Issue – 04 | April 2009

SNK Newsletter

FLASH NEWS

- No banking cash transaction tax from Apr 1
- Pension for all, up & running from May 1
- Duty reduction likely on packaged software
- Cost audit may cover all petroleum, power firms
- Free cash withdrawals from all ATMs from April 1
- Commodities Transaction Tax - Chapter VII of the Finance Act, 2008 has introduced a new tax called Commodities Transaction Tax (CTT) to be levied on taxable commodities transactions entered w.e.f. 01-04-2009
- Notification on Amendment of AS-11 dtd. 31-03-2009 providing postponement of the applicability of AS-11 upto 31-03-2011. (Detailed Notification given under the heading **Other Laws**) It may be noted that the amendment as contained in the said Notification shall be applicable to corporates registered under the Companies Act, 1956. As for entities other than those registered under the Companies Act, 1956, the Accounting Standard-11 as issued by the Institute shall continue to apply.

DIRECT TAXES

Judicial Pronouncements

ACIT v. Bhaumik Colour (P) Ltd. (2009) 120 TTJ (Mumbai)(SB) 865

Deemed dividend under s. 2(22)(e) - Loan to company vis-a-vis beneficial shareholding

Assessee company took interest bearing loan of Rs. 9 lacs from company UPPL. Assessee not a shareholder in UPPL. However, one N trust held 20 per cent shares in assessee company and 10 per cent in UPPL.

On this basis, AO was not justified in assessing the loan amount as deemed dividend in the hands of assessee. If a person is a registered shareholder but not the beneficial then the provision of s. 2(22)(e) will not apply. Similarly if a person is a beneficial shareholder but not a registered shareholder then also the first limb of provisions of s. 2(22)(e) will not apply. For purposes of s. 2(22)(e), "such shareholder" occurring in the last limb thereof must be both beneficial and registered shareholder. N trust, consisting of three trustees, had five beneficiaries and none of the trustees was also beneficiary of the trust. CIT(A) was justified in deleting the addition.

Loan to shareholder vis-a-vis concern in which shareholder is member or partner

Deemed dividend can be assessed only in the hands of a person who is a shareholder of the lender company and not in the hands of the borrowing concern in which such shareholder is member or partner having substantial interest. Intention behind the provisions of s. 2(22)(e) is to tax dividend in the hands of shareholder.

Judicial pronouncements

Deeming provision as it applies to the case of loans or advances by a company to a concern in which its shareholder has substantial interest is based on the presumption that the loan or advances would ultimately be made available to the shareholders of the company giving the loan or advance. CBDT Circular No. 495, dt. 22nd Sept., 1987 to the extent not benevolent is not binding. Provisions of sub-cl. (i) of s. 2(22)(e) allowing set off of deemed dividend in the hands of shareholder also contemplates assessment of deemed dividend in the hands of shareholder only.

Container Corporation of India Ltd. v. ACIT (ITA Nos. 2851 & 3680/Del/2007)(Delhi ITAT)

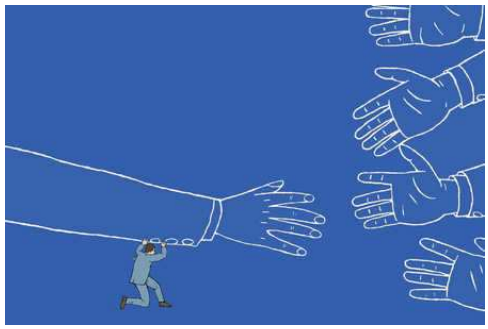
Rate of depreciation allowable with regard to computer peripherals and accessories

Printers, scanners and other peripherals are part and parcel of computer and depreciation against such asset are allowable @ 60 per cent.

Ciba India Pvt. Ltd. v. ITO (ITA NOS. 6719 & 6720/Mum/2006)(Mumbai ITAT)

Deduction under section 35 of IT Act is not available when scientific research relates to a business not carried on by assessee

The relationship of the capital expenditure on scientific research has to be in connection with the assessee's business and not the business of the other assessees; the deduction under section 35 is not intended to the assessee, who does not develop the in-house scientific research activities but is engaged in development and supply of the scientific research to the business of the other assesses.



Metro Exporters Ltd. v. ITO (ITA No. 1693/M/05)(Mumbai ITAT)

Allowability of interest expenditure under section 36(1)(iii) of IT Act where borrowed funds and own funds are mixed.

In all such cases where mixed funds are used for both business and other than business purposes, there is no presumption that moneys used for other purposes came out of borrowed funds; it can be said that interest free funds given are out of own funds to the extent of capital and reserves; if an assessee having sufficient interest free funds, in the form of capital reserves and other funds without interest from relatives and friends not related to business, to cover funds given interest free or utilized other than for business purposes, no disallowance is warranted; if the own funds are not sufficient to cover interest free advances, a proportionate disallowance is warranted.

DIT v. Oman International Bank (Bombay High Court)

Section 36(1)(vii) – Bad Debts

Held, affirming the majority view of the Special Bench in DCIT vs. Oman International Bank 100 ITD 285 that:

(i) Though the Circulars issued by the CBDT are not binding on the court as held in CCE vs. Ratan Melting & Wire Industries 231 ELT 22 (S.C.), it is binding on the authorities and while it is for the Court to read the section in its proper context, while so reading the Court will bear in mind the circular issued by the CBDT. Circulars are sometimes issued to obviate difficulties in the operation of the provisions and these are aspects which Courts do bear in mind while considering the Circulars. Accordingly, Circulars have to be taken into account.

