the assessee out of treaty and taxability of income had to be determined under s. 9(1). Sec. 9(1)(vii)(c) envisages two conditions to be fulfilled: services, which are source of income sought to be taxed in India must be (i) utilized in India and (ii) rendered in India. Thus, income of the assessee for services rendered in India and utilized in India as disclosed by assessee in its return is only chargeable to tax in India to the exclusion of income from services rendered out of India

Income deemed to accrue or arise in India - Fees for professional services rendered in India

Assessee, UK firm having fulfilled the condition of presence in India for 90 days or more as provided in art. 15 of DTAA between India and UK, fee received by it for legal services rendered to its clients in India is chargeable to tax under s. 9(I)(vii)© only to the extent referable to services rendered in India to the exclusion of services rendered from abroad.

ACIT v. EPCOS AG, Germany (2009) 120 TTJ (Pune) 29

Double taxation relief - Agreement with foreign country - Consideration of treaty provisions vis-a-vis domestic laws

In the case of cross-border tax situation between treaty partner States, first thing for a source tax jurisdiction is to establish the right to tax under the applicable tax treaty, and, only if such a source tax jurisdiction indeed has right to tax, the next thing is to examine the taxability under the domestic laws of that State. Unless a tax jurisdiction has a right to tax an income, it is irrelevant whether or not under the domestic tax legislation of that tax jurisdiction; the income in question is taxable. As per sec. 90, the provisions of treaty override and the provisions of Indian IT Act are applicable only to the extent these provisions are more beneficial to a Taxpayer covered by a tax treaty. In view of this principle of treaty overrides, the need to look at the provisions of domestic tax legislation will arise only when a non-resident taxpayer is found liable to Indian tax in terms of tax treaty. Holding the non-resident liable to tax under domestic law first and shifting the burden on him to prove exemption under the tax treaty would be putting the cart before the horse. It would indeed be somewhat illogical to examine the taxability under the domestic law first and then examine whether or not the source jurisdiction has right to tax at all. However, whichever path one follows, he reaches the same destination anyway; whether or not a cross-border income is taxable in the source country in the light of the domestic tax laws read with the applicable tax treaty. In case of non-resident assessee governed by Indo-German tax treaty, one has to first examine the case on the touchstone of provisions of Indo-German tax treaty and only when the non-resident is held taxable in India in terms of the treaty that one is required to take a look at the taxability under the domestic tax legislation in India.

Dy. DIT (International Taxation) v. Delmas France [ITA NO. 5824/MUM./2006, DATED 28-11-2008] (MUM. - ITAT)

Provisions contained in Article 9(2) of Indo-French DTAA have nothing to do with definition of 'Operation of Ships'

The expression "Operation of ships", in the absence of any definition in the Article 9, would include not only the direct activity of transportation of cargo by ships owned, leased or chartered by the assessee but also transportation of cargo by feeder vessels from Indian port to the mother vessel if such transportation is ancillary or incidental to main activity.

DaimlerChrysler India vs. DCIT (ITAT Pune) (ITA No. : 968/PN/03)

Even an Indian company can claim the benefits of non-discrimination under the DTAA

Where the assessee was an Indian company and more than 51% of its equity share capital was held by a German company (Daimler Benz AG)

and pursuant to an offshore merger the said shares came to be held by another German company (DaimlerChrysler AG) and there being a change of more than 51% of the beneficial interest in the shares, the question arose whether section 79 of the Act (pre-amendment) applied and the loss suffered by the assessee in the earlier years was not eligible for carry forward & set-off - HELD:

(1) Under Article 24 (4) of the India-Germany DTAA, Enterprises of India, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of Germany, cannot be subjected in India to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of India are or may be subjected;

(2) Accordingly, the fact that the assessee is an Indian company and not a resident of Germany is not a bar to its claiming the benefit of the non-discrimination provision of the DTAA;

(3) The term "other similar enterprises of India" means a company which is subsidiary of a domestic company and not a company which is a subsidiary of a foreign company (judicial precedents from Germany, United States and France followed);

(4) S. 79 read with s. 2(18) is discriminatory to the Indian subsidiary of a German company as compared to the Indian subsidiary of an Indian company because while the latter qualifies as a "company in which the public are substantially interested" by virtue of the holding company being listed on an Indian stock exchange, the former is not even though its holding company is listed on a German stock exchange. There is no rational basis for this differentiation in treatment. Consequently, section 79 cannot apply to the assessee;

(5) On the question whether double taxation was necessary to invoke the DTAA and whether the non-discrimination provisions of the DTAA could, prior to the insertion of s. 90 (1) (a)(ii), be said not to be protected by treaty override, HELD the ground reality in today's world is that the role of tax treaties is not only confined to avoiding double taxation or to giving relief in respect of an income taxed twice but it is an instrument of fostering economic relations, trade and investment. Consequently, treaty override, even before the 2004 amendments in Section 90(1), covered all provisions of the tax treaties, including the provisions relating to non discrimination;

(6) Held also that though judicial precedents from foreign judicial bodies do not have any binding value, it is desirable that the interpretation assigned to the expressions found in the bilateral tax treaties should be in harmony with the judicial opinion abroad and, where there is a divergence of judicial opinion abroad, it should at least be in harmony with the judicial opinion in the treaty partner country. This approach will bring uniformity of interpretation of expressions used in global treaty networks.

