INCOME TAX APPELLATE TRIBUNAL ORDER

2009-TIOL-602-ITAT-MUM

ADIT, Mumbai Vs M/s Reliance Infocomm Ltd (Dated: September 9, 2009)

Income tax - Sec 195, 244A - Assessee enters into a contract with a non-resident company from Israel for purchase of telecom software - approaches Revenue for no TDS certificate - AO treats the payment as royalty, liable to tax in India - TDS deducted u/s 195(2) and deposited - Appeal filed - CIT(A) finds non-resident recipient of payments is not taxable in India - directs AO to refund the tax deposited - also holds that the assessee is entitled to refund with interest u/s 244A - held, issue is no longer res integra as it has been settled by the Tribunal that the order u/s 195(2) is appealable u/s 248, and once an appeal is filed and the decision favours the assessee, refund u/s 244A with interest is admissible - Revenue's appeal dismissed

2009-TIOL-601-ITAT-DEL-TM

M/s KRBL Ltd Vs DCIT, New Delhi (Dated: July 20, 2009)

Income Tax - Section 263, 80IA and 80HHC - whether deduction u/s 80IA is to be reduced while computing the deduction u/s 80HHC - CIT in exercise of his revision jurisdiction u/s 263 forms an opinion otherwise and directs the AO to reduce 80IA deduction while computing deduction u/s 80HHC because of the provisions contained in section 80IA (9) - JM holds that the order passed u/s 263 for all the three assessment years under consideration cannot be justified in law because the orders of the AO cannot be treated erroneous in law and prejudicial to the interests of revenue - AM holds that action u/s 263 has been correctly taken on the facts of this case and deduction u/s 80IA and 80HHC would have to be recomputed in terms of the decision of the Special Bench in case of Rogini Garments - Held, what is to be seen to enable the CIT to exercise jurisdiction u/s 263 is whether the matter at the time of exercising that jurisdiction was free from doubt and if yes, then he can exercise the jurisdiction but where there are conflicting views available of the Tribunal or High Courts, the CIT would not be legally in a position to exercise jurisdiction u/s 263 in view of the Apex Court decisions, CIT order liable to be quashed - Assessee's appeal allowed

2009-TIOL-600-ITAT-MUM

DCIT, Mumbai Vs M/s Citicorp Finance (India) Ltd (Dated: August 12, 2009)

Income Tax - deduction u/s 80M - Assesee, a NBFC, claims deduction u/s 80M of the earned gross dividend income and submits that no expenditure incurred for earning the same - AO says only the net dividend income is eligible for deduction u/s 80M, and on the fact that the total of the said expenditure is greater than the gross

dividend, restricts the disallowance. Consequently, AO denies the claim of deduction u/s 80M - CIT(A) confirms the stand taken by the AO - Held, the disallowance of administrative expenditure is unwarranted;

On the issue of Venture Capital advisory fee - Held, CIT (A) shall take into account the binding jurisdictional High Courts judgment in the case of GIC while deciding the issue afresh and proceed to adjudicate the issue only after considering the requirement of establishing the direct relationship between the advisory services rendered and the earning of the dividend.

2009-TIOL-599-ITAT-AGRA-TM

Shri Kulbir Singh Vs CIT, Agra (Dated: January 5, 2009)

Income Tax - Section 263 - Assessee is an individual and derives income from manufacture and export of shoes - the 100% EoU claims relief u/s 80HHC - CIT acting u/s 263 considers the order passed by the AO u/s 143(3) as erroneous and also prejudicial to the interest of the Revenue so far as it relates to certain cash credits appearing in the books of account - As per CIT the cash credits have been accepted by the AO on the basis of certain papers filed by the assessee without making any enquiries about the genuineness of the transaction and creditworthiness of the creditor - JM does not find favour CIT's order and according to her, there is no error in the impugned assessment order, let alone causing prejudice to the interest of the Revenue - AM, on the other hand, supports the order of the CIT - Third Member holds that in view of Apex Court decision in Malabar Industrial Company Ltd and Bombay High Court decision in CIT vs. Gabriel India Ltd the order of CIT u/s. 263 cannot be sustained - Having regard to the facts and details that were there before AO, he would have left with no other alternative but to definite conclusion that the cash credits deserve to be accepted.

2009-TIOL-598-ITAT-BANG

M L Krupal Vs ITO (Dated: June 26, 2009)

Income Tax - Pursuant to a scrutiny assessment u/s 133A on the assessee's (a wholesale dealer in coffee) premises, AO disallowed the loss finding that the gross profit rate returned was 0.96% and there were inflated purchases and manipulated closing stock for which no records were maintained - CIT(A) confirmed AO's order - Held, though assessee could not explain the purchases because it did not maintain the purchase register, he, however, has offered the enhanced income on account of the exact valuation of stock that was from all purchases which the Assessing Officer did not consider as closing stock for taxation in pursuance to the survey proceedings wherein the sales tax returns are verified and accepted - Held, matter is restored to the file of Assessing Officer for reconsideration - Assessee's appeal allowed for statistical purposes.

2009-TIOL-597-ITAT-BANG

ACIT Vs Honeywell Technology Solutions Lab Pvt Ltd (Dated: August 4, 2009)

Income tax - Sec 10A - Assessee is in the business of software development - incurs expenditure in foreign currency on travel - AO is for deduction of such expenditure from export turnover before Sec 10A benefits are allowed - CIT(A) orders for deduction of the same from total turnover also - held, since the philosophy incorporated in Sec 10A is the same that of Sec 80HHE, there is no infirmity in the CIT(A) order - Revenue's appeal dismissed.

2009-TIOL-596-ITAT-CHD

Himachal Pradesh Environment Vs CIT (Dated: August 28, 2009)

Income Tax - preservation of environment covered under charitable activity – Pollution Control Board pursuing objects of general public utility. Collecting fee does not affect the situation - Cancellation of Registration as charitable organisation quashed - No conflict in an assessee being a regulatory body and its pursuing an 'object of general public utility' which qualifies to be a charitable activity under section 2(15) of the Act. The scope of expression 'any other object of general public utility' is indeed very wide, though it would indeed exclude the object of private gain such as an undertaking for commercial profit even as the undertaking may subserve general public utility. Courts have taken a very broad view of the connotations of 'objects of general public utility'. Bearing in mind the fact that assessee is admittedly engaged in the activities for the purposes of "prevention, control or abatement of pollution", the objects of the assessee trust are of general public utility. The assessee was indeed pursuing objects of general public utility.

