

Issue – 10 | October 2009

# SNK Newsletter

## DIRECT TAXES

### *Judicial Pronouncements*

**ADIT (Exemption) v. The Chembur Gymkhana (ITA No. 3899/Mum./2006)**

**Allowability of exemption under section 11 of IT Act, 1961 claimed by a trust/club engaged in, inter alia, advancement of sports, games and athletic activities.**

If the activities undertaken by the trust are undisputably for the well being of a section of the public at large, it meets the requirements of both the expressions i.e. `general public' and the `general public utility' as per section 2(15) of the Act; so long as the public utility motive is disproved by the revenue, the claim of exemption under section 11 cannot be denied merely based on the filmsy grounds that the assessee-trust/club serves alcohol to the members and their friends in the club; serving alcohol is part and parcel of the activities of any club and it is an integral part of the activities of the club.

**The Living Room Designers v. ITO (ITA No. 996/ Mum/2008)**

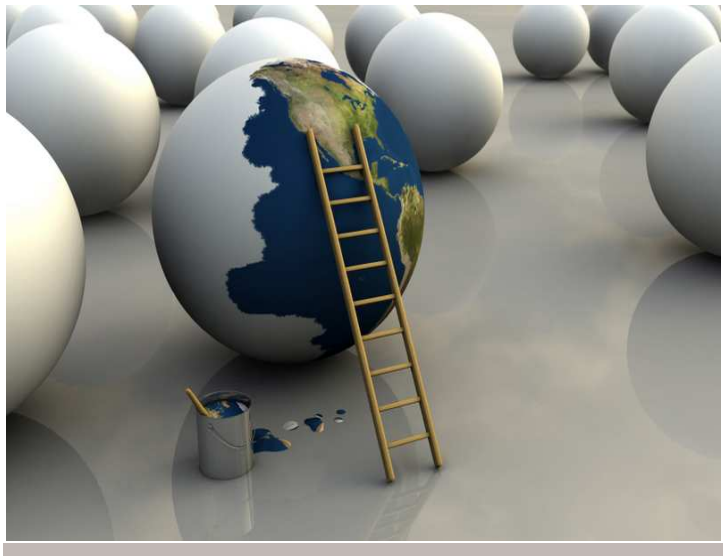
**Renovation expenses incurred on leased premises and allowability of same as revenue**

In order to claim deduction of an expenditure as revenue which otherwise gives enduring advantage, the onus is on assessee to prove that the ownership of the property even during subsistence of lease, vests with the lessor and the assessee enjoyed the benefit of reduced license fee.

**CIT vs. Techno Shares & Stocks (Bombay High Court) (ITA No. 218 of 2007)**

**Stock Exchange card is NOT an intangible asset eligible for depreciation**

S. 32 (1), as amended w.e.f. 1.4.1998 allows depreciation on “intangible assets” being, inter alia, “licenses … or any other business or commercial rights of similar nature”. The Tribunal took the view that a BSE card was an “intangible asset” eligible for depreciation. On appeal by the Revenue, HELD, reversing the Tribunal:



(1) Though the term ‘licences’ is a very wide term and includes permission to carry on any trade, business, profession, etc, it is used in s. 32(1)(ii) in a restricted sense. S. 32 restricts depreciation to a class of tangible & intangible assets specifically enumerated therein. All intangible assets enumerated in s. 32(1)(ii) (except the term ‘licences’) belong to the class of intellectual properties. As the expression ‘licences’ in s. 32(1)(ii) is preceded by the expressions know-how, patents, copyrights, trade marks and succeeded by the expression ‘franchises’ which are all relatable to intellectual property rights, the term ‘licences’ in s. 32(1)(ii) is, applying the principle of Noscitur a sociis, intended to be used restrictively and as applying only to licences relating to acquisition / user of intellectual property rights;

(2) A BSE card is also not a "business or commercial right" because what s. 32(1)(ii) contemplates is "business or commercial rights" relating to intellectual properties and not all categories of business or commercial rights. Since a BSE card is not a business or commercial right relating to intellectual property rights depreciation cannot be allowed on it;

(3) The fact that a BSE card is a capital asset and liable for capital gains tax is irrelevant because s. 32 does not allow depreciation on all capital assets but only on capital assets which fall in the enumerated categories.

**CIT v. Kotak Mahindra Finance Ltd. (Bom)( (317 ITR 236)**

**Condition precedent for claiming Depreciation – Test of User of assets in case of lease transaction**

Lease of machinery before end of accounting year. Lessee installing machinery after end of accounting year. Not relevant and assessee was entitled to depreciation.

**CIT v. M/s. Hi Tech Arai Limited (ITA No. 670 & 671 of 2009)(Madras HC)**

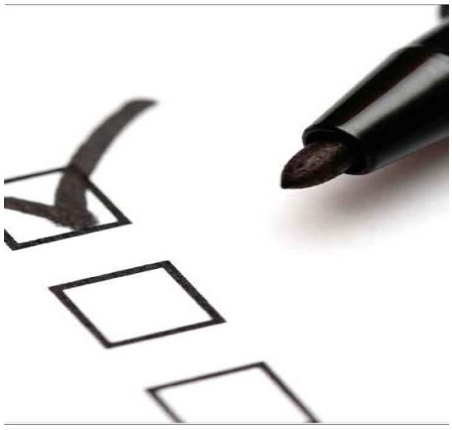
**Additional depreciation not subject to asset's operational connectivity with main business**

The assessee was engaged in the business of manufacture of oil seeds, moulded rubber parts, etc. apart from power generation. The HC held that for the purpose of claiming additional depreciation as per Income Tax Act, it is not required for the setting up of new machinery or plant to have any operational connectivity with the main business of the assessee and accordingly additional depreciation was allowed on new windmills.

