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SNK Newsletter

DIRECT TAXES

News

Finance (No. 2) Bill, 2009 assented by President on August 19, 2009 to become Finance (No. 2) Act, 2009

Judicial Pronouncements

Madras Gymkhana Club v. DCIT [TC(A) No. 397 of 2008] (Madras HC)

Entitlement of a club to claim benefit of exemption qua interest income earned by it from investments of its surplus funds with corporate members on ground of mutuality

Even though existence of the club and its activities and facilities are for the mutual interest of its members and such mutual interest in respect of its regular activities vis-a-vis its members continue to remain, based on that alone it cannot be held that its other activities such as its financial management of depositing the surplus funds in various banking institutions and thereby earning substantial amount by way of interest should also be held to have every nexus to the regular and normal activities of the club vis-a-vis its members; investment of surplus fund with some of the member banks and other institutions in the form of Fixed Deposits and securities which in turn result in earning of huge surplus amounts by way of interest cannot be held to satisfy the mutuality concept.

DCIT v. Alok Gautam (ITA No. 1506/All./97)

Ingredients of a genuine gift transaction

For proving a gift to be genuine, the assessee-donee is required to prove the existence of natural love and affection between the donor and donee, voluntary nature of the gift and the occasion for giving gifts; for a gift to be genuine, what should appear to any quasi-judicial authority is that the donors and donee are so close to each other that the donors are prompted to part away their dear money in favour of the donee.

Yash Pal Goel v. CIT (Appeals)(2009) 181 Taxman 175 (PUNJ. & HAR.)

Identification of donor and receipt of gift by cheque not sufficient to prove genuineness of gift

Opinion formed by Assessing Officer for not accepting assessee's explanation as regards sums found credited in books maintained by him constitutes a prima facie evidence against assessee relating to receipt of money, and if assessee fails to rebut said evidence, same can be used against him by holding that it was a receipt of an income nature. Where claim of gift is made by assessee, onus lies on him not only to establish identity of person making gift but also his capacity to make a gift, and that it has actually been received as a gift from donor. A simple identification of donor and showing movement of gift amount through banking channels is not sufficient to prove genuineness of a gift.

Topstar Mercantile Pvt. Ltd. (Formerly, Urvi Chemicals & Allied Industries Ltd.) v. ACIT (ITA No. 1460 of 2009)

ITAT cannot remand to apply section 14A if AO in his Assessment order not made disallowance u/s 14A

In assessment proceedings, the AO raised a query about disallowance of expenditure attributable to exempted dividend income u/s 14A. After considering the assessee's reply, no disallowance was made u/s 14A, though interest expenditure was disallowed on the ground that it was not for business purposes. This was confirmed by the CIT (A). On appeal by the assessee, the Tribunal remanded the matter to the AO by observing that the AO should reconsider the matter in the light of Daga Capital Management 199 TTJ 289 (SB) (Mum). On appeal by the assessee, HELD:

As the AO had not made any disallowance u/s 14A, the Tribunal could not have not touched the question of s. 14A and made observations prejudicial to the assessee while remanding the matter. It had no jurisdiction to issue directions to the AO decide afresh on the touchstone of s. 14A and Daga Capital Management Pvt. Ltd. Accordingly, the order of the Tribunal to the extent it directed consideration of applicability of s. 14A was quashed & set aside.

Cheminvest Ltd vs. ITO (ITAT Delhi-SB)(ITA No. 87/Del/2008)

S. 14A disallowance has to be made even if assessee has no tax-free income

The assessee had borrowed funds for the purpose of investing in shares. The shares were held for capital purposes as well as for investment purposes. In AY 2004-2005, the assessee did not receive any dividend on the said shares and so there was no exempt income. The Special Bench had to consider whether the interest expenditure incurred by the assessee on the said borrowings used for purposes of investment in shares could be disallowed u/s 14A even though the assessee had not received any tax-free income in respect of the said shares. HELD, deciding against the assessee:

(1) In Rajendra Prasad Moody 115 ITR 522 the Supreme Court held that interest on monies borrowed for purchase of shares was allowable as a deduction u/s 57 (iii) irrespective of whether or not there is any yield of dividend to the assessee. It was held that the words "expenditure incurred for making or earning the income" in s. 57 (iii) did not mean that income actually had to be earned for the allowability of the expenditure. The converse of this principle is now applicable. i.e. s. 14A disallows expenditure "in relation to income which does not form part of total income" and in order for the expenditure to be disallowed, actual income need not be earned;

(2) The fact that the expenditure is allowable u/ss 36 (1) (iii) / 57 is irrelevant because s. 14A has overriding effect and supercedes all other provisions;

(3) The disallowance has to be of the entire amount of the expenditure so related and cannot be reduced by the receipt of interest which has no relation to such expenditure.

Vikram Golecha v. DCIT (ITA No. 799/Jp/2005)

Ascertainment of head of income derived by a landlord from hirers of his office space

Intention of the landlord is a material factor in deciding the issue as to whether charging of services to be provided in terms of the agreements with the tenants is business income or not; if it is found that main intention is for letting out the property or any portion thereof, the same must be considered as rental income or income from property; in case it is found that the main intention is to exploit the immovable property by way of complex commercial activities, in that event it must be held as business income.

Kotak Forex Brokerage Ltd. v. ACIT (ITA NO. 2692/Mum/2007)

Allowability of depreciation on goodwill

Goodwill is a `business or commercial right of similar nature'; once it is held that the goodwill is also an intangible asset of the similar nature referred to in clause (ii) of section 32(1) of the Income-tax Act, 1961 the depreciation is consequently allowable on the same.

