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SNK Newsletter

DIRECT TAXES

Judicial Pronouncements

Bombay Oil Industries Ltd. v. DCIT (2009) 28 SOT 383 (MUM.)

Section 2(22) of the Income-tax Act, 1961 - Deemed dividend

It was held that requisite condition for invoking section 2(22)(e) is that payment must be made by way of loan or advance. Further, Inter-Corporate Deposits (ICDs) are different from loans or advances and would not come within purview of deemed dividend under section 2(22).

Chargeability as Capital gains

During relevant previous year, assessee had transferred trademark and copyright of two brands. Assessing Officer taxed long-term capital gains on sale of said brands. Assessee contended that words 'Trademark or brand name associated with a business' were introduced in section 55(2) with effect from 1-4-2002 and, thus, capital gains could not be taxed in case of transfer of 'Trade mark or brand name' in assessment year 2001-02. In view of above contention it was held that, sale receipts on account of transfer of trademark/brand name would not be liable to capital gains tax in relevant year.

Morgan Stanley Advantage Services Pvt. Ltd. v. ITO [ITA NO. 5651/MUM/2007]

For purpose of section 10A(3) of IT Act, permission of RBI or any other designated authority is required for extension of time

Once the assessee has completed all the formalities and the request of the assessee for extension of time not having been rejected, it can be presumed after a reasonable time that the extension has been granted and the assessee is entitled to deduction under section 10A even in respect of the remittances not realized within the period of six months from the end of the previous year.

Hero Cycles Ltd. v. JCIT (2009) 20 DTR (Chd)(Trib) 213

Disallowance under s. 14A - Expenditure towards dividend income

In order to make disallowance under s. 14A, there must be a connection between the expenditure sought to be denied deduction and the income which is excludible from the total income of the assessee. Material placed on record by assessee showed that entire dividend-earning investment was out of dividend proceeds, sale proceeds, debenture redemption, etc. CIT(A) had come to a categorical finding that except the main unit, none of the interest bearing funds of the other two units was utilized in making the dividend-earning investments. As regards the main unit, interest income earned by it exceeded the expenditure by way of interest, thus ruling out the application of s. 14A. Funds flow statement of main unit also showed that only non-interest bearing funds were utilized in making the investment. There being no evidence to show that any interest bearing funds were utilized in dividend-earning investment, no disallowance could be made under s. 14A on mere presumptions.

Solid Containers Ltd. v. DCIT & Anr. (2009) 20 DTR (Bom) 120

Business income u/s. 28(iv) - Waiver of loan

Amount received as loan by the assessee for trading activity and ultimately, retained in the business upon waiver of the loan is taxable under s. 28(Iv); no substantial question of law arises for consideration.

ITO v. Medicorp Technologies India Ltd. [ITA No. 2328/Mds/2007]

`Non-compete right' acquired by an assessee is eligible for depreciation under clause (ii) of section 32(1) of IT Act

Capability to have a market value, assignability, transferability, diminution in value, are no more the touch stones on which the admissibility for depreciation under section 32 has to be tested; consequently, if the business/ commercial right of a patent, copy right, trade mark, license and franchise fulfills the conditions of being intangible asset as mentioned in clause (ii) of section 32(1), then surely the business/commercial right by way of non-compete right acquired by the assessee also fulfills that condition, by way of a logical corollary.

DCIT v. Sarup Tanneries Ltd. (2009) 19 DTR (Asr)(Trib) 322

Bad debt - Loan or guarantee not related to business

Assessee can claim a debt as bad debt only if such debt would have appeared in the balance sheet as a trading debt. Debt arising out of capital field or emerging from the investment activity of the assessee is not a trade debt, hence not allowable as bad debt. Assessee engaged in the business of manufacture and sale of leather goods, granted loan to and stood guarantee for its wholly owned subsidiary company in USA. Granting of loan and standing surety not being the business of assessee, amounts representing loan advanced by assessee to its wholly owned subsidiary and discharge of standby guarantee in respect of said subsidiary which became irrecoverable on account of closure of business of subsidiary not being related to assessee's business and being in the capital field could not be allowed deduction under s. 36(1)(vii) as bad debt. Further, as per letter of RBI directing assessee to write off investment in asst. yr. 2004-05, the loss does not pertain to assessment year in question viz., asst. yr. 2005-06. Having not booked the provision for expenditure in the year of accrual, payment could not be allowed in other assessment year.