**Srivatsan Surveyors Pvt. Ltd. v. ITO,Appeal No.: ITA No. 1899 (Mds.)/2007**

**Allowability of depreciation on non-compete fee u/s. 32 of the Income Tax Act, 1961**

Right as to know-how, patents, copy-rights, trademarks, licences, franchises, etc. can be construed to be `right in rem' which can be claimed against the world at large. Right in restrictive covenant is `right in personam' which is available against the contracting parties only. As such right in restrictive covenant is not of similar nature. Therefore depreciation on restrictive covenant is not allowable as per the prescription of section 32(1)(ii). Once this conclusion is arrived at, the issue whether the transaction was collusive and colourable becomes only academic. Thus, no depreciation is allowable on payment of non-compete fee u/s. 32.



**CIT vs. DB (India) Securities (Delhi High Court)(ITA No. 415/2007)**

**Share broker is eligible to claim "bad debts" u/s 36 (1) (vii) / 36 (2)**

The assessee, a broker, purchased shares of the value of Rs.1,06,10,247 on behalf of its sub-broker. The sub-broker made payment of Rs.64 lakhs. As the remaining amount of Rs.41,37,881 was not paid, the assessee did not deliver those shares to the client though it offered the brokerage to tax. Since the balance payment was not made even in the next year, the assessee claimed deduction of Rs. 41,37,881 as a "bad debt" u/s 36 (1) (vii). The Tribunal allowed the claim. On appeal by the Revenue to the High Court HELD:

1. The contention of the Revenue that the said amount was not a "debt" u/s 36 (2) and, therefore, could not be treated as a "bad debt" was not acceptable because there was a valid transaction between the assessee and the sub-broker. The brokerage was offered to tax and assessed. The assessee had to make payment on behalf of the sub-broker and as he could not recover to the extent of Rs.41,37,881/-, that sum had to be treated as a "debt".

2. However, as the assessee had retained the shares, the "bad debt" would have to be reduced by the sale proceeds of the said shares. The balance was allowable.

**CIT v. Indian Visit Com (P.) Ltd. (Delhi HC)**

**Web Designing & Hosting -Capital or Revenue Expenditure**

Assessee dealing in hotel, air and taxi booking for tourists, incurs expenditure on creating a website for regular business and claims deduction threof. AO disallows it by invoking enduring benefits theory. Tribunal allows the assessee's appeal. Held that, merely because an expenditure may result in enduring benefits it cannot be classified as expenditure of a capital nature. Revenue needs to examine the real intent and purpose of the expenditure

and to see whether there is any accretion to the fixed capital of the assessee. Since the purpose of creating a website is not to acquire an asset but to promote the business it is revenue expenditure. Revenue's appeal dismissed.

**Cipla Investments Ltd. v. ITO (ITA No. 1996/Mum/2008)**

**Loan waived by lender**

Remission of a debt by the lender which was not claimed and allowed as a deduction to the borrower in any manner in any earlier previous year cannot be brought to tax either under section 41(1) or under section 28(iv) of Income-tax Act, 1961.

**DCIT v. Allied Leather Finishers Pvt. Ltd. (ITA No. 58/LUC/09)**

**Liability can not be added to income just because they are old or not proved genuine**

Section 41(1) concerns with only trading liability and not with any other type of liability; every liability standing in the balance sheet cannot be presumed to be a trading liability; where the assessee has not written off a trading liability in its books then the Assessing Officer cannot invoke section 41(1) merely because the liabilities standing in the books are old or they could not be proved to be genuine by the assessee.

**Shree Capital Services Ltd. v. ACIT (ITA No. 1294 (Kol) of 2008) (SB)**

**Derivatives will also fall within meaning of 'commodity' used in section 43(5) of IT Act, 1961**

If it is held that the transaction in derivatives does not fall in section 43(5), it will make clause (d) and Explanation thereto below section 43(5) introduced by Finance Act, 2005 to be redundant.

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

**Addition of custom duty under section 43B of Income-tax Act, 1961**

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.

**CIT vs. Papilion Investments (Bombay High Court)(ITA No. 226 of 2006)**

**For s. 47(v), share capital of the subsidiary need not be "held" in the name of the holding company**

S. 47 (v) provides that a transfer of a capital asset by a subsidiary company to its holding company shall not be regarded as a "transfer" if the whole of the share capital of the subsidiary company is **held** by the holding company. The assessee transferred shares to its holding co and claimed exemption from capital gains u/s 47 (v). The AO denied exemption on the ground that as two shares of the said subsidiary were held by a director of the assessee and not by the assessee itself, the shares were not "wholly held" by the holding company and s. 47 (v) did not apply. The Tribunal upheld the plea of the assessee. On appeal by the Revenue, the High Court upheld the order of the Tribunal and upheld the following findings:

(a) Though s. 47 (v) refers to shares being "wholly held", a strict or mechanical interpretation should not be adopted. A construction must be adopted which makes the statute effective rather than redundant. It must be construed having regard to the object and purpose which the legislature had in view in enacting the provision. K.P. Varghese 131 ITR 597 (SC) and Teja Singh 35 ITR 408 (SC) followed.

(b) Under the Companies Act it is not possible for a company to have less than two shareholders. The requirement of s. 47(v) that the whole of the share capital of the subsidiary company should be held by the holding company is certainly not the same thing as the whole of the share capital being held in the name of the holding company. If one proceeds on the basis that the entire share capital of the subsidiary company should be held in the name of the holding company, there cannot be any situation in which s. 47(v) can apply. That interpretation makes the statutory provision redundant. If the holding company has a beneficial ownership over the entire share capital, s. 47 (v) applies.

**Addl. CIT v. Narendra Mohan Uniyal (ITA No. 1624 /Del/2009)**

**Allowability of exemption under section 54F of IT Act, 1961 qua purchase of second plot of land appurtenant to first plot**

There is no rider under section 54F that no deduction would be allowed in respect of investment of capital gains made on acquisition of land appurtenant to the building or on the investment on land on which building is being constructed.