State Bank of Mysore v. DCIT (ITA No. 647/Bang./2008)

Depreciation on transfer of Investment from available for sale (AFS) to held to maturity (HTM) category by banks

In view of the clear cut guidelines of the RBI regarding transfer of AFS category investment into HTM category investment, the claim of the assessee-bank towards provisions of depreciation on account of transfer of securities from AFS category to HTM category is to be allowed.

Judicial pronouncements

Western Coalfields v. ACIT (ITAT Nagpur)(ITA No. 289-290/Nag./2006)

Explanation to s. 37 (1) does not apply to "penalty" which is not of the nature of illegal / unlawful expenditure

The assessee became liable to pay "penalty" for overloading wagons under the rules of the Railways. The question arose whether the said "penalty" was disallowable under the Explanation to s. 37 (1) which provides that "expenditure incurred for any purpose which is an offence or which is prohibited by law" shall not be allowable. HELD, deciding in favour of the assessee:

The substance of the matter had to be looked into and given preference over the form. Though the amount was termed "penalty", it was essentially of a commercial nature and incurred in the normal course of business and was consequently allowable.

The judgement also holds that provision for estimated increases in wages made during ongoing negotiations with workers pending finalization of an agreement is deductible expenditure.

Ranbaxy Laboratories Ltd. v. ACIT (2009) 26 DTR (Del)(Trib) 420

Amortisation of preliminary expenses under s. 35D - Fees for increasing authorized share capital

As per s. 35D(1), expenditure in connection with issue for public subscription of shares in or debentures of the company should be incurred either before the commencement of business of the company or in connection with the extension of industrial undertaking or in connection with setting up of a new industrial unit of the company. Admittedly, assessee company did not incur the expenditure either on extension of its industrial undertaking or for setting up a new industrial unit. Thus, assessee is not eligible for amortization of said expenses under s. 35D.

Allowability of expenditure on Issue of shares under ESOP at below market price

Assessee is to issue shares of face value of Rs. 10 by receiving Rs. 595 per share i.e., premium of Rs. 585, as against the market price of Rs. 738.95 per share. It has not accounted for the difference between Rs. 738.95 and Rs. 10 as its income during the relevant year. Thus, there is no loss of income. What is loss to the assessee is by way of short receipt of share premium and not by way of any expenditure or incurring of any liability. Receipt of share premium is not taxable and hence, any short receipt of such premium would only be a notional loss and not actual loss. SEBI guidelines requiring the assessee to account for short receipt of share premium as employees compensation expenses are relevant only for the purpose of accounting and are not conclusive for the purpose of allowing the same as expenditure. Prerequisite for deduction under s. 37 is that the assessee should have incurred an expenditure. Expenditure is what is 'paid out or away' and is something which has gone irretrievably. A benefit or income foregone cannot be considered as an expenditure. Since the assessee had not incurred any expenditure but has merely received lesser amount of share premium, the same does not amount to expenditure within the meaning of s. 37. Therefore, the claim of assessee is not allowable. Claim of expenditure is not allowable only on the basis of entry in the books of account. Unless the provision of s. 37 is complied with, deduction is not permissible.

Year of allowability of expenditure - Demand raised by National Pharmaceutical Pricing Authority (NPPA) disputed before High Court

Demand raised against the assessee, a pharmaceutical company, by NPPA for overcharging the price of a drug having arisen during the relevant year, and the same being a quantified and crystallized demand enforceable in law, it is allowable as deduction in the relevant year despite the fact that the assessee is disputing the liability before the High Court.

CIT vs. Secure Meters (Rajashthan High Court)(ITA No. 8 of 2007)

Expenditure on convertible debentures is deductible

The assessee incurred expenditure onc issue of convertible debentures. The department claimed that convertible debentures were akin to shares and that in line with the judgement of the Supreme Court in Brooke Bond 225 ITR 798 the expenditure was capital in nature. HELD rejecting the claim that:

A debenture, when issued, is a loan. The fact that it is convertible does not militate against it being a loan. In accordance with India Cement 60 ITR 52 (SC), expenditure on a loan is always revenue in nature even if the loan is taken for capital purposes. Consequently, the expenditure on convertible debentures is admissible as revenue expenditure.

ACIT v. Bilawala & Co. (ITA NO. 2509 TO 2511/Mum/2008)

Assessability of interest earned on bank deposits held on account of "client account" by a firm of Advocates & Solicitors

Interest on the bank deposits held on account of "client account" is assessable under the head "profits and gains of business or profession" and the same would, therefore, be part of the professional income for the purposes of computation of deduction under section 40(a)(ii) of the IT Act, 1961, on account of remuneration permissible to the partners of the firm.

Mindteck (India) Ltd. v. ITO (2009) 26 DTR (Mumbai)(Trib) 125

Profit chargeable to tax under s. 41 (1) as Business income - Waiver of loan by group company

Assessee's undertaking acquired by another concern and in order to keep the company in running condition and discharge debts etc., it borrowed money from a group concern. Later on the loan was waived by the creditor company. On these facts, s. 41(1) was not attracted. Though assessee received benefit by way of remission or cessation of liability, the same is certainly not in respect of any trading liability. Assessee did not receive the said amount in respect of any sales or purchases or other related direct or indirect expenses to qualify for trading activity. Sec. 41(1) deals with the amounts or benefits received and not the ones input. Provisions of s. 28(iv) also did not apply.

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

Scope for reduction of actual cost of plant and machinery by waiver of loan amount when loan was not given directly or indirectly for purchasing plant and machinery

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.