CIT v. Woodward Governor India (P) Ltd. (2009) 21 DTR (SC) 106

Foreign Exchange fluctuation losses are allowable on accrual basis

Where the assessee carrying on the mercantile system of accounting claimed that:

(i) The additional liability arising on account of fluctuation in the rate of exchange in respect of loans taken for revenue purposes was allowable as deduction u/s 37(1) in the year of fluctuation in the rate of exchange and not in the year of repayment of such loans; and

(ii) The actual cost of imported assets acquired in foreign currency is entitled to be adjusted u/s 43A (prior to the amendment by the FA 2002) on account of fluctuation in the rate of exchange at each balance sheet date, pending actual payment of the varied liability HELD approving the claim that:

(a) The term “expenditure” in s. 37 covers an amount which is a “loss” even though the said amount has not gone out from the pocket of the assessee. The “loss” suffered by the assessee on account of the exchange difference as on the date of the balance sheet is an item of expenditure u/s 37 (1) ;

(b) Profits and gains are required to be computed in accordance with commercial principles and accounting standards (AS-11);

(c) Accounts and the accounting method followed by an assessee continuously for a given period of time needs to be presumed to be correct till the AO comes to the conclusion for reasons to be given that the system does not reflect true and correct profits;

(d) The fact that the department taxed the gains on fluctuation on the basis of accrual while disallowing the loss is important and indicates the double standards adopted by the Department;

(e) U/s 43A (pre-amendment), the change in the rate of exchange subsequent to the acquisition of asset triggers the adjustment in the actual cost of the assets. Actual payment of the liability as a consequence of the exchange variation is not required. The amendment of s. 43A by the FA 2002 w.e.f. 1.4.2003 is not clarificatory.

Maheshwar Prakash-2 Co-op. Hsg. Society Ltd. v. ITO (2009) 20 DTR (Mumbai)(Trib) 269

Cost of acquisition - If an asset is such that it has no inherent quality of being available on expenditure of money then it would be outside scope of section 45

Assessee, a co-operative housing society established in year 1962, owned a building in Santacruz, Mumbai. This building had been constructed after utilizing entire FSI available to it and, therefore, no right was available for any further construction on this plot of land. However, Bombay Municipal Corporation relaxed development regulations in year 1991 and on that account additional Transferable Development Right (TDR) of FSI was allowed under newly enacted Development Control Regulations, 1991 (DCR). Thus, assessee became entitled to construct additional space of 15,000 sq. ft. In view of availability of such right, assessee entered into an agreement with two developers on 25-11-2002 for construction of additional floors on existing structure of society's building and development of said property against a consideration of Rs. 42 lakhs. Under this agreement, TDR was to be arranged by developers at their own cost. For relevant assessment year 2003-04, assessee did not admit any capital gain tax liability on amount of Rs. 42 lakhs by contending that there was no cost of acquisition and, therefore, nothing was chargeable to capital gain. Assessing Officer observed that as per amended provisions of section 55(2) applicable to year under consideration cost of acquisition was to be taken as nil and, therefore, entire receipt was to be treated as capital gain. He, therefore, assessed entire sum of Rs. 42 lakhs in hands of assessee as long-term capital gain, holding that right to construct was embedded in land which was held by assessee for more than three years.

Indian Oil Panipat Power Consortium Limited v. ITO (DEL - HC)

Section 56 read with Section 4 and 14 of the Income-tax Act, 1961 - Income from other Sources - Interest earned on funds primarily brought for infusion in the business could not have been classified as income from other sources.

Issue which arose for consider-ation of the authorities below was as to the treatment which was to be accorded to the interest earned on monies received as share capital by the assessee which were temporarily put in a fixed deposit awaiting acquisition of land which had run into legal entanglements on account of title. The Assessing Officer had treated the interest as 'income from other sources', whereas the Commissioner (Appeals) had accepted the stand of the assessee that the interest was in the nature of capital receipt which was liable to be set off against pre-operative expenses. On appeal, the Tribunal reversed the decision of the Commissioner (Appeals).

The test which permeates through the judgment of the Supreme Court in Tuticorin Alkali Chemicals and Fertilizers Ltd vs. C1T (1997)227 ITR 172 is that if funds have been borrowed for setting up of a plant and if the funds are 'surplus' and then by virtue of that circumstance they are invested in fixed deposits the income earned in the form of interest will be taxable under the head "income from other sources'. On the other hand the ratio of the Supreme Court judgment in CIT vs. Bokaro Steel Ltd. (1999) 236 ITR 315 is that if income is earned, whether by way of interest or in any other manner on funds which are otherwise 'inextricably linked' to the setting up of the plant, such income is required to be capitalized to be set off against pre-operative expenses.

On facts, once it is held that the assessee's income is an income connected with business, which would be so in the present case, in view of the finding of fact by the CIT(A) that the monies which were inducted into the joint venture company by the joint venture partners were primarily infused to purchase land and to develop infrastructure - then it cannot be held that the income derived by parking the funds temporarily with Bank, will result in the character of the funds being changed, in as much as, the interest earned from the bank would have a hue different than that of business and be brought to tax under the head 'income from other sources'.