As far as assessee being engaged in trade, commerce or business is concerned, it is not even the Commissioner's case that running an organization, set up under the statute, for controlling, preventing and abating pollution, is pursuing trade, commerce or business. Obviously, a trade, commerce or business implies an activity with profit motive even though public good may be a secondary benefit from such an activity. That is not the case here. The legal framework under which the assessee is set up is quite clear and unambiguous and it reflects will of the lawmakers in no uncertain terms, which is to prevent pollution.

Also see analysis of the Order

2009-TIOL-595-ITAT-MUM

Fidelity Investment Trust Fidelity Overseas Fund Vs ADIT (Dated: August 18, 2009)

Income tax - Sec 111A, 115AD - Assessee is non-resident investor - invests in shares - claims set off of short term capital loss u/s 111A against short term capital gain u/s 115AD - AO disallows on the ground that capital loss made after 30.9.2004 cannot be set off against capital gains made prior to this cut-off date when the Securities Transaction Tax was levied - held, the assessee has the option to set off short term capital loss against the short term capital gains as per the provisions of section 70(3) r.w. s.111A and 115AD of the Income tax Act - Assessee's appeal allowed

2009-TIOL-594-ITAT-DEL

Shri Rajan Nanda Vs DCIT, New Delhi (Dated: May 15, 2009)

Income Tax - penalty u/s 271(1)(c) - Assessee is chairman of two corporate bodies - companies pay certain sums to the assessee for payment of premium towards keyman insurance policy of the LIC - assessee takes policies of the sum less than the payments made - assessee also does not declare the same in his income - AO considers that the policies on which huge amounts are paid as premia, are assigned in favour of assessee on payment of nominal amount in the immediately succeeding year. It is further held that this is a colourable device to pass on benefit to the assessee, which is not shown by assessee for the purpose of taxation. Therefore, the amount paid by the company before assignment as reduced by the amount paid by the assessee to the company for assignment is taken as income and further held that the amount received by the assessee on maturity of the policy taken from LIC as a keyman insurance policy and initiated the Penalty proceedings for non-inclusion of the aforesaid income in the total income of the assessee - CIT(A) upholds penalty - Held, the issue whether any thing was left for taxation at the time of receipt is a matter of considerable debate and discussion. In view of the decisions of Delhi High Court, the explanation tendered by the assessee was bona fide notwithstanding the fact that sketchy disclosure was made in the return of income. The whole question has to be seen under Explanation-I with a view to examine whether the explanation was bona fide and adequate disclosure was made to arrive at the correct total income. As the whole issue is beset with controversy about the taxation of the amount assesseee, Assessee's Appeal allowed.

2009-TIOL-593-ITAT-MUM

DDIT, Mumbai Vs M/s Van Oord Dredging & Marine Contractors BV (Dated: August 21, 2009)

Income tax - Sections 147/148 - Assessee is a non-resident company, engaged in dredging operations in India - claims depreciation on exported / re-exported plant and machinery - AO disallows - CIT(A) deletes the additions - held, issue is no longer res integra as it is settled in favour of the assessee - Revenue's appeal dismissed

2009-TIOL-592-ITAT-MUM

M/s Arya Offshore Services Pvt Ltd Vs ACIT, Mumbai (Dated: May 20, 2009)

Income tax - Sec 32(1) - Assessee takes office premises on lease - claims deduction for various expenses incurred on renovation and furnishing of the office - AO disallows on the ground that none of the expenses were incurred for preservarion and maintenance of the existing assets and new assets like furniture were created - depreciation allowed - CIT(A) agrees with the AO - held, it has been held by the Tribunal in the case of Star India that the Explanation 1 to section 32(1) would apply only if the expenditure per se is capital in nature and is incurred on construction for improvement, renovation or extension of the building taken on lease. And an expenditure can be termed as capital expenditure if it is brings into the existence a new asset of enduring nature. Expenditure incurred on repair of existing assets cannot be called expenditure as in such cases no new assets can be said to have come into existence - issue remanded for fresh examination

2009-TIOL-591-ITAT-MUM

M/s Morgan Stanley Asset Management Inc Vs DCIT, Mumbai (Dated: August 11, 2009)

Income tax - Sec 139(9) and 292B - Assessee is an FII, having sub-account called A/C Morgan Stanley India Investment Fund Inc - files return - then revises return - total income consists of interest and dividend - assessee claims set off for losses under the head 'capital gains' - AO finds the verification of return was not done in accordance with the law - points out defects which are not enumerated in the list provided u/s 139(9) - also takes the view that provsions of Sec 292B not applicable in this case - holds that the returns filed are invalid and non est - CIT(A) dismisses the appeal on the ground that power of attorney given by the non-resident was not notorised by any authority of that country - held, types of defects enumerated in Sec 139(9) are only inclusive, and not exhaustive - Even if there are some other defects or irregularities, apart from those mentioned in the Explanation to Sec 139(9), which are merely in the nature of non-compliance of certain formalities or some irregularities, those will still be considered as impliedly included in section 139(9) and the return not fulfilling such requirements will become defective and not invalid;

++ there is no substance in the Assessee's plea that filing return in a wrong form is not a serious deficiency as long as the facts are correctly disclosed. If the assessee's plea is accepted it would result in a chaos as the I-T Act prescribes different types of Forms for different classes of taxpayers, and if all the assessees begin filing returns in their choice Forms, it would defeat the very reason for providing different Forms as per the Act. AO directed to issue defect memo to the assessee and give a fair opportunity to rectify the same - the AO's decision to invalidate defective returns not sustainable

Also see analysis of the Order

2009-TIOL-590-ITAT-BANG

ITO, Mysore Vs Shri M B Ramesh (Dated: June 19, 2009)

Income Tax - Assessee, HUF, furnished a loss return by claiming exemption u/s 54F for having purchased residential property from capital gain arisen on sale of property - AO held assessee had not declared the CG accruing on the transfer of the property resorting to incorrect computation - CIT(A) allowed exemption u/s 54F but held the indexation was done wrongly by the assessee - Held, assessee was not entitled to exemption u/s 54F because no pertmanent structure was built and there was no other sign of any house /foundation on the site mentioned by the assessee which did not have the look of a well developed and maintained - Revenue's appeal allowed.

