Issue 03 | March 2010

Website : www.snkca.com Email: newsletter@snkca.com

SNK Newsletter

DIRECT TAXES

Judicial pronouncements

Anurag Chaudhary, In Re (2010) 35 DTR (AAR) 77

Determination of Residential status

A person has stayed for 123 days in India during previous year. As per s. 6(1) read with Explanation thereto, an individual who has left India for employment outside India is to be treated as resident of India only if he was in India during the relevant year for 182 days or more. If he has spent less than 182 days in India during the relevant previous year and was outside India for the purposes of employment, then regardless of his stay in India for 365 days or more during four preceding previous years, he cannot be treated as a resident of India. Applicant left India for USA for employment purposes and was in India only for 123 days in the relevant previous year. There is no information regarding his stay in India during four preceding years. Thus, he neither satisfies cl. (a) nor cl. (c) of s. 6(1) so as to merit treatment as a resident in India during the relevant period. Therefore, the applicant was a non-resident during the relevant period and the income that accrued to him outside India by reason of his employment in USA cannot form part of taxable income in India.

Scientific Atlanta vs. ACIT (ITAT Chennai Special Bench) (ITA No. 229/Mds/2007 & 352/Mds/2008)

S. 10A deduction allowable without set off of losses of non-eligible units

In respect of AY 2003-04, the assessee had an unit in Chennai which was engaged in software development and whose profits were eligible for deduction u/s 10A. The assessee had another unit in Delhi which was engaged in trading and had suffered a loss. The assessee claimed that it was eligible for a deduction u/s 10A on the whole of the profits of the Chennai unit without it being reduced by the losses of the Delhi unit. The AO and CIT (A) rejected the claim on the ground that after the amendment of s. 10A

w.e.f. 1.4.2001, a deduction is allowed from the "total income" and consequently the losses have to be taken into account. On a reference to the Special Bench, HELD deciding in favour of the assessee:

(i) S. 10A allows a deduction of the "profits and gains derived by the undertaking from the export of computer software" "from the total income of the assessee". The effect is that the deduction has to be made at the stage of computing the income under head "Profits & gains" and not at the stage of computing the gross total income;

(ii) S. 80AB is confined to deductions granted under Chapter VI-A. As s. 10A does not fall in Ch. VI-A, s. 80AB has no application;

(iii) S. 10A grants a deduction to the "profits of the undertaking" and not to the "profits of the assessee". There is a well known distinction between the "undertaking" and the "assessee" as also noted by the CBDT in Circular F. No. 15/563 dated 13.12.1963. The deduction u/s 10A attaches to the undertaking and not to the assessee;

(iv) Consequently, the losses of a non-eligible unit cannot be set off against the profits of an eligible unit and are eligible to be set-off against other income or to be carried forward. The position of a losses of an eligible unit may be on a different footing.

TRF Limited vs. CIT (Supreme Court) (Civil Appeal No. 5293 of 2003)

Bad debts need not be proven to be irrecoverable u/s 36(1)(vii). It is sufficient if they are written off

The Supreme Court had to consider whether after the amendment to s. 36 (1) (vii) w.e.f. 1.4.1989, an assessee had to establish, as a matter of fact, that the debt advanced by the assessee had, in fact, become irrecoverable or whether writing off the debt as irrecoverable in the accounts was sufficient. HELD deciding in favour of the assessee:

(i) The position in law is well-settled. After 1.4.1989, it is not necessary for the assessee to establish that the debt, in fact, has become irrecoverable. It is enough if the bad debt is written off as irrecoverable in the accounts of the assessee. When a bad debt occurs, the bad debt account is debited and the customer's account is credited, thus, closing the account of the customer. In the case of companies, the provision is deducted from Sundry Debtors.

(ii) As the AO has not examined whether the debt has, in fact, been written off in accounts of the assessee. the matter is remitted to the AO for de novo consideration of the above-mentioned aspect only and that too only to the extent of the write off.

ACIT v. Grandprix Fab. (P) Ltd. (ITA No. 1208/2009)(Delhi ITAT)

Disallowance u/s 40(a) for non-deduction of TDS on payments made to clearing agent on actual reimbursement

Assessee was not obliged to deduct tax at source from the payments made by it to the clearing agent towards customs duty and other expenses paid by the latter while clearing the imported goods on behalf of the assessee as no element of income is embedded in reimbursement of expenses and therefore, impugned payments could not be disallowed under s. 40(a)(ia).

ACIT vs. Elecon Engineering (Supreme Court) (Civil Appeal No. 2057 of 2010)

Roll-over charges for foreign currency contracts have to be capitalized u/s 43A

The assessee procured a foreign currency loan for expansion of its existing business. To ensure availability of foreign currency, the assessee booked forward contracts with a bank. The contract was for the entire amount and delivery of foreign currency was obtained from the bank for the installment due from time to time. The balance value of the contract was rolled over for a further period up to the date of the next installment. The assessee paid "roll over premium charges" for the same. The AO disallowed the said charges on the ground that as it were incurred for purchase of plant & machinery, it was capital expenditure. The CIT (A) reversed the AO on the ground that the charges were expenditure for raising a loan and was consequently revenue in nature. The Tribunal reversed the CIT (A) on the ground that u/s 43A the expenditure had to be capitalized. The High Court reversed the Tribunal on the ground that the charges were in the nature of interest or commitment charges and allowable u/s 36(1) (iii). On appeal, HELD reversing the High Court:

Exchange differences are required to be capitalized if the liabilities are incurred for acquiring fixed assets like plant and machinery. It is the purpose for which the loan is raised that is of prime significance. Whether the purpose of the loan is to finance the fixed asset or working capital is the question which one needs to answer;

The cost for carrying forward the contracted foreign currency not immediately required for repayment is called the roll over charge(s). The argument that s. 43A applies only to cases where there is a fluctuation in the rate of exchange and that since roll over charges are paid to avoid increase or reduction in liability on account of such fluctuation, s. 43A does not apply has no merit because s. 43A applies to the entire liability remaining outstanding at the year end and is not restricted merely to the installments actually paid during the year. Therefore the year-end liability of the assessee has to be looked into. Further, it cannot be said that roll over charge has nothing to do with the fluctuation in the rate of exchange. Roll over charges represent the difference

arising on account of change in foreign exchange rates. Roll over charges paid/ received in respect of liabilities relating to the acquisition of fixed assets should be debited/ credited to the asset in respect of which liability was incurred. However, roll over charges not relating to fixed assets should be charged to the Profit & Loss Account.