It is well-settled that an income received by the assessee can be taxed under the head "income from other sources" only if it does not fall under any other head of income as provided in section 14. It is clear upon perusal of the facts as found by the authorities below that the funds in the form of share capital were infused for specific purpose of acquiring land and the development of infrastructure, therefore, the interest earned on funds primarily brought for infusion in the business could not have been classified as income from other sources.

ITO v, Arasan Subbiah (2009) 20 DTR (Mad) 113

Addition under s. 69B - Cost of construction vis-a-vis report of Valuation Officer

AO has not rejected the books of accounts maintained by the assessee in the usual course of business nor the AO has established that there is difference in the constructed area of the building. Thus, the value reflected in the books of accounts has to be taken as correct rather than the one furnished by the Valuation Officer, and the addition made under s. 69B towards the difference cannot be sustained.

Meera Cotton & Synthetic Mills (P.) Ltd. v. ACIT (ITA No. 5901 of 2007-Mumbai)

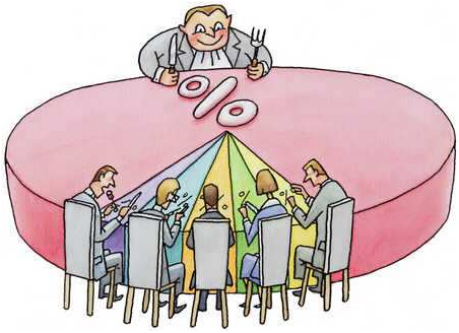
Section 80-IB - Profits and gains from industrial undertakings other than infrastructure development undertakings

It was held that deduction u/s. 80-IB is to be allowed with reference to profits of a particular industrial undertaking and not with reference to total income of assessee-company and, therefore, loss suffered in other eligible unit of assessee-company cannot be set off against profits of eligible unit in question while calculating amount of deduction to be allowed under section 80-IB.

Cartini India Ltd. v. Addl. CIT (Writ Petition No. 2468 of 2008)(Bombay HC)

Reopening of assessment on ground of excess allowance of relief

Once the Assessing Officer, on consideration of the material on record and the explanation offered, arrives at a final conclusion that the assessee is entitled to the deduction as claimed then, on the basis of the very same material, he cannot form a prima facie opinion that the deduction is not allowable and accordingly reopen the assessment on the ground that income chargeable to tax has escaped assessment.



Satish Builders vs. ACIT (ITA No. 4095 (Del) 2005)

Survey - Section 133A

Assessee, a civil contractor doing construction work of Government as well as of private parties. In survey, surrendered Rs. 25 lakhs and paid taxes accordingly. Return of income filed without offering the amount surrendered in survey. Explanation of assessee that surrender made under pressure and mentally disturbed state of mind. No material or evidence found in survey to support the amount surrendered. Addition made only on basis of surrender deleted.

Taneja Developers & Infrastructure Ltd. v. ACIT & Ors. (2009) 222 CTR (Del) 521

Stay of Recovery of High-pitched assessment

Assessment at a figure 350 times the returned income is unreasonably high pitched, hence recovery needs to be stayed in view of CBDT Instruction No. 96, dt. 21st Aug., 1969.

Shivnath Rai Harnarain (India) Ltd. v. DCIT (2009) 117 ITD 74 (DELHI)

Section 153A r.w.s. 132 - Search and seizure

A search and seizure operation under section 132 was conducted at business premises of assessee-company on 18-6-2003. Subsequently, notice under section 153A was issued to it on 31-5-2005 wherein it was required to file returns for relevant assessment years. Assessee filed returns and assess-ments were framed thereon. On appeal, assessee contended that as there was no seized material based on which assessment had been completed by Assessing Officer in its case, assessment so framed by Assessing Officer under section 153A should be held to be null and void. It was held that since there is no requirement for an assessment made under section 153A being based on any material seized in course of search, contention raised by assessee was invalid.

Further, under second proviso to section 153A pending assessment or reassessment proceedings in relation to any assessment year falling within

period of six assessment years, referred to in section 153A(b), shall come to an end (abate), which means that Assessing Officer gets jurisdiction for said six assess-ment years, for making an assessment or reassessment. Therefore, Assessing Officer was perfectly justified in framing an assessment under section 153A for assessment years under consideration.

Jay Bharat Maruti Ltd. v. CIT (ITA NO. 501/2007)(Delhi HC)

Proceedings u/s 147 r.w.s 148 of IT Act do not wipe out or set aside original proceedings

The proceedings under section 147 cannot impinge upon items which have no connection or relation with items of income and/or expenditure which form the basis of a notice under section 148(1).