2009-TIOL-589-ITAT-NAGPUR

Western Coalfields Ltd Vs ACIT, Nagpur (Dated: June 30, 2009)

Income Tax - Assessee is a subsidiary of Coal India Ltd (CIL) - makes a provision for incremental wages on the basis of directions received from CIL., the holding company after the closure of the F.Y. but before the finalization of audited account. The provision made at 10% of the basic pay on the basis of past history, subject to the final agreement under negotiation. A.O., forms an opinion that since the agreement had not been signed, hence, this liability had neither accrued nor crystallized in the year under consideration and, therefore, in the nature of contingent liability, hence, not allowable. CIT(A) confirms the decision of the A.O - Held , such provision needs to be recognized in the year under consideration. Making of such provision is also in consonance with the principle of matching of cost with the Revenue. The impugned amount is allowable as an expenditure in the year under consideration.

Explanation 1 to section 37(1) - On the issue of CIT(A) confirming the disallowance in respect of overloading charges, under loading charges and credit notes issued by the assessee to its customers for stones, shells, etc., contained in the consignment sent to them at various point of time-Held, all the three charges have been clubbed together without analyzing the exact nature of these items. As far as underloading charges and credit notes are concerned, these expenses have been incurred by the assessee as a consequence of agreement with its customers and these have not been paid to Railways like overloading charges, hence, at the very outset, these are not covered within the ambit of Explanation 1 to section 37(1). The fact of incurrence of these expenses for the purpose of business is also not in doubt. These are allowable expenses as incurred for the purpose of business. Grounds no.5 and 6 allowed. As regards overloading charges the object of Explanation 1 also supports the claim of the assessee as these expenses are not of the nature of any illegal / unlawful expenditure. Ground 4 allowed. Assessee Appeal allowed.

2009-TIOL-588-ITAT-MUM

M/s Akshnishit Investments & Trading P Ltd Vs ITO, Mumbai (Dated: May 5, 2009)

Income Tax—Assessee, an investment company, claimed the profit on mutual funds under the head 'capital gains'—AO held that the assessee had traded in mutual funds and therefore the profit in respect of the transaction was assessable business profit—CIT(A) dismissed assessee's appeal—Held, the frequency of the transaction in the year under appeal is not as a result of actual purchase and sale but transfer from one fund to another fund and the profits thereof has been assessed as profits on investments—Held, intention of the assessee to trade in the units of mutual funds is absent in this case and, thus, profit should be assessable under the head 'capital gains' and not under the head 'profits and gains of business'—Assessee's appeal allowed.

2009-TIOL-587-ITAT-MUM

ADIT , Mumbai Vs M/s Citibank NA (Dated: August 5, 2009)

Income tax - Sec 36(10(vii) - Assessee is a bank incorporated in the USA - claims deduction for bad and doubtful debts - the proviso to section 36(1)(vii) lays down that the amount that will be allowed as deduction on account of bad debts written off cannot exceed the actual debt written off in the books of account of the previous year including the provision for bad debts which is claimed as deduction u/s. 36(1)(viia) - AO allows deduction for provision for bad debt as it was within the 5% range - CIT(A) disagrees and deletes additions - held, given the fact that the assessee cannot get more deduction than the actual debts written off in the books, if the assessee gets the

same by way of provisions for bad debts and also the actual debts written off, it cannot, under any circumstances, exceed the total figure written off as irrecoverable in the books - CIT(A) order upheld - Revenue's appeal dismissed

2009-TIOL-586-ITAT-DEL

SRF Ltd Vs DCIT, New Delhi (Dated: June 26, 2009)

Income Tax – Excise Duty deposited in PLA, though not due – allowable deduction under section 43B - deduction for tax, excise duty etc. is allowable under section 43B on payment basis even before incurring liability to pay such amount. Since in the present case the amount is already paid by way of excise duty, though lying in PLA balance, yet the same is payment towards excise duty and hence allowable in terms of section 43B of the Act.

Prior period expenses allowed irrespective of the year in which it pertains as the liability got crystallized during the relevant previous year; 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 is allowable in the year in which the liability got crystallized.

Issuance of shares in lieu of interest liability cannot be considered payment towards expenditure – disallowed - The word "expenditure" is not defined under the Act. When the assessee issues shares the assessee does not incur any expenditure as the assessee is not to make any payment legally towards shares issued. Thus by issuance of shares the assessee cannot be said to have incurred any expenditure and hence issuance of shares in lieu of interest liability cannot be considered to have been payment towards expenditure. **Accordingly the interest liability discharged is not an allowable expenditure.**

Also see analysis of the Order

2009-TIOL-585-ITAT-MUM

DDIT, Mumbai Vs M/s Scientific Atlanta Inc (Dated: July 3, 2009)

Income Tax - Indo-USA DTAA - Article 12(4) - Assessee is tax resident of the USA - enters into agreement with Indian Company to provide Satellite Network Communication System and certain installation and commissioning services - AO treats the consideration paid for Project management and engineering support services and Factory acceptance test services as fees for included services under the DTAA - CIT(A) deletes the addition - held, merely rendering some technical services in themselves is not covered under the Article 12 of the DTAA until it is 'made available' to the recipient for further use, even once if not on continuous basis - since in this case the non-resident company has only provided services assoicated with the supply of equipmentm and that too outside India, it is not taxable until the assessee has a PE and the income is attributable to the PE.