SRF Ltd. v. Dy. CIT (2010) 32 (II) ITCL 28 (Del 'H'-Trib)

Business disallowance u/s 43B of excise duty paid through PLA

Payment through personal ledger account (PLA)-Deposit of excise duty through personal ledger account, in accordance with rule 173G of Central Excise Rules, 1944, constituted payment of excise duty and was not disallowable under section 43B.

Year of allowability of miscellaneous expenses, etc., claimed during relevant year

Expenses related to tour and travel, internal audit fee, etc., were related to preceding years but since the bills or claims were made during the year, it can be said that the liability became known for the first time when such claim was made. Accordingly, the same was allowable in the year in which the liability got crystallized.

DCIT v. Piyush A. Shroff (HUF) (2010) 128 TTJ (Ahd)(UO) 25

Search and seizure - Addition under s. 68

AO made addition of cash credits/ deposits appearing in the books of CCS, a society floated by the assessee. CIT(A) found that the AO made the addition on the analogy of two concerns without highlighting the similarity in both the cases. CIT(A) also observed that the AO used part statements of certain parties which is in favour of the Revenue while ignoring the other part of the statements which impart more clarity to the issue involved. Revenue has not pointed out any material to controvert the findings of the CIT(A) or demonstrated as to how cash credits appearing in the books of the aforesaid society could be added in the hands of the assessee. There is no material to show that the amounts deposited with the said society by various persons were actually undisclosed income earned by the assessee nor any seized material has been brought on record which could form the basis of such estimated income. Addition rightly deleted.

Kalyan Memorial & Charitable Trust v. Asstt. CIT (2010) 32 (II) ITCL 2 (Agra-Trib)(TM)

Income from undisclosed sources-Burden of proof for addition u/s 68

Where assessee, by furnishing evidence regarding creditworthiness as well as genuineness of credit appearing in books, had discharged its burden of proof, it was on revenue to prove that credits were not genuine, which revenue failed to do, addition was, therefore, deleted.

Jawaharbhai Atmaram Hathiwala v. ITO (2010) 128 TTJ (Ahd)(UO) 36

Addition on account of alleged payment of 'on money' for purchase of flat

K, partner of developer firm OD, admitted during the course of search and seizure operation that he had received Rs. 4,83,101 upto 31st March, 1999, from the assessee for purchase of a flat as recorded in the seized document. Assessee claimed that he has made payment of Rs. 1,01,687 only upto 31st March, 1999. and has consistently taken the stand that it has not paid balance amount of Rs. 3,81,414 as stated in the seized document. No evidence has been brought on record by the Revenue to show that the assessee had in fact paid the amount of Rs. 3,81,414 to OD. No document bearing the signature or handwriting of the assessee to corroborate the said payment was found during the course of search. Assessee's denial cannot be brushed aside without bringing any positive material on record. Therefore, CIT(A) was not justified in confirming addition of Rs. 3,81,414 in the hands of the assessee.

CIT vs. Lokmat Newspapers (Bombay High Court)(ITA (L) No.3005 of 2009)

Speculation loss can be set off against delivery based profits

The assessee earned a profit on sale of shares held as stock-in-trade. This profit was offered as profit from a 'speculation business' and was set off against a 'speculation loss' brought forward from an earlier assessment year. The AO took the view that the profit from sale of shares was not from a 'speculation business' on the ground that the assessee had settled its transaction of sale and purchase of shares through physical delivery. Consequently, the claim for set off against the speculation loss was denied. This was confirmed by the CIT (A) through

reversed by the Tribunal on the ground that the profit earned from sale of shares fell within the purview of the Explanation to s. 73 and could be set off against speculation losses. On appeal by the Revenue, HELD affirming the Tribunal's order:

(i) The Explanation to s. 73 creates a deeming fiction that where the assessee is a company and any part of its business consists of the purchase and sale of shares of other companies, the assessee is deemed to be carrying on a speculation business, to the extent to which the business consists of the purchase and sale of shares. A business postulates a systematic course of activity or dealing. Unless the business of a Company consists of the sale and purchase of shares, the deeming fiction would not apply. However, once the requirements of the Explanation are satisfied the assessee is deemed to be carrying on a "speculation business";

(ii) The argument of the Revenue that the term "speculative transaction" in s. 43(5) must be read into the provisions of s. 73 and that a business which involves actual delivery of shares would not constitute a speculation business cannot be accepted having regard to the deeming fiction created by the Explanation to s. 73. There is no justification to exclude a business involving actual delivery of shares. Once an assessee is deemed to be carrying on a speculation business for the purpose of s. 73, any loss computed in respect of that speculation business, can be set off only against the profits and gains of another speculation business.