CIT v. J.M.D. Computers & Communications (P) Ltd. (2009) 20 DTR (Del) 317

Income from undisclosed sources – Addition of Bogus purchases

Department having accepted purchases made by assessee, could not have assumed that the assessee had inflated purchases and made addition. Alleged investigation carried on by the Inspector was not part of the report which the Inspector had prepared for perusal of AO. Statement of A, which was made basis of addition, was not even put to the assessee and evidence regarding operations of T, brother of A collected by Investigation Wing, was not even available to the AO. Addition was rightly deleted and no substantial question of law arose out of concurrent findings of CIT(A) and the Tribunal which do not suffer from any infirmity.

Prakash Bhalaji Bafna v. ACIT 21 DTR (Pune)(Trib) 25

Limitation of Fresh assessment pursuant to appellate order of Assessment

There was a change of jurisdictional CIT as a result of restructuring of jurisdiction but no intimation or information was given by the Department to the Tribunal as to change of jurisdiction. Therefore, Tribunal was justified in dispatching the copy of the order passed by it to the CIT, Karve Road, Pune, as per the last information and material available in the records and the date on which the order of the Tribunal was received by the said CIT would be material for the purpose of computing the period of limitation for passing the trash assessment order by the AO. No direct evidence or material has been produced as to when the order of the Tribunal was actually received by that CIT. However, there is a noting dt. 3rd April, 2003 on a sheet of paper whereby this order along with some other orders were directed to be returned back to the Registry of the Tribunal. Therefore, the date of service of the Tribunal's order on the CIT is to be taken as 2nd April, 2003. Accordingly, the period of limitation for passing the fresh assessment order was to expire on 31st March 2005. Thus, the fresh assessment order passed on 25th Feb., 2005 was not time-barred.

Search and seizure - Block assessment - Computation of undisclosed income

Addition of Rs. 2,75,000 made by the AO after interpreting the code word "27.50" as Rs. 2,75,000 on the basis of the assessee's statement made before FERA authorities. Tribunal restored the matter to the AO observing that this addition requires further probe and investigation and directing that the statement of the concerned persons including RD must be recorded in the presence of the assessee. However, AO has not made any further enquiry or investigation nor recorded the statement of RD in the presence of the assessee giving him an opportunity to cross-examine RD. Further, the question as to whether the same can be said to be undisclosed income of the assessee has not been examined. Addition was deleted.

CIT vs. Singapore Airlines (Delhi High Court) (ITA Nos. 306 of 2005 & 123 of 2006)

TDS required even on commission retained by agent

Where the assessee-airline supplied blank tickets to the travel agent, on terms that the same be sold at a minimum price and the difference between the said minimum price and the price at which the tickets were sold to the passenger was retained by the travel agent and the question arose whether the amount so retained by the agent was "commission" and whether the assessee was required to deduct tax thereon u/s 194-H of the Act, HELD, reversing the decision of the Tribunal:

(a) The relationship between the airline and the travel agent was that of a principal and agent as all the requirements of s. 182 of the Contract Act were fulfilled by the PSA. By the acts of the travel agent, a legal relationship was created between the airline and the passenger;

(b) The monies retained by the travel agent in the form of supplementary commission is not a "discount" because the travel agent never obtains proprietary rights to the tickets and has never paid a "price" for the same. Instead, the same is "commission" because it is received for services rendered on behalf of the assessee-airline and the airline ought to have deducted tax u/s 194-H;

(c) The argument that the assessee-airline is unable to deduct tax at source since it is unaware of the commission retained by the agent till a billing analysis is done is not acceptable because once an obligation is cast, it is for the assessee-airline to retrieve the necessary information from the travel agent and put itself in a position to deduct tax. The assessee cannot take up the stand that the machinery for deduction of tax has failed;

(d) However, in respect of the issue of "concessional" tickets to the agents, the difference between the full value and the concessional price was not "commission" because though it was a reward for services, title to the ticket passes to the agent and the relationship was that of a principal to principal. The difference was a "discount".

Contech Transport Services (P) Ltd. & Ors. v. ACIT (2009) 121 TTJ (Mumbai) 780

Search and seizure - Computation of undisclosed income

No addition can be made only on the basis of admission in statement under s. 132(4). However, under s. 158B(b), as amended by the Finance Act, 2002, w.e.f. 1st July, 1995, any expense deduction or allowance claimed under the Act which is found to be false is defined as undisclosed income. When the assessee himself suo motu declares undisclosed income under this category, it is not correct to argue to the contrary that the addition is not within the jurisdiction of Chapter XTV-B. Though there is no basis for the assessee to have returned a particular income as undisclosed income, except loose calculations by way of summary of random selection vouchers, this by itself does not give Revenue the licence to make an addition. As the AO has failed to bring out any evidence in support of the addition, there is no other alternative but to delete the additions.