Business income - Article 7 - Since the receipt is not fee for included services, it is business profits for the assessee as per Article 7 - however, such income of the enterprise is taxable in the other contracting state only if it is attributable to the PE -

but since the assessee has no PE in India, it is not taxable - Revenue's appeal dismissed
Also see analysis of the Order
2009-TIOL-584-ITAT-DEL
Harish Dargan Vs DCIT, New Delhi (Dated: June 05, 2009)
Income Tax - Section158 BFA(2) - Search and seizure operation conducted at the residence and business premises of the assessee - books of account, documents and assets found and seized - On Notice u/s 158BC assessee files nil return - On assessment, undisclosed income of the assessee for the block period computed, comprising of unexplained cash and the value of unexplained investment in gold and diamond stocks - Penalty imposed u/s 158BFA(2) - CIT(A) dismisses appeal - Held, assessee has not obtained the documents in due process of law - there is no affidavit about the manner in which the documents were obtained by the assessee. These documents are not considered for deciding the proceedings. This case relates to the cash and stock found from the assessee. His explanation was examined and was not found to be bona fide right up to the stage of Tribunal in quantum proceedings - CIT(A) order of penalty u/s 158BFA(2) upheld - Assessee's Appeal dismissed.
2009-TIOL-583-ITAT-MAD
Lohia Metals Pvt Ltd Vs ACIT, Chennai (Dated: May 29, 2009)
Income Tax - Assessee Company showed long term capital gain on sale of shares which was converted into investments claiming that conversion of stock into capital asset was not a transfer - AO held that stocks acquired the character of capital assets only after conversion and therefore, not a long term capital gain - CIT(A) confirmed AO's order—Held, capital asset came into existence only from the date of conversion before which it was merely a stock in trade and the same cannot be treated as capital asset as per the definition of capital asset and, therefore, the holding period prescribed in sec.2(42A) has also to be reckoned when the shares became capital asset - Assessee's appeal dismissed.
2009-TIOL-582-ITAT-DEL
ACIT, New Delhi Vs M/s Citi Finance Consumer Finance (I) Ltd (Dated: August 21, 2009)
Income Tax - Section 147 /148 - Reopening of assessments after lapse of four years from the end of relevant A.Y which under the proviso to section 147 could not be done – CIT(A) cancels assessment - Held, assessment is sought to be reopened on three counts. That in respect of all these three issues, the A.O. has raised queries in original assessment before allowing respective claim/loss by the assessee. It cannot be said that there was any failure on the part of the assessee to disclose fully and truly all material facts relevant for assessment for that year. Instant reopening is covered by proviso to section 147. Revenue's appeal dismissed.

2009-TIOL-581-ITAT-MUM

Warden International (Agencies) Pvt Ltd Vs DCIT, Mumbai (Dated: April 17, 2009)

Income tax – Section 263 – Assessee claimed interest free Lease Rent/License compensation deposit of Rs. 35,20,000/- following cash accounting method as rent paid to the sub-lessor for a period of 25 years which was to be adjusted and appropriated every year for a entire period of 25 years – CIT invoked provisions of section 263 considering that cash system of accounting could never extend to include allowance for any sum which was liability for a future period and therefore, assessment order in this regard was erroneous in so far as it was prejudicial to the interest of Revenue – Held that there was no dispute that the assessee was following cash method of accounting, whole amount was paid by the assessee to the sub-lessor, copy of sub-lease agreement was placed before the AO, as per the agreement the amount was to be adjusted / appropriated for 25 years, the assessee was not having any right to terminate the lease at any time before expiry of 25 years and the assessee paid the amount with no right to recovery. Therefore, it cannot be stated to be an erroneous treatment especially since assessee was following cash system of accounting. The provision of Section 263 could not be invoked to correct each and every type of mistake or error committed by an AO and it was only when an order was erroneous, the section would be attracted and as there was no error which was prejudicial to the interest of the revenue, CIT was not justified in invoking section 263 of the Act.

Assessee declared a short term capital gain of Rs. 1,61,36,066/- on sale of shares – the assessee submitted the details of purchases and sales alongwith the bills, contract notes and a statement from NSDL. Though the AO was having full details, he had not taken the view that the transactions of sale and purchase be taken as a business venture – CIT invoked section 263 considering the transactions as business transactions – Held that cryptic order of the AO would not mean that there was lack of enquiry. It is not that the AO had simply accepted entries in the statement of the account of the assessee but on the other hand, he had called for the supporting materials and therefore, application of mind is obvious. The view taken by CIT as well as by AO is possible. As there is no error in the order, CIT was not justified in invoking section 263.

Travelling and conveyance expenses – CIT invoked section 263 stating that AO did not make scrutiny of the details submitted by the assessee regarding the foreign travelling which requires to be examined and held the assessment as erroneous – Held that during the assessment proceedings assessee was asked to provide the details of the travelling and conveyance expenses and was asked why disallowance should not be made for the personal element in the expenses incurred. This shows that AO allowed the claim of the assessee considering the details and records produced by the assessee. Order is not erroneous and appeal of the assessee is allowed.

Assessee claimed expenses towards STT which was wrongly allowed by the AO though it was not an allowable expenditure u/s 40(ib) – Assessee stated that it is a rectifiable mistake and as the assessee was eligible to get rebate u/s 88E, there is no error which is prejudicial to the interest of the revenue – Held that rebate u/s 88E is allowable only in case the income is shown under the head 'profits and gains of business or profession' and it is not for the assessee to claim or assert that an authority should invoke only one particular set of powers when a different set of powers are also allowable to it. CIT rightly invoked the provisions of section 263 as the error for allowing the STT was prejudicial to the interest of the revenue.

Payment of processing fee to the bank for expansion of the business – Section 263 was invoked considering the expenses as capital in nature – Held that AO was having the copy of the sanction letter of the bank for expansion of the business and

therefore, it is considered that the expenditure is allowed only considering the details and explanations filed by the assessee and there is no error in the order of the AO – CIT erred in invoking the provisions of section 263.

CIT considered the order of the AO to be erroneous since he failed to verify the information from computer system under CASS – Held that assessee was having no control over the process and methods by which Department is compiling the information and an assessee could not be burdened with an onus to explain why an AO chose not to download or upload any data from its information system. Whatever details were sought from the assessee with regard to its investments, technical fees, commission income were all admittedly furnished by it before the AO in the course of the assessment proceedings and if the AO was satisfied on such details, it cannot be held that the order was erroneous. Appeal of the assessee allowed.