G.K. Ramamurthy vs. JCIT (ITAT Mumbai)(ITA No. 1367/Mum/2009)

Non-exempt capital loss cannot be set off against exempt capital gains

S. 10 (38) inserted w.e.f. 1.10.2004 provides that long-term capital gains (LTCG) on which security transaction tax (STT) is paid shall not be included in total income. The assessee earned long term capital gain (LTCG) of Rs. 33,01,57,200 on sale of shares after 1.10.2004 in respect of which STT was paid. The LTCG was exempt u/s 10 (38). In the period prior to 1.10.2004, the assessee suffered a long term capital loss of Rs. 9,23,55,945 on redemption of units. The assessee claimed that the said long term capital losses were not liable to be set off against the exempt capital gains. The AO & CIT (A) took the view that in computing income under the head "capital gains", the said loss had to be set off against the capital gains. On appeal by the assessee, HELD deciding in favour of the assessee:

(i) Under the scheme of the Act, income which does not form part of the total income as per Chapter-III does not enter the computation of total income at all. (N.M. Raiji 17 ITR 180 (Bom) followed where it was held that exempt share income of a partner could not be taken into account even for rate purposes);

(ii) S. 70 (3) which provides that long-term capital gains shall be set off against long-term capital loss does not apply because the exempt capital gains do not enter the computation of total income at all and the question of aggregating them under Chapter VI and setting them off u/s 70 (3) does not arise. Consequently, the right of carry forward the loss u/s 74(1) is unaffected;

(iii) S. 10(38) was inserted with the object to grant exemption to LTCG as tax has already been levied on a different footing (STT). The revenue's contention that long term capital loss should be adjusted against exempt LTCG will be contrary to the intention, object and purpose of enacting s. 10 (38). Further, the revenue's view will result in absurdity if the facts are reversed because then LTCG earned before 1.10.2004 (which is taxable) will be eligible for set off against (exempt) long term capital loss suffered after 1.10.2004. This will result in a loss from an exempt source being set off against taxable gain which is contrary to law.

(iv) Consequently the long term capital loss is not liable to be set off against exempt income long term capital gains.

CIT vs. Sona Koya Steering Systems (Delhi High Court)(ITA No. 1279/2008 & ITA No. 194/2009)

S. 80-I deduction allowable without setting off loss of other units

The assessee had two units, namely, a steering unit and an axle unit, both of which were eligible u/s 80-I. While one unit was making profits, the other was incurring losses. The AO and CIT (A) took the view that deduction u/s 80-I on the profits of one unit could be allowed only after setting off the losses of the other unit. On appeal, the Tribunal allowed the claim of the assessee on the ground that the two units were independent of each other and that u/s 80-I (6), the profit making unit had to be considered to be independent of the other. Before the High Court, the department claimed that the issue was covered in their favour by Synco Industries 299 ITR 444 (SC) where it had

been held that the losses had to be set off before claiming deduction u/s 80-I. HELD dismissing the appeal and deciding in favour of the assessee:

(i) The effect of s. 80-I (6) is that the deduction has to be computed as if the industrial undertaking were the only source of income of the assessee. Each industrial undertaking is to be treated separately and independently. It is only those industrial undertakings which have a profit or gain which have to be considered for computing the deduction. The loss making industrial undertaking would not come into the picture at all. The loss of one such industrial undertaking cannot be set off against the profit of another such industrial undertaking to arrive at a computation of the quantum of deduction that is to be allowed to the assessee u/s 80-I (1);

(ii) In Synco Industries 299 ITR 444 (SC), the Supreme Court did not hold that while computing the deduction u/s 80-I(6), the loss of one eligible industrial undertaking is to be set off against the profit of another eligible industrial undertaking. All that the Supreme Court said was that in computing the gross total income of the assessee, the same has to be determined after adjusting the losses and that, if the gross total income of the assessee so determined turns out to be "Nil", then the assessee would not be entitled to deduction under Chapter VI-A. In fact, the Supreme Court clearly held that while computing the quantum of deduction u/s 80-I (6), the AO has to treat the profits derived from an industrial undertaking as the only source of income of the assessee in order to arrive at a deduction under Chapter VI-A and that the loss sustained in one of the units is not to be taken into account.

Dr.G.G. Dhir v. ACIT (2010) 35 DTR (Agra)(TM)(Trib) 81

Search and seizure - Computation of undisclosed income

No books of account for the current year or for the immediately preceding year were found during the action under s. 132. These were claimed to have been maintained and stated to be lying with the counsel of the assessee. Fact that the counsel did not produce those books in compliance of the summons does not necessarily lead to the presumption that there were no books of account or that they were not maintained in the regular course of business/profession by the assessee. Neither the authorised officer in the post-search enquiries nor the AO in the assessment proceedings could lay hand on any material or evidence which could disprove the assessee's stand. In fact, assessee produced the computerised cash book for verification in the assessment proceedings in the first instance when the AO demanded the same. Thus, it cannot be held that cash book was not existing or that the computerised books were not books of account in the eyes of law nor its reliability could be doubted. There is no inconsistency in the final accounts as on 31st March, 2002, seized from assessee's residence with the computerised books presented in the assessment proceedings. AO himself has relied on this cash book and accepted receipts recorded therein as assesse's professional income and the assessee also filed his regular return for asst. yr. 2002-03 based on such accounts on the same day when he was searched. Computerised books produced by assessee are printout of data stored in a floppy and as such they are books of account as per s. 2(12A). Therefore, the same cannot be ignored for deciding as to whether or not the cash found during the search and the other amounts of additions made on various grounds are undisclosed income of the assessee.

Search and seizure - Cash found in bank locker

Assessee explained that the cash included an amount of Rs. 50 lakhs being the advance received by him from a company SAL as per agreement for sale of land and produced a copy of Moll said to have been executed by assessee and B on behalf of SAL. Said Moll was not found during the search operation. It was brought on record before the AO in the assessment proceedings. It is stated to be false and fabricated and denied by B, the alleged signatory on behalf of SAL, by way of an affidavit. B was made available to the assessee for cross-examination but he did not avail of the opportunity. P, director of SAL, has also stated that the said document could not have been entered into on behalf of SAL as B was never authorised to do so and that the company did not have funds to the tune of Rs. 50 lakhs at any point of time.

