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SNK Newsletter

DIRECT TAXES

Highlights of Economic Outlook for 2009-10

The Indian economy weathered the financial turbulence well

- 6.7 % growth in 2008/09 – amongst the highest growth rates in the world.
- well calibrated adjustments in the monetary and fiscal policies

Projected growth 6.5 % in 2009/10 against 6.7 % in 2008/09

- Agriculture : -2.0 % (1.6% in 2008/09)
- Industry (including construction) : 8.2% (3.9% in 2008/09)
- Services: 8.2 % each. (9.7% in 2008/09)

Unlikely that growth will be lower than 6.25 % but may reach 6.75 %.

Impact of international conditions

- Recession, higher household savings and demand contraction in developed economies- adverse for exports growth.
- Encouraging signs of revival of capital flows.
- A further negative shock to the global financial system and global inflation could threaten growth in Indian economy.

Investment rate unchanged from 2008/09

- Projected investment rate in 2009/10: 36.5%. Will pick up with improvement in domestic conditions.
- Projected savings rate 34.5% in 2009/10 (33.9% in 2008/09)

22.7 % deficiency in the SW monsoon will lower agricultural output

- Large acreage losses under kharif foodgrain, mainly rice. Rabi prospects good
- Projected food grain production:223 million tonnes in 2009/10 (234 mt in 2008/09)

Current Account Deficit : - 2.0 % of GDP in 2009/10 (- 2.6 % in 2008/09)

- Exports projected at $188.9 billion in 2009/10
- Imports projected at $306 billion in 2009/10
- Projected merchandise trade deficit for 2009/10:$ 117 billion or 9.4 % of GDP.
- Projected net invisibles: $92.2 billion. Service exports & remittances have revived.

Highlights of Economic Outlook for 2009-10 / Judicial pronouncements

Capital inflows of $57.3 billion in 2009/10 ($9.1 billion in 2008/09)

- Net accretion to reserves : $31.6 billion (- $20.1 billion in 2008/09)

Surge in food inflation

- 13% annualized increase in overall WPI index and 33% for primary food index in first half of 2009/10. Sharper rise in CPI indices.
- Global inflationary pressures will be high – oil and commodity prices rising
- Inflation in March 2010 expected around 6%

Improvement in financial conditions – global and domestic

- Recovery in international loan and equity markets – lower LIBOR/ CDS spreads
- Bank credit sluggish till September 2009 but corporate sector raised large amounts from the domestic capital market through debt and equity issuance.
- Calibration of monetary measures will depend on growth and inflationary pressures.

Serious fiscal strain

- Projected consolidated fiscal deficit: 10.09% in 2009/10 (8.6% in 2008/09). Higher revenue and primary deficit to persist.
- Debt of centre and states as a ratio of GDP is projected to increase to over 77% in 2009/10
- Need to return to fiscal consolidation

Some Policy Options – focus on agriculture and power

Short Term - managing inflation, specially food price inflation

- Protect and enhance rabi crop.
- Focus on strengthening PDS distribution system

Medium Term – Farm economy and power

- Improve farm productivity – use technology optimally
- Imperative need to achieve targets and have an active plan over a time horizon of 15 years for capacity creation in electricity
- Actively explore fuel sources like natural gas and nuclear energy

Judicial pronouncements

Hami Aspi Balsara v. ACIT (ITA No. 6402 & 6403/Mum/2008)

Transfer of share completes when the share certificate along with duly executed transfer deed is handed over to the transferee

Sale as contemplated u/s 2(47)(i) and extinguishment of rights as contemplated u/s 2(47)(ii) are not mutually inter-changeable; if a particular transaction is the transaction of sale then unless the sale is complete, no transfer can be said to have taken place because there will always be extinguishment of rights in case of sale and if a single right out of the entire bundle of property in capital asset is extinguished, then, the transfer would be taken as complete; this will lead to absurd situation; thus, the transfer of share is complete when the share certificate along with duly executed transfer deed is handed over to the transferee.

Dharmasingh M. Popat v. ACIT (ITA No. 7534/Mum./2004)

Applicability of section 14A of IT Act vis-a-vis assessment of a firm and its partners

A partnership firm is a separate entity than that of its partners under the Income-tax Act and therefore, partners vis-à-vis partnership firm would stand on the same footing of shareholders vis-à-vis company; accordingly , income charged in the hands of partnership firm cannot be treated as being a non-exempt income in the hands of a partner of such firm and, therefore, provisions of section 14A would be applicable in computing the total income of such partner in respect of his share in the profits of such firm.

ITO v. Baker Technical Services Pvt. Ltd. (ITA Nos. 5262 to 5264/ Mum./2006)

Determination of ALV of a house property in accordance with section 23(1)(a) of IT Act, 1961

In respect of properties where restriction under Rent Control Act is not applicable, the annual letting value has got to be determined after taking into consideration various factors and the standard rent or Municipal valuation may be adjusted after taking into account such factors.

CIT v Beirsdorf (India) Ltd & Anr (2009) 28 DTR (Bom) 188

Accrual of income from sales tax refund order

Once an order of refund of sales tax has been passed, the same has to be treated as income notwithstanding pendency of appeal against refund order.

Judicial pronouncements

Siemens Public Communication Networks Ltd. v. CIT (ITA No. 694/ Bang/08)

Allowability of provision for warranty

Provision for warranty is an allowable expenditure and such provision is not a contingent expenditure.

CIT v. Eicher Ltd. (2009) 30 (I) ITCL 37 (Del-HC)

Accrual of Income - Interest on loan of doubtful recovery

One time settlement amount received less than tax paid. Where loan amount itself was doubtful of recovery no interest income can be said to have accrued. Further, where the amount of interest offered to tax on basis of accrual was more than the amount finally received on settlement no further addition can be made on basis of accrual of income.