(ii) The decision of an assessee to treat a debt as a bad debt in his books has to be a business or commercial decision and not whimsical or fanciful and must be based on material that the debt is not recoverable. The decision must be bona fide;

(iii) Post amendment of s. 36 (1)(vii) & 36 (2), the burden is not on the assessee to show the debt is "bad". In order to disallow, the AO must show that the decision of the assessee was not bona fide.

DSA Engineers (Bombay) v. ITO (ITA No. 5354/Mum/2007)(Mumbai ITAT)

Limitation of time is not a determining factor in matters relating to remission or cessation of liabilities

When the assessee continues to reflect or record the liabilities as still payable to the creditors and he decides to not to write them off unilaterally, the AO has higher levels of responsibility and has to establish with evidence that the said book entries are wrong or not bona fide for invoking the provisions of section 41(1) of the Income-tax Act, 1961.

M/s Four Star Oil & Gas Co., In re [2009 - TMI - 32793 - AAR]

Long-term capital gains arising to applicant (non-resident) from transfer of shares held in Indian listed company

Revenue seek to deny indexation benefit provided u/s 112(1) on ground that 2nd proviso to s. 48 is not applicable to a non-resident. Revenue plea was rejected and held that applicant can avail relief of lower rate of tax of 10% u/s 112(1). It was also held that as per S. 55(2)(b)(i), FMV prevailing on April 1, 1981 ought to be taken as cost of acquisition when bonus shares held by applicant on April 1, 1981.

Inderlok Hotels Pvt. Ltd. v. ITO (Mumbai ITAT)

Applicability of Sec. 50C to Business Income

It was held that when admittedly the sale of flats is treated as business income and not as capital gain, provisions of section 50C cannot be applied. Section 50C cannot be applied for determination of income under heads other than capital gains.

Container Corporation of India Ltd. v. ACIT (ITA Nos. 2851 & 3680/ Del/2007) (Delhi ITAT)

Allowability of deduction under section 80-IA of IT Act against income derived from Inland Container Depot (ICD)

The term "Inland Port" does not include the ICD; had it been included in the term Inland Port, the CBDT would have not notified it as separate infrastructure facility and would have clarified that ICDs and Container Freight Stations (CFSs) are part and parcel of Inland port.

Prasad Agents v. ITO (Bombay High Court) (ITA No.19 of 2009)

Expl. to s. 73 applies to valuation losses as well

Where the question arose whether the Explanation to s. 73 (which deems the loss from trading in shares by a company to be speculation loss) can be confined only to cases where there is manipulation in shares of group companies and whether the loss arising on valuation of closing stock of shares is also covered, HELD:

(i) Though the Circular of the CBDT supports the interpretation that the object of the Expl. to s. 73 is to curb manipulation of group companies' shares, the scope of the Expl. extends to all companies carrying on business in shares;

(ii) Though the Expl. refers to purchase and sale of shares and not to losses suffered on account of valuation, it applies to valuation losses as well as there is no difference between trading losses and valuation losses.

CIT v. Inder V. Nankani (Bombay High Court)

VDIS's declared diamonds not liable to tax

Where the assessee made a VDIS declaration in which diamonds were disclosed and he later claimed that the moneys received by him were the sale proceeds of the said diamonds which could not be taxed but the AO held that the sale was fictitious as the second purchaser to whom the diamonds were stated to have been sold by the first purchaser was not traceable, HELD

In view of the fact that the diamonds formed a part of the declaration which was accepted by the department and the consideration was received from the purchaser by cheque and recorded in the books of accounts, the assessee had proved the possession of the diamonds at the time of declaration and the sale thereof could not be disbelieved merely because there was doubt about the second sale.

Bhrama Associates vs. JCIT (ITAT Pune Special Bench)

On a rationalized interpretation of s. 80-IB (10), "Housing Projects" held to include commercial area.

Where the assessee constructed a project in Pune in which the percentage of commercial area to the total area was 20.83% and the said project was approved by the Pune Municipal Corporation as a "New/ Residential + Commercial project" (and not as a "housing project") and the question arose whether prior to the amendment of s. 80 IB (10) w.e.f. 1.4.2005 (to the effect that the commercial area in a housing project should not exceed the lesser of 5% of the built up area or 2,000 sq ft), the assessee's project was a "housing project" eligible for deduction u/s 80-IB (10), HELD:

(i) S. 80 IB (10) is aimed at promoting construction of housing projects so as to address the problem of shortage of *dwelling units*. It cannot be said that the object is to encourage *house building* activity per se, irrespective of whether these are dwelling or commercial units;

(ii) However, given that under the DC Rules (of Pune) there cannot be a pure residential project and it is incumbent on the developer to reserve a part of the plot for shopping, commercial use of area must be regarded as an integral part of a housing project and does not vitiate the character of a housing project;

(iii) The fact that the 2005 amendment placed a restriction on commercial user also shows that commercial user was permissible even prior to that;