ACIT v. Rasna Industries (2009) 31 SOT 26 (JODH.)(URO)

Addition of G.P. on stock short found during search

A search and seizure operation in case of 'B' and 'K' group of cases was carried out. Consequently, a notice under section 158BC was issued to assessee. During course of search, a detailed inventory of stock and related material was prepared and when it was compared with stock available in books of assessee it resulted into shortage of stock. Assessing Officer treated it as undisclosed sales and thereupon, made an addition. On appeal, assessee contended that when stock is found short, only profit element of sales, to extent of short stock, has to be added and not entire value of short stock. Commissioner (Appeals) accepted said contention and adopted gross profit rate at 10.5 per cent as declared by assessee and, thus, reduced addition and the said action of CIT (A) was justified.

Computation of Undisclosed income

Pursuant to a search various documents in form of diaries and loose paper regarding details of trade of rasgullas were found and seized. When assessee was asked to explain nature of transaction recorded in seized documents, it explained that seized documents related to trade of rasgullas, which was not accounted for in regular books of account. On basis of assessee's explanation, Assessing Officer made huge addition by taking sample of sale of rasgulla for one month, and, accordingly, estimated undisclosed sales at rate of 28 per cent over entire block period in question. Held that since sample of sales taken from one month could not be treated as representative of undisclosed trading activity of entire block period as there could not be uniformity in sale throughout a year, there was no justification for applying ratio of 28 per cent over entire block period for computing undisclosed sales.

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

Allowability of set off of speculation loss against income from future and option (F&O) transactions

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

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.

First State Investments (Hongkong) Ltd. A/c First State Asia Innovation and Technology Fund v. ADIT [2009-TIOL-547- ITAT-MUM]

Set-off of short-term capital losses, subject to STT, allowable against short-term capital gains not subject to STT

The Tribunal held that :

- If the intention of the legislature had been not to confer the choice on the assessee for setting- off of the short-term capital loss where transactions have been subject to STT against short-term capital gains where transactions have not been subject to STT, it would have clearly set out such an intention in the language of section 70 (2) itself, as has been done in sub-section (3) of section 70 of the Act. In the absence of such stipulation in sub-section (2) of section 70 of the Act, the choice has been left to the assessee in deciding about the setting-off of short-term capital loss from one transaction against any other short-term capital gain.
- The words used in section 70(2) of the Act stating that "the assessee shall be entitled" means that the option is with the assessee and the assessee will decide the manner of setting-off of short-term capital loss from one transaction against short- term capital gains from any other transaction.
- Chapter XII, which includes sections 111A and 115AD, provides for a particular rate of tax to be applied on the income covered under those sections individually and those sections do not deal with computation of income but provide the rate of tax applicable on the income.

Metropolitan Traders Pvt. Ltd. v. ITO (ITA No. 1535/Mum/2007)

Speculative transactions

In case of a company, if part of its business consists of dealing in shares then all types of transactions, whether delivery based or non-delivery based, will be treated as speculative transactions.

Liberty India vs. CIT (Supreme Court)

DEPB and Duty Drawback are not eligible for deduction u/s 80-IB

The assessee claimed that profit from Duty Entitlement Passbook Scheme (DEPB) and Duty Drawback Scheme are "derived from the business of the Industrial Undertaking" and consequently eligible for deduction u/s 80-IB. Rejecting the plea of the assessee, HELD:

(1) The Act broadly provides for two types of tax incentives, namely, investment linked incentives and profit linked incentives. Ch VI-A essentially belongs to the category of "profit linked incentives";

(2) When ss. 80-IA/80-IB refer to profits derived from eligible business, it is not the ownership of that business which attracts the incentives but the generation of profits (operational profits). It is for this reason that Parliament has confined deduction to profits derived from eligible businesses;

(3) Each of the eligible business in sub-sections (3) to (11A) constitutes a stand-alone item in the matter of computation of profits. That is the reason why the concept of "Segment Reporting" stands introduced in the Indian Accounting Standards (IAS) by the Institute of Chartered Accountants of India (ICAI);

(4) Ss. 80-IB/80-IA are a Code by themselves as they contain both substantive as well as procedural provisions. S. 80-IB allows deduction of profits and gains derived from the eligible business. The words "derived from" is narrower

in connotation as compared to the words "attributable to". By using the expression "derived from", Parliament intended to cover sources not beyond the first degree;

(5) Though the object behind DEPB etc is to neutralize the incidence of customs duty payment on the import content of export product DEPB credit/duty drawback receipt do not come within the first degree source as the said incentives flow from Incentive Schemes enacted by the Government or from s. 75 of the Customs Act. Such incentives profits are not profits derived from the eligible business u/s 80-IB. They are 'ancillary profits' of such undertakings;

(6) Even as per AS-2 and the ICAI Guidance Note, duty drawback, DEPB benefits, rebates etc. cannot be credited against the cost of manufacture of goods but have to be shown as an independent source of income beyond the first degree nexus between profits and the industrial undertaking.

Vandana Properties v. ACIT (2009) 31 SOT 392 (MUM.)