DCIT v. Satyam Computer Services Ltd. (2009) 121 TTJ (Hyd) 255

Chargeability of Interest u/s. 234B - Treatment of tax paid in USA

DTAA between India and USA is silent on the point as to whether to treat the tax paid in USA as advance tax or self-assessment tax. Assessee having paid tax in USA during financial years relevant to asst. yrs. 1998-99 and 2005-06, which if paid in India would have been treated as advance tax, there is no question of charging of interest under s. 234B. Explanation 1 to s. 234B introduced by the Finance Act, 2006, w.e.f. 1st April, 2007, being clarificatory will apply to asst. yrs. 1998-99 and 2005-06 also.

CIT v. V.L.S. Finance Ltd. (2009) 178 Taxman 433 (DELHI)

Appellate Tribunal

Non-consideration by Tribunal of a judgment of Supreme Court relevant to point in issue would give rise to a mistake apparent from record which can be rectified under section 254(2).

SEBI v. Saikala Associates Ltd. (Civil Appeal No. 3696 of 2005)(SC)

Supreme Court on power of Tribunal to modify penalty imposed by SEBI upon a broker/sub-broker

The position of Broker/Sub-Broker in case of violation is statutorily provided under section 12 of the SEBI Act, 1992 which has to be read along with rule 3 of the SEBI (Stock Brokers & Sub Brokers) Rules, 1992; no power is conferred on the Tribunal to travel beyond the areas covered by section 12 and rule 3; when something is to be done statutorily in a particular way, it can only be done that way; there is no scope for taking shelter under a discriminating power.

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Mahindra & Mahindra Ltd. v. DCIT (ITA NOS. 2606, 2607, 2613 & 2614/MUM/2000)(Mumbai ITAT-Special Bench)

Special Bench of ITAT on limitation period for passing of an order under section 201 of IT Act in absence of any express provision in Act

The canons of limitation are ordinarily provided expressly in the Act and in their absence, they are to be impliedly inferred by taking into consideration the scheme of the relevant provisions; there cannot be a particular time limit which can be described as reasonable for all the actions under the Act, when no time limit is prescribed; the reasonable time for taking action under a particular section largely depends on host of factors, inter alia, the nature of proceedings, the character of the order etc.; passing of the order under section 201(1) has to be within one year from the end of the financial year in which proceedings under section 201 (1) were initiated; same time limits for initiation and passing of orders will be valid for the passing of order under section 201(1A) also.

Kanbay Software vs. DCIT (ITA No. 300 of 2007- Pune ITAT)

SC judgment on s. 271 (1)(c) penalty in Dharmendra Textiles explained

In respect of AY 2002-2003, the assessee claimed by a revised return that the loss suffered in respect of one s. 10A unit was not liable to be set-off against the profits of another s. 10A unit. The AO rejected the claim and the assessee accepted the decision of the AO. On the question whether the assessee was liable for penalty u/s 271 (1) (c) for "furnishing inaccurate particulars of income", especially in the light of UOI vs. Dharmendra Textile Processors 306 ITR 277 (SC), HELD allowing the appeal:

(2) On first principles, penalty u/s 271 (1)(c) is not simply a consequence of an addition being made to the income of the assessee. Penalty u/s 271(1) (c), irrespective of whether it is a civil liability or a criminal liability can only be imposed when the scheme of the Act permits or requires so. It is not an automatic consequence of an addition being made to the income. An addition made during the course of assessment proceedings, by itself, cannot be enough to initiate, leave aside conclude, penalty proceedings u/s 271(1)(c).

(3) The judgment in UOI vs. Dharmendra Textile Processors has to be understood in the correct perspective. It does not make a radical change in the law nor does it affect the basic scheme of s. 271 (1) (c). Even in K P Madhusudanan vs. CIT 251 ITR 99, the assessee's plea to the effect that 'revenue was required to prove mens rea of a criminal offence' before penalty u/s 271(1)(c) can be imposed was rejected. Penalty u/s 271 (1) (c) has been held to be 'civil liability' in contradistinction to prosecution u/s 276C. It is wrong to infer that because the liability is a "civil liability", it ceases to be penal in character. There is no contradiction in a liability being a civil liability and the same liability being a penal liability as well, though a civil liability cannot certainly be a criminal liability as well. As observed in Om Prakash vs. UOI AIR 1984 SC 1194 @ 1209 "A penalty imposed by the sales tax authorities is a civil liability, though penal in character".