(iv) On the question as to the extent to which commercial use in a "housing project" is permissible, the approval by the local authority of a project as a "housing project" is conclusive and no further enquiry is required;

(v) Where the local authority does not grant approvals to "housing projects" but instead grants approvals to "residential and residential cum commercial projects", one will have to adopt the doctrine of purposive interpretation to draw a "*lakshman rekha*" and ensure that the basic character of the project continues to remain in harmony with the object of the tax incentive i.e. augmenting affordable dwelling units. Applying the said doctrine of purposive interpretation, cases where commercial built up area does not exceed 10% of the total area are eligible for the benefit as such projects are predominantly residential in nature;

M. Baxi vs. DDIT (ITAT Mumbai Special Bench)

Representative Assessee

Where the assessee suo motu filed returns as "agent" of a non-resident but no assessment was made and after the expiry of two years from the end of the assessment year a notice under section 148 of the Act seeking to assess the income and the question arose whether the said notice was barred by limitation u/s 149 (3), HELD:

(i) Ss 160 to 166 are machinery and enabling provisions and give the department the option to either assess the non-resident or his agent;

(ii) U/ss 160 to 166, agents are of two types: (1) agents who admit their liability as agents of a non-resident either expressly or impliedly. In such cases, there is no obligation to give a hearing or even to pass an order treating them as an agent u/s 163. (2) Agents u/ ss 160(1)(i) or 163(1) who deny their liability to be agents of the non-resident. In such cases, an opportunity of a hearing and a formal order is require to be passed. Whether a person falls in one or the other category depends on the facts of the case;

(iii) S. 149 (3) applies only in a case where a person is "treated as an agent" of a non-resident u/s 163 i.e. persons disputing their liability as agent. It does not apply to persons who have voluntarily treated themselves as an agent of the non-resident.

(iv) On facts, as the assessee had treated himself as the "agent", it was not necessary for authorities in this case to provide any opportunity of being heard to the assessee as regards his liability to be treated as an agent under the Act. The time limit prescribed in s. 149 (3) was also not applicable.

Glenmark Pharmaceuticals Ltd. v. ITO (TDS) (ITA No. 935/Mum./2007)

Contract for sale of goods will not be covered within ambit of section 194C of IT Act

Simply because the assessee monitors the manufacturing process it does not change the character of the transaction.

Sahney Kirkwood vs. ACIT (Bombay High Court)

High Court has power to grant stay of demand in s. 260A appeal

Where the question arose whether in respect of an appeal admitted u/s 260A, the High Court has power to grant stay of recovery of outstanding demand, HELD:

(i) S. 260A provides that the provisions of the Code of Civil Procedure relating to appeals to the High Court shall apply;

(ii) Rules 5 (1) and 5 (3) of Order 41 of the Code of Civil Procedure authorize the Court to grant stay provided it is satisfied that:

(a) that substantial loss may result to the party applying for stay of execution unless the order is made;

(b) that the application has been made without unreasonable delay; and

(c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

(ii) On facts, as these conditions were satisfied, the assessee was entitled to stay subject to conditions.

ITO v. GACL Finance Ltd. (ITA NO. 6528/M/05)(Mumbai ITAT)

Assessing Officer cannot invoke provision of section 271(1)(c) of IT Act on basis of routine & general presumptions

Mere non-acceptance of explanation offered by the assessee cannot form a basis for the satisfaction of ITO to the effect that the assessee has concealed particular of his income; the ITO must have some definite evidence to refuse assessee's claim or evidence or explanation.

Niton Valve Industries Pvt. Ltd. v. ACIT (ITA NO. 1150/M/07) (Mumbai ITAT)

When penalty under section 271(1)(c) of IT Act is not leviable upon assessee.

Where the Assessing Officer computed the different total income than the total income declared by the assessee, the same would not amount to furnishing of inaccurate particulars of income or concealment of particulars of income as contemplated by section 271(1)(c).

ACIT vs. VIP Industries (ITAT Mumbai)(ITA No. 4524/Mum/2006)

SC judgement on penalty distinguished

Where the assessee carrying on R & D activity claimed 100% deduction on a motor car on the ground that it was used for scientific research but the same was negatived by all authorities and the question arose whether penalty u/s 271(1)(c) for making a wrong claim was imposable and the dept relied on Dharmendra Textiles Processors 306 ITR 277 (SC) to argue that penalty was automatic for a wrong claim, HELD:

(i) The mere fact that an addition is confirmed cannot per se lead to the confirmation of the penalty because quantum and penalty proceedings are independent of each other;

(ii) In order for the deeming provision of Explanation 1 to s. 271(1)(c) to apply it must be show either that (a) the assessee fails to offer an explanation, or (b) he offers an explanation which is found to be false, or (c) he offers an explanation which cannot be substantiated or shown to be bona fide. On facts, the claim of deduction on a motor car used for research staff cannot be said to be not bona fide;

(iii) The judgement of the Supreme Court in Dharmendra Textiles Processors which holds that penalty u/s.271(1)(c) is a civil liability and that "willful concealment" and "mens rea" are not essential ingredients for imposing penalty cannot be read to mean that in all cases where addition is confirmed, penalty shall mechanically follow. In order to attract s. 271 (1)(c), there must be "concealment" – the fact that the same is willful or unintentional is irrelevant;

(iv) But where an assessee genuinely claims a deduction after disclosing necessary facts, there is no "concealment" even if the claim is rejected. If penalty is imposed under such circumstances also there will remain no course open to an assessee to raise disputed claims and such proposition is beyond recognized canons of law.