2009-TIOL-580-ITAT-MUM

DDIT, Mumbai Vs M/s Ciba Speciality Chemicals Inc Dasle (Dated: August 4, 2009)

Income tax - India-Swiss DTAA - Assessee enters into agreement with an Indian company for providing engineering services - royalty income - assessee offers the income for taxation @ 10%, relying on the understanding that the Germany where the rate is 10% and Swiss Confederation are members of the OECD and only lower rate is applicable to the OECD Member countries - AO applies 20% rate as per Article 12(2)(a)(i) - Also levies penalty u/s 271(1)(c) - CIT(A) deletes penalty - held, given the fact that the assessee has disclosed all the facts and had a bona fide belief to apply lower rate, it does not call for levy of penalty - Since neither concealment of income nor incorrect income particulars are funished in this case, penalty is not imposable - Revenue's appeal dismissed

2009-TIOL-579-ITAT-DEL

DSD Industrieanlagen GmbH Vs DDIT (Dated: July 24, 2009)

Income tax - Sec 44BBB - Assessee is a German company - provides engineering and technical services to various power projects - As per DTAA, its profits attributable to PE along are taxable in India - offers 10% of taxable profits of the project office and claims deduction for losses incurred by the branch office - AO observes that the assessee has offered profits to tax on book profit basis rather than the deemed income which is on higher side - applying principle of consistency AO holds that the assessee be taxed on net profit basis as it was done in the previous year assessment - CIT(A) agrees with the AO - held, the principle of consistency cannot be invoked in a case where the law itself mandates that if proper books are maintained and the same are audited, a foreign company is allowed to show income even less than deeming income at 10% - since the assessee has followed normal book keeping procedure as per the special provision of Sec 40BBB, it cannot be forced to follow the net profit method for declaring profit in the name of principle of consistency - Assessee's appeal allowed

Also see analysis of the order

2009-TIOL-578-ITAT-DEL

Smt Seema Gupta Vs DCIT, New Delhi (Dated: April 22, 2009)

Income Tax - Section 142A - A search and seizure action u/s 132(1) conducted in the case of Grain merchants group which included the residential premises of assessee as well. A notice u/s 153A issued to the assessee. Assessee had purchased a property - AO referred the matter to the Departmental Valuation Officer u/s 142A who determined the value in excess of assessee's claim - AO makes additions - CIT(A) reduces addition - Held, revenue could not produce any material which could require valuation of the property to be referred to valuation officer u/s 142A - on this ground alone, the addition cannot be made and the order is to be vacated. The comparable case referred to by the District Valuation Officer for the purposes of valuation has been found by the CIT (A) to be not a comparable one as it was in respect of a property located at 9 kms away from the property owned by the assessee. Rough estimate of CIT (A) has no basis and hence addition cannot be made. Assessee Appeal allowed and Revenue Appeal dismissed.

2009-TIOL-577-ITAT-DEL

ACIT, New Delhi Vs M/s Sage Publications India Pvt Ltd (Dated: April 30, 2009)

Income Tax - Assessee claims deduction on account of litigation settlement expenses - AO disallows it - CIT(A) allows assessee's claim – Held, the expenditure was the liability of the assessee company incurred as a prudent amount and was allowable deduction - Revenue's Appeal dismissed.

2009-TIOL-576-ITAT-MUM

Bombay Dyeing & Mfg Co Ltd Vs ACIT, Mumbai (Dated: April 29, 2009)

Income Tax - Assessee, engaged in the business of manufacturing and sale of textile and DMT, filed a revised return and AO issued revised intimation u/s 143(1)(a) - Held, It is not open to the revenue to issue intimation under section 143(1)(a) of the I-T Act, 1961, after notice for regular assessment is issued under section 143(2) - held, once a regular assessment proceedings having been commenced under section 143(2), there is no need for a summary pro ceeding under section 143(1)(a) - W.r.t. deduction u/s 80HHC which was disallowed by the AO, it was held merely on the basis of change of opinion reassessment proceedings cannot be initiated - Held, there has to be some material or information before the Assessing Officer at the time of formation of belief regarding of assessment which constitutes the reasons for reopening of assessment - Assessee's appeal allowed.

2009-TIOL-575-ITAT-DEL

Sutlej Industries Ltd vs ACIT, Delhi (Dated: April 24, 2009)

Income Tax - Assessee Company, a member of AOP, claims set off on account of its share of losses in AOP losses - AO allows the losses - CIT issues notice u/s 263 proposing revision of assessment order - Held, considering the provisions of sections 67A, 86 and 167B, that both on the grounds that there are no provisions to carry forward or set-off of loss of AoP against the income of the members and also because of the provisions of section 167B, neither income nor the loss can be taxed or allowed as deduction in the hands of the member of AoP - Assessee's appeal dismissed.

2009-TIOL-574-ITAT-MUM

ACIT Vs Shri Shreegopal Purohit (Dated: June 30, 2009)

Income Tax – Section 43(5) - Assessee set off the loss from speculation loss of the current year as well as brought forward speculation loss from income earned from F & O transactions considering the same as speculative income as per the definition of speculative transaction – AO treated the same as non speculative transactions as per the definition given in section 43(5) amended by Finance Act 2005 which as per AO is clarificatory in nature – CIT (A) allowed the appeal of the assessee stating that without delivery F & O transactions are speculative in nature and amendment is applicable prospective – Held following the decision of Jaipur Bench in the case of P S Kapur (29 SOT 587), as the F & O transactions are intangible and are not capable of delivery or transfer, it does not satisfy the basic ingredients of section 43(5) and the amendment is clarificatory in nature. Revenue's appeal is allowed and the F & O transactions are not speculative transactions.

2009-TIOL-573-ITAT-MUM

Mr Bomi S Billimoria Vs AC, Mumbai (Dated: June 30, 2009)

Income tax – Gain on ESOP sale - Assessee an employee of Johnson & Johnson, Bombay receives an option to buy the shares of Johnson & Johnson, USA under a stock option plan at the fair market value on the day of granting the option – RBI approves the scheme on the condition that there should not be any payment, either in India or abroad, for acquiring the shares – As per the scheme of the ESOP, the option could be exercised after 11.7.1991 but not after the expiration of the 10 years – Assessee exercised the option and sold the shares on 13.08.1992 and claimed that the gain is not taxable as the assessee did not pay any amount towards cost of acquisition – AO stated that the profit on sale of stock option is liable to be taxed either as salary or short term capital gains or speculation profit – CIT (A) considered that the amount in question is liable to be taxed under the head "capital gains" and as the cost is reduced at the time of sale of shares, it cannot be said that the cost of the shares is nil. Moreover, ESOP is a capital asset and therefore as the holding period is less than 3 years, the capital gain is long term capital gain – Held,

++ that shares purchased under ESOP amounts to capital asset and sale of such shares amounts to transfer of capital asset following the decision of Special Bench Mumbai in the case of Sumit Bhattacharya Vs. ACIT.