Cholamandalam MS General Insurance Co. Ltd., In re [AAR No. 752 of 2007]

AAR on obligation of an Indian company to deduct tax at source for payments made to a Korean company under 'Secondment Agreement'

From the mere fact that the Korean company did provide the service of a technical person and received from the applicant-Indian company a substantial part of the salary payable by the Korean company, it cannot be inferred that the part reimbursement in terms of the secondment agreement represents the fee for technical services within the meaning of Explanation 2 to section 9(1)(vii) of the Income-tax Act or Article 13.4 of the Indo-Korean Tax Treaty; therefore, no tax is liable to be deducted at source by the applicant in respect of the payments made or to be made to the Korean company under the terms of the secondment agreement.

DDI v. Cie de Navegacao Norsul (2009) 27 SOT 316 (Mum)

Section 90 of the Income-tax Act, 1961, read with article 8 of Double Taxation Avoidance Agreement ('DTAA') between India and Brazil - Where agreement exists

Assessee, a non-resident company, was engaged in business of transportation of cargo in international traffic by sea. It claimed 100% exemption in respect of freight received on trans-

-portation of cargo from Indian port to ultimate destination in Brazil via Durban under article 8 of DTAA between India and Brazil. Assessee submitted that none of ships owned/chartered by it was called at Indian ports and that all vessels shown in freight statement were feeder vessels owned by other shipping lines with whom assessee had slot arrangements. Assessing Officer opined that assessee had failed to link and establish voyage wise that its feeder vessels were actually loading goods into mother vessels operated by assessee. Thus, Assessing Officer rejected assessee's claim. On appeal, Commissioner (Appeals) taking view that linkage of feeder vessel with mother vessel was not a condition for grant of exemption under article 8, allowed assessee's claim.

In view of scope of expression 'operation of ships or aircraft' in article 8(4) of DTAA, transportation of persons, mails, livestock or goods must be by ships owned or leased or chartered by assessee. Since, in instant case, assessee was neither owner nor lessee nor charterer of feeder vessels carrying cargo from Mumbai Port to destination in Durban, profits attributable to such voyage would be outside scope of article 8 of DTAA. So far as transportation of cargo from Durban to destination in Brazil was concerned, since assessee had issued one single Bill of Lading covering entire transportation from Indian Port to destination in Brazil, if voyage between Durban to Brazil was through ship owned/leased/ chartered by assessee, it would fall within ambit of article 8 of DTAA. Said exemption would be available to assessee even if goods were transported from Durban to Brazil through ships belonging to consortium of which assessee was a member. In view of aforesaid, matter was remanded to Commissioner for disposal afresh in accordance with guidelines.

Circulars / Notifications

Notification No. 10/2009 dated: January 19, 2009

CBDT has amended the Table to the New Appendix-I prescribing the Rates at which depreciation is admissible. Now new commercial vehicle which is acquired on or after the 1st day of January, 2009 but before the 1st day of April, 2009 and is put to use before the 1st day of April, 2009 for the purposes of business or profession , will get 50% depreciation.

INDIRECT TAXES

Judicial Pronouncements

Kesarwani Zarda Bhandar v. State of U.P. 2009 (13) S.T.R. 95 (SC)

Manufactured goods vis-a-vis processed goods

When a new form comes into being and in the market parlance it is considered to be a new prod-uct, the same would be deemed to be manufactured goods as contradistin-guished from processed goods. The distinction between 'manufactured' and 'proc-essed' may not in all situation depend upon the nature of the Statute involved. It must pass the requisite test, namely, as to whether it is a completely new item. Raw material of a manufactured product has to be distinguished from the manufactured product. The distinction between 'processing' and 'manufacturing' is well known. When a new thing comes into being, the steps which are taken for manufacture may be relevant but may not be decisive.

Tobacco - Market fee - Zafrani Zarda - Whether processed form or manufactured form prepared from the raw material tobacco

Zafrani Zarda is not processed tobacco but held to be a manufactured tobacco. Tobacco in raw form or in any other processed form is not commercially known as zarda. Common parlance test have to be applied for finding out as to whether prod-uct in question is manufactured goods. Market fee not leviable. Sections 2(a) and 2(d) of U.P. Krishi Utpadan Mandi Adhiniyam, 1964.