CIT v. Iqbalpur Cooperative Cane Development Union Ltd. (ITA No. 57 of 2007) (Uttarakhand HC)

When penalty under section 271B of IT Act is not imposable for non-submission of audit report on or before due date

Where the assessee was a co-operative society and its income was deductible under section 80P, it was not necessary for the AO to impose penalty under section 271B upon the assessee for non-submission of audit report under section 44AB on or before due date since there appeared no intention on the part of the assessee to conceal the income or to deprive the Government of revenue, as there was no tax payable on the income of the assessee, in view of the provisions of section 80P.

The East India Hotels Ltd. & Jaswant Singh Bhatia v. CBDT and UOI [2009 - TMI - 32651 - Bombay HC] (Writ Petition No. 2104 of 1994)

Validity of the CBDT circular No.681 dated 8-3-1994 for enlarging scope and ambit of section 194C of IT Act

The said circular provides that all service contracts are covered u/s 194C. Petitioner, is engaged in the business of running a hotel. The question involved was whether the services rendered by the petitioner to its customers is covered u/s 194C? It was held that, as facilities/amenities made available by petitioner do not constitute 'work' within the meaning of section 194C, consequently, the circular No.681 to the extent it holds that the services made available by a hotel are covered u/s 194C must be held to be bad in law.

International Taxation

In Re WorleyParsons Services Pty. Ltd (AAR)(A.A.R. No. 747 OF 2007)

Ishikawajima Harima (SC) doubted / distinguished

Where the assessee, an Australian company, entered into an agreement with Reliance and it was agreed that the consideration thereof constituted "royalty" but the assessee claimed (i) that the said royalty was "effectively connected" with a permanent establishment (PE) and consequently assessable as business profits, (ii) that the portion of such "profits" as was not "attributable" to the PE was not assessable to tax in India and (iii) that even otherwise the royalty was not assessable to tax in view of Ishikawakima 288 ITR 408 (SC) where it was held that fees for technical services (and royalty) was not assessable to tax u/s 9(1)(vii) (9(1)(vi)) if it was not rendered and utilized in India, HELD:

(i) In order to be "effectively connected", the PE should be engaged in the performance of royalty generating services. There must be a real and intimate connection and clear co-relation between the services giving rise to royalty and the PE. A connection between the PE and the contract is not enough;

(ii) On facts, as the bulk of the work was done outside India, the royalty was not "effectively connected" with the PE so as to qualify as business income. The fact that the said work was done based on inputs from India and the end-product was delivered and utilized in India was not relevant as that was pursuant to a different agreement;

(iii) Ishikawajima cannot be read to mean that the mere existence of a PE is enough to trigger the exclusion clause and cause royalty income to be assessed as business income. It does, however, imply that there may be situations where though the royalty may be "effectively connected" with the PE, still it may not be "attributable" to the PE;

(iv) It is not clear why in Ishikawajima reference has been made to s. 9 (1) (vii) (c) instead of s. 9 (1) (vii) (b) even though the two deal with different situations and why it was stated that s. 9 (1)(vii) (c) requires that the services have to be rendered as well as utilized in India in order to be taxable in India even though the word "rendered" is not to be found even in the inapplicable clause (c). Though it is difficult to find an answer, the dicta has to be respected without invoking the doctrine of per incuriam as far as possible;

(v) Further, though in Ishikawajima it was observed that "the legal fiction created by s.9 should be construed having regard to the object which it seeks to achieve", it was not indicated as to what is the object of the said provision that deters the legal fiction being carried to the extent specifically provided by the language of the section. The object of s. 9(1) is to deem certain incomes as accruing or arising in India so as to widen the net of taxation and this object will not be defeated if the legal fiction enacted by s. 9 is taken to its logical extent (other judgements of SC referred to where it was held that a fiction has to be given full effect);

(vi) Though in Ishikawajima it was held that the location of the source of income within India would not render sufficient nexus to tax the income from that source, this cannot be construed to mean that the age-old test of source of income should be eschewed altogether while considering territorial nexus (other judgements of SC on territorial nexus referred to);

(vii) There is a doubt why Ishikawajima proceeded on the basis that the offshore services performed by the contractor executing a turn key project as a step-in-aid to the execution of the project and deploying those services in India had no real connection to the Indian territory even though it gave rise to a 'live link' with the Indian territory and why it was felt that the income arising therefrom did not accrue or arise in India, not to speak of deemed accrual;

(viii) A decision not expressed and accompanied by reasons and not proceeded on a conscious consideration of issue cannot be deemed to be a law having binding effect as is contemplated under Art.141 of the Constitution. That which has escaped in the judgment is not the ratio decidendi;

(ix) Though the AAR has to give full effect to the law laid down in Ishikawajima vis-à-vis s. 9 (1) (vii) and territorial nexus, on facts, there was territorial nexus and a "live link" because a part of the services were rendered in India. The extent and magnitude of services is not decisive.