Its cash book was also produced as an evidence to deny the alleged payment. Further, neither during the search/ survey nor in the proceedings thereafter, any reference was made by the assessee to the availability of cash of Rs. 50 lakhs. Outcome of the enquiries conducted by the Investigation Wing has been confronted to the assesee and the same remains unaddressed. Assessee has failed to explain availability of cash Rs. 50 lacs. On the contrary, the evidence on record disproves the availability of cash from the source stated in the computerised statement furnished by the assessee. Addition was liable to be upheld.

Search and seizure - Cash found in bank locker

Rs. 8,44,294 found in locker was stated to be professional receipts and was explained by the assessee on the basis of cash in hand shown in his books as on 31st March, 2003. Same not accepted by AO. Not justified. Since certain patient receipts and patient sheets were seized during the search or were impounded in survey proceedings, the fact of issuing such receipts was glaring on the assessment record itself. These receipts having been entered into the accounts by computer programming itself, same constituted a record of receipts. AO did not verify that the entries of receipts disclosed in the computerised cash book were correct and did not point out any inconsistency with the seized or impounded records. Revenue did not find any material to suggest that the receipts so disclosed in the books were suppressed or that the receipts remained unrecorded. Thus, the correctness of entries of professional income recorded in the cash book are to be accepted as correct and the same cannot be treated as undisclosed income. Explanation of the assessee with regard to availability of cash on the basis of cash book cannot be rejected even on the ground that the locker was last operated on 27th June, 2002, while the availability of cash is being shown as per cash book as on 31st March, 2003, as the bankers sometimes permit their premier customers to operate the lockers without insisting upon them to make entries in the register for this purpose. Therefore, the amount of Rs. 8.44,294 cannot be treated as undisclosed income.

Search and seizure - Cash found in bank locker

Admittedly, assessee is the Karta of his HUF which owns agricultural land. Fact that the said land is irrigated and is capable of giving yield is supported by the certificate issued by the District Agriculture Officer. Further, the fact that land measuring 3.5 acres out of 10 acres stood sold in asst. yr. 2000-01 has been accepted by the Department. No finding is given by any Departmental authority that the agricultural income from such land was utilized by the assessee or any of his family members during the block period or earlier to that for any purpose. Thus, the explanation of the assessee that the cash so found represented the agricultural income cannot be rejected, particularly when he is a professionally Qualified person and has disclosed sufficient income and drawings in his individual capacity. Agricultural income not being taxable, HUF was not liable to pay any tax on such income nor obliged to file any return of such income. Maintenance of bank account was also not mandatory. Therefore, the money which is shown to be savings out of the agricultural income cannot be treated as undisclosed income of the assessee.

Search and seizure - Cash found in bank locker

Lockers were held in the name of assessee's wife Smt. V who is independently assessed to tax. She filed an affidavit admitting the fact that the said three lockers are held by her and the cash found therein also belongs to her. She also stated that she has ostensive source of income as partner in DP and has declared income over Rs. 2,00,000 p.a.. Fact that Smt. V was not having capacity to possess cash to the extent it was found in her lockers, by itself could not be a reason to discard the ownership of cash as that of the lady and to treat the same as the property and the income of the assessee. Impugned amounts cannot be treated as undisclosed income of the assessee. Similar was the position in respect of lockers held in the name of assessee's son.

Search and seizure - Deposits in bank account

No material evidence has been found and detected in the search to show that the deposits made in the said accounts are by the assessee or relate to the income that has not been disclosed by him. Action in the hands of those account holders under s. 158BC is taken by the assessing authority. Thus, there is no factual or legal justification to treat the amount of deposits as undisclosed income of the assessee.

Search and seizure - Deposits in alleged benami account

Two pay-in slips were found at the residence of the assessee which showed cash deposit of Rs. 1,00,000 each for purchase of FDRs in the name of one G who had a savings bank account with the bank. Some more amount was also found deposited in that account. Further, it was found that the assessee in his capacity as secretary of an association had made a payment of Rs. 2,29,184 in the name of G. AO found similarity in the signatures of the assessee and that of G in respect of said bank account and, therefore, treated the deposits made in the name of G in various years as undisclosed income of the assessee. Not justified. Mere similarity in the signatures as seen from photocopies with that on bank deposits is not sufficient to reach the conclusion that the account belongs to the assessee and thus it could not be held that the entire money deposited in the bank account in the name of G is undisclosed income of the assessee. Payment was made by the said association to G who is a transport agent for providing transport facilities and hospitality to the doctors attending a conference. Such expenditure has to be allowed and only the profit can be taken as income of the assessee. In the absence of complete and proper details, the profit is estimated at 10 per cent of Rs. 2,29,184/- and only same can be taken as undisclosed income of the assessee. As regards the remaining deposits made in the said account, entire amount cannot be taken as undisclosed income of the assessee. Facts and circumstances and nature of account have to be analysed. Therefore, matter is restored back to the AO for taking decision thereon afresh.

Purchase of tyres and tubes

Impugned expenditure incurred by assessee having been debited in the books and shown to have been incurred through an employee could not be treated as undisclosed income of the assessee.

Whisky bottles found during search

Whisky bottles received by assessee-doctor as gifts in appreciation of good work done by him did not amount to fee or income and, therefore, value thereof could not be treated as undisclosed income of the assessee in the absence of any documentary evidence or material to show that the assessee himself purchased the liquor out of undisclosed sources.