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

**Requirement of section 68 of IT Act, 1961 to prove identity, creditworthiness and genuineness of cash credits**

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.

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

**Sustainability of addition merely made on basis of presumption**

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.

**Industrial Cables (India) Ltd. v. Addl. CIT (ITA No. 237/Chandi/2008)**

**Allowability of interest on borrowed funds advanced by assessee-company to its subsidiary without interest**

Where funds have been advanced by the assessee to its subsidiary company on the ground of commercial expediency, the assessee would be entitled to claim deduction of interest on borrowed loans.

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

**Accrual of income by way of notional interest on advance of loan**

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.

**Priyasha Meven Finnance Ltd v. ITO (2009) 119 ITD 163 (Mum)**

**Speculation business by Share broker u/s. 73**

Loss suffered by the assessee in the trading of shares is speculation loss and can not be set off against non – speculative income i.e., brokerage income of the assessee.

**ACIT v. Shreegopal Purohit (ITA No. 5666/Mum/2007)**

**Future option income (F&O) can not be set off against speculation Loss**

F&O transactions are not speculative transactions and thus, the income from such transactions cannot be set off against the speculation loss.

**Kalyanam Karoti v. CIT (ITA No. 682/Luc/08)**

**Recognition can not be denied U/s. 80G (5) only on the ground that the particulars of donors are not provided by Institution or fund**

There is no provision either in the Act or in the Rules made thereunder to refuse recognition under section 80G (5) or continuation thereof only on the ground that the particulars of donors are not provided by Institution or fund.

**ACIT v. Shri K. T. Joseph (IT (S&S) A. No. 58/Coch/2005)**

**Assessment of undisclosed income from business admittedly carried on by a firm**

If the business is carried on by the firm, then whether it is disclosed income or undisclosed income, is to be assessed in the hands of the firm and not in the hands of the partners; there is no machinery to assess the income of the firm in the hands of the partner, merely because it is not disclosed in the accounts of the firm; such assessment in the hands of the partner can not be justified merely because the income is pocketed by the partner.

**Harrisons Malayalam Ltd. v. ACIT (2009) 32 SOT 497 (Cochin)**

**Section 115JB r.w.s. 2(1A)**

Agricultural income does not form part of book profit for purposes of section 115JB

**Section 50B r.w.s. 2(42C) - Cost of acquisition in case of slump sale**

Assessee-company was engaged in various business activities like growing and manufacturing tea, rubber plantations, agricultural operations, etc. During relevant year assessee had sold one of its rubber estates with standing trees and all other paraphernalia known as 'Boyce Estate' as a going concern. Assessee claimed profit arising on sale of rubber estate to be exempt from levy of tax. Assessing Officer accepted assessee's claim. Commissioner (Appeals), however, held that said profit was taxable as capital gain under section 50B, as rubber estate was sold as a going concern, which showed that sale was a slump sale of an undertaking in its entirety.

Held that since rubber estate had been sold by assessee excluding cash in hand, stock in hand, receivables, finance, asset and liabilities, it could not be treated as slump sale as construed in section 50B. Further, since profit-in-question was agricultural income in nature, it would not come within meaning of capital assets and by nature of income, it would not come under provisions of section 50B.

**Indian Oiltanking Ltd. v. ITO (2009) 120 ITD 237 (MUM.)**

### Allowability of Business expenditure u/s 37(1)

Assessee-company was engaged in providing oil terminal services and construction of petroleum-terminals. It was awarded two contracts for construction and operation of petroleum terminals at two places by 'IOC'. Under these contracts, assessee was required to design and construct storage facilities and also to provide services relating to handling, storage and dispatch of petroleum products. There was a warrantee clause in agreement whereby assessee had undertaken to make good any defect arising during defect liability period. Assessee filed its return for assessment year 2001-02 and claimed deduction at 5 per cent of provision made for performance warranties. Assessing Officer disallowed provision for performance warranties on ground that liability for meeting expenses and outgoes during defect liability period had not crystallized and were not ascertained. It was found from records that assessee had a technical assessment which had been vetted by an independent agency where expenses during defect period had been estimated at 5.97 per cent and further, industrial experience in this regard had also been filed by assessee which gave instances of failure/development of defects which had actually occurred in oil industry in this line of activity and assessee had also submitted details of expenses incurred for rectification of various damages during defect liability period, subsequent to 31-3-2001. From above facts it was held that liability was very much ascertained as on end of relevant previous year and 5 per cent of warranty provisioning done by assessee was reasonable, therefore, Assessing Officer was not justified in disallowing provision for performance warranties made by assessee.

### Section 115JB of the Income-tax Act, 1961

In view of above facts, Assessing Officer could not make addition of provision of performance warranties to net profit of assessee for arriving at its book profit for purpose of section 115JB

Assessee-company had written off balance remaining under head 'Preliminary and deferred revenue expenditure'. Assessing Officer added that amount to net profit of assessee for purpose of computing book profit under section 115JB on ground that said expenses had been written off due to change in accounting policy of assessee. It was held that Accounting Standards and policies of ICAI nowhere state that there cannot be a change in an accounting policy by a company. Since by writing off balance remaining under head 'Preliminary and deferred revenue expenditure', assessee was only doing what was prudent, in that, it was removing from asset side of its balance-sheet a non-productive item, and which in any case was not an asset at all, it could be said that it had done nothing contrary to any accounting standard or ICAI guideline, therefore, addition made by Assessing Officer was to be deleted.

**Ravinder Kumar v. DCIT (ITA No. 661/Del/2009)**

### No addition can be made on the basis of mere statement recorded during survey

Merely on the basis of statement having been recorded, no addition can be made unless the same can be corroborated by any material either found during the course of survey or subsequently brought on record by the department while framing the assessment.