CIT vs. Eli Lilly (Supreme Court)

TDS on foreign salary is reqd even though assessee is not the payer

Where the assessee-employer obtained expatriate-employees from a foreign company and the said employees, continuing to be employees of the foreign company, received salary and allowance in their home country in foreign currency and the question arose whether the assessee was obliged to deduct tax thereon at source u/s 192 and the High Court held that the assessee was not obliged to deduct tax at source on the ground that the payment was by the foreign company and not by the assessee, HELD, reversing the High Court that:

(i) Though the payment of salary to the expatriate was made by the foreign company outside India, the TDS provisions did apply as the Act had extra-territorial operation as there was a nexus between the said salary and the rendering of services in India;

(ii) U/s 9 (1) (ii), salary received abroad is deemed to arise in India if it is for services rendered in India. This charging provision has to be read with the machinery provision of s.192 and both are part of an integrated code;

(iii) S. 192 requires the employer to deduct tax after "estimating" the salary payable to the employee. The act of "estimation" is akin to computation of income. In making the estimate, s. 9 (1) (ii) has to be taken into account;

(iv) On facts, as it was found that the salary paid by the foreign company was for services in India the same was deemed to accrue in India u/s 9 (1) (ii) and the assessee ought to have deducted tax u/s 192 though it was not the payer;

(v) Levy of interest u/s 201 (1A) is mandatory and has to be calculated from the date of default to the date of payment either by the assessee or the payee-employee;

(vi) However, levy of penalty u/s 271C is not mandatory or compensatory or automatic. Penalty can be levied only if there is no good and sufficient reason for the failure to deduct tax at source. On facts, as the issues were controversial and the assessees acted bona fide, penalty could not be imposed.

DIT (International Taxation) v. Delmas France (2009) 121 TTJ (Mumbai) 501

DTAA with France, arts. 7 & 9; Income-tax Act, 1961, s. 90 - Profits from operation of ships

Expression "operation of ships" in international traffic occurring in art. 9 of the DTAA between India and France would also include transportation of cargo by feeder vessels from Indian port to the mother vessel if such transportation is ancillary to the main activity and the assessee is able to establish link between transportation of cargo by feeder vessels with that by mother vessels owned, leased or chartered by the assessee. Assessee having produced before the CIT(A) only sample evidence to establish linkage between the feeder vessel and the mother vessel, order of CIT (A) granting benefits of art. 9 of the DTAA set aside and matter remanded to CIT(A) for granting opportunity to assessee to produce entire evidence. If the CIT(A) finds that freight attributable to feeder vessel falls under art. 9 (1), then inland haulage charges, the amount of which is admittedly negligible in comparison to freight relating to the main voyage, would also fall under that article, otherwise it shall be treated as business profit.

E*Trade Mauritius Limited (Bombay HC)

Income of a Mauritius Company from sale of shares of an Indian subjected to capital gains in India

The Bombay High Court has disposed of a writ petition filed by E*Trade Mauritius Limited (E*Trade Mauritius) and directed that the tax amount deposited with it earlier should be released to the Tax Department. The capital gains tax tax (approximate of Rs. 24.5 crores) was paid on the consideration received by E*Trade Mauritius from another Mauritian company on sale of shares of an Indian company

E*Trade Mauritius is a limited company formed under the laws of Mauritius and is a subsidiary of E*Trade Financial Corporation (E*Trade US). E*Trade Mauritius sold shares of IL&FS Investmart Limited (IL&FS) to HSBC Violet Investments (Mauritius) Limited (HSBC Mauritius). After the transaction, E*Trade Mauritius filed a writ petition before the Bombay High Court challenging a withholding tax certificate issued by the Tax Department to pay capital gain tax on the consideration.

The HC had directed the matter back to the Tax Department for revision proceedings. Further, until disposal of the matter by the Tax authorities, the High Court directed HSBC Mauritius to deposit an amount of Rs 24.5 crore, being the tax amount, with the HC.

The court held that the tax amount set aside under its earlier order be released to the Tax Department and the balance, of Rs 20 lakh should be released to E*Trade Mauritius. The court has directed HSBC Mauritius to issue a Tax Deducted at Source (TDS) Certificate to E*Trade Mauritius to the extent of tax amount released to the Tax Department.

M/s. Cairn Energy India Pty. Ltd. v. ACIT (ITA Nos. 208 to 211 of 2006) (Chennai ITAT)

Withholding tax provisions cannot be applied to payments representing reimbursement of expenses

A sum can be chargeable to tax only when it contains element of profit, if there is no element of profit embedded, then provisions of section 195 would not apply. The Tribunal referred to various rulings to hold that no income accrued to the parent company from payments by way of reimbursement of expenses and hence the provisions of section 195 were not applicable. The Tribunal while discussing the rulings relied upon by the tax department held that all the decisions were distinguishable and therefore cannot be applied to the present case.

The Tribunal referred to the clauses of the PSC and the auditor's certificate of the parent company and agreed with the taxpayer's contention that the payments represented reimbursement of actual expenditure and there was no profit element embedded therein.

The argument of the tax department that the taxpayer has himself deducted taxes at source on similar payments in subsequent years and that the taxpayer cannot argue now that it is not liable for deducting taxes at source, was not accepted by the Tribunal in light of the Supreme Court's decision in the case of National Thermal Power Co. Ltd. (229 ITR 383), wherein it has been held that even if the taxpayer has returned an income, the same can be challenged before the appellate authority on the ground that it is not taxable.