CIT v. Priya Village Roadshows Ltd. (ITA No. 145/2007)(Delhi HC)

Determination of nature of expenditure on expansion of business which has not materialized

If the expenditure is incurred for starting new business which was not carried out by the assessee earlier, then such expenditure is held to be of capital nature; in that event it would be irrelevant as to whether project really materialised or not; however, if the expenditure incurred is in respect of the same business which is already carried on by the assessee, even if it is for the expansion of the business, namely, to start new unit which is same as earlier business and there is unity of control and a common fund, then such an expense is to be treated as business expenditure; in such a case whether new business/asset comes into existence or not would become a relevant factor; if thee is no creation of new asset, then the expenditure incurred would be of revenue nature.

CIT vs. G. R. Shipping (Bombay High Court)

Depreciation allowable even if asset not used at all for entire year: Mumbai High Court

The assessee, engaged in shipping business, owned a barge which was included in the block of assets. The barge met with an accident and sank on 6.3.2000 (AY 2000-01). As efforts to retrieve the barge were uneconomical, the barge was sold on as-is-where-is in May 2001 (AY 2002-03). As the barge was non-operational and not used for business at all in AY 2001-02, the AO denied depreciation. The CIT (A) upheld the stand of the AO. On appeal by the assessee, the Tribunal took the view that after the insertion of the concept of "block of assets" by the T. L. (A) Act, 1988 w.e.f 1.4.1988 individual assets had lost their identity and only the "block of assets" had to be considered. It was held that the test of "user" had to be applied upon the block of assets as a whole and not on individual assets. On appeal by the Revenue, the High Court dismissed the appeal holding that the issue was squarely covered in favour of the assessee by its earlier judgments in Whittle Anderson 79 ITR 613 and G. N. Agrawal 217 ITR 250.

ADIT (IT) v. Citibank NA (ITA No. 3160/Mum/06)

Deductions allowable under section 36(1)(viia) of IT Act, 1961

In respect of assessee's to whom clause (viia) of section 36(1) applies, there can be two deductions allowed; one, on account of provision for bad debts; two, on account of provision for bad debts actually written off.

Enem Nostrum Remedies (P.) Ltd. v. ACIT (ITA Nos. 1179 & 1180 (Mum.) of 2008)

Allowability of deduction u/ 10B to company engaged in business of contract research and in providing of laboratory facility to its parent company in USA

Assessee-company was engaged in business of contract research and in providing of laboratory facility to its parent company in USA. It had claimed exemption under section 10B. Assessing Officer observed that assessee was not manufacturing or exporting anything, as it was simply providing services of laboratory testing to its parent company in USA and, same could not be considered as business of developing or of exporting computer software under section 10B and, thus, denied exemption. On appeal, Commissioner (Appeals), considering decision of Ministry of Communications and Information Technology as also of DSIR that activities of assessee were not covered under category of IT/ITES (Information Technology Enabled Services), upheld said order. Held that Commissioner (Appeals) was justified in doing so.

Section 35 of ITA – Scientific research expenditure

Provisions of sub-section (2AB) of section 35 apply only in respect of in-house research expenditure to companies which are engaged in manufacture of specified things, including drugs and, which have approval from prescribed authority.

Section 43(4), read with section 35, of the Income-tax Act, 1961 – Meaning of Scientific research

In order to avail deduction under section 35, activity of assessee should first fall within meaning of `scientific research' as per section 43(4). As per section 43(4)(iii), scientific research done by assessee should contribute to extension of business carried on by it and it is not akin to extension of business of scientific research.

ACIT v. Travancore Titanium Products Ltd. (ITA No. 823/Coch/2004)

If assessee has no enforceable right to receive interest then there can not be accrual of income

Unless and until the terms and conditions of advance are known and agreed between the parties, assessee will not acquire any right to receive interest on the advanced loan and no income would accrue by way of interest.

Steelco Gujarat Ltd. v. ACIT (ITA NO. 1050/Ahd/2006)

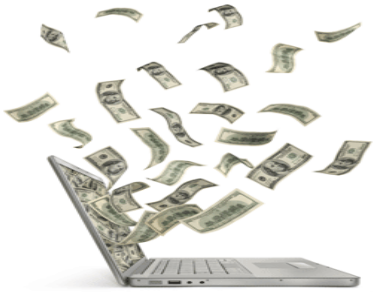
Loan "waiver" does not fall into either of the three terms "subsidy", "grant" and "reimbursement"

The word "waiver" does not fall into either of the three terms "subsidy", "grant" and "reimbursement" used in Explanation 10 to section 43(1) of the Income-tax Act, 1961 or proviso thereof; where plant and machinery were already existing prior to taking the loan, it could not be inferred that it was given to meet the cost of plant and machinery; once, the amount of loan waived by the lender, could not be related to purchase of plant and machinery, it could not be reduced from the cost for the purposes of reducing allowable depreciation.

Dynavision Ltd. v. ACIT (ITA No. 250/Mds./1996)

No disallowance u/s 43B if deduction not been claimed by the Assessee in respect of sum payable by way of tax or duty

Section 43B can only be invoked when the assessee claims deduction for any sum payable by way of tax or duty, under any law for the time being in force, and, as such, where no such deduction is claimed nor charged made to the profits and loss account, there is no question of disallowing the amount.



Vijaykumar M. Shah v. DCIT (ITA NO. 552 of 2006)(Mumbai ITAT)

Valuation u/s 55A

A combined reading of the provisions of s. 55A read with its Explanatory Notes vide Circular No. 96, dt. 25th Nov., 1972, makes out three group of cases where the AO can exercise jurisdiction in making reference to the DVO. They are : (i) where the value of the asset as claimed by the assessee is in accordance with the estimate by the registered valuer; (ii) the cases, where the basis for such FMV of the asset is the valuation report itself and assessee failed to adopt the value of the asset in accordance with the estimate of such valuation report and also the cases, where the basis for such FMV of the asset is other than the valuation report; and finally (iii) the cases, where the assessee has opted for substitution of the cost of acquisition of an asset by its FMV and the FMV as claimed by him may be higher than its actual FMV. The provisions of cl. (a) of s. 55A cannot be resorted to by the AO while making a reference to the DVO, as the said cl. (a) deals with the cases of assets of value lesser than the FMV. The case of the assessee, where there exists a valuation report and assessee adopted the value of the asset in accordance with the estimate of the registered valuers, obviously falls in cl. (a) of the s. 55A but for the value so adopted. This aspect of in accordance with an estimate, requires comparison of the estimate made by the registered valuer with that of the assessee's claim, as noticed from the relevant records. The assessee has strictly adopted the value as per the estimate of the registered valuer. AO is empowered to make reference only when 'that the value so claimed is less than its FMV', which is not the case here. Therefore, the assessee's presumption that the AO's reference is under the said cl. (a) could not have been held as a valid presumption.