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

Housing project does not mean that there should be group of buildings and only then same can be called as a housing project. Additional housing project on existing housing project can qualify for deduction under section 80-IB(10) provided correct profit can be ascertained. Assessee-firm was engaged in business of construction and development of housing projects. It had constructed five wings of residential buildings, namely, 'A', 'B', 'C, 'D' and 'E'. Commencement Certificate for construction on said plot was granted on 9-6-1993, which was subsequently extended over years. For relevant assess-ment year assessee claimed deduction under section 80-IB(10) in respect of profits relating to building 'E'. Assessing Officer held that building 'E' was part of existing project and, accordingly, disallowed deduction in respect of building 'E'. It was found from records that in respect of buildings 'A', 'B', 'C and 'D', Commencement Certificate was finally granted for entire work of ground + 7 floors on 5-8-1998 and in respect of building 'E' Commencement Certificate was granted up to plinth level as per approved plans dated 11-10-2002 and finally for entire work of building 'E', permission was granted on 20-5-2003 and while granting Commencement Certificate step by step to buildings 'A', 'B', 'C and 'D', there was a reference of four buildings only, i.e., 'A', 'B', 'C and 'D', and building 'E', found no mention in said certificate. In view of above facts it could be said that construction of building 'E' commenced after year 1998 and, therefore, it was an indepen-dent housing project as contemplated under section 80-IB(10) and it could not be fastened with earlier buildings, i.e., 'A', 'B', 'C and 'D'. Therefore, assessee was eligible to get deduction under section 80-IB(10) in respect of building 'E'.

Topman Exports vs. ITO (ITAT Mumbai-SB)(ITA No. 5769/Mum/2006)

For s. 80HHC r.w.s 28(iiid), only DEPB 'profits' to be reduced / added & not sale value

Expl. (baa) to S. 80HHC defines the term "profits of the business" to mean the profits under the head "profits and gains" as reduced by 90% of the sum referred to in s. 28 (iiid). The 2nd & 3rd Provisos to s. 80HHC (3) provide that the profits computed there under shall be increased by the said 90% amount computed in the proportion of export turnover to total turnover. S. 28 (iiid) refers to "any profit on the transfer of the Duty Entitlement Pass Book Scheme ('DEPB')". The Special Bench had to consider whether the entire amount received on sale of DEPB entitlements represents 'profits' chargeable u/s 28 (iiid) or the profit referred to therein requires any artificial cost to be imputed. HELD deciding in favour of the assessee:

(1) The argument of the Revenue that DEPB is a post export event and has no relation with the purchase of goods cannot be accepted. There is a direct relation between DEPB and the customs duty paid on the purchases. For practical purposes, DEPB is a reimbursement of the cost of purchase to the extent of customs duty;

(2) The DEPB benefit (face value) accrues and becomes assessable to tax when the application for DEPB is filed with the concerned authority. Subsequent events such as sale of DEPB or making imports for self consumption etc are irrelevant for determining the accrual of the income on account of DEPB;

(3) Though s. 28 (iiib) refers to a "cash assistance against exports", it is wide enough to cover the face value of the DEPB benefit;

(4) S. 28 (iiid) which refers to the "profits on transfer of the DEPB" obviously refers only to the "profit" element and not the gross sale proceeds of the DEPB. If the Revenue's argument that the sale

proceeds should be considered is accepted there would be absurdity because the face value of the DEPB will then get assessed in the year of receipt of the DEPB and also in the year of its transfer;

(5) Consequently, only the "profit" (i.e. the sale value less the face value) is required to be considered for purposes of s. 80HHC.

Fujitsu Services Ltd., In Re (2009) 26 DTR (AAR) 169

Computation of Capital gains - Applicability of s. 112(1), proviso to non-resident

A non-resident company can also seek the benefit of the proviso to s. 112(1). Words "before giving effect to second proviso to s. 48" only mean that the calculation under the second proviso shall not enter into the computation of capital gain, wherever that proviso is applicable. Said expression cannot be construed as a condition precedent for invoking the proviso to s. 112(1).

ACIT v. Deepak Agarwal (ITA No. 176/Luc/08)

Levy of penalty for declaration of ingenuine gift in revised return u/s. 139(5) of IT Act

Section 139(5) has not been enacted for providing an escape route to the assessee when he is caught in the penal provisions relating to evasion of tax and AO is in the process of collecting evidence to nail him down; it is not the intention of law to give a right to file a revised return to those assessees who know very well at the time of filing original return that gifts taken by them are not genuine, but are only an arranged affair and when investigations are started then they came forward and declare them as their income in their revised return.

Morgan Stanley Asset Management Inc. v. DCIT (ITA No. 1833/ Mum/2004)

Invalid versus defective return

The signing of return by an unauthorized person cannot invalidate the return, but would make the return defective; when a defective return is filed, the Assessing Officer is obliged to give chance to the assessee to rectify the defect within the specified period; it is only on the failure to remove the defect within the said specified or extended period that the defective return is converted into invalid return; section 292B helps the assessee only to the extent to saving the return from being declared as "Invalid", it does not render the defective or irregular return as valid; if a return is successfully brought within the sweep of section 292B, then it will not be declared as invalid, but will become defective and the case will come back to be governed by section 139(9); in such a situation the Assessing Officer will allow an opportunity to the assessee to rectify the defect as per the prescription of this sub-section and the assessee will be under obligation to remove the defect, if the defect is cured as per section 139(9), then such return becomes valid; if the assessee fails to remove such defect, then the defective return is converted into invalid return.

CIT v. Greenworld Corporation (2009) 181 TAXMAN 111 (SC)

Income escaping assessment u/s 150 in pursuance of an order on appeal, etc.

Although section 150 appears to be of a very wide amplitude, but it would not mean that recourse to reopening of proceedings in terms of sections 147 and 148 can be initiated at any point of time whatsoever; such a proceeding can be initiated only within period of limitation prescribed therefor as contained in section 149. For reopening of proceedings under section 150, records of proceedings must be before appropriate authority and it must examine records of proceedings; if there is no proceeding before it or if assessment year in question is also not a matter which would fall for consideration before higher authority, section 150 will have no application.