Shardadevi P. Jhunjhunwala v. CIT (W. P. No. 428 of 1996) (2010) 1 taxmann.com 92 (Bom.)

Any disclosure made subsequent to seizure of incriminating material cannot be called voluntary

Merely because assessee cooperated in deciphering the seized documents would not mean that the revenue authorities could not have deciphered the same without voluntary assistance of assessee.

Prashant S. Joshi v. ITO (2010) 1 taxmann.com 103 (Bom.)

Reasons which are recorded by AO for reopening an assessment are the only reasons which can be considered when formation of belief is impugned

The reasons recorded while reopening the assessment cannot be allowed to grow with age and ingenuity, by devising new grounds in replies and affidavits not envisaged when the reasons for reopening an assessment were recorded.

CIT v. Idea Cellular Ltd. ITA No. 146 of 2009 with ITA No. 784 of 2009 (Delhi HC) [2010] 1 taxmann.com 99 (Delhi)

Commission paid for sale of SIM card, pre-paid or post-paid, is commission as envisaged under section 194H

Essence of post-paid and pre-paid services rendered by the Cellular company is the same and the relationship between the Cellular company and the customers is also the same, therefore, if post-paid scheme is subject to section 194H, it is quite unlikely that pre-paid system would be outside the purview of section 194H.

CIT *v.* Smt. Neena Jain [2010] 1 taxmann.com 101 (Punj. & Har.)

Value of house under construction including investment on construction is not liable to wealth-tax

The incomplete building of the assessee neither falls within the definition of a building, as contemplated under section 2(ea) of the Wealth-tax Act, nor within the purview of 'urban land' as excluded by Explanation 1(b) thereto.

BBC Worldwide vs. DDIT (ITAT Delhi)(ITA No. 1188(Del)06)

Foreign Co not liable to tax in India if Indian agent is paid on arms' length basis

The assessee, a UK company, operated the "BBC World News Channel". It appointed its subsidiary in India (BBC India) to solicit orders for the sale of advertising airtime on the Channel and to pass on such orders to the assessee for acceptance and confirmation. The payment from the Indian advertisers in foreign currency was to be received directly by the assessee while the consideration in Indian rupees would be received by BBC India and remitted to the assessee. BBC India was entitled to receive 15% marketing commission of the advertisement revenues. The assessee claimed that as the revenue was 'business profits' and there was no permanent establishment in India, the income was not taxable in India under the India-UK DTAA. The AO took the view that BBC India was a 'business connection' under s. 9 (1)(i) as well as a 'permanent establishment' under Article 5 of the DTAA and that 20% of the total advertisement revenue was attributable to India. This was upheld by the CIT(A) who estimated the profits of the assessee at 10% of the total advertisement revenue allocable to India on the basis of CBDT Circular No. 742 dated 2.5.96. On appeal by the assessee, HELD deciding in favour of the assessee (without going into the issue of whether there was a business connection or PE) that:

(i) In the transfer pricing proceedings for subsequent years, the department had accepted that the commission of 15% paid to BBC India was fair and at arms' length. It was found that the rate of commission in the assessee's trade was fairly uniform and almost everyone was charging the same rate of commission;

(ii) In Circular No. 23 of 1969 dated 23rd July 1969 the CBDT has held that if a non resident's sales to Indian customers are secured through the services of an agent in India, the assessment in India of the income arising out of the transaction will be limited to the amount of profit which is attributable to the agent's services provided that non-resident's business activities in India are wholly channeled through its agent, the contracts to sell are made outside India and sales are made on a principle-to-principle basis. It has been held that in the assessment of the amount of profits, a deduction will be given for the expenses incurred, including the agent's commission. Accordingly, if the agent's commission fully represents the value of the profit attributable to his service, nothing further can be assessed in the hands of the non-resident;

(iii) This principle that if a transaction is at arms length and the associated enterprise, which also constitutes a permanent establishment, is remunerated on arm's length basis, taking into account all the risks–taking functions, then nothing further would be left to attribute to the permanent establishment has been accepted in Morgan Stanley 292 ITR 416 (SC), SET Satellite (Singapore) 307 ITR 205 (Bom) and Galileo International 114 TTJ 289 (Del) {approved 224 CTR 251 (Del)};

(iv) The consequence is that even if the assessee had a business connection or permanent establishment in India, it could not be assessed to tax in India.

ACIT v. Paradigm Geophysical Pty. Ltd. (2010) 122 ITD 155 (DELHII)

Relief u/s 90 the Act where DTAA exists

Where non-resident is taxable under domestic law but there is a provision in treaty between India and country in which non-resident is incorporated to exempt transaction or reduce rigour of taxation to benefit of non-resident, provisions of treaty override provisions of domestic law.

Section 44BB r.w.s. 9 of the Act and articles 7 and 12 of the DTAA between India and Australia - Business for prospecting/ exploration, etc. of Mineral oil

Assessee, a non-resident company incorporated in Australia, entered into a contract with Reliance Industries Ltd. (RIL) for services, in connection with exploration and extraction of mineral oils. Agreement provided, inter alia, that assessee would undertake work of 2D and 3D seismic data processing based on data collected by RIL to be completed as per agreed delivery schedule that -

- entire processing was to be carried out by assessee at its processing centre located in city of Perth, Australia;
- assessee was duty bound to arrange to get all tapes containing data collected from RIL;
- after comple-tion of job, assessee would return original tapes along with pro-cessed tapes to RIL;

- assessee would provide all committed equipment and personnel for processing job at assessee's Perth office;
- assessee would carry out processing job at single processing centre at Perth;
- assessee would provide licence for software 'Focus 2D/3D' to RIL at Mumbai for a period of four months and also licence for 'VoxGeo' software for a period of two months at no cost to RIL; and
- assessee would deploy all needed resources like manpower, software, hardware, etc., during entire period of contract to meet timely execution and delivery of data and would not divert these resources to any other jobs without prior written approval of RIL