Kalyan Memorial & Charitable Trust v. ACIT (ITA NO. 233/Agr./2006)

Burden to prove identity, creditworthiness and genuineness of cash credits under section 68 of IT Act

When the particulars regarding income-tax assessments and bank account of creditors have been filed then initial burden has to be held to be discharged by the assessee and then the burden shifts on the Revenue to show that what is stated or explained by the assessee is not satisfactory.

Judicial pronouncements

Shri Avnish Kumar Singh v. ITO (ITA No. 204/Ag/2006)

Genuineness of a gift transaction depend on immediate source of the gift

The adverse facts inter alia that the donor has no house, no telephone number, no fixed deposit and no other immovable assets are not so material to hold the gift not a genuine one or sources thereof unsatisfactory so long as the immediate source of the gift is admittedly established to be from a third party.

ITO v. Orbital Communication (P) Ltd. (ITA No. 14/Del/2007)

Addition as Cash Credit of Share application money when evidences produced but share applicant not produced

Amount received as share application money added as unexplained income by AO despite assessee furnishing details of the share applicant, her PAN, copy of IT return, bank statement, etc. Said share applicant is an income-tax assessee. Amount in question figuring in the balance sheet of the share applicant. Addition not sustainable solely on the ground that the share applicant was not produced before the AO by the assessee. CIT justified in deleting the addition

DCIT v. Sri Sai Roller Flour Mills Pvt. Ltd. (ITA No. 1440/Hyd/08)

Allowability of deduction under section 80-IB of IT Act, 1961 to a manufacturer and trader of wheat products

Milling of wheat into Rawa, bran, Atta, and Maida has to be considered as amounting to manufacture or production and as such, the assessee-manufacturer of such items is entitled for deduction u/s 80-IB.

Goetze (India) Ltd. v. CIT (ITA Nos. 208 & 1031 (Delhi) of 2007)

Applicability of Minimum alternate tax on Revaluation Reserve credited to profit and loss account (A.Y. 2000-01)

Assessee had created a reserve in assessment year 1986-87 by enhancing value of assets. Assessee had withdrawn Rs. 1.53 crores from said reserve and credited it to profit and loss account. In A.Y. 2000-01 assessee-company claimed deduction of Rs. 1.53 crores from book profit for calculating adjusted book profit under section 115JA. Assessing Officer allowed assessee's claim. Commissioner held that since reserve was created in assessment year 1986-87 adjustment was to be made in book profit in said year at time of its creation. He, therefore, set aside order of Assessing Officer. It was held that since at time of creation of reserve by assessee in assessment year 1986-87 provision contained in section 115JA was not there on statute and it was inserted in Act by Finance (No. 2) Act, 1996 with effect from 1-4-1997, there was no question of making any adjustment in book profit in those years at time of its creation, therefore, Commissioner was not justified in his view.

Provisions of 14A(2)/(3) cannot be imported into clause (f) of Explanation to section 115JA while computing adjusted book profit

Assessee-company made investment in certain bonds and earned dividend income on same. It claimed deduction in respect of dividend income which was allowed by Assessing Officer. Subsequently, Commissioner found that no expenditure was shown by assessee in earning dividend income. He, estimated expenditure of Rs. 183.60 lakhs for earning dividend income and added said amount to book profit of assessee for purpose of computing adjusted book profits under section 115JA. It was held that since it was evident from record that no expenditure was incurred by assessee which could be related to dividend income, Commissioner was not justified in adding amount-in-question to book profit of assessee for purpose of computing adjusted book profits under section 115JA.

CIT v. Khaitan Chemicals & Fertilizers Ltd. (ITA No. 301 of 2007)(Delhi HC)

Computation of net profit for purposes of section 115JA of IT Act

Prior period items and extraordinary items form part of the net profit or loss; the fact that the assessee adopted the alternative approach of showing such items in the statement of profit and loss after determination of current net profit or loss, does not mean that these items are not to be taken into account in computing net profit as envisaged in section 115JA.

Indo Rama Synthetics (I) Ltd. v.CIT (ITA No. 851/2009)(Delhi HC)

Scope for reduction of amount withdrawn from revaluation reserve and credited to P&L account for purpose of computing book profit u/s 115JB of IT Act, 1961

Prior to insertion of the proviso to clause (i) of the Explanation of section 115JB the assessee was entitled to reduce the sum from revaluation reserve while computing book profit under section 115JB; however, after the insertion of the proviso to clause (i) of Explanation to section 115JB, the

assessee has been deprived from this benefit by clearly mandating that in case the amount of such reserve has not been added back by the assessee in relevant assessment year i.e. when the assessee created the revaluation reserve while computing the book profit for that year, then the amount is statutorily to be included while computing the book profit under section 115JB.

Growth Avenue Securities Pvt. Ltd. v. DCIT (ITA No. 3912/Del/2005)

Scope for exclusion of capital gains in computation of book profit under section 115JB of IT Act, 1961

The long term capital gain included in the net profit prepared under the Companies Act is not deductible from the net profit for the purpose of computing book profit u/s115JB; merely because the long term capital gain is not liable to be taxed under the normal provision of the Act for the reason that the assessee has made investment in specified schemes as contemplated u/s 54EC, it is not correct to say that it is also to be reduced from the net profit for the purpose of computing deduction u/s 115JB when the Explanation to section 115JB does not provide for any deduction in terms of section 54EC meaning thereby that section 54EC has no application in the computation of book profit u/s 115JB.