CWT v. Hotel Ornate (Nilgiri) P. Ltd. [2009 - TMI - 32733 – BOMBAY HC]

Wealth Tax on unused Land

Land purchased on which party constructed building existed which was not usable. Land is an asset assessable to wealth tax u/s 40(3)(v). It was held that section 40(3)(v) will not apply to any unused land held by the assessee for construction of hotel for a period of two years from the date of acquisition. Land is exempted from tax only for period of 2 years from date of acquisition. Matter is remanded to AO for determining the value of the land and thereafter to pass appropriate order.

UCB India Pvt. Ltd. v. ACIT [ITA NOS. 428 & 429/MUM/2007]

Determination of ALP in accordance with most appropriate method

When the burden of proving that a particular method is the most appropriate method is initially on the assessee, it is for the assessee to demonstrate the same by furnishing adequate records and data, irrespective of the fact whether they are statutorily required or not; once the method adopted by the assessee is rejected, the revenue is duly bound to compute the ALP by adopting a most appropriate method and it has also to substantiate and justify the use of such a method.

Nike Inc. v. ACIT (ITA Nos. 60 to 63/ Bang./2007)

Taxability of a non-resident assessee for making purchases from India through its liaison office in India

When the activities of the assessee-non resident are confined to purchase of goods though not for itself, but for its affiliates and it ends by export of the same from India, all the services that is rendered by the non-resident company through its liaison office is for purchase for export, and hence, no income is earned in India as per Explanation I(b) to section 9(1)(i) of Income-tax Act, 1961.

DDI (International Taxation) v. Stock Engineer & Contractors B.V. (2009) 121 TTJ (Mumbai) 320

DTAA between India & Malaysia, arts. 5 & 7; Income-tax Act, 1961, ss. 40(a)(i), 90 & 195

Payment for supply of technical personnel vis-a-vis absence of PE in India. Assessee, a company incorporated in Netherlands, awarded turnkey contract in India by Indian Oil Corporation Ltd. (IOC) for engineering, procurement and. construction of sulphur block for its Haldia Refinery Project. Assessee set up a project office in Mumbai, a site office in Haldia and in turn awarded sub-contract in favour of its Malaysian subsidiary for supply of personnel to the assessee for execution of its project at Haldia. AO was not justified in making disallowance under s. 40(a)(i) of deduction claimed in respect of payment made by assessee to Malaysian company for failure to deduct tax at source under s. 195. Undisputedly, payment received by Malaysia company was business profit in terms of art. 7 of the DTAA between India and Malaysia which could be taxed in India only if Malaysian company had a PE in India. As per agreement between assessee and Malaysian company, role of latter would end with the supply of personnel to the assessee and the assessee shall be responsible for imparting or conducting training for the personnel to carry out execution of Haldia project under the direction, control and supervision of the assessee. Malaysian company having no place of business in India, it had no PE in India in terms of para 2 of art. 5 of the DTAA between India and Malaysia. Payment received by Malaysian company was not taxable in India, hence provisions of s. 195 and for that purpose s. 40(a)(i) could not be invoked by the AO.

Non-resident - Head office expenses - Scope and applicability of s. 44C

Head office expenses within the meaning of s. 44C, Expln. (iv) are restricted to executive and general administrative expenses only. Payment by way of salary for technical job done by engineers in India is neither for executive job nor for general administrative expenses of head office, hence not hit by s. 44C.

DTAA between India & U.K., art. 5; Income- tax Act, 1961, ss. 40(a)(i), 90 & 195;

Disallowance of Business expenditure u/s. 40(a)(1)

The assessee was required to construct a sulphur block at Haldia. The services rendered by the personnel supplied by the non-resident company would therefore fall under both the clauses, namely (j) & (k) of art. 5(2) of DTAA between India and U.K. Therefore, the CIT(A) was justified in holding that cl. (j) being more beneficial to the assessee would be applicable. Period of stay being less then six months, art. 5 was not attracted. Consequently, assessee was not required to deduct tax at source and disallowance under s. 40(a)(i) was not called for.

Hindustan Aeronautics Ltd. v. ITO (2009) 121 TTJ (Bang) 242

DTAA with Russia, art. 12: Income-tax Act, 1961, ss. 9(l)(vii), 90 & 195; - Fees for technical services

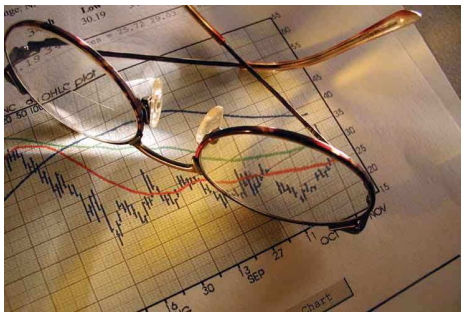
Assessee already owning HJT-36 aircraft needed three prototype engines as per its technical requirements for being used in said aircraft for carrying out flight testing. A contract was entered into with a Russian company for supply of the same.