++ that as per the terms of Reserve Bank of India, no payment was made by the assessee and thus there is no cost of acquisition in which event the amount received is not liable to tax under the head 'Income from Capital Gains' applying the decision of BC Srinivasa Shetty.

++ that even if it is assumed that the market value of the share is the benefit given

to the assessee, it can be said to accrue only on the date of exercise of option and in this case, the date of exercise of option and the date of sale is same and there is no difference between the deemed cost of acquisition and the actual price realised. Therefore the CIT (A) is not justified to direct to tax short term capital gain.

2009-TIOL-572-ITAT-MUM

M/s G R Engineering Works Ltd Vs ACIT, Mumbai (Dated: April 16, 2009)

Income Tax - Assessee contributes funds to partnership firms - earns exempt income u/s 10(2A) - AO disallows deduction for interest claimed under section 14A - In alternate Assessee submits a revised working u/s 14A - CIT(A) considers the submission and restricts the disallowance - Held, the issue is covered by the Special Bench decision in the case of Daga Capital Management Pvt. Ltd. In view of the findings CIT(A) has correctly worked out the disallowance which does not require any modification. Assessee's ground rejected.

On the issue of deduction u/s 80IB on interest and rent received - Held, in view of the findings of lower authorities in respect of rent and in the view of Apex Court decision in CIT Vs. Pandian Chemical Ltd in respect of interest, the assessee is not entitled for 80IB deduction - Assessee's Appeal dismissed.

2009-TIOL-571-ITAT-DEL-SB

M/s Concept Creations Vs ACIT, Panipat (Dated: September 15, 2009)

ITAT Members who retired prior to 3.6.2009 and Members who resigned before being confirmed can practice in ITAT: Bar on practice before ITAT does not apply to Members who have retired prior to the date of publication of notification; it applies to the Members who retired from the Tribunal on or after the date of the publication of this Notification.; once the Member reties after the date of Notification, it certainly applies. It does not matter when the Members were recruited. Even it applies to the Members who are recruited prior to the date of Notification. Crucial date must be the date of retirement. If it is after 3rd June, 2009, it applies.; the Members who retire on or after 3-6-2009, even if otherwise qualified to practice u/s 288 of the Act, would still be debarred to appear and argue before the Tribunal, in the light of Rule 13E of the ITAT Members (Recruitment and Conditions of Service) Rules, 1963; Persons who have resigned from service prior to the date of Notification, without any retirement benefits would not be covered by this Notification because it applies to those persons who have retired after the date of Notification; does not apply to members who are appointed on a temporary basis and resign from service without being confirmed during probationary period.

Also see analysis of the Order

2009-TIOL-570-ITAT-MUM

DCIT, Mumbai Vs M/s Rolls Royce Marine India Pvt Ltd (Dated: August 12, 2009)

Income tax - Sec 40(a)(iii) - Assessee is in the business of servicing of marine equipments and sale of marine spares - pays salary to non-resident Managing Director - return filed - AO notices TDS was not deducted on the salary paid and disallows the same under Sec 40(a)(iii) - CIT(A) deletes additions as he finds only delay in deposit of TDS - held, Sec 40(a)(iii) cannot be invoked for mere delay in deposit of TDS - as long as tax is paid, mere delay in depositing TDS as per Sec 200(1) not to attract rigours of Sec 40(a)(iii) - Revenue's appeal dismissed

2009-TIOL-569-ITAT-MUM

JCIT, Mumbai Vs M/s Reuters Ltd (Dated: July 29, 2009)

India-UK DTAA - Assessee is a tax resident of the UK - enters into various agreements with Indian subsidiary for royalty and distribution of its financial products - assessee is a leading global news gatherer and also provides premium financial products - pays tax for royalty earned from the subsidiary but claims that the income from distribution of its financial products is business profits not taxable as per Article 7 of the DTAA - AO holds that since the subsidiary is a dependent agent it can be treated as a PE for the assessee, and its income is taxable in India - CIT(A) disagrees with the AO - held, since the fact that the assessee had seconded some employees to work with the subsidiary, and this information was not available to the CIT(A) at the time of decision, it is a fit case for remand to the AO for fresh consideration with regard to existence of PE of the Assessee in India, within the meaning of Article 5(2)(k) and 5(5) of the India-UK DTAA.

Also see analysis of the Order

2009-TIOL-568-ITAT-MUM

Transworks Information Services Ltd Vs ITO, Mumbai (Dated: February 16, 2009)

Income Tax - TDS - section 201, 201(1A) - Assessee carrying on the business of IT-enabled services, call centres and BPO industries - assessee pays conveyance allowance of Rs. 800 per month to every employee - also provides bus service facility for pick up and drop to its employees. - AO treats the assessee as an assessee in default and raises demand u/s 201 and charged interest u/s 201(1A) for non deduction of TDS on conveyance allowance and the bus service facility, exceeding the limit of exemption - CIT (A) dismisses Assessee's Appeal - Held, the “transport service for workers and staff” is collectively enjoyed benefit which is neither taxed as salary nor as fringe benefit tax even after introduction of FBT in Chapter XII-H of the Act. - Assessee's appeal allowed.