CIT v. Escorts Finance Ltd. (ITA No. 1005/2008)

False claim in return of Income would be treated as case of concealment of Income or of furnishing inaccurate particulars of Income

Even if there is no concealment of income or furnishing of inaccurate particulars, but on the basis thereof the claim, which is made, is ex facie bogus, it may still attract penalty provision.

Maurya Realtors (P) Ltd. v. UOI & Ors. (2009) 30 (I) ITCL 16 (Pat-HC)

Reopening of assessment on direction of CIT(A) - Validity of notice under section 148

Where CIT(A), in the case of one of directors of assessee-company, has observed that certain amount should be considered in the hands of company, then the assessee company assessment can be reopened at any time and no time limit would apply in view of section 150.

ACIT v. Surindra Engg. Co. P. Ltd. (IT (SS) A. No. 253/M/2005)

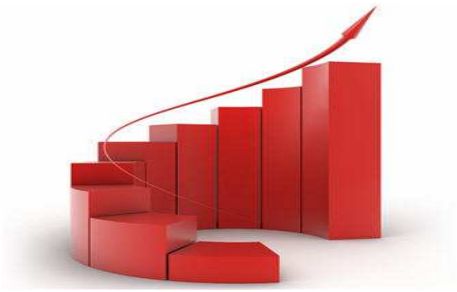
Computation of undisclosed income in case no incriminating document was found during search

As long as there is an evidence to the undisclosed income of the assessee, that would be sufficient to clothe the Assessing Officer with the powers to add to such evidence any further material or information that may pertinent or necessary to reach a logical conclusion but there has to be a certain and specific nexus between the evidence found as a result of search and income proposed to be assessed in the block assessment.

Prakash Motwani v. ITO (ITA NO. 48/Agr./2005)

Addition can not be made merely on the basis of assumption

Mere possession of currency notes with the assessee cannot prove that payments were actually made by him particularly in the circumstances when he is claiming otherwise and to substantiate such claim the evidence is produced.



ACIT v. Subhash Verma (2009) 28 DTR (Del)(SB)(Trib) 508

Computation of undisclosed income - Commission income

Assessee is a property dealer. In the absence of seizure of any definite material, addition could not be made in respect of undisclosed commission income from real estate business on the basis that all the entries recorded in the enquiry register represent actual sale transactions without examining the correct nature thereof and on the presumption that the assessee must have arranged these sales at double the price mentioned in the documents by simply relying on a summary report of the Tehsildar.

Investment in agricultural lands

Assessee having disclosed the purchase of agricultural lands in the original returns and no incriminating material having been found during the course of search indicating extra investment, addition on account of undisclosed investment could not be made on the basis of ex parte estimate given by the Tehsildar about the fair market value of the lands at the time of purchase.

Profit on sale of agricultural lands

All the impugned amounts were disclosed by the assessee in the regular returns. No incriminating document suggesting payment or receipt of any on-money was found during the course

of search. If assets are declared in the original returns on which assessments are framed, they cannot be treated as undisclosed assets or investments. In the absence of seizure of any incriminating material during the search, the estimates of valuation made by Tehsildar cannot be treated as evidence to assess undisclosed income. Therefore, the impugned additions cannot be upheld.

Profit on sale of plots

Assessee had disclosed the purchases and sales of the plots in his returns in the relevant years. Thus, the same cannot be treated as undisclosed transactions. Besides, AO cannot change the head of income while assessing the undisclosed income. Addition rightly deleted.

Investment in plot and construction

Consideration for purchase of plot was shown by the assessee in an earlier assessment year which is admitted by the AO and no incriminating material was found during the course of search. However, with reference to cost of construction, assessee's claim that six rooms were purchased in weak condition along with the plot and the shops are temporary structure is not substantiated. Sale deed clearly indicates that these rooms were in "dilapidated condition" whereas the litigation before Civil Judge indicates that there was Pucca construction. Since this construction of Pucca house and shops was not disclosed, addition in respect of unexplained investment in construction is sustained.

Investment in purchase of land and construction

Assessee who is owner of 60 per cent share of the land purchased by him along with another, having established the payment of Rs. 6 lacs on the basis of cash flow statement, addition in respect of unexplained investment in land is sustainable to the extent of 60 per cent of the total price as revealed by the seized document less Rs. 6 lacs; since the agreement to sell is dt. 28th Aug., 1998, no inference regarding incurring of construction expenses can be drawn on the basis of seized material pertaining to the year 1995-96, and, therefore, addition on account of undisclosed construction expenses cannot be sustained.

Commission on sale of land

Assessee, explained that the land in question has not been sold and that the transaction reflected in the seized papers was in respect of another party TI Ltd. and urged the AO to verify the correctness of his claim from the concerned parties. Explanation of the assessee not examined by the AO. Thus, assessee's claim remains uncontroverted and the addition made on account of undisclosed commission on the alleged sale of said land cannot be sustained.

Investment in land

It could not be held that the assessee, a broker, had purchased land along with another merely on the basis of some illegible scribbling in the purchase and sale record maintained by him, in the absence of any amount, description or name or any further enquiry by the AO, and, therefore, addition on account of undisclosed investment cannot be sustained.

Alleged benami share in building

In the absence of anything to indicate that the assessee was benami owner of the property in question, and in view of the fact that additions have been made in respect of the same property in the hands of his sons on substantive basis, addition could not be made in the hands of the assessee.

Unexplained household expenses

Household withdrawals for each year having been shown in the regular returns, the adequacy thereof is subject-matter of regular assessment and not block assessment. However, during the course of search, assessee himself admitted that his son was undertaking engineering studies but did not give satisfactory reply regarding the education expenses. Therefore, this fact became part of enquiries and CIT(A) was justified in sustaining the addition to the extent of Rs. 6 lacs.