**Kirtichandulal Oswal v. DCIT (2009) 124 TTJ (Pune) 548**

### Search and seizure - Computation of undisclosed income

After the amendment of s. 158BB(1) with retrospective effect from 1st July, 1995, addition in respect of undisclosed income can be made on the basis of evidence found as a result of search as well as such other material or information relating to such evidence found in the course of search at the assessee's premises. There must be a direct nexus between the material found in the course of search at the assessee's premises as well as other material gathered by the AO from extraneous source. Material relied upon by the AO having been found during the course of search at the premises of third party, no addition could be made in the hands of assessee on that basis. That apart, that third party had made a vague statement and name, of assessee was nowhere mentioned specifically and therefore addition was not justified.

**Mahaan Foods Ltd. v. DCIT (2009) 27 DTR (Del)(Trib) 185**

**Limitation under s. 158BE**

Search team having concluded the search temporarily after passing a prohibitory order under s. 132(3) on 15th Sept., 2000, as it was not practicable to conclude the search finally and voluminous documents remained to be seized, the search stood finally concluded on the dale on which the second and final Panchnama was drawn i.e., 4th Oct., 2000, after revocation of said prohibitory order and seizure of the remaining material and, therefore, the block assessment completed on 31st Oct., 2002, was within a period of two years from the end of the month in which the warrant of authorization was executed and was not barred by limitation.


**Computation of undisclosed income u/s 158BB**

Impugned amount having been duly declared by the assessee as its undisclosed income for the block period and no case having been made out by the AO either in the assessment order or even in the remand report to the CIT (A) to show that the said amount represented some other undisclosed income of the assessee than what was shown by the assessee in the details furnished, addition of the same amount to the undisclosed income clearly amounted to double addition; additions rightly deleted.

In the absence of any other evidence found during the course of search or brought on record by the AO to show that the expenditure found noted on seized documents was actually incurred by the assessee, the same cannot be added to the undisclosed income of the assessee by invoking the provisions of s. 69C.

Amount receivable from different parties for sales made to them which was found recorded on a seized document could not be added to assessee's undisclosed income once the corresponding sales bills raised by the assessee on the said parties were duly recorded in its regular books of account.

No inference could be drawn against the assessee company much less any inference of unexplained expenses on the basis of a dumb document found at the residence of its director as there is no proof to show that the amount mentioned in the said document was paid by the assessee company, and, therefore, addition thereof cannot be sustained.

No evidence having been found during the course of search or brought on record by the AO to show that the actual salary paid to an employee during the relevant period was more than what was shown by the assessee company in its books of account, no adverse inference can be drawn against the assessee company that part salary was paid to the said employee outside the books of account merely on the basis of contents of a document found at his residence.

In the absence of anything on record to discredit the explanation of the assessee that the difference in cash balances between daily cash books and regular cash books was due to the fact that the amounts given to one S were not recorded in the computerised cash book, and the cash balance as per regular books of account on the relevant date being more than the cash balance as per daily cash book, the difference in cash balances could not be treated as undisclosed income of the assessee.

Only the profit earned on the sales made by the assessee outside the books of account can be treated as undisclosed income of the assessee from such sale.

Production process of the assessee company being a continuous one wherein the raw material including sugar is issued on continuous basis, the explanation of the assessee that the quantity of sugar found short at the time of search was actually issued for the production process on the preceding day which was not entered in the stock record was acceptable and, therefore, addition made on account of alleged undisclosed sale of sugar cannot be sustained.

Moreover, raw material including SMP is issued on continuous basis, the explanation of the assessee that 15,000 kgs. of SMP was issued for production on the day of search was acceptable and therefore, the shortage in stock cannot be treated as sale outside the books of account; only the profit on the remaining unexplained deficient stock can be treated as undisclosed income.

In view of relevant evidence on record, unaccounted stock of raw materials of Rs. 1,82,590 which was lying outside the factory building rightly treated as explained by the CIT(A) to the extent of Rs. 1,47,910 on the facts of the case.

Assessee having furnished relevant details to show that the items of packing material found during the course of search were purchased by it and the said purchases were duly recorded in its books of account, it could not be presumed that the said packing material was something different than what was reflected in the purchases especially when nothing was found during the course of search to support and substantiate the same and thus, the addition on account of alleged unexplained investment in the stock of packing material is not sustainable.

**Microsoft Regional Sales Corporation v. ADIT (ITA Nos. 991 and 992 (Delhi) of 2005)**

**Section 143, read with sections 234A to 234C, of the IT Act and articles 12 and 7 of the DTAA between India and USA**

Return of income filed by an assessee, for purpose of section 143(1), would include every part of return of income and whole return of income along with relevant note, if any, filed explaining assessee's liability of tax payable on amount of income shown in return of income, and it should be read and considered by Assessing Officer while exercising his power to determine tax payable or refund due on basis of return of income. Nature and character of income disclosed in return of income cannot be changed to or substituted by another nature and character by Assessing Officer, while determining tax payable on that income as shown in return of income under section 143(1), as this could be done only in regular assessment by issue of notice under section 143(2).

Assessee was a company incorporated in USA and was a wholly owned subsidiary of Microsoft Corporation, USA with a branch in Singapore. It was engaged in business of distribution of computer software in Asian region, including India. It filed its return of income under section 139(4) disclosing payments received by it from India for sale of software. Along with said return assessee had appended a note wherein it was stated that payments received by it on sale of software did not result in transfer of any rights in a copyright which would result in such payments being classified as `royalty' under provisions of article 12 of DTAA with USA and, though payments received were business profits those could not be taxed in India as it did not have a permanent establishment in India. Assessing Officer, however, ignored said note and made an intimation under section 143(1) and worked out tax payable at rate of 15 per cent of income returned by assessee along with interest. It was held that when in return of income assessee had claimed that no tax was payable on income shown therein, and had given reason thereof vide a note annexed to return filed, said note filed with return were to be treated as part and parcel of return when Assessing Officer proceeded to make an intimation under section 143(1). Since Assessing Officer had created demand by ignoring note appended to return, such an action was beyond scope of section 143 (1) and, therefore, intimation under section 143(1) was to be cancelled.