Assessee, originally offered 10 per cent of amount/profit/income received from RIL to tax under section 44BB. Subsequently, assessee resiled from above position and in course of assessment proceedings took stand that since it had no PE in India within meaning of article 5 of DTAA between India and Australia, and further since none of employees of assessee-company came to India and no part of processing activity was carried out by assessee in India, profits arising to it under contract with RIL were not assessable in India as stipulated in article 7 of DTAA. Assessing Officer did not dispute that work of processing had to be carried out by assessee in Perth in Australia, but held that, even if it was so, so long as data was being utilised by RIL in India, provisions of section 44BB were attracted

It was held that since amount received by assessee-company from RIL under contract did not represent consideration for any technical services rendered to RIL or consisted of development and transfer of any technical plan or design within meaning of article 12 (3Xg) of DTAA, consideration would continue to be viewed as business profits under article 7 of DTAA and since assessee had no PE in India, business profits could not be taxed in India.

Section 44BB r.w.ss 9(l)(vii)(b), 44D and 115A, of Act and articles 12 and 13 of DTAA between India and Australia

Assessee, a non-resident company incorporated in Australia and having no PE in India, entered into a contract with Reliance Indus-tries Ltd. [RIL] - As per said contract (i) assessee had to impart training to employees of RIL for operating Geolog software; (ii) assessee was to impart training to personnel of RIL at job sites designated by RIL and was to provide technical guidance and direction to RIL's employees on usage of assessee's proprietary software tools so as to achieve quality levels in conformity with global industry standards; (iii) assessee's representatives would be fully qualified and experienced in carrying out work; assessee would not be an agent of RIL in performing services and maintain-ing complete control and responsibility over its employees; and assessee would maintain confidentiality of data and documents related to project and information obtained from drawings, designs, etc., and other data provided by RIL while performing services. Assessee declared receipts in respect of above contract with RIL under article 13 of DTAA between India and Australia but in course of assessment proceedings resiled from that position and offered to be assessed under section 44BB. It was held that in view of clear Instruction No. 1862, dated 22-10-1990 issued by CBDT that consid-eration for services rendered by a non-resident in connection with prospecting for mineral oil in India would be taxed under section 44BB, assessee was right in offering revenues under section 44BB.

Gharda Chemicals Ltd. v. DCIT (2010) 35 SOT 406 (MUM.)

Section 92C of the Act - Computation of arm's length price

Assessee entered into contract for sale of Dicamba to its associated enterprise (AE), namely, 'G' Ltd., incorporated in USA. Total amount received by assessee as ALP towards export of Dicamba to AE was determined on basis of Comparable Uncontrolled Price Method (CUP method). Assessing Officer referred matter to TPO for determining ALP. TPO noted that assessee had made sale of Dicamba to unrelated parties in other countries at higher price. Accordingly, TPO determined ALP on basis of internal CUP method in preference to external CUP method as used by assessee. Assessing Officer having accepted ALP determined by TPO, made certain additions to assessee's income. Commissioner (Appeals) upheld order of Assessing Officer.

It was held that price on which a particular product is available in one country may largely vary from price prevailing in other countries due to host of factors such as climatic conditions and demand and supply factors, etc. In such a situation, a valid comparison could not be made between price charged by assessee from other countries with that from USA, particularly when quan-tity exported to USA was on wholesale basis whereas it was in smaller lots on retail basis to other countries. In aforesaid circum-stances, internal CUP method adopted by authorities below was to be set aside and, matter was to be remanded to Assessing Officer to get ALP determined from TPO afresh.

Dassault Systems K.K., In Re (2010) 229 CTR (AAR) 105

Sale of software products to independent third party resellers – DTAA with Japan

Applicant, a Japanese company, markets licensed software products mostly through a distribution channel comprising value added resellers (VARs) by entering into general VAR agreements (GVA). Product is sold to VAR for a consideration based on standard list price less discount. VAR in turn sells such products to the end-users at a price independently determined by it. End-users enter into end-user licence agreement (EULA) with the applicant and the VAR. Applicant company grants the licensee (end-user) a non-exclusive, non transferable licence to use the licensed programmes on the computer equipment belonging to the latter or under its control. End-user is not given the authority to do any of the acts contemplated in sub-cls. (i) to (vii) of cl. (a) of s. 14 of the Copyright Act, not to speak of exclusive right to do the said acts. Restrictions are placed on the end-user and the VAR coupled with a declaration that the intellectual property rights in the licensed programmes will remain exclusively with the applicant or its licensors. Entire tenor of the agreement and the various stipulations therein make it clear that no rights in derogation of the applicant's exclusive rights in relation to the copyright have been conferred on the licensee i.e., end-user or VAR. Passing on a right to use and facilitating the use of a product for which the owner has a copyright is not the same thing as transferring or assigning rights in relation to the copyright. Where the purpose of the licence or the transaction is only to establish access to the copyrighted product for internal business purpose, it cannot be said that the copyright itself has been transferred to any extent. A non-exclusive licence permitting user for in-house purpose is not covered by s. 9(l)(vi), Expln. 2. In the absence of an independent right with VAR to conclude the sale or offer for sale, sub-cl. (ii) of cl. (b) of s. 14 of the Copyright Act cannot be invoked to bring the case within the fold of art. 12.3 of the DTAA or s. 9(1)(vi). Thus, no rights in relation to copyright have been transferred. Further, right of using the process involved in the software has also not been conveyed to the end-user. By making use of or having access to the computer programs embedded in the software, it cannot be said that the customer is using the process that has gone into the end-product or that he acquired any rights in relation to the process as such. Therefore, payment received by the applicant from VARs on account of supplies of software products to the end-users is not in the nature of royalty either under the IT Act or under art. 12.3 of the DTAA.