2009-TIOL-567-ITAT-MUM

M/s Jaykay Finholdings (India) Pvt Ltd Vs ACIT, Mumbai (Dated: June 22, 2009)

Income tax – Section 10(23G) –The assessee company purchased equity shares of an enterprise ‘SCL' engaged in the business of operating any infrastructure facility and

was an eligible enterprise for exemption u/s 10(23G) of the Act - In A.Y. 2005-06, the assessee sold these shares and claimed the capital gains arising on it as exempt u/s. 10(23G) - Rule 2-E of the I. T. Rules, 1962 provides for guidelines for approval u/s. 10(23G) of the Act – The 'SCL' was approved as an eligible enterprise for section 10(23G) for the A.Y. 2002-03 to 2004-05 as per the Rule 2-E applicable at that time – Rule 2E was substituted by the I.T. (6th Amendment) Rules 2004 w.e.f. 12.1.2004 and provided that an approval once granted would remain valid till the same is withdrawn by the Central Government however it did not provide for any procedure regarding renewal of approvals already granted after the expiry of the period of three years as per the earlier Rule 2E (6). 'SCL' made an application after amendment in Rule 2B on 3.4.2007 which was pending without any action being taken on the same. Further the assessee's name was changed from SCL to M/s. Hutchison Essar Telecom Ltd. (HETL) when the shares were sold by the assessee - AO disallowed the exemption claimed by the assessee stating that SCL ceased to exist when its name was changed to HETL and the business of the said company also changed and therefore for non compliance of sub rule (6) & (7) approval granted u/s. 10(23G) to SCL will not hold good – Moreover the assessee failed to furnish the tax audit report for A.Y. 2005-06 before CCIT as required by sub rule (3) of Rule 2E to enquire and furnish the report to the Central Government for passing necessary order for considering it an eligible enterprise for exemption u/s 10(23G) - therefore, exemption is no longer available. Therefore the capital gains arising from sale of shares of M/s HETL are not exempt from capital gains – CIT (A) confirmed the addition – Held

++ that Section 23(3) of the Companies Act, 1956 provides that change of name does not affect rights or obligations of the Company. By a mere change of name the constitution of the company is not changed and that all rights and obligations under law of the old company pass to the new company as it held by Hon'ble Calcutta High Court in Economic Development Corporation Ltd. Vs. CIT, 75 ITR 233 (Cal). Therefore, the change of name of SCL to HETL will have no effect for exemption u/s 10(23G).

++ that it is only the Central Government which have the authorities under sub-rule (8) of Rule 2-E to withdraw the approval granted under sub-rule (5) of Rule 2E and the AO has no jurisdiction to go into the aspect with regard to existence of conditions for grant of approval or its continuance or its cancellation. So long as the approval granted remains valid, he has to accept the same. The AO exceeded his jurisdiction while holding that the assessee did not fulfill the conditions for eligibility and its continuation of approval u/s. 10(23G) of the Act.

++ that Rule 2E being a procedural provision, the new Rule 2E substituted w.e.f. 12.01.04 would apply to all approvals which are in force as on the date of its substitution. As on 12.1.04, when the new rule came into force, the Assessee's approval remained valid and should be deemed to be one issued under new Rule 2-E. There are no facts justifying coming to a conclusion that SCL was not engaged in the business of infrastructure development. The word 'substitution' would connote that the rule making authority intended to give benefit to the enterprise who were already approved and whose approvals were valid as on the date of its substitution. Therefore, the appeal of the assessee is allowed and the capital gain on sale of shares of an enterprise approved u/s 10(23G) is considered as exempt u/s 10(23G).

++ that the capital gains computed on sale of shares of HETL in the books of account will be excluded while computing the book profits u/s 115JB as per the explanation 1 to (ii) to section 115JB which provides that the income covered under the provisions of section 10 (excluding 10(38)) section 11 or 12 are to be reduced from amounts so credited to the profit and loss accounts in order to work out the book profit.

2009-TIOL-566-ITAT-DEL

Aftab Seth Vs DIT, New Delhi (Dated: July 23, 2009)

Income tax - long-term capital gains - assessee inherits property on demise of his mother in 2003 - disposal of property - long term capital gains - AO takes cost inflation index for FY 2002-03 as per the Explanation 1(b) to Section 2(42A) - Assessee for fair market value of the property as on 1-4-81 - held, it is now settled law that the period of holding for determination of the long term capital asset, includes the period for which the previous owner held the asset that devolved upon the legal heir as per section 49(1) of the Act. The indexation is to be done from 1-4-1981 - Assessee's appeal allowed

2009-TIOL-565-ITAT-MUM

DDIT, Mumbai Vs M/s Tata Iron And Steel Co Ltd (Dated: August 13, 2009)

Income Tax - Indo-UK DTAA - Assessee brings out Euro Issue of convertible bonds - hires lead managers - pays commission, underwriting and management fees - AO for TDS u/s 195 as he takes the view that the services provided by the non-resident are technical services as per Explanation 2 to Sec 9(1)(vii) and also under Article 13 of DTAA - payments are liable to TDS u/s 195 - CIT(A) disagrees except for the payments made to solicitors' firm based on Hong Kong which had no DTAA with India during the relevant time - held, no TDS is applicable as no technical knowledge or skills or service is 'made available' to the Indian company which can be used over a period of time - however, payments made to Hong Kong-based solicitors' firm is liable to TDS as the legal services provided are very much technical service as held by the Special Bench in Mahindra & Mahindra Ltd case and there is no substance in the assessee's argument that legal services are not technical services as they are covered under Sec 44AA or Sec 194J because legal services are specifically covered under technical services as per Expl 2 to Sec 9(1)(vii) as held by the Special Bench - Assessee's appeal partly allowed

Also see analysis of the Order

2009-TIOL-564-ITAT-MUM

M/s Sheorey Digital Systems Ltd Vs ACIT, Mumbai (Dated: March 09, 2009)

Income Tax - Section 147 - Assessee files return declaring loss under the normal provisions but pays tax u/s 115JA - order u/s 154 is issued on the same date on which the intimation is issued. Proceedings u/s 147 - AO makes an assessment u/s 144 r/w 147 - Though several grounds of appeal has been raised, the CIT(A) has decided the legality of the notice issued u/s 148 as well as the notice issued u/s 143(2). About the other grounds raised the CIT(A) held that the additions has been challenged merely on technical grounds..-Held, the AO has reopened the assessment merely for the purpose of verification of the claim which is not permissible in law. The validity of the reopening of assessment has to be seen in the light of the facts available on records and on the date of satisfaction whether there was any evidence supporting the additions made in the year under appeal or not could not be ascertained by the AO on the date of recording of reasons for reopening of assessment. Prior period expenses and preliminary expenses written off is also not a ground on which the AO could have reasons to believe that the income of the assessee had escaped assessment. Section 147 is not a tool for verification of the claim made by the assessee. The reopening of assessment is perm issible only if a case falls within the parameters of section 147 read with section 148. The statue has provided a separate mechanism for verification of the returns and the claims made by the assessee. Section 147 is meant to assess

escaped income. The reopening of the assessment is not valid. Assessee Appeal allowed.