Jurisdiction of Assessing Officer u/s Section 124 r.w.s. 119

When a statute provides for different hierarchies providing for forums in relation to passing of an order as also appellate or original order, by no stretch of imagination a higher authority can interfere with independence which is basic feature of any statutory scheme involving adjudicatory process. Though while making order of assessment Assessing Officer shall be bound by statutory circulars issued by CBDT, yet it cannot be said that assessing authority, exercising quasi-judicial function keeping in view scheme contained in Act, would lose its independence to pass an independent order of assessment and even merits of decision in assessment proceedings shall be discussed and shall be rendered at instance of higher authority.

Therefore, where Assessing Officer passed an order of assessment at instance of higher authority, it would be illegal.

Revision of orders prejudicial to interest of revenue u/s Section 263 r.w.s. 148

An order of assessment passed by ITO can not be interfered with only because another view is possible.

Principal Officer, Jaipur Vidyut Vitaran Nigam Ltd. v. ITO (2009) 26 DTR (Jp)(Trib) 154

Applicability of TDS u/s. 194J on Payment of transmission, wheeling and SLDC charges

Assessee, an electricity distribution company, made payments of wheeling charges and SLDC charges to the transmission company RVPN under the 'transmission service agreement'. Operation and maintenance of transmission lines by RVPN and the user of these lines by assessee for transmitting energy does not result into any technical services being rendered to the assessee.

Sec. 194J has application only when technology or technical knowledge of a person is made available to others and not where mere services are rendered to others by using technical systems. Where facility is provided by use of machine/robot or where sophisticated equipments are installed and operated with a view to earn income by allowing the customers to avail of the benefit of such equipment, the same does not result in the provision of technical service to the customer.

No scientific knowledge, experience or skill is made available by RVPN to the assessee. RVPN is also entrusted with the statutory function of supervision over the intra-State transmission system. By discharging such statutory function RVPN does not provide any technical service. That apart, there is force in the alternative argument of the assessee that the payment of transmission/wheeling/SLDC charges is reimbursement of cost. Tariff is fixed by an independent regulatory body i.e., Rajasthan Electricity Regulatory Commission and it is determined on no profit no loss basis. In case, on the basis of such tariff, any surplus is left with RVPN, it gives credit of the same to the assessee. Provisions of deduction of tax at source do not apply on actual reimbursement. Therefore there is no liability to deduct tax at source on payment of transmission/wheeling/SLDC charges under s. 194J.

Interest under s. 201(1A) when no tax is payable by payee

Provision of s. 201(1 A) is a measure to compensate the Revenue for the delay in the payment of taxes. RVPN to whom transmission charges were paid had no tax liability and it has been allowed refund of tax which was deducted at source from payments made by some other parties. Hence, there is no loss of revenue to the Department on account of non-deduction of tax at source by the assessee in respect of payment made by it. Therefore, interest under s. 201(1 A) is not leviable on the assessee. If the payee has no liability of payment of taxes, no interest liability under s. 201(1A) is visualized.

Tushti Securities Pvt. Ltd. v. ACIT (ITA No. 998 & 999/Ahd/2007)

Levy of penalty under section 271 (1)(c) of IT Act, 1961 for diversion of income

Under Explanation 1 to section 271(1) (c), an assessee would be deemed to have concealed the particulars of his income if, in respect of facts material to the computation of his income, he fails to offer an explanation or offers a false explanation or an explanation which he is not able to substantiate and also fails to prove that his explanation is bona fide.

Chairman, CBDT & Ors. v. Umayal Ramanathan (2009) 25 DTR (Mad) 210

Prosecution - Compounding of offences - Scope and application of s. 279(2)

An offence under the IT Act can be compounded under s. 279(2) even after conviction at the appellate stage. For the purposes of s. 279(2), 'proceeding' includes appeal against conviction. Department was not justified in rejecting the application of assessee for composition of offence under ss. 120B, 420 and 109 IPC and s. 278 of the IT Act on the ground that assessee had already been convicted and appeal was pending, moreso, when in another case, the Department had allowed composition of offence where appeal of assessee against conviction had been dismissed and revision was pending. Offence ordered to be compounded with certain directions.

Fujitsu Services Ltd., In re, (AAR No. 800 of 2009)

AAR on tax rate applicable to a foreign company on LTCG accruing to it on sale of shares in Indian company

The benefit of lesser rate of tax conferred by the proviso to section 112(1) of the IT Act, 1961 can be invoked by a non-resident foreign company as well; the expression" before giving effect to 2nd proviso to section 48" cannot be construed as a condition precedent for invoking the proviso to section 112(1); hence, the applicant-foreign company is liable to pay tax at the lesser rate of 10 per cent as per the proviso to section 112(1) apart from the surcharge and cess.

Jindal Thermal Power v. DCIT (Karnataka High Court)(ITA No.3021/2005)

Ishikawajima-Harima is still good law despite retrospective amendment

The assessee entered into a contract with Raytheon – Ebasco, a foreign company, and two of its' foreign subsidiaries, for commissioning of a power plant. The assessee made payments to Raytheon for rendering technical services, providing 'start-up' services and taking 'overall responsibility' for the Project. The two foreign subsidiaries of Raytheon carried on onshore services. The technical services were rendered by Raytheon wholly outside India and it supervised the carrying on of the 'start up' services by its subsidiaries. The assessee did not deduct tax at source on payments to Raytheon and the AO held it to be liable u/s 195 r.w.s 201.