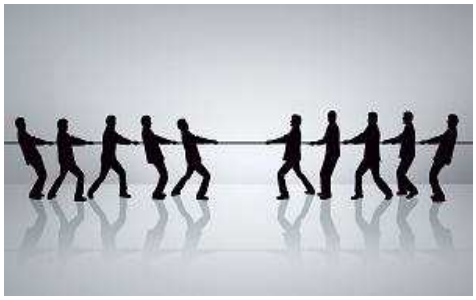
Further, Value added resellers (VARs) who are selling the licensed software products of the applicant, a Japanese company, at prices independently determined by them, subject to certain restrictive terms, cannot be said to be the agents much less dependent agents of the applicant as the business of a VAR is not confined to the dealings only with the applicant and its products nor it is controlled by the applicant except to the extent necessary to promote its own business and, therefore, the applicant cannot be deemed to have a PE in India, and the payments received by the applicant from VARs cannot be taxed as business profits in India under art. 7 of Indo-Japan DTAA.

Rakesh Chauhan v. DDIT (Int'l Taxation) (2010) 128 TTJ (Chd) 116

TDS - Payment towards purchase of land to power of attorney holder of non-resident

Assessee made payment in respect of purchase of land to one P, a resident of India, who was holding power of attorney for five non-resident co-owners. Agreement was entered into with P and it is not the case of the Revenue that the payment has been made to P as a representative nominated by the non-residents. Admittedly, the rights in land were assigned to P by way of power of attorney executed by the co-owners. Thus, he was not merely acting as an agent of the non-residents to receive money but had the right to alienate the land by virtue of rights vested in him by the power of attorney. Sec. 195 applies only to payments which are made to non-residents.

Payment made by the assessee to P cannot be considered as payment to non-residents and, therefore, s. 195 is not applicable and the assessee cannot be treated as an assessee in default under s. 201(1) for not deducting tax at source from the payment made by it. Hence, impugned demand is quashed. Consequently penalty under s. 271C is also not leviable.



Indian Oil Corporation Ltd. v. DCIT (2010) 35 DTR (Mumbai)(Trib) 69

DTAA with Australia - Royalty

Assessee entering into an agreement with an Australian company for setting up a plant for manufacture of bitumen by using Biturox process. Amount paid by IOC is for creating asset in the shape of plant and the consideration is for passing of information concerning the design of plant which is tailor-made to meet the requirements of a buyer. Australian company has granted the right to use the Biturox process, which is embedded in the plant to be set up based on basic design engineering package and not the right to use the license. Consideration is not based on the amount of use. Payment made by IOC was not royalty. Services were not rendered in India nor the Australian company had a PE in India. Amount paid by IOC therefore not being taxable in the hands of the Australian company, there was no requirement for deducting tax at source.

Circulars / Notifications

Circular No. 03/2010 dated 2nd March, 2010.

Sub: Tax Deduction at Source on payment of interest on time deposits under Section 194A of the Income Tax Act, 1961 by banks following Core-Branch Banking Solutions (CBS) software – reg.

As per provisions of section 194A of the Income Tax Act 1961, income tax has to be deducted at source at the time of credit of interest income to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, at the rates in force if such interest amount exceeds specified limit. Further, Explanation to section 194A states that "*for the purpose of this section, where any income by way of interest as aforesaid is credited to any account, whether called 'Interest payable account' or 'Suspense Account' or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly*".

2. Representations have been received from Indian Banks Association (IBA) seeking clarification regarding deduction of tax at source from payment of interest on time deposits by banks using Core-Branch Banking Solutions (CBS) software. In case of banks using CBS software, interest payable on time deposits is calculated generally on daily basis or monthly basis and is swept & parked accordingly in the provisioning account for the purposes of macro-monitoring only. However, constructive credit is given to the depositor's / payee's account either at the end of the financial year or at periodic intervals as per practice of the bank or as per the depositor's / payee's requirement or on maturity or on encashment of time deposits; whichever is earlier.

3. The matter has been considered by the Board. Explanation to section 194A was introduced with effect from 1.4.1987 by the Finance Act, 1987 to plug the loophole of avoiding deduction of tax at source by crediting interest in the books of accounts under accounting heads 'interest payable account' or 'suspense account' instead of to the depositor's / payee's account. Therefore, the Explanation is not meant to apply in cases of banks where credit is made to provisioning account on daily/monthly basis for the purposes of macro monitoring only by the use of CBS software.

4. In view of the above position, it is clarified that since no constructive credit to the depositor's / payee's account takes place while calculating interest on time deposits on daily or monthly basis in the CBS software used by banks, tax need not be deducted at source on such provisioning of interest by banks for the purposes of macro monitoring only. In such cases, tax shall be deducted at source on accrual of interest at the end of financial year or at periodic intervals as per practice of the bank or as per the depositor's / payee's requirement or on maturity or on encashment of time deposits; whichever event takes place earlier; whenever the aggregate of amounts of interest income credited or paid or likely to be credited or paid during the financial year by the banks exceeds the limits specified in section 194A.

Circulars / Notification

Notification No. 9/2010/ F.No. 142/27/2009-SO(TPL) dtd 18-2-2010

Income-tax (First Amendment) Rules, 2010

New Form 16, Form 16A, Form 16AA, Form 27D, and forms showing breakup of TDS and TCS for Financial Year 2009-10 (A.Y. 2010-11)

Please click the link given bottom of this page for the detailed text of the notification.