Investment in property

Explanation of the assessee that the investment of Rs. 1,25,000/- in the. property was made out of collections of offerings made to the oral trust said to have been created by him not being acceptable, addition on account of undisclosed investment in the property is sustained.

Marriage expenses of assessee's son

Incriminating material found during search indicated expenses of Rs. 1,24,898 on the marriage of assessee's son. Assessee has shown expenditure of Rs. 1,75,000 on the basis of cash flow statement. Ad hoc addition of Rs. 50,000 sustained by CIT(A) is deleted.

Expenses on foreign visit

Addition towards expenses on visit to Nepal could not be made in the hands of the assessee since the boarding pass is in the name of assessee's son who has been separately assessed under s. 158BD and the contention of the assessee that he has never visited Nepal has not been controverted.

Judicial pronouncements

Investment in plot

Assessee having duly shown the advance payment and purchase price of the plot in her regular returns and no inriminating material having been found suggesting payment of any on-money, no addition could be made on the basis of presumption that the market rates were high.

Alleged bogus loan

Assessee having shown the impugned loan in the balance sheet filed with the return for an earlier year and the creditor having confirmed the loan, the same cannot be treated as unexplained merely because of discrepancy in the date of repayment; addition rightly deleted.

Moreover, Loans which were shown by the assessee in the balance sheet filed with the return for an earlier year cannot be treated as bogus and addition cannot be made merely because interest has not been paid.

Silver jewellery found during search

Assessee having disclosed 2 kgs. of silver in the regular returns and filed a cash flow statement indicating purchase of remaining 3 kgs. silver which is not controverted, no addition could be made on account of unexplained jewellery.

Repayment of loan to LIC

Assessee has not furnished any explanation before any of the authorities in respect of repayment of loan to LIC in cash and accordingly Addition was upheld.

CIT v. Bimal Auto Agency (Gauhati HC)(IT Appeal No. 29 of 2006)

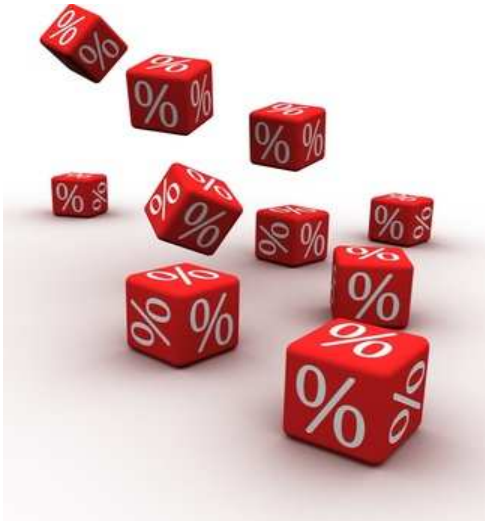
Block Assessment – Addition to be based on material or information found in search

A reading of the provisions of s. 158BB, as it existed before and after 2002 amendment, amply discloses that even prior to the amendment, s. 158BB authorized the AO to make an assessment of undisclosed income on the basis of evidence found as a result of "search... and such other materials or information as may be available with the AO". The use of the word "such" clearly points out that such materials or information must have some connection with the search and do not constitute independent materials, i.e., independent of the search. The aforesaid is the view indicated in CBDT Circular No. 8 of 2002. In the said clarification, the CBDT had made it clear that the amendment was necessitated by contrary views expressed by the authorities in certain quarters. From the CBDT circular in question, it is, therefore, clear that the amendment of s. 158BB brought about by the Finance Act of 2002 is merely clarificatory. In the present case, admittedly, no evidence or material was discovered in the course of the search of the premises of the group to which the assessee belongs. The undisclosed income insofar as the building is concerned was solely made on the basis of the report of the DVO as obtained by the search party. The report of the DVO does not constitute material or information relatable to the search.

Utkal Investments Ltd. v. ADIT (2009) 120 TTJ 67 (Mum)

Agent of non-resident u/s 163

The foreign company was in receipt of some income from the assessee, on account of sale of shares. The Act uses the words "from or through", instead of the word 'thorough' in section 163(1)(c). Any person in India from or through whom the non-resident is in receipt of any income directly or indirectly can be treated as agent of the non-resident.



The Medi Assist India TPA Pvt. Ltd. v. DCIT (TDS) (Writ Petition No. 11376 of 2009)(Karnataka HC)

Applicability of section 194J of IT Act, 1961 in case of Third Party Administrator (TPA) providing health insurance claim services.

Having regard to the agreement entered into inter se between the hospital and the TPA for payment of money to the hospital, it cannot be said that the TPA, who is the authority or the person to pay the amount to the hospital, is not required to deduct the tax at source and section 194J is not attracted.

CIT v. Atul Mohan Bindal (Civil Appeal No. 5769 of 2009)

Penalty under Section 271(1)(c) of the Income tax act, 1961 is neither criminal nor quasi criminal but a civil liability

The penalty spoken of in section 271 (1)(c) is neither criminal nor quasi criminal but a civil liability; albeit a strict liability; such liability being civil in nature, mens rea is not essential.

New Skies Satellites v. ADIT (SB) (ITA Nos. 5385 to 5387/Del/2004)

Fee for use of satellite is "royalty" under Act & DTAA

The assessee, a foreign company, was engaged in operating geostationary telecommunication satellites with transponder capacity which were provided to telecasting companies in India for a fee. The question arose whether the said fee was "consideration for … the use of any … secret formula or process …" so as to constitute "royalty" under Expl. 2 to s. 9 (1)(vi) and corresponding definition under the DTAA.