2009-TIOL-563-ITAT-MUM

WNS Global Services Private Limited Vs ITO (Dated: July 30, 2009)

Income tax – Perquisite u/s 17(2) – Assessee, a BPO, debited expenses for pick-up and drop-down facilities to its employees as car hires charges during the night and bus hire charges during the day from point to point and conveyance allowance is given to employees – AO treated the expenses for pick up and drop down facilities as taxable perquisite u/s 17(2) subject to TDS and treated the assessee as a defaulter u/c XVII-B – CIT(A) reduced the rate of TDS calculated by the AO for TDS but considered the facility as taxable perquisite – Held as per explanation to section 17(2) the transportation facilities provided by an employer to an employee from his residence to office and office to residence is not a perquisite. Further, the transport facility is not taxable since computation of value of facility is not possible in individual hands of the assessee as it is in the nature of composite service collectively provided. Appeal is the assessee allowed.

2009-TIOL-562-ITAT-BANG

M/s VRSG Bulk Carriers Vs ACIT, Hubli (Dated: May 22, 2009)

Income tax – Assessee claimed expenses for Rs. 18,13,200/- as 'driver's entry' which are incurred to the drivers of the transport to attract the drivers and ensure timely lifting of ore from the railway-yard – AO disallowed 50% of the expenses stating that assessee is having agreement with lorry owners and has paid advances to such lorry owners and there are no payment vouchers for such expenses duly signed by the payee – CIT(A) observed that the expenditure is incurred for commercial expediency. However as no proper evidences were found disallowance is made for 10% of the expenses – Order of the CIT (A) is upheld as the disallowance is to be based only in respect of non-verifiable nature of expenditure and not on the ground that the expenditure was not incurred for the purpose of business.

Section 68 - AO made addition for credits entries in the partners accounts in the firm stating that the assessee failed to furnish the account extract from individual records to show from where the money is transferred to the firm – CIT (A) confirmed the addition calculating the peak credits of the partners – Held that no details have been filed to ascertain the creditworthiness of the partner or the genuineness of the transaction and as the amounts have been credited in the books of the firm and as per section 68, these amounts can be added in case the assessee is not able to offer an explanation – Addition as upheld by the CIT (A) is confirmed.

Capital or Revenue Expenditure – AO treated the expenses incurred by the assessee for developing the plot belonging to the railway in order to give strength to the base and facilitate the transportation of the iron ore as capital expenditure – CIT (A) allowed the appeal of the assessee and treated as revenue expenditure – Held that for allowing expenditure, one has to see whether the expenditure has been made for the purpose of its business and to take into consideration question of commercial expediency and if the expenditure is incurred for the purpose of the business of the assessee, it does not matter that the payment made is for the benefit of the third party. As the plot was not belonging to the assessee, the pit digged by the assessee will not be an asset in the hands of the assessee to be used endlessly and hence, no

capital asset has come into existence – Revenue's appeal is disallowed.

Disallowance of expenses claimed as provision of wheel loader expenses – AO disallowed the expense Rs. 3,40,010/- stating that provisions are not allowable – CIT (A) confirmed the disallowance – Held that simply on the basis of nomenclature, the learned CIT(A) should not have confirmed the disallowance. In case the expenditure of this nature has been allowed in the immediately preceding year then following the principle of consistency, the expenditure will be allowable – Issue is restored back to the AO.

2009-TIOL-561-ITAT-AGRA-TM

ITO, Gwalior Vs M/s Laxmi Narain Ramswaroop Shivhare (Dated: January 2, 2009)

IT – Trading of country liquor – No sale bills, but purchases supported by valid bills – No reason for addition applying estimated gross profit: This is the first year of the assessee's business. All its supplies are duly supported by proper vouchers and are regulated by the excise authorities and payment of country liquor is made through government warehouses against payment made to the government on the basis of the auction conducted by the government. In other words, the purchases are all supported by valid documents. When it comes to the sale, the nature of the assessee's business is such that it cannot maintain proper sale bills. But the assessee has declared 3.11% of gross profit. In fact, the AO has given comparative cases wherein the profit of 2.56% in the case of M/s S.R. Trading Co., Gwalior was shown. Again, the profit varies from area to area and the bid money that is paid by the assessee. The accounts of the assessee are subject to regular audit and the small variation in the profit is quite possible. The CIT(A) himself writes in his order that no significant defects are pointed out in the books of account by the assessee except the lack of sale bills. Having regard to these facts, A.M. is right in having given the direction to the department to accept the declared results.

Also see analysis of the Order

2009-TIOL-560-ITAT-DEL

M/s Ansal Housing & Construction Ltd Vs DCIT, New Delhi (Dated: June 19, 2009)

Income tax – Section 132 & 158BC – Search was conducted – Certain papers found and seized – In the said documents seized, a working was made showing the opening balance, transactions receipts and payment and the closing balance payable to Managing Director – As per the statement recorded of the Managing Director of the assessee company, he was not aware of the transactions recorded in the said document seized and denied the transactions recorded in the said papers and stated that no addition based on this can be made as it is a piece of dump paper – Assessee filed its return of income for the block period u/s 158BC and declared a net loss of Rs.32,35,840/- considering some of the entries reflecting in these seized documents as per the working attached with the return of income. AO made addition for Rs. 1,22,47,029/- as undisclosed income based on the papers seized - Held,

++ that the documents were seized from the briefcase of Managing Director at his residence during the course of search operation u/s 132 of the Act and clearly show that the entries therein are concerning to family members of the directors, employees of the assessee company, projects under process, to a friends, to business associates,

to certain entries on the receipt side clearly linking to the ongoing projects of the assessee and there is a live-link as to the transactions recorded in the said document and the assessee. The fact that no unaccounted cash was seized on the date of search is not relevant in determining the belonging of the document as it is not relevant in view of the clear provisions of section 132(4A) presuming the documents as to belong to the person in whose possession or control they are found in the course of search. Moreover, these documents