Instruction No. 1/2010, dated 25-2-2010

Processing of returns of A.Y. 2008-09 - Steps to clear the backlog

The issue of processing of I.T. returns for the A.Y. 2008-09 and giving credit for TDS has recently been considered by the Board and following decisions have been taken, in order to clear the backlog of returns pending for processing:

- In all the returns filed in ITR-1 and ITR-2 for the A. Y. 2008-09, where the aggregate TDS claim does not exceed Rs four lakh and where the refund computed does not exceed Rs.25,000; the TDS claim of the tax payer concerned should be accepted at the time of processing of return.
- In all the returns filed in forms other than ITR-1 and ITR-2 for the A. Y. 2008-09, where the aggregate TDS claim does not exceed Rs four lakh and the refund computed does not exceed Rs.25,000, and there is 70% matching of TDS amount claimed, the TDS claim of the tax payer concerned should be accepted at the time of processing of return.
- In all remaining cases, TDS credit shall be given after due verification.

INDIRECT TAXES

Circulars / Notifications

Notification No. 01/2010-Service Tax, dated 19-2-2010

Service Tax (Amendment) Rules, 2010 - Amendment in rules 6 & 7

In exercise of the powers conferred by sub-sections (1) and (2) of section 94 of the Finance Act, 1994 (32 of 1994), the Central Government hereby makes the following rules further to amend the Service Tax Rules, 1994, namely :-

1. Short title and commencement.- (1) These rules may be called the Service Tax (Amendment) Rules, 2010.

(2) They shall come into force on the 1st day of April, 2010.

2. In the Service Tax Rules 1994 (hereinafter referred to as the said rules), in rule 6, in sub-rule (2), for the proviso, the following proviso, shall be substituted, namely:-

"Provided that where an assessee has paid a total service tax of rupees ten lakh or more including the amount paid by utilisation of CENVAT credit, in the preceding financial year, he shall deposit the service tax liable to be paid by him electronically, through internet banking."

3. In the said rules, in rule 7, after sub-rule (2), the following proviso shall be inserted, namely:-

"Provided that where an assessee has paid a total service tax of rupees ten lakh or more including the amount paid by utilisation of CENVAT credit, in the preceding financial year, he shall file the return electronically".

OTHER LAWS

OTHERS

Vishnu Prakash Bajpai v. SEBI (Crl. M. C. 1182/2009)(Delhi HC) [2010] 1 taxmann.com 88 (Delhi)

For a person to be vicariously liable for an offence committed by a company under SEBI Act, he need not necessarily be a Director of that company; even without being a director he can be shown to be a person in charge of and responsible to company for conduct of its business.

Even if the accused was not a director of the Company but was one of its promoters, it is open to the SEBI, to prove, during trial that being a promoter of the company, he was a person in charge of and responsible to the company for conduct of the business of the company.

RBI introduces new category of NBFCs

- The Reserve Bank of India (RBI) issued a notification introducing a new category of Non-Banking Finance Companies (NBFCs) as "**Infrastructure Finance Companies (IFCs)**".
- The existing categories of NBFCs are Asset Finance Companies (AFCs), Loan Companies (LCs) and Investment Companies (ICs).
- Further with a view to encouraging larger flow of funds to infrastructure, the exposure of a bank to infrastructure finance companies has been enhanced up to 20 per cent of its capital funds.

OTHER LAWS

Judicial pronouncements

- The IFCs should deploy a minimum of 75 per cent of itstotal assets in infrastructure loans.
- Net owned funds of Rs. 300 crore or above with a minimum credit rating 'A' or equivalent of Crisil, Fitch, CARE, ICRA or equivalent rating by any other accrediting rating agencies could enter infrastructure financing.

Govt to release monthly data on outward investments

- With India Inc emerging as an important player in the global merger and acquisition market, the government has decided to release the data on outward investments every month from next fiscal.
- The Department of Industrial Policy and Promotion (DIPP) is closely working with the Reserve Bank of India.
- At present, the government releases detailed foreign direct investment inflows to India on a monthly basis.
- DIPP was working with a committee headed by RBI Deputy Governor Shyamala Gopinath regarding this. The committee has devised a format for detail collection of outward fund flows.

Due Dates of key compliances pertaining to the month of March 2010:

5th Mar.	***Payment of Service Tax & Excise duty for February***
6th Mar.	***Payment of Excise duty paid electronically through internet banking***
7th Mar.	***TDS/TCS Payment for February***
10th Mar.	***Excise Return ER1 / ER2 /ER6***
15th Mar,	***PF Contribution for payment by SSI***
15th Mar,	***Payment of last installment of Advance Tax***
21st Mar.	***ESIC Payment for February***
31st Mar.	***Service Tax payment for Individual/HUF for the period Jan to March*** ***Excise/Service Tax payment for March*** ***Filing of belated pending returns***

OUR OFFICES:

- **MUMBAI**
  - 303, Konark Shram, 3rd Floor, 156 Tardeo Road, Tardeo, Mumbai-400 034.
  - 49/2341, M.H.B. Colony, Ghandhinagar, Bandra(E) Mumbai-400 051

  Tel. : 91-22-26428494, 26451439, 26515396
  Fax : 91-22-26455586
- **PUNE**

  E-2-B, 4th Floor, The Fifth Avenue, Dhole Patil Road Pune.

  Tel. : 91-20-32549007-8 Fax : 91-20-30529401
- **SURAT**

  'SNK House' 31-A, Adarsh Soc, Opp. Seventh Day Adventist High School, Athwalines, Surat-395 001.

  Tel. : 91-261-2656273-4 & 6544791-2 & 3299540 & 47
  Fax : 91-261-2656868
- **AHMEDABAD**

  111, Nalanda Enclave, Opp. Chicago Hotel, Pritamnagar, Ellisbridge Ahmedabad-380 006.

  Tel-fax: 91-79-26586348 & 30006348