**Shipra Srivastava v. ACIT (ITA No. 8683/2007)(Delhi HC)**

**Validity of notices issued under section 147/148 of IT Act, 1961 on alleged escapement of income**

Where in the reasons recorded seeking reopening of the assessment, the Assessing Officer had failed to disclose as to how he had come to the finding and on the basis of which materials that income chargeable to tax had escaped assessment; the reasons recorded were therefore, ex facie without any foundation and were in fact wholly baseless conclusion; accordingly, the notices issued against the assessee under sections 147/148 were to be quashed.

**Shri Arun Lal v. ACIT (ITA No. 289/Agr./2006)**

**Validity of service of notice under section 148 of IT Act, 1961 by affixture**

Where there was no material on record to show or to suggest that any effort was made by the Assessing Officer to serve the notice in normal course before issuing the directions to serve the same by way of affixture; it could not be held that service of notice by affixture was a valid service.

**EMA India vs. ACIT (Allahabad HC) (Civil Misc. Writ Petition No. 181 (Tax) of 2004)**

**An order passed without discussion is liable for reopening. Kelvinator 256 ITR 1 (Del) (FB) dissented from**

In respect of AY 2000-01, the assessee filed a ROI. In the accompanying balance sheet it was disclosed that prior period expenditure of Rs. 5,41,850 was debited to the P&L A/c and that interest of Rs.8,34,720 receivable from a particular party had not been accounted for as income. The AO passed an order u/s 143(3) in which he did not make any addition on account of the aforesaid two items. Subsequently (within 4 years), he issued a notice u/s.148 in which he took the view that income had escaped assessment as the prior period expenditure was not allowable as a deduction

and the interest on advances was assessable. The assessee filed a writ petition on the ground that there being a disclosure of the material facts and the implied acceptance of the stand of the assessee vide the s.143(3) order, the reopening was based on a change of opinion. HELD, dismissing the Petition:

(i) Reassessment is permissible where the AO has passed an assessment order without any application of mind. If the order of assessment does not contain any discussion on a particular issue, the same may be held to have been rendered without any application of mind. On facts, as there was no discussion by the AO in the s. 143 (3) order about the prior period expenditure and the non-offering of interest income, there was no application of mind by the AO and he was entitled to reopen;

(ii) The judgement of the Full Bench of the Delhi High Court in CIT vs. Kelvinator of India Ltd. 256 ITR 1 where it was held that when an order u/s 143 (3) is passed, a presumption is raised that it has been passed on application of mind and that the Revenue cannot support reopening on the ground of non-application of mind because that would amount to giving a premium to an authority to take benefit of its own wrong cannot be followed as it is contrary to the law laid down by the Supreme Court in Kalyanji Mavji 102 ITR 286, Indian Eastern Newspaper Society 119 ITR 996 and A. L. A. Firm 189 ITR 285 where it was held that if the AO had not considered the material on record and subsequently came across it, the case fell within the scope of s. 147(b) and could be reopened. The Full Bench also did not consider the effect of Explanations 1 & 2 to s. 147;

(iii) If the reassessment is within 4 years, the fact that the assessee has made a disclosure of material facts is not a defense in view of Expl. 1;

(iv) The effect of Expl. 1 to s. 147 is that the assessee does not discharge his duty by merely producing the books of account or other evidence. He has to further bring to the notice of the Assessing Officer particular items in the books of account or portions of document which are relevant. The fact that from the books produced, the AO could have found out the truth does not preclude him from exercising the power to re-assess the escaped income;

(v) On facts, though the books of account including audit report, profit and loss account, balance sheet and other documents were filed before the AO at the time of passing of the s. 143 (3) order and it was stated in the balance sheet that the amount of Rs. 8, 34,720 was not credited in the profit and loss account, still it does not amount to disclosure under Expl. 1 to s. 147 since the same could have been discovered by the AO only with due diligence.

**Medi Assist TPA v. DCIT (Karnataka High Court)(Writ Petition No. 1376 of 2009)**

**TPAs are required to deduct tax u/s 194J on payment to hospitals**

The assessee, a Third party Administrator ("TPA") licensed by IRDA, was engaged in providing "cashless" health insurance claim services. The insurance company issued cashless mediclaim policies (that were serviced through TPAs) under which it assured the policy holder of free treatment up to the assured amount. The TPA issued an identity card to the insured pursuant to which he could approach any network hospital to avail of cashless treatment. Upon treatment, the hospital sent the bill to the TPA and the same would be paid by the TPA to the hospital. The payment would be made from funds made available by the insurance company to the TPA. The assessee also entered into MOUs with hospitals and nursing homes by which it undertook to reimburse / settle the bills of the policy holders. The AO took the view that as the hospitals had rendered professional ('medical') services the assessee ought to have deducted tax at source u/s 194J at the time of payment. The assessee filed a writ petition to challenge the said order on the ground that it was not "responsible" for making the payment.

HELD, dismissing the petition:

(1) Under the arrangement, it is the TPA who is responsible for making payments to the hospital. The TPA can be termed as an "agent" of the insurance company. The TPA was given unbridled power and had taken over a part of the work of the insurance company. Its decision as to the payment of bill and sending the insured to the accredited hospitals was final and the Insurance company was not in touch with the insured at all;

(1) Another factor which was a pointer to the fact that the TPA was required to deduct tax at source was the mechanism of operation of funds. A claim float account was opened in the name of the TPA into which money would be deposited by the insurer and used by the TPA to pay the hospitals. The funds were replenished by the insurer. The TPA was in control of making payments to the hospitals and the liability of the Insurer was only of replenishing the funds. The control of the funds was with the TPA;

(3) The 'Service Level Agreement' entered into by the TPA with the insurance company as well as the agreement entered into by the TPA with the hospital indicated that the TPA was 'responsible for making payment' and that it was obliged to deduct the tax at source.