In Asia Satellite 85 ITD 478 the Tribunal held that the said receipts were taxable as 'royalty' having been paid in respect of a "process". However, in PanamSat 9 SOT 100 it was held that as in the term "royalty" in Art. 12 of the India-USA DTAA there was a 'comma' after the words "secret formula or process", it was only a 'secret process' which would qualify as royalty and not what was provided by the assessee. To resolve the conflict, the issue was referred to the Special Bench. HELD, reversing PanamSat:

(i) The provision of the transponder through which the telecasting companies are able to uplink the desired images/data and downlink the same in the desired area is a "process". To constitute "royalty", it is not necessary that the process should be a "secret process". The fact there is a 'comma' after the words "secret formula or process" in the DTAA does not mean that a different interpretation has to be given to the DTAA as compared to the Act;

(ii) The argument that there is no "use" of the satellite by the payer as it has no control or possession of the satellite is not acceptable. To constitute "royalty", it is not necessary that the instruments through which the "process" is carried on should be in the control or possession of the payer. The context and factual situation has to be kept in mind to determine that whether the process was "used" by the payer. In the case of satellites physical control and possession of the process can neither be with the satellite companies nor with the telecasting companies. The fact that the telecasting companies are enabled to telecast their programmes by uplinking and downlinking the same with the help of that process shows that they have "use" of the same. Time of telecast and the nature of programme, all depends upon the telecasting companies and, thus, they are using that process;

(iii) The consideration paid by telecasting companies to satellite companies is for the purpose of providing "use of the process" and consequently assessable as "royalty" under the Act and the DTAA.

DCIT v. Vertex Customer Services (ITA No. 1506/Del/2008)

No penalty under Expl. 7 to s. 271 (1) (c) for bona fide transfer pricing adjustments

Expl. 7 to s. 271 (1) (c) provides that in the case of an assessee who has entered into an international transaction, any amount added or disallowed in computing the total income u/s 92C (4) shall for purposes of s. 271 (1) (c) be deemed to represent income in respect of which particulars have been concealed or inaccurate particulars furnished unless the assessee shows that the s. 92C computation was made in good faith and with due diligence.

The assessee, a call centre, adopted the Transactional Net Margin Method ("TNNM") and showed an operating profit to operating cost at 10.12% on the basis of comparables. The assessee, however, showed a loss of Rs. 4.27 crs from the international transaction after making adjustment for (i) cost relating to first year operation, (ii) cost relating to excess capacity and (iii) provision for doubtful debts towards sums due from the parent company. The adjustments were made on the ground that these were extraordinary costs and required to be excluded in computing the arms' length price under Rule 10B (e) (iii) which provides that the net profit margin arising in comparable uncontrolled transactions can be adjusted for differences between the international transaction and the comparable transaction or between the enterprises entering into such transactions which could materially affect the amount of net profit margin in the open market. The TPO rejected the third adjustment on the ground that it being an ordinary item of expenditure did not qualify for adjustment. On merits, the assessee accepted the addition though it challenged the levy of penalty. The CIT (A) allowed the appeal on the ground that the treatment of the provision for doubtful debts as an extraordinary item and not as operational cost was justified. On appeal by the Revenue, HELD dismissing the appeal:

(i) The question whether the provision for bad debt in respect of sum owed by the parent company is a matter falling in the ordinary course of trade or whether it is an extraordinary item warranting exclusion from operational cost is a debatable point on which there can be two opinions. The fact that the assessee accepted the addition and did not challenge the same will not change this aspect;

(ii) In accordance with the law in Hindustan Steel 83 ITR 26 (SC) and Nath Bros 288 ITR 670 (Del), penalty u/s 271 (1) (c) cannot be imposed where there is merely a difference of opinion. Penalty also cannot be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation;

(iii) On facts, there was also a full disclosure of the relevant facts by the assessee. The conduct of the assessee was not mala fide or contumacious. The computation claiming exclusion of the provision for doubtful debts in arriving at comparable profit margins cannot be said to have been done not in good faith or without due diligence. Accordingly penalty under Expl. 7 to s. 271 (1)(c) could not be levied.

Gearbulk AG, In re (Application No. AAR/803/2009) (2009) 29 DTR (AAR) 98

Shipping income derived from international operations is outside the purview of the Indo-Swiss Tax Treaty

Shipping income derived from international operations is outside the purview of the Indo-Swiss Tax Treaty and it is left to be taxed under the domestic law i.e. the Income-tax Act, 1961.

International Tire Engineering Resources LLC, In re (AAR No. 804 of 2009)

AAR on taxability of an American company, having no PE in India, for technology transfer to an Indian company against consideration

It cannot be doubted that the technology/know-how transfer that is contemplated by clause 2 of the `Technology Transfer Agreement' between the parties gets covered by more than one sub-clause of Explanation 2 to section 9(1)(vi) of the Income-tax Act, 1961 i.e., sub-clauses (i),(ii) and (iv); the services in the form of technical assistance and consultancy connected with those items fall under sub-clause (vi); therefore, the consideration received by the American Company towards technology transfer/technical know-how and the services connected therewith is clearly liable to be taxed as royalty under section 9(1)(vi).

Pintsch Bamag Antriebs-Und Verkehrstechnik Gmbh, In Re (2009) 226 CTR (AAR) 1

DTAA between India and Germany - Permanent establishment

Work place set up by the sub-contractor to carry out the work entrusted to him by the applicant cannot be treated as the work place and the PE of the applicant. On a plain reading of the opening para of article 5 and the nature of relationship between the applicant and sub-contractor, it cannot be concluded that the business of the applicant is being carried on through the sub-contractor's workshop. Entirety of work of fabrication and assembly is carried out by the sub-contractor at the workshop set up by him at a place far away from installation site and run by him independent of any control of the applicant. Such a place of business of sub-contractor cannot be regarded as the PE of applicant. Further, the duration of the applicant's activities at the site/yard as well as the supervisory activities at the stage of installation and commissioning would not exceed six months. Applicant's business profits arising from the periodical payments made by TPT as a consideration for the contract cannot therefore be subjected to tax under the IT Act, 1961 in view of art. 7.1 of DTAA between India and Germany.