When income is computed as per the special provisions, no disallowance of expenditure can be made

The Tribunal further held that scheme of the Act makes it clear that the provisions of section 42 would prevail over the general provisions of computing income contained in section 30 to 38. Provisions of section 40 cannot be invoked when the income is to be computed under section 42 of the Act as it is a settled law that general provisions must give way to the special provisions.

Lucent Technologies International Inc. v. DCIT (2009-TIOL-161-ITAT-DEL)

Foreign company is having a service PE in India by virtue of employees of its sister concern being made available to the Indian subsidiary to carry out the project.

The Tribunal held that Article 5(2)(1) of the tax treaty clearly shows that it is not only the employees through whom if services are provided the PE is to set to come into existence. It also includes other personnel. The term other personnel has to be read with reference to the earlier words as provided in the said article 5(2)(1).

The other personnel specified here would be persons over whom the enterprise would be having a control. In the present case, the employees of the affiliates over whom the taxpayer had a control would fall within the term "other personnel" and consequently, it would have to be held that a PE did exist as per the inclusive term as provided in article 5(2)(1) of the tax treaty. Further the expatriate personnel's had been in India for more than 90 days within the twelve months period and hence it was held that LTIL in fact was a service PE of the taxpayer

Income from transfer of a copyrighted article (but not the copyright) is not taxable as royalty

The licensee had been denied the right of making the copies of the software or parts thereof except for archival back-up purposes. The Tribunal held that

(i) merely because the licensee had been permitted to take copies just for back up purposes, it could not be said that he had acquired a copyright in the software.

(ii) even though one cannot have the copyright right without a copyrighted article, it does not follow that one having the copyrighted article has also the copyright in it.

(iii) the decision of the Special Bench in the case of Motorola Inc. would squarely cover the facts of the taxpayer's case and just because Motorola had entered into a mutual agreement procedure it did not make the decision of the Special Bench of the Tribunal, otiose.

(iv) Accordingly, the amount received by the taxpayer under the licence agreement for allowing the use of the software was not royalty either under the Act or under the tax treaty and the same constituted the business profit of the taxpayer.

Skoda Auto India Pvt. Ltd. v. ACIT (ITA No. 202/PN/ 07) (Pune ITAT)

Different Business Models call for Appropriate Economic Adjustments

Skoda Auto India Pvt Limited had undertaken international transactions with associated enterprises for purchase of raw material and payment of royalty and technical know-how fees.

The Assessing Officer, however, rejected two of the six comparables used by Skoda in benchmarking these related party transactions on the basis of non availability of data and losses incurred. Instead, comparables with a different business model and in a different stage of business were included, resulting in an upward adjustment of about Rs 24 crores.

The Pune Bench of the Income-tax Appellate Tribunal (Pune Tribunal), held that appropriate economic adjustments may be required while undertaking comparability analysis to account for differences in functional profile under different business models.

The comparability analysis should also consider unusually high costs incurred by the taxpayer during its startup phase. While so holding, the Tribunal referred the matter back to the Transfer Pricing Officer (TPO) for fresh adjudication with specific instructions. In addition, the Tribunal reaffirmed the availability of the benefit of +/- 5 percent range (safe harbour provisions) to the taxpayers. This is in line with the recent ruling in the case of Sony India Private Limited.

Circulars / Notifications

Income-tax (Sixth Amendment) Rules, 2009 - Insertion of rule 37BA and 37-I
Notification No. 28/2009, Dated 16-3-2009

In the Income-tax Rules, 1962,-

(A)after rule 37B, the following rule shall be inserted, namely:-

37BA. Credit for tax deducted at source for the purposes of section 199.

(1) Credit for tax deducted at source and paid to the Central Government in accordance with the provisions of Chapter XVII, shall be given to the person to whom payment has been made or credit has been given (hereinafter referred to as deductee) on the basis of information relating to deduction of tax furnished by the deductor to the income-tax authority or the person authorised by such authority.

(2) (i) If the income on which tax has been deducted at source is assessable in the hands of a person other than the deductee, credit for tax deducted at source shall be given to the other person in cases where -

(a) the income of the deductee is included in the total income of another person under the provisions of section 60, section 61, section 64, section 93 or section 94;

(b) the income of a deductee being an association of persons or a trust is assessable in the hands of members of the association of persons, or in the hands of trustees, as the case may be;

(c) the income from an asset held in the name of a deductee, being a partner of a firm or a karta of a Hindu undivided family, is assessable as the income of the firm, or Hindu undivided family, as the case may be;

(d) the income from a property, deposit, security, unit or share held in the name of a deductee is owned jointly by the deductee and other persons and the income is assessable in their hands in the same proportion as their ownership of the asset:

Provided that the deductee files a declaration with the deductor and the deductor reports the tax deduction in the name of the other person in the information relating to deduction of tax referred to in sub-rule (1).

(ii) The declaration filed by the deductee under clause (i) shall contain the name, address, permanent account number of the person to whom credit is to be given, payment or credit in relation to which credit is to be given and reasons for giving credit to such person.

(iii) The deductor shall issue the certificate for decuction of tax at source in the name of the person in whose name credit is shown in the information relating to deduction of tax referred to in sub-rule (1) and shall keep the declaration in his safe custody.