Each engine being unique, the technical know-how, intellectual property and designs were engine specific. There was a remedy clause in the agreement in case of any inconsistency in respect of material delivered or its documentation. Assessee was debarred from copying or reproducing the material or document without supplier's consent and in case assessee so wanted, another corresponding licence agreement was to be executed. All these showed that it was an outright purchase of engines not followed by any technical services. Engines supplied being unique and peculiar, assessee would not be able to operate them without technical details and supply of such details along with the engines cannot be construed as transfer of technical services within the meaning of Expln. 2 to s. 9(I)(vii) r/w art. 12 of the DTAA. Requirement of the assessee was engines proper and not any technical know-how to reproduce or manufacture them in future. Payment made by assessee to Russian company thus not being fees for technical services, assessee was not required to deduct tax at source from the remittance.

Dolphin Drilling Ltd. v. ACIT (2009) 19DTR (Del)(Trib) 385

Disallowance under s. 40(a)(i) - Fees for technical services vis-a-vis salary to crew members

Assessee company incorporated in UK entered into an agreement with ONGC to conduct drilling operations for ONGC in offshore waters of India with drilling ship 'BD' taken by assessee on charter hire basis from one DDL, a group company incorporated in Singapore. As assessee did not have its own crew, it entered into a contract with another group company, ACAS for procuring drilling and marine crew for operation of BD. Under the agreement with ACAS, inter alia, assessee agreed to reimburse ACAS all crew salaries and expenses reasonably incurred by ACAS with 5 per



cent handling fee on production of evidence of such expenses by ACAS. Assessee company itself appointed the crew staff provided by ACAS as its own employees. Fact that the crew were employees of the assessee is supported from further facts that BD was operated by assessee and it was assessee who was accountable to ONGC as regards nature and quality of crew services to the entire exclusion of ACAS; payment of 5 per cent handling fee by assessee to ACAS showed that ACAS merely supplied crew and not crew services; it was the responsibility of assessee to secure work permits and security passes for the crew members; it was assessee's responsibility to provide housing and transportation to crew members; payment to ACAS on this account was booked as salary in assessee's accounts and assessee deducted tax at source, wherever applicable taking into account exemption under s. 10(6)(viii) and deposited the same in Government account. Reimbursement of salary of said crew to ACAS could not therefore, be treated as fees for technical services which was separately quantified. Tax was therefore, deductible at source under s. 192 and not under s. 195. Payments in question were therefore covered by s. 40(a)(iii) and not by s. 40(a)(i). In respect of crew members, who did not stay in India, exceeding in the aggregate a period of 90 days, salary paid was exempt under s. 10(6)(viii) and assessee was not liable to deduct tax at source under s. 192. No disallowance under s. 40(a)(1) was therefore, called for.

Allowability of Business expenditure - Genuineness of expenditure for taking over management rights of a drillship

Assessee acquiring a drilling ship on charter hire basis from DDL of Singapore. Management rights of the drilling ship were vested in DAS of Norway. By agreement dt. 17th Sept., 2004, assessee took over management rights of the drillship from DAS retrospectively w.e.f. 9th Aug., 2003. This sort of arrangement of effecting transaction first by conduct of the parties and then later reducing the same in writing with a view to ratify and confirm the same is commonly prevalent and accepted system in the business transactions and cannot be a reason for disallowing the expenditure treating the same as not genuine merely on the basis of suspicion. AO having failed to make any enquiry about correctness of chronological events or history of management rights explained by the assessee and assessee having also failed to bring on record copies of previous agreements as regards management rights with different entities as mentioned in agreement dt. 17th Sept., 2004,

matter needs restoration to the file of AO for verification of chronological events. Fact that such expenditure was not projected in the course of proceedings under s. 195(2) is also not material as the assessee had capitalised the expenditure earlier and the same was claimed as revenue expenditure only in the return filed after end of the previous year. Neither the AO nor the CIT(A) having verified whether the expenditure had gone to swell the revenues of DAS or any invoice was ever raised by DAS, matter required restoration to AO. Fact that assessee had made an alternate claim of being assessed at 10 per cent under s. 44BB in case the assessed income under normal provisions of the Act exceeded said limit of 10 per cent is of no avail to Revenue as exercise of such option by the assessee cannot be said to deposit a culpable state of mind on the part of assessee.