The Court had to decide: (i) Whether the assessee as payer had locus standi to argue that the payments to the foreign company were not liable to tax and (ii) Whether Ishikawajima-Harima 288 ITR 408 (SC) was still good law in view of the retrospective amendment to s. 9 by the Finance Act 2007 w.r.e.f 1-6-1976. HELD:

(1) It cannot be said that the person obliged to effect TDS u/s 195 has no right to question the assessment of tax liability since in law, if TDS is not effected by the payer, the payer would be responsible to pay the tax liability of the payee. The payer has every right to question the tax liability of the payee to avoid vicarious consequences;

(2) In Ishikawakima-Harima it was held that fees for technical services was not assessable to tax u/s 9(1)(vii) if the twin conditions of it being rendered in India and utilized in India were not satified. The amendment to s. 9 suggests that the criterion of residence, place of business or business connection of a non-resident in India have been done away with for fastening the tax liability. However, the criteria of rendering service in India and the utilization of the service in India as laid down in Ishikawajma-Harima to attract tax liability u/s 9 (1)(vii) remains untouched and unaffected by the Explanation to s. 9 ;

(3) As the purport of the Explanation to s. 9 is plain in its meaning, it is unnecessary and impermissible to refer to the Memorandum explaining the Finance Bill 2007. It is explicit from s. 9(1)(vii)(c) and the Explanation to s. 9 that the ratio of Ishikawajma – Harima still holds the field;

(4) On facts, as the "technical services" were rendered outside India, the fees thereof were not chargeable to tax in India. As regards, the "start up services and over all responsibility", the work was done partly in India by Raytheon's two subsidiaries under its' direct supervision. Though the subsidiaries held an independent contract with Jindal, they virtually constituted the agents of Raytheon and accordingly the fees for the said services were taxable in India.

Spahi Projects (P) Ltd., In Re (2009) 26 DTR (AAR) 303

DTAA with South Africa - Commission for services rendered in connection with arranging sales abroad

The commission could be taxed in South Africa only on the principle of tax residency. Business profits made up of the commission paid by the applicant to Zaikog for the services rendered as a commission agent in South Africa cannot be brought within the net of income-tax in India as Zaikog had no fixed place of business in India nor does it enter into any contracts in India. Sec. 9(1)(i) could not be invoked since no business activity was carried out in India through a person voting on behalf of Zaikog.

DDIT (INTERNATIONAL TAXATION) v. CIE (2009) 124 TTJ (Mumbai) 124

DTAA between India and Brazil - Income from operation of ships

Assessee, Brazilian company engaged in transportation of cargo in international traffic by sea, claimed exemption on the entire freight received on transportation of cargo from Indian port to Brazil via Durban under art. 8 of the

DTAA. Cargo transported to Durban by feeder vessels neither owned nor leased nor chartered by assessee. Not eligible for relief under art. 8 as for purposes of relief under that article, assessee must be owner or lessee or charterer of the ships employed in international traffic. However, if the assessee was owner, lessee or charterer of ships which transported cargo from Durban to destination in Brazil, exemption under art. 8 shall be allowed. Benefit of art. 8 will also be available if the ships were owned, leased or chartered by members of consortium. Matter remanded to CIT(A) to verify whether the cargo sent from Indian port was transported through mother vessels owned/leased/chartered by members of consortium and allow exemption but if the goods had been transported by some other ships then art. 8 would not apply.

Cal Dive Marine Construction (Mauritius) Ltd., In Re (2009) 224 CTR (AAR) 447

DTAA with Mauritius - Permanent establishment vis-a-vis construction or assembly project

Minimum period for continuance of construction or installation project set out in cl. (i) of para 2 of art. 5 of Indo-Mauritius DTAA has to be projected into para 1 for the purpose of determining whether there is a fixed place of business within the meaning of para 1; for counting the period of nine months duration under art. 5(2)(i), neither the date of signing the contract nor the actual commencement of active phase of construction/installation is the starting point; the starting point can be counted from the preparatory stages leading to the actual commencement of the work such as gathering the equipment and arranging the infrastructure for carrying out the work in full swing; so counted, the applicant's activities did not last for nine months and therefore it had no PE in India.

ACIT v. M S S India (P) Ltd. (2009) 123 TTJ (Pune) 657

Special Bench decision vis-a-vis Division Bench decision

As a matter of fact, a Division Bench cannot even disregard decision of another Division Bench of equal strength, leave aside a Larger Bench. The fact that this a conscious decision not to follow the Larger Bench does not make things better. When the law mandates that a Division Bench cannot disregard another Division Bench, and here is a Division Bench decision which is directly contrary to a Larger Bench decision, the order so disregarding the Larger Bench cannot be said to have any binding force. Elementary principles of judicial discipline warrant that superior wisdom of the tier below has to give way to the higher wisdom of the tier above. Special Bench decision has to be followed notwithstanding the fact that decision of Division Bench is a conscious decision not to follow the Special Bench (Larger Bench) decision after noticing that decision.