**Karnal Singh v. State of Haryana (CWP No. 21077 of 2008)(P&H HC)**

**TDS liability of recipient of interest income accrued on delayed payment of enhanced compensation for acquisition of agricultural land**

Once interest is regarded as revenue receipt then it would fall within the mischief of section 4 of the Income-tax Act, 1961; therefore, TDS under section 194A of the Act is to be paid by the recipient in respect of the interest income on the delayed payment.

**Essel Propak Ltd. v. ACIT (M. A. 24/Mum/09)**

**Issue decided on merit cannot be construed as decided on the basis of mistake apparent from the record**

The issue decided on merit after appreciation of the facts of the case cannot be construed as suffering from patent, self-evident, glaring and mistake apparent from the record as contemplated under section 254(2).

**Sunilchandra Vohra v. ACIT (2009) 32 SOT 365 (Mum.)**

**Penalty u/s 271(1)(c) for concealment of income**

Assessee was engaged in business of supply and replacement of parts and accessories of ships. He was also a 99 per cent shareholder in 'M' Ltd. During relevant previous year he had taken loan from 'M' Ltd. in order to acquire certain property. Said loan was repaid in same financial year and, consequently, factum of taking loan did not figure in final balance sheet filed along with return of income. Assessing Officer, in course of assessment proceedings, found that assessee had obtained loan from closely held company and, thus, he was liable to pay tax on deemed dividend by virtue of section 2(22)(e). Accordingly, assessment was completed by bringing to tax dividend income. Thereafter, penalty proceedings under section 271(l)(c) were initiated on ground that assessee had furnished inaccurate particulars of income by not disclosing deemed dividend assess-able to tax. Assessee replied that he, being an engineer by profession, was not conversant with provisions of Act and, hence, he was filing returns by taking assistance of C.A. but at no stage said C.A. brought to his notice possibility of applicability of section 2(22)(e) in respect of said loan transaction. However, Assessing Officer rejected assessee's explanation and imposed penalty by invoking Explanation 1 to section 271(l)(c). It was found that liability to pay tax under section 2(22)(e) arose for first time in assessee's case and that tax authorities had not disputed, in principle, about incorrect guidance by C.A. to assessee. On facts and circumstances, explanation of assessee was bona fide and, hence, case fell outside ambit of Explanation 1 to section 271 (l)(c), therefore, penalty levied by Assessing Officer was to be cancelled.

**Jitu Builders Pvt. Ltd. v. ACIT (ITA No. 1905/Ahd/2006)**

**Leviability of penalty under section 271D of IT Act, 1961 for violation of section 269SS**

When the assessee-company, a builder and developer of lands, resorted to cash borrowing in violation of section 269SS only because of the advantage which the ready cash back-up would give to it in negotiating the purchase of agricultural lands for development, penalty under section 271D would not be leviable on the facts and in the circumstances of the case.

**Amrit Lal Jindal & Sons (HUF) v. ITO (WTA No. 12 of 2009)**

**Charge of Wealth-tax and assets subject to such charge**

The land which falls within the exception of `urban land' would have to be excluded from the ambit and scope of expression `urban land' and, such land would not be covered by the expression `assets' as defined in section 2 (ea) of the Wealth-tax Act, 1957; consequently, such land would not be treated as net wealth of an assessee for the purposes of provisions of the Act.

**Pintsch Bamag, In re (AAR No. 790 of 2008)**

**AAR on taxability of applicant– German company, having no PE in India, for executing a contract of Tuticorin Port Trust (TPT) through an Indian sub-contractor**

It is not possible to hold that the place of manufacture of the sub-contractor situated far away from the installation site should notionally be regarded as part of the applicant's PE; occasional or brief visit by some of the employees of the applicant right from the beginning does not give rise to inference of the existence of PE; hence, its business profits arising from the periodical payments made by TPT as a consideration for the contract cannot be subjected to tax under the Income-tax Act, 1961 in view of Article 7.1 of DTAA between India and Germany.

**Jt. Director of IT (IT) v. Krupp UHDE Gmbh. (2009) 26 DTR 289 (Mumbai) (Trib)**

**DTAA between India and Germany- Reimbursement of expenses and Technical services - Permanent Establishment**

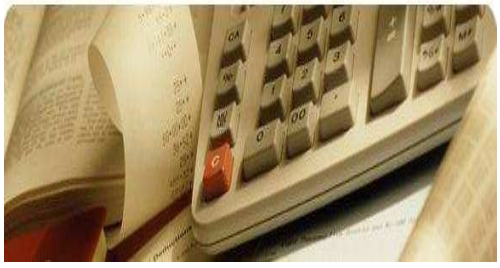
Reimbursement of expenses does not involve the element of income and therefore could not be taxed under Art. 12 of the DTAA between India and Germany.

Amount received by assessee German company for inspection of compressor of ammonia tank belonging to Indian Company constituted fee for technical services within the meaning of art 12 of the DTAA between India and Germany. For computing the period of six months for constituting PE within the meaning of art 5 (2) (i) of DTAA between India and Germany, various sites can not be considered together, in case of supervisory contract for commissioning of a project, it is not the date of commencement of the project itself but the date of commencement of supervisory contract which is relevant . Further, the period of six months has to be counted cumulatively irrespective of the fact that it falls in more than one financial year.

**Factset Research Systems Inc., In re (AAR)(317 ITR 169)**

**Ss. 2(1), 14 -Non-resident maintaining database outside India containing financial and economic information relating to companies**

Agreement with Indian customer for grant of a limited, non-exclusive, non-transferable right to use information in the database for personal use and in own business premises. Licence fees received by non-resident is not "royalty" but only business income, not taxable in India. Even if business income, not taxable as "permanent establishment" not in existence as held on facts. Department free to find business establishment in which case income would be taxable as business income.