Circulars / Notifications

Circular No. 108/02/2009 – ST F. No. 137/12/2006-CX.4 dated 29th January 2009

Subject: Imposition of service tax on Builders

1. Construction of residential complex was brought under service tax w.e.f.01.06.2005. Doubts have arisen regarding the applicability of service tax in a case where developer / builder/promoter enters into an agreement, with the ultimate owner for selling a dwelling unit in a residential complex at any stage of construction (or even prior to that) and who makes construction

linked payment. The 'Construction of Complex' service has been defined under Section 65 (105)(zzzh) of the Finance Act as "any service provided or to be provided to any person, by any other person, in relation to construction of a complex". The 'Construction of Complex' includes construction of a 'new residential complex'. For this purpose, 'residential complex' means any complex of a building or buildings, having more than twelve residential units. A complex constructed by a person directly engaging any other person for designing or planning of the layout, and the construction of such complex intended for personal use as residence by such person has been excluded from the ambit of service tax.

2. A view has been expressed that once an agreement of sale is entered into with the buyer for a unit in a residential complex, he becomes the owner of the residential unit and subsequent activity of a builder for construction of residential unit is a service of 'construction of residential complex' to the customer and hence service tax would be applicable to it. A contrary view has been expressed arguing that where a buyer makes construction linked payment after entering into agreement to sell, the nature of transaction is not a service but that of a sale. Where a buyer enters into an agreement to get a fully constructed residential unit, the transaction of sale is completed only after complete construction of the residential unit. Till the completion of the construction activity, the property belongs to the builder or promoter and any service provided by him towards construction is in the nature of self service. It has also been argued that even if it is taken that service is provided to the customer, a single residential unit bought by the individual customer would not fall in the definition of 'residential complex' as defined for the purposes of levy of service tax and hence construction of it would not attract service tax.

3. The matter has been examined by the Board. Generally, the initial agreement between the promoters / builders / developers and the ultimate owner is in the nature of 'agreement to sell'. Such a case, as per the provisions of the Transfer of Property Act, does not by itself create any interest in or charge on such property. The property remains under the ownership of the seller (in the instant case, the promoters/builders/developers). It is only after the completion of the construction and full payment of the agreed sum that a sale deed is executed and only then the ownership of the property gets transferred to the ultimate owner. Therefore, any service provided by such seller in connection with the construction of residential complex till the execution of such sale deed would be in the nature of 'self-service' and consequently would not attract service tax. Further, if the ultimate owner enters into a contract for construction of a residential complex with a promoter / builder / developer, who himself provides service of design, planning and construction; and after such construction the ultimate owner receives such property for his personal use, then such activity would not be subjected to service tax, because this case would fall under the exclusion provided in the definition of 'residential complex'. However, in both these situations, if services of any person like contractor, designer or a similar service provider are received, then such a person would be liable to pay service tax.

4. All pending cases may be disposed of accordingly. Any decision by the Advance Ruling Authority in a specific case, which is contrary to the foregoing views, would have limited application to that case only. In case any difficulty is faced in implementing these instructions, the same may be brought to the notice of the undersigned.

Circular No. 107/01/2009 – ST F.No137/23/2007-CX.4 dated 28th January 2009

Circular issued for resolution of doubts regarding Levy of service tax on educational institutions.

SEBI

SEBI PR No.58/2009 dtd. January 21, 2009

SEBI makes it mandatory to disclose details of shares pledged by the promoters

To enhance the disclosure requirements, SEBI Board, in its meeting held today, decided to make it mandatory on the part of promoters (including promoter group) to disclose the details of pledge of shares held by them in listed entities promoted by them. Such disclosures shall be made as and when the shares are pledged ("event based disclosure") as well as by way of periodic disclosures. Necessary steps to amend the relevant regulations and the listing agreement are being taken. Details of pledge of shares and release/ sale of "pledged shares" shall be made to the company and the company shall in turn inform the same to the public through the Stock Exchanges.

Consequent to this changes made to Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) (Amendment) Regulations, 2009 vide Notification No. LAD-NRO/GN/2008-2009/ 33/ 15022 dtd. January 28, 2209

SEBI/CFD/DIL/LA/2009/3/2 dated February 3, 2009

Notification is issued by the SEBI containing amendments to Clause 35 and Clause 41 of the Listing Agreement.

OTHERS

Vodafone International vs. UOI (Supreme Court)

AO directed to decide "jurisdictional issue" as a "preliminary issue" and assesee entitled to challenge the same.

Against the judgment of the High Court, the assessee filed a SLP. In dismissing the SLP it was held:

In view of the assessee submitting copies of the agreements (which had not been submitted earlier before the AO or the High Court) and the law laid down in **Management of Express Newspapers vs. Workers** AIR 1963 SC 569 that the High Court should ordinarily not embark upon deciding questions of fact which require appreciation of evidence, the question in regard to "the jurisdictional issue" should be decided by the AO as a "preliminary issue" and the assessee shall be entitled to question the decision of the AO on that preliminary issue before the High Court. The question of law "to that extent" remains open.

Due Dates of key compliances pertaining to the month of February 2009:

5th Feb.	*Payment of Service Tax & Excise duty for January*
6th Feb.	*Payment of Excise duty paid electronically through internet banking*
7th Feb.	*TDS/TCS Payment for January*
10th Feb.	*Excise Return ER1 / ER2 /ER6*
15th Feb,	*PF Contribution for January, Excise payment by SSI*
21st Feb.	*ESIC Payment for January*