Computation of arm's length price - CUP and cost plus method vis-a-vis TNMM

On a conceptual note, transactional profit methods (i.e., TNMM and profit split method) are treated as methods of last resort which are pressed into service only when the standard methods, which are also termed as 'traditional methods' (i.e. CUP method, resale price method and cost plus method) cannot be reasonably applied. In a situation in which the assessee has followed one of the standard methods of determining ALP, such a method cannot be discarded in preference over transactional profit methods unless the Revenue authorities are able to demonstrate the fallacies in application of standard methods. Assessee having determined ALP of its international transactions with AEs by applying CUP/cost plus method by offering the comparison of gross profit mark up margin on transactions with unrelated companies, TPO was not justified in rejecting the method adopted by assessee and making adjustments by applying TNMM on the ground that assessee had incurred loss in transactions with AEs and that the method employed by assessee was complex. Once it is not in dispute that the billing by the AE for raw materials supplied to the assessee is done on the basis of the London Metal Exchange prices plus certain mark up, there is no further need of the internal comparables since London Metal Exchange, being an independent organization entering into transparent and arm's length transactions with a number of other organizations, provides the most reliable prices at which uncontrolled comparable transactions are entered into. Adjustments on account of services rendered by the AE and the insurance and freight costs are required to be made to the LME prices as per r. 10B(l)(a)(ii).

An adjustment of 2 per cent to 6 per cent, for such factors, cannot be said to be unjustified. In any event, the benefit of the ± 5 per cent range is available to the taxpayers in all the cases and the TP adjustment should be restricted only on the net amount remaining after allowing the benefit of 5 per cent range provisions. As long as the assessee has entered into raw material purchase transaction with the AE at an ALP, it is of no consequence whether or not the assessee makes sufficient profits on manufacturing products from such raw material. Even on the same prices of raw materials, the assessee has made profits in the subsequent years making it clear that the loss of the assessee is not explained by the prices at which the raw materials are purchased but by the special factors which applied to this particular year alone. As far as determination of ALP of exports to the AEs is concerned, the AO has duly noted assessee's contention that the profit margin earned by the assessee on exports to AEs vis-a-vis exports to unrelated enterprises is comparable and, accordingly, it cannot be said that the exports to the AEs are not made at ALP. Merely because a method of ALP determination presents complexity in approach, it cannot be discarded. Test in selecting the most appropriate method of ALP determination does not have 'complexity of the method' as one of the factors. TPO did indeed err in applying the TNMM on the facts of this case and thereby disturbing the ALP determined by the assessee as on the facts of the present case, the ALP could be best determined by the CUP and cost plus method and that did not warrant any interference.

Circulars / Notifications

EXTENSION OF TIME LIMIT FOR FILING ITR-V FORM Thursday, August 13, 2009 (Ministry of Finance)

The Central Board of Direct Taxes had, vide circular No.3/2009 dated 21.05.2009, allowed assessees who file their income tax returns in electronic form without digital signature to submit their verified ITR-V form, within a period of 30 days, thereafter. The ITR-V form was required to be sent to Post Bag No.1, Electronic City Post Office, Bengaluru, Karnataka-560100, by ordinary post.

It has now been decided to extend the time limit for filing the ITR-V form by relaxing the stipulations in the circular dated 21.05.2009. The ITR-V form relating to returns which have been filed electronically (without digital signature) on or after 1st April, 2009 can now be filed on or before the 30th September, 2009 or within a period of 60 days of uploading of the electronic return data, whichever is later. The ITR-V should continue to be sent by ordinary post to Post Bag No.1, Electronic City Post Office, Bengaluru, and Karnataka-560100.

CBDT introduced software to provide automatic alerts for scrutiny assessment

The Central Board of Direct Taxes (CBDT) has introduced a new software programme, called '360 degree profiling', which would provide automatic alerts for scrutiny assessment of an individual or a company to the income tax department, based on its investments and expenditure.

The department has also decided to hasten the process of clearance of high-demand cases from the stage of appealing to the commissioner of appeals, so that officials could press for recovery. In such cases, even if the assessee proposes to approach higher courts for further appeal, it would first have to make the payments and then appeal.

Notification No. 61 of 2009 dated 12-08-2009

Vide this notification some amendment has been made to DTAA between India and France.

INDIRECT TAXES

Judicial Pronouncements

Chandra Shipping & Trading Services v. CCE [2009] 21 STT 266 (BANG. – CESTAT)

If ST 3 returns and CENVAT credit returns are filed, then department cannot ask for tax beyond 1 year

The ST-3 returns and also the Cenvat credit returns have been filed regularly by the appellant. It was held that when the returns are filed, if there is any doubt the department has to verify the correctness of the particulars given in the returns, both ST-3 returns and also the Cenvat credit returns. The department has not done that. Therefore, the allegations that the appellants have not spent these amounts on reimbursement and have not made payment towards tax on input service are not sustainable. The appellants have stated that the service tax on input services have been paid from out of their own account maintained with the input service providers. These facts could have been verified by the revenue. In the absence of verification, the benefit of doubt was given to the appellant. It is for the department to prove the allegations with solid evidence.

The burden of proof is always on the department. In view of this above findings, there is no suppression of facts were established, especially when the appellants had filed service tax returns and Cenvat tax returns regularly. Hence, the appeal were allowed with consequential relief.

Circulars / Notifications

Circular No. 897/17/2009-CX, New Delhi, dated the 3rd September, 2009.

Subject: Liability of interest where CENVAT credit was wrongly taken but reversed by assessee before utilization–reg.

Representation has been received from the field formation stating that the decision of Hon'ble High Court of P&H in the case of CCE, Delhi III V/s Maruti Udyog Ltd. [2007(214) ELT173 (P&H)], has upheld the order of Tribunal wherein it was held that assessee is not liable to pay interest in the case where credit was only taken and not utilized. The SLP against this order has been dismissed by the Hon'ble Supreme Court. On the other hand, Rule 14 of The CENVAT Credit Rules, 2004, provides for recovery of credit taken or utilized wrongly with interest. In view of this conflict in legal provisions and the decision of Hon'ble Supreme Court, a clarification has been requested from the Board.