**Infrasoft Ltd. v. ADIT (Int.Tax) (2009) 28 DTR (Del)(Trib) 215**

**DTAA with UK - Receipts from sale/ licensing of software**

Assessee, licensed software to Indian customers under a non-exclusive and non-transferable licence permitting the licensee to use the software only for its own business as specifically identified without any right to loan, rent, sell, sub-license or transfer the copy of the software to any third party without the consent of assessee and with the condition that all copyrights and intellectual property rights in and to the software and copies made by the licensee are owned by assessee, the amount received by the assessee under the license agreement for allowing use of software was not royalty either under the IT Act or under the DTAA but was in the nature of business profits chargeable to tax under art. 7 of the DTAA.

**SPAHI Projects (P.) Ltd., In re (2009) 183 TAXMAN 92 (AAR)**

**Income Deemed to accrue or arise in India - Section 9 and DTAA with South Africa**

Applicant is an Indian company engaged in business of manufacture and supply of industrial pesticides. A company 'Z' incorporated in South Africa has offered its services to promote and market products of applicant in South Africa. For services rendered, 'Z' will receive from applicant commission on every completed transaction. Main role and responsibilities of 'Z' are to procure orders from different buyers and to forward same to applicant. Such orders will be executed directly by applicant. Sale consideration will also be received in India by applicant. Amount of commission is paid to 'Z' from India by way of crediting it to Z's bank account in South Africa. 'Z' renders all services in South Africa and it does not maintain any permanent establishment in India. It was held that income of 'Z' on account of commission paid to it by applicant is not chargeable to tax in India by virtue of article 7 of DTAA between India and South Africa and section 9(I)(i), read with Explanation thereto.

## *Judicial pronouncements (International Taxation)*

**Invensys Systems Inc., In Re (2009) 27DTR (AAR) 26**

### DTAA with USA; Sections 90 & 195 - Fees for technical services vis-a-vis management services

Applicant providing various services for the benefit of group as a whole and raising invoices on its Indian group company. Most of the services are managerial in nature and not technical. Assuming that some of the services can be brought within the definition of technical or consultancy services, yet the other ingredient in cl. (b) of art. 12.4. of DTAA viz. "make available" is not satisfied in the instant case. Applicant is not liable to be taxed in India as per the provisions of DTAA viz. art. 7.1 and art. 12.4(b) and IIPL is not obliged to withhold tax at source under s. 195

### Circulars / Notifications

**Notification No. 67/2009 Dated 9-9-2009**

### Cost Inflation Index for F.Y. 2009-10

In exercise of the powers conferred by clause (v) of the Explanation to section 48 of the Income-tax Act, 1961 (43 of 1961), the Central Government hereby makes the following amendment in the notification of the Government of India in the Ministry of Finance (Department of Revenue), Central Board of Direct Taxes, number S.O.709(E), dated the 20th August, 1998, namely :-

In the said notification, in the Table, after serial number 28 and the entries relating thereto, the following serial number and entries shall be inserted, namely:-

| | | |
|---|---|---|
| "29 | 2009-10 | 632" |

**PRESS RELEASE No.402/92/2006-MC (21 of 2009) Dated: September 30, 2009**

### Gifts of property (gifts-in-kind) above value of rs.50,000 become taxable from 1st October 2009

The Income Tax Act 1961 (the Act) has been amended with effect from 1st October 2009 to provide that any gift-in-kind, being an immovable property or any other property, the value of which exceeds Rs.50,000 (rupees fifty thousand), will become taxable in the hands of the donee, being an individual or a Hindu Undivided Family (HUF), as income from other sources under clause (vii) of sub-section 2 of section 56 of the Act. Therefore, any such person who receives a gift of any such property on or after 1st October 2009 must pay the income tax due on the value of the gift and disclose the taxable value of such property in the return of income for assessment year 2010-11 and subsequent years.

The following types of gifts will, however, not be subject to tax, i.e. gifts (a) from a person who is a relative; (b) on the occasion of marriage of the individual; (c) under a will or by way of inheritance; (d) in contemplation of death of the donor; (e) from any local authority as defined in the Explanation to section 10(20) of the Act; (f) from any fund or trust established under section 10 (23C) of the Act; (g) from any trust or institution registered under section 12AA of the Act.

Relative is defined in the Act as (i) spouse; (ii) brother or sister; (iii) brother or sister of the spouse; (iv) brother or sister of either of the parents; (v) any lineal ascendant or descendant; (vi) spouse of any of the relative at clauses (ii) to (v); of the individual. Gifts received from these relatives will not be subject to tax.

Earlier cash gifts exceeding Rs.25,000 were subject to tax with effect from 1st April 2004. Later the Act was amended with effect from 1st April 2006 to tax all cash gifts having aggregate value exceeding Rs.50,000. Cash gifts also enjoy exemptions as is available for gifts-in-kind.

### Social Security Agreement with Luxembourg (September 30, 2009)

India has entered into a Social Security Agreement with Luxembourg to provide benefits to Indian nationals working in the European country.

According to the agreement, for posted workers, for a detachment period of 60 months no social security contribution need to be paid under the Luxembourg law by the detached workers provided they continue to pay social security payment in India.

If the detachment period continues beyond 60 months the competent authorities of the two countries or the competent agencies designated may agree to extend the period of posting, an official release said here.

"The provision of detachment is also applicable where a person who has been sent by his employer from the territory of one contracting state to the territory of a third country is subsequently sent by that employer from the territory of the third country to the territory of the other contracting state," says the agreement.

The Social Security Agreement includes the features of full portability of social security benefits. It also provides for totalisation of the periods of contribution for pension/benefits.

### Social Security agreement with Switzerland (September 3, 2009)

The ministry of overseas Indian affairs has entered into a bilateral social security (SSA) agreement with the government of Switzerland on 3rd Sep, 2009 which will help cross-border movement of professionals across the two countries.

This treaty will ensure the avoidance of double payment of social security for Indian professionals working in Switzerland. In some cases, it will provide portability of benefits whereby the professionals can avail themselves of social security benefits, such as pension, even after they return to India.