Fugro Engineers B.V. v. ACIT (2009) 21 DTR (Del)(Trib) 224

DTAA between India and Netherlands - Permanent establishment

Assessee a foreign company of Netherlands carried out for ONGC in India the work of drilling two bores in Godavari delta region and testing the material obtained onboard laboratory. This lasted for a period of 13 days. Assessee also carried on for another Indian company, 'C, geo-physical and geo-technical investigation in the Gulf of Khambat by mobilising its own equipment. This continued for 41 days. As regards yet another India company 'G', assessee carried on geo-technical investigation on ONGC vessel. This lasted for another 37 days. For all the three works, assessee had carried these works on the Indian soil and therefore, it could be said that it had a fixed place in India in the sense that it could complete the works. The number of days of assessee's presence in India is irrelevant. Clauses (a) to (h) of para (2) of art. 5 are not applicable as it is not a case of any installation or structure used for exploration of natural resources. No length of time is prescribed in para 1 of art. 5 to constitute a PE. Assessee having provided only results of investigations and not the technical skill, the receipts could not be termed as fee for technical services. All receipts by assessee are includible for working out presumptive income under s. 44BB.

Circulars / Notifications

INCOME-TAX (TENTH AMENDMENT) RULES, 2009 - AMENDMENT IN FORM NO. 3CD

Notification No 36/2009, Dated 13-4-2009

In exercise of the powers conferred by section 295 read with section 44AB of the Income-tax Act, 1961 (43 of 1961), the Central Board of Direct Taxes hereby makes the following rules further to amend the Income-tax Rules, 1962, namely :

1. (1) These rules may be called the Income-tax (Tenth Amendment) Rules, 2009.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. In the Income-tax Rules, 1962, in Appendix II, in Form No. 3CD, after item 17, the following shall be inserted, namely :

> 17A. Amount of interest inadmissible under section 23 of the Micro, Small and Medium Enterprises Development Act, 2006.

INDIRECT TAXES

Judicial Pronouncements

Geo Foundations and Structures (P.) Ltd. v. CCE & C (Appeal No. ST/111/2007)(CESTAT, Banglaore)

Levy of Service Tax

When a specific category of services are brought into the service tax net subsequently, these services will not be covered under any other services earlier.

CCE v. Kulcip Medicines (P) Ltd. (CEA NO. : 34 OF 2006)(P & H HC)

If clearing operations are separated from forwarding operations, levy of tax would not be attracted if it only involves one of two activities

By necessary intendment the expression `clearing and forwarding agent in relation to clearing and forwarding operations, in any manner' contemplates only one person rendering service as `clearing and forwarding agent' in relation to `clearing and forwarding agent' in relation to `clearing and forwarding operations'; to say that, if one person has rendered service as forwarding agent' without rendering any service as `clearing agent' and he be deemed to have rendered both services would amount to replacing the conjunctive word "and" by a disjunctive word "and" which is not possible.

INDIRECT TAXES

Judicial pronouncements

CCE v. Hindoostan Spinning & Weaving Mills Ltd. (SC)

HC & SC judgment prevail over excise department circulars & Instructions

The Supreme Court emphasised that circulars and instructions issued by the customs and excise boards are no doubt binding on the authorities but when the Supreme Court or a high court declares the law on a disputed question, the courts' view shall prevail.

The court reiterated the view in the instant case. The authorities had sought clarifications in some earlier judgments. Therefore, the Supreme Court once again asserted that the circulars represented only the understanding of the law by the officials. But they are not binding on the courts.

OTHER LAWS

Niulab Equipment Company Pvt. Ltd., In re (Company Petition Nos. 382 & 383 of 2008)(Bombay HC)

Sanction of a Scheme of Amalgamation despite Violation of Provision of Section 295 of the Companies Act

The mere fact of a violation of the provisions of sections 235 to 351 by itself does not invalidate or warrant the Court refusing to sanction a scheme of arrangement under sections 391 to 394, including a scheme of arrangement; it is not every violation of these sections that disentitles a scheme being proposed or sanctioned; it is only those violations which adversely reflect upon or affect the scheme that would persuade the Court not to sanction the scheme.

Maharashtra State Warehousing vs. DCIT (ITA No. 74 of 2007- Pune ITAT)

Even State Govt. Undertakings need COD clearance

In the light of the judgment of the Supreme Court in ONGC vs. CIDCO (2007) 7 SCC 39 and that of the Madras High Court in Tamilnadu Warehousing Corp Ltd vs. DCIT (2008) 15 DTR 67, even appeals involving State Government undertakings require approval of the Committee on Disputes. The appeal can be proceeded with only if the appellant is either able to obtain the requisite COD clearance or file satisfactory evidence to prove that a COD to deal with State – Centre disputes has not been formed.

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

5th May	***Payment of Service Tax & Excise duty for April***
6th May	***Payment of Excise duty paid electronically through internet banking***
7th May	***TDS/TCS Payment for April***
10th May	***Excise Return ER1 / ER2 /ER6***
15th May	***PF Contribution for April , Excise payment by SSI***
21st May	***ESIC Payment for April***
31st May	***TDS/TCS Payment for amount credited on 31st March***