The matter has been examined. It is seen that the Tribunal decision and the High Court judgement referred to above, was delivered in the context of erstwhile Rule 57I of the Central Excise Rules, 1944 and that the Supreme Court order under reference is only a decision and not a judgement. Since, the Rule 14 of the CENVAT Credit Rules, 2004, is clear and unambiguous in the position that interest would be recoverable when CENVAT credit is taken or utilized wrongly, it is clarified that the interest shall be recoverable when credit has been wrongly taken, even if it has not been utilized, in terms of the wordings of the present Rule 14.

No service tax on transport of goods by rail

Vide Notification No. 33/2009 - Service Tax dated 1st September, 2009 it is provided that the taxable service provided to any person in relation to transport of goods by rail, as referred to in sub-clause (zzzp) of clause (105) of section 65 of the Finance Act, shall be exempt from tax from the whole of the service tax leviable thereon under section 66 of the Finance Act.

OTHER LAWS

Gujarat Mineral Development Corp vs. ITAT (Gujarat High Court)

State Govt. Undertakings do not need COD clearance

Cross appeals filed by the assessee, a State Govt. undertaking, and the department were dismissed by the Tribunal on the ground that the parties had not obtained the approval of the Committee on Disputes ("COD"). The assessee as well as the department challenged the decision of the Tribunal. HELD, reversing the decision of the Tribunal:

(1) Four judgments of the Supreme Court (ONGC vs. CCE 1992 Supp (2) SCC 432, ONGC vs. CCE 1995 Supp (4) SCC 541, ONGC vs. CCE 2004 (6) SCC 437 and MTNL vs. CBDT 267 ITR 647) deal with disputes between public sector undertakings of the Central Government and a Department of the Central Government, while the fifth judgment (Chief Conservator of Forests vs. Collector (2003) 3 SCC 472) deals with a dispute was between two Departments of the State Government. The directions made by the Apex Court have to be read in context and in backdrop of the controversy before the Apex Court. There is not a single order made by the Apex Court which relates to a dispute between Union of India and a State, or a Department of Union of India and a State, or a Public Sector Undertaking of Union of India and a State. Hence, it is not possible to expand the scope of directions made by the Apex Court so as to include a dispute between a Department of the Central Government and a State Government Undertaking. Therefore, the impugned order of Tribunal suffers from an error apparent in law and cannot be sustained.

(2) Apart from the above, a more fundamental aspect of the matter is that the Tribunal is a creature of statute. Under sections 252 to 254 and connected provisions, the Tribunal does not have the power to determine whether an appeal should be admitted or not except on the ground of limitation. The Tribunal has any right of holding that an appeal cannot be admitted. approvals, if any, required under any other law.

Rashima Verma v. SEBI (Crl. MC No. 3080 of 2007)(Delhi HC)

Summoning of directors of accused company for offences under SEBI Act

Mere allegations contained in a line or two against the directors without specifying the violative act committed by any of the directors would not suffice to make the directors offenders so as to summon them for the offences under SEBI Act; mere bald averments in the complaint do not make the directors offenders; minimum averments to be made in a complaint has to contain that the person sought to be arraigned as an accused was in charge of the affairs of the company or responsible for the conduct of its business in such capacity at the time when the offence was committed, before he is deemed to be guilty of an offence committed by the company.

Harinarayan G. Bajaj v. Investors Protection Fund of Stock Exchange, Mumbai [2009] 94 SCL 21 (SAT - MUM.)

Section 11 of the Securities and Exchange Board of India Act, 1992, read with Comprehensive Guidelines for Investor Protection Fund at Stock Exchange - Powers and Functions of Board

Guidelines which are statutory in force shall override provisions of trust deed and rules governing Investor Protection Fund insofar as they are inconsistent with provisions of guidelines and it is guidelines which shall govern disbursement from Investor Protection Fund. No exchange can defeat claim of an investor, if it is otherwise eligible under guidelines, merely because it failed to amend its trust deed or rules in accordance with guidelines. Appellant was an investor who traded on BSE through several brokers. Appellant had traded with two brokers `D' and `T' and had two arbitration awards in his favour. Awards had become final and appellant claimed that award amount against brokers who had been declared defaulters on BSE should be paid out of Investor Protection Fund. BSE rejected appellant's claim on ground that he too owed large sums of money to others on exchange. Since amount claimed by appellant under arbitration award had become final and his claim satisfied all requirements of guidelines for disbursement from fund, that amount could not be withheld on ground that another broker had a claim against him, therefore, impugned communication by which BSE had withheld amounts due to appellant from `D' and `T' was to be set aside and BSE was to be directed to release forthwith amounts due under two awards.

MRTP Act repealed and is replaced by the Competition Act, 2002, with effect from September 1, 2009

The Ministry of Corporate Affairs, Government of India has issued a Notification dated 28th August 2009, whereby the most controversial the Monopolies and Restrictive Trade Practices Act, 1969 ("the MRTP Act") stands repealed and is replaced by the Competition Act, 2002, with effect from September 1, 2009.

Companies Act

Companies Bill introduced on August 3, 2009.

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

5th Sept.	*Payment of Service Tax & Excise duty for August*
6th Sept.	*Payment of Excise duty paid electronically through internet banking*
7th Sept.	*TDS/TCS Payment for August*
10th Sept.	*Excise Return ER1 / ER2 /ER6*
15th Sept.	*PF Contribution for July, Excise payment by SSI*
15th Sept.	*Advance Income Tax for Companies & non-corporate assessees*
15th Sept.	*Advance FBT for Quarter ending September*
21st Sept.	*ESIC Payment for August*