According to the terms of the SSA, detached workers sent by Swiss companies to their Indian operations and those sent by Indian companies to their branches in Switzerland will be exempt from social security contribution in the host country for a period of 72 months. While working overseas, these employees will only be subject to the social security regulations in the home country.

The treaty is likely to come into effect by Q2, 2010.

## INDIRECT TAXES

### Judicial Pronouncements

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

### Allowability of rebate claim for services exported under Export of Service Rules, 2005

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.

**DHL Lemuir Logistics Pvt. Ltd. v. CST (STAppeal No. 389/2007) (CESTAT, Banglaore)**

### Levy of service tax on freight forwarding services under CHA Services

The activities relating to freight forwarding cannot be brought under CHA.

**Maruti Suzuki Ltd. v. CCE (Civil Appeal No. 5554 of 2009)(SC)**

### Interpretation of word "input" as defined in Rule 2(g) of Cenvat Credit Rules, 2002

The definition of "input" brings within its fold, inputs used for generation of electricity or steam, provided such electricity or steam is used within the factory of production for manufacture of final products or for any other purpose.

## OTHER LAWS

### OTHER

**Press Release No. BSC/BY/GN-338/9 dated September 30, 2009**

### Scheme of 1% Interest Subvention on Housing Loans upto Rs.10 Lakhs

The Government today launched an interest subvention scheme of 1% on all individual housing loans upto Rs.10 lakh for units costing upto Rs. 20 lakh. The scheme recognizes that cut in interest rates has an important role to play in reducing EMIs of borrowers & creating additional demand for housing. The Scheme will cover all regions of the country and support the low and middle income sections of society to become house owners. The scheme is also expected to give a boost to credit flow to the housing sector and create additional employment in the housing and allied sectors, such as steel and cement.

The scheme was formulated in response to an announcement made by the Finance Minister in the Lok Sabha on 27th July, 2009 where he stated that housing, particularly lower and middle income housing, deserved to be supported. In order to stimulate the demand for housing for this segment of the population he proposed an amount of Rs. 1000 crore to be allocated as interest subsidy for a period of one year of operation of the scheme. The allocation of the amount and the guidelines of the scheme were approved by the Cabinet on 10th September 2009.

The scheme will be in operation for a period of one year starting from 1st October 2009 to 30th September 2010. Subsidy of 1 per cent will be defined as reduction in interest rate by 100 basis points per annum from the existing rate of interest for a particular amount & tenor. It will be applicable to the first twelve instalments of all such loans sanctioned and disbursed during the currency of the scheme and will be computed for 12 months on the disbursed amount. The subsidy amount will be adjusted upfront in the principal outstanding, irrespective of whether the loan is on fixed or floating rate basis. The Scheme will be implemented through scheduled commercial banks (SCBs) and housing finance companies (HFCs) registered with the National Housing Bank.

The RBI and the NHB will be the Nodal Agencies for this Scheme for SCBs and HFCs, respectively. The number of beneficiaries covered under the scheme will depend, interalia, upon the size of the loan amount and the number of beneficiaries approaching the nodal agency for interest subvention. Being a demand driven scheme no specific targets for coverage of beneficiaries have been fixed. An amount of Rs. 300 crore will be allocated in the Budget of 2009-10 for implementation of the Scheme. The balance amount will be allocated in the Budget of next year.

### Companies Act

**Reliance Communications Ltd., In re (2009) 94 SCL 219 (BOM.) Bombay HC**

**Section 391, read with section 211, of the Companies Act, 1956 - Compromise and arrangement**

Possibility of violation of accounting standard cannot be basis to straightway disapprove a scheme of arrangement. While considering a scheme of arrangement propounded by company, same will have to be tested on touchstone of provisions of Act which do not completely prohibit deviation of accounting standard subject to disclosures in terms of section 211 Petitioners, i.e., demerged company and resulting company, filed petition to obtain sanction of scheme of arrangement between them and their respective shareholders and creditors whereunder optic fiber undertaking of demerged company would stand transferred to and vested in resulting company with effect from appointed date in terms of scheme. Board of directors of petitioners approved scheme of arrangement. Requirement of holding meetings of sole secured creditor of demerged company and unsecured creditors of both companies had been dispensed with by an order of Court. Scheme was unanimously approved by equity shareholders of both companies. Respective stock exchanges also approved proposed scheme. However, intervenor who claimed to be a shareholder of demerged company filed an intervention application at behest of one 'R' opposing scheme of arrangement on grounds that demerged company had failed to furnish valuation report and it should be directed to first furnish valuation report before proceeding with hearing of petition; that disclosures made in scheme with respect to value of optic fiber undertaking were vague and were not transparent; and that accounting treatment proposed to be followed by demerged company for accounting difference between consideration and net book value was not in line with accounting standards. Since applicant was not personally present to oppose scheme in meeting of equity shareholders, objections then raised by such applicant either before Registrar of Companies/Regional Director or for that matter, before High Court, at time of opposing scheme which was put for sanction of Court, were clearly an afterthought.

Moreover, since applicant had filed his intervention applications and objections to proposed scheme at behest of person who was neither a shareholder nor a creditor of either company, bona fides of applicant to intervene in proceedings would be questionable. Since valuation report was available for inspection before meeting of shareholders was held and, moreover, scheme had been approved with an overwhelming majority of shareholders of both companies, there was no reason to adjourn matter for reason stated by intervenor. Having regard to fact that companies had produced audited books of account till 31-3-2008 and unaudited books till 31-12-2008 which disclosed all relevant information coupled with fact that valuer had also referred to figures of value of assets of optic fiber undertaking, it was neither a case of vagueness nor of non-transparent disclosure made by companies. Since companies assured to abide by provisions of section 211, objection as regards deviation from accounting standards was to be rejected, therefore, objections raised by intervenor were to be rejected and proposed scheme was to be sanctioned.

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

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