(3) (i) Credit for tax deducted at source and paid to the Central Government, shall be given for the assessment year for which such income is assessable.

(ii) Where tax has been deducted at source and paid to the Central Government and the income is assessable over a number of years, credit for tax deducted at source shall be allowed across those years in the same proportion in which the income is assessable to tax.

(4) Credit for tax deducted at source and paid to the account of the Central Government shall be granted on the basis of

(i)the information relating to deduction of tax furnished by the deductor to the income-tax authority or the person authorized by such authority: and

(ii)the information in the return of income in respect of the claim for the credit,

subject to verification in accordance with the risk management strategy formulated by the Board from time to time.

(B) after rule 37H, the following rule shall be inserted, namely:

37I. Credit for tax collected a source for the purposes of sub-section (4) of section 206C.

(1) Credit for tax collect at source and paid to the Central Government in accordance with provisions of section 260C of the Act, shall be given to the person form whom the tax has been collected, on the basis of the information relating to collection of tax at source (hereinafter referred to as the collector) to the income-tax authority or the person authorized by such authority.

(2) (i) Where tax has been collected at source and paid to the Central Government, credit for such tax shall be given for the assessment year for which the income is assessable to tax.

(ii) Where tax has been collected at source and paid to the Central Government and the lease or license is relatable to more than one year, credit for tax collected at source shall be allowed across those years to which the lease or license relates in the same proportion.

(3) Credit for tax collected at source and paid to the account of the Central Government shall be granted on the basis of

(i) the information relating to collection of tax furnished by the collector to the income-tax authority or the person authorized by such authority; and

(ii) the information in the return of income in respect of the claim for the credit,

subject to verification in accordance with the risk management strategy formulated by the Board from time to time.

Notification No. 31/2009, Dated: March 25, 2009

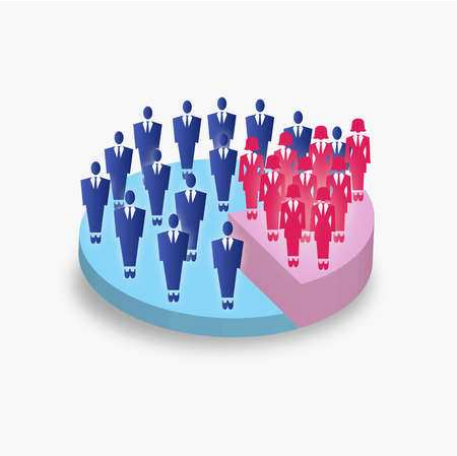
Income-tax (8th Amendment) Rules, 2009 (Applicable from 01-04-2009)

Main abstract of the New amended Rules are-

1. Mandatory E payment: E-payment of TDS /TCS is mandatory for all type of deductors.
2. New Challan for TDS/TCS deposit: TDS/TCS deposit challan is now on Form number 17
3. Deductee detail in challan required: Deductee detail is to be given in TDS challan while depositing the TDS/TCS upto 10 deductee
4. Deductee Detail with challan to be uploaded in file: If deductees are more than 10 ,then detail of deductees is to be uploaded with challan through file.
5. Quarterly deposit of TDS/TCS: Quarterly deposit of TDS is now can be done in few cases with the approval of Jt commissioner
6. Form16/16A amended: Form 16 and 16A has also been amended and 16AA abolished
7. Unique transaction number concept: A unique transaction number will be alloted to each tax deduction and tax collection entry. This unique number is to be mentioned in every Form 16/16AA
8. In form 16/16A status of quarterly return is also to be given ,whether pan uploaded in etds return validated by the department or not.
9. Mandatory quarterly E TDS/TCS returns: Quarterly TDS/TCS is now required to be filed irrespective of tax deduction in the quarter or not.
10. Tax compliance new return in Form 24-C: A new form 24 C ,Tax Compliance Form is also required to be filed with quarterly etds returns
11. Form 26Q, 24Q, 27EQ amended: Form 24Q, 26Q and 27 EQ has also been amended to give effect the concept of unique transaction number .

Notification No.32/2009 dated 27-03-2009

Income-tax (9th Amendment) Rules, 2009 - ITR forms for Assessment Year 2009-2010 in Form ITR 1, Form ITR 2, Form ITR 3, From ITR 4, Form ITR 5, Form ITR 6, Form ITR 7, Form ITR 8, and ITR V prescribed.



INDIRECT TAXES

Judicial Pronouncements

CCE v. Hongo India (Supreme Court - Larger Bench)

High Court has no power to condone delay in filing appeals

Where s. 35G of the Central Excise Act (= 260A of the I. T. Act) provided a time limit of 180 days for filing an appeal and there was no provision for condoning delay by showing sufficient cause after the prescribed period, there was complete exclusion of section 5 of the Limitation Act and the High Court had no power to condone the delay after expiry of the prescribed period. Even otherwise, the legislature had provided sufficient time for filing a reference to the High Court which was more than the period prescribed for an appeal and revision.