DDIT v. Scientific Atlanta Inc (2009) 182 Taxman 4

Agreement with USA – fees for technical services

Assessee, a tax resident of USA entered into a VSAT Agreement with Telstra Videsh Communication Limited (TVCL). As per the agreement, the taxpayer was to provide Satelite Network Communication System and certain installation and commissioning services associated with the initial installation and communications thereof. Various services provided by the taxpayer to TVCL were offered to tax except for the services like Factory Acceptance Test, Project Management and Engineering Support, (FAT and PMES) etc.

It was held that since the taxpayer did not make available any technical knowledge, experience or skill to TVCL by way of rendering FAT and PMES services, the amount received by the taxpayer was not taxable under article 12 of the India – USA tax treaty

The Tribunal observed that as per article 7(1)(a) of the India – USA tax treaty, the business profits can be taxed in India only to such extent which are attributable to the PE in India. Therefore, if there is no PE in India then the business profits of the non-resident cannot be taxed in India. Further, even if there is PE but if no part of the business profits is attributable to such PE, then no taxability arises under article 7 of the India – USA tax treaty. Accordingly, the Tribunal held that no portion of the revenue earned by the taxpayer will be subject to tax in India.

ITO v. Cepha Imaging Pvt. Ltd. [2009-TIOL-558-ITAT-BANG]

Agreement with USA – fees for technical services

The taxpayer was a 100 percent export-oriented unit, exporting services to USA and UK. The taxpayer company was engaged in the business of providing customised publishing-related solutions which includes editing, typesetting, layout design and other services. The taxpayer entered into a Master Services Agreement (MSA) with M/s. Keyword Group Ltd. (KGL) of UK. As per the MSA, KGL was to rearrange its client relationship and systems to promote publishing related services in the UK market. The services included managing client relationship and providing catalytic support for deliverables to the clients of the taxpayer.

The Tribunal held that the since no technical knowledge, expertise, skill, know how or process consisting of the development and transfer of technical plan or technical design has been transferred to the taxpayer so that the taxpayer could use them in the future and therefore, the payments made to KGL by the taxpayer is not taxable in terms of article 13(4)(c) of the India – UK tax treaty.

CIT v. Maggronic Devices Pvt. Ltd. [2009-TIOL-568-HC-HP-IT]

Outright purchase of know-how abroad does not result into royalty income in India

The taxpayer was engaged in the manufacture of audio magnetic sound heads, which are used in various audio appliances like tap recorders, stereos, sound systems, telephone answering systems etc.

The taxpayer entered into an agreement with a Singapore Company for the purchase of plant know-how in the form of technical and engineering data, design data, drawings, sketches, photographs etc., and product know-how. The said agreement was approved by the Government of India and the Reserve Bank of India.

It was held that payment made by the taxpayer to a Singapore company for outright purchase of plant and product know-how cannot be considered as 'Royalty' within the provisions of the Income-tax Act, 1961. Accordingly, no tax was required to be deducted while making payment to the Singapore company for acquiring such know-how outside India.

Circulars / Notifications

Circular No. 7 /2009, dtd October 22, 2009

Withdrawal of Circular No 23 dtd 23rd July, 1969, No 163 dtd 29th May, 1975 & No. 786 dtd 7th February, 2000

1. The Central Board of Direct Taxes had issued Circular No 23 (hereinafter called "the Circular") on 23rd July 1969 regarding taxability of income accruing or arising through, or from, business connection in India to a non-resident, under section 9 of the ncome-tax Act, 1961.
2. It is noticed that interpretation of the Circular by some of the taxpayers to claim relief is not in accordance with the provisions of section 9 of the Income-tax Act, 1961 or the intention behind the issuance of the Circular.
3. Accordingly, the Central Board of Direct Taxes withdraws Circular No 23 dated 23rd July, 1969 with immediate effect.
4. Even when the Circular was in force, the Income-tax Department has argued in appeals, references and petitions that-
   - the Circular does not actually apply to a particular case, or
   - that the Circular cannot be interpreted to allow relief to the taxpayer which is not in accordance with the provisions of section 9 of the Income-tax Act or with the intention behind the issue of the Circular.

   It is clarified that the withdrawal of the Circular will in no way prejudice the aforesaid arguments which the Income-tax Department has taken, or may take, in any appeal, reference or petition.
5. The Central Board of Direct Taxes also withdraws Circulars No 163 dated 29th May, 1975 and No 786 dated 7th February, 2000 which provided clarification in respect of certain provisions of Circular No 23 dated 23rd July, 1969.

Dell International Services India Pvt. Ltd. v. CCE (Appeals) (ST/115/2008 & ST/145-146/2008)

Once the taxable service is exported and various input services have been utilized for providing the output service the service provider is entitled for the rebate

Once the taxable service is exported and various input services have been utilized for providing the output service the service provider is entitled for the rebate, which is equal to the service tax paid on the input services.

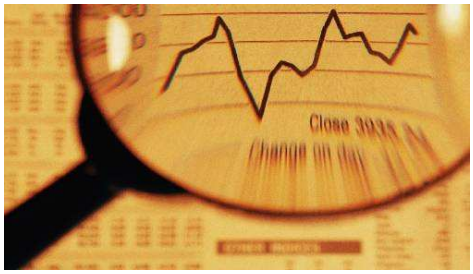
Coca Cola India Pvt. Ltd. v. CCE (242 E.L.T. 168 (Bom.) – 2009)

Cenvat credit of Service tax on Input service - Credit admissibility of Service tax to concentrate manufacturer on advertising service used for market-ing of soft drink removed by bottlers

All and any activity relating to business covered under input service provided there is relation between manufacture of concentrate and such activity - Service tax is destination based consumption tax and is a value added tax with tax burden on ultimate consumer and not manufacturer or service provider - Credit availed on advertisement and not on contents of advertisements - Service tax paid on advertisements, sales promo-tion and market research admissible as credit for payment of excise duty on concentrate particularly when such expenses form part of price of final prod-uct on which excise duty is paid - Rules 2(1), 3 and 14 of Cenvat Credit Rules, 2004.