CCE v. M/s. B.S.B.K. Pvt. Limited [2009 - TMI - 32789 - CESTAT, New Delhi]

Cenvat Credit on mobile phone

Credit on mobile phone used in providing Industrial Construction service denied on ground that mobile phone bills were not issued in the name of the respondent company. Revenue submits that mere payment of bills by the respondents does not imply that the services have been utilized by the respondent company for business activities. Since mobile phones were utilized by the full time directors of the company for business purposes which were not negated by the Revenue, credit was allowed.

Pasha Educational Training Institute v. CCE (Appeals-II), Hyderabad [2009 - TMI - 32764 - CESTAT, Bangalore]

Liability of Service Tax

Appellant-institute imparts very comprehensive training for insurance agents. Comprehensive training given by appellant enables the trainees to appear for the examination conducted by IRDA. Moreover, the appellant institute is also recognized by the IRDA. Training imparted should be considered to be a vocational training.

Once, it is held that the appellant imparts vocational training, then they would be entitled for the benefit of exemption Notification 9/2003 ST, dated 20.6.03 as amended.

Cross Road Auto Pvt. Ltd. v. CCE [2009 - TMI - 32756 - CESTAT, New Delhi]

Business Auxiliary Services

In addition to activity as authorized service station appellant also arranging car loan from various banks/ financial institutions to the car buyers for which they were getting commission from banks/financial institutions. Impugned services are covered by the definition of "Business Auxiliary Services" and not as "Consignment Agent". Held that tax is payable on the gross amount (commission) received from the bank. Since levy of tax on BAS was new, consolidated penalty of Rs. 10,000/- upheld.

CCE, Chandigarh v. Gravs Appliances (P.) Ltd. (2009 TMI - 32850 - CESTAT, New Delhi)

Payment of Service Tax on GTA services fromCenvat Credit

The question before the tribunal was whether Credit of Service Tax paid on the input services is available to the manufacturer and whether they are allowed to pay the Service Tax on GTA services from Cenvat credit? Tribunal in the case of Nahar Industrial Enterprises Ltd. held that Cenvat credit of manufacturing activity can be utilised by the manufacturer for payment of Service Tax on GTA services. In view of this decision, there is no merit in the appeal of the revenue and accordingly appeal filed by the revenue is rejected.

OTHER LAWS

Company Law

Companies (Accounting Standards) Amendment Rules, 2009 - Amendments in Annexure

Notification No. G.S.R. 225(E), DATED 31-3-2009

In exercise of the powers conferred by clause (a) of sub-section (1) of section 642 read with sub-section (1) of section 21A and sub-section (3C) of section 211 of the Companies Act, 1956 (1 of 1956), the Central Government in consultation with the National Advisory Committee on Accounting Standards, hereby makes the following rules to amend the Companies (Accounting Standards) Rules, 2006, namely:—

1. (1) These rules may be called the Companies (Accounting Standards) Amendment Rules, 2009. (2) They shall come into force on the date of their publication in the Official Gazette.

2. In the Companies (Accounting Standards) Rules, 2006, in the Annexure, under the heading "B. ACCOUNTING STANDARDS", in the sub-heading "Accounting Standard (AS) 11" relating to "The Effects of Changes in Foreign Exchange Rates", after paragraph 45, the following shall be inserted, namely:-

"46. In respect of accounting periods commencing on or after 7th December, 2006 and ending on or before 31st March, 2011, at the option of the enterprise (such option to be irrevocable and to be exercised retrospectively for such accounting period, from the date this transitional provision comes into force or the first date on which the concerned foreign currency monetary item is acquired, whichever is later, and applied to all such foreign currency monetary items), exchange differences arising on reporting of long-term foreign currency monetary items at rates different from those at which they were initially recorded during the period, or reported in previous financial statements, insofar as they relate to the acquisition of a depreciable capital asset, can be added to or deducted from the cost of the asset and shall be depreciated over the balance life of the asset, and in other cases, can be accumulated in a "Foreign Currency Monetary Item Translation Difference Account" in the enterprise's financial statements and amortized over the balance period of such long-term asset/liability but not beyond 31st March, 2011, by recognition as income or expense in each of such periods, with the exception of exchange differences dealt with in accordance with paragraph 15. For the purposes of exercise of this option, an asset or liability shall be designated as a long-term foreign currency monetary item, if the asset or liability is expressed in a foreign currency and has a term of 12 months or more at the date of origination of the asset or liability. Any difference pertaining to accounting periods which

commenced on or after 7th December, 2006, previously recognized in the profit and loss account before the exercise of the option shall be reversed insofar as it relates to the acquisition of a depreciable capital asset by addition or deduction from the cost of the asset and in other cases by transfer to "Foreign Currency Monetary Item Translation Difference Account" in both cases, by debit or credit, as the case may be, to the general reserve. If the option stated in this paragraph is exercised, disclosure shall be made of the fact of such exercise of such option and of the amount remaining to be amortized in the financial statements of the period in which such option is exercised and in every subsequent period so long as any exchange difference remains unamortized."

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

31st March	***Payment of Service Tax & Excise duty for March***
31st March	***Payment of Excise duty paid electronically through internet banking***
7th April	***TDS/TCS Payment for March except amount credited on 31st March***
10th April	***Excise Return ER1 / ER2 /ER6***
15th April	***PF Contribution for March, Excise payment by SSI***
20th April	***Excise return ER3 for quarter ended March***
21st April	***ESIC Payment for March***
25th April .	***Half yearly return of service tax***