Interpretation of definition of Input service

Definition of input service using terms "means", "includes" and "such as". Expression "means" and "includes" is exhaustive. Services which may otherwise not within ambit of definition clause included by use of "includes" and these are made exhaustive by word "means". Words "such as" illustrative and not exhaustive and refer to services related to business in the context of busi-ness. Rule 2(1) of Cenvat Credit Rules, 2004.



Interpretation of term "business"

Expression "business" is an integrated/ continuous activity and not confined or restricted to mere manufacture of product. Activities in relation to business can cover all activities related to functioning of a business. Term "business" cannot be given restricted definition to say that business of manufacturer is to manufacture final products only. "Business" is of wide import in fiscal statutes - Rule 2(1) of Cenvat Credit Rules, 2004.

Burden of Service tax borne by ultimate consumer and not manufacturer or service provider

Cenvat credit on input stage goods and service admissible as long as connection between such goods and services is established. Any input service that forms part of value of final product should be eligible for Cenvat credit - Rule 2(1) of Cenvat Credit Rules, 2004.

Definition of input service containing five categories or limbs

Credit admissible if any one of the limbs satisfied even if other limbs are not satisfied. Rule 2(1) of Cenvat Credit Rules, 2004. To illustrate input services used in relation to setting up, modernization, renova-tion or repairs of a factory will be allowed as credit, even if they are assumed as not an activity relating to business as long as they are associated directly or indirectly in rela-tion to manufacture of final products and transportation of final products upto the place of removal,

Input service definition - Scope of phrase "activity relating to business" widened by words "relating to"

Expression "relating to" widens scope of definition. Use of word "activities" signifies wide import of phrase "activities relating to busi-ness". Qualifying words like "main activities" or "essential activities" not employed in the rule. All and any activity relating to business covered under input service subject to relation between manufacture of final product and the activity - Rule 2(1) of Cenvat Credit Rules, 2004.

Circulars / Notifications

Circular No. 902/22/2009-CX., dated: October 20, 2009

Circular on value for payment of excise duty if goods are manufactured on job work basis

CBEC clarifies if goods are manufactured on jobwork basis, value for payment of excise duty to be determined as per Rule 10A.

It has been brought to the notice of the Board that some manufacturers of Motor Vehicles are getting complete Motor Vehicles manufactured by sending the Chassis of the Motor Vehicles to independent body builders for building the body as per the design/ specification of the manufacturer.

The practice followed is that the Chassis is transferred to the Body builder on payment of appropriate Central Excise duty on stock transfer basis and is not sold to them . The body builder avails the Cenvat Credit of the duty paid on the chassis and clears the same on payment of duty to the Depot/Sales Office/Distributer of the Motor Vehicle manufacturer. The duty is discharged by the body builder on the assessable value comprising the value of Chassis and the job charges. The Depot/Sales office of the MV manufacturer sells the vehicles at a higher price than the price on which duty has been paid. Similar practice may be prevailing in respect of other commodities also.

2. The matter has been examined. Rule 10A (ii) of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 stipulates that where the excisable goods are produced or manufactured by a job-worker, on behalf of a principal manufacturer, then in a case where the goods are not sold by the principal manufacturer at the time of removal of goods from the factory of the job-worker, but are transferred to some other place from where the said goods are to be sold after their clearance from the factory of job-worker, and where the principal manufacturer and buyer of the goods are not related, and the price is the sole consideration for the sale, the value of the excisable goods shall be the normal transaction value of such goods sold from such other place at or about the same time.

3. A plain reading of the aforesaid provision of law makes it clear that the assessable value for the purpose of charging Central Excise duty, in the cases where the Job-worker transfer the excisable goods to the Depot/Sale office/Distributer and/or any other sale point of the principal manufacturer, shall be the transaction value on which goods are sold by the principal manufacturer from such a place. Accordingly, after the insertion of Rule 10 A, the practice of discharging the duty on cost construction method by the body builder is not legally correct. It is, therefore, clarified that wherever goods are manufactured by a person on job work basis on behalf of a principal, then value for the purpose of payment of excise duty may be determined in terms of the provisions of Rule 10 A of the Central Excise Valuation (Determination of price of Excisable goods) Rules, 2000 subject to fulfillment of the requirements of the said rule. It is requested that the practice followed in your zone may be verified for body builders of motor vehicles and/or other commodities, which are manufactured on job work basis to ensure that duty is paid correctly as per Rule 10A wherever required.

Notification No: 24 /2009-Central Excise (N.T.) dated 21st October, 2009

Central Excise Notification on exemption of packing material with brand name or trade name of another person

This notification exempts Packing materials, namely, printed cartons of paper or paper board, metal containers, high density polyethylene woven sacks, adhesive tapes, stickers, pilfer proof caps, crown corks, metal labels, Plastic bags, Printed laminated rolls affixed with brand name or trade name of another person.

OTHER LAWS

NBFC

Circular No.DNBS(PD) CC. No. 162/03.05.002/2009-2010, dtd 22-10-2009

Submission of certificate from Statutory Auditor to the Bank

In terms of Para No. 15 of Non-Banking Financial (Deposit Accepting or Holding) Companies Prudential Norms (Reserve Bank) Directions, 2007 and Non-Banking Financial (Non-Deposit Accepting or Holding) Companies Prudential Norms (Reserve Bank) Directions, 2007, every non-banking financial company has to submit a Certificate from its Statutory Auditor that it is engaged in the business of non-banking financial institution requiring it to hold a Certificate of Registration under Section 45-IA of the RBI Act. A certificate from the Statutory Auditor in this regard with reference to the position of the company as at end of the financial year ended March 31 has to be submitted to the Regional Office of the Department of Non-Banking Supervision under whose jurisdiction the non-banking financial company is registered, latest by June 30, every year.

It has been decided that the NBFCs may submit the certificate within one month from the date of finalization of the balance sheet and in any case not later than December 30th of that year.

Due Dates of key compliances pertaining to the month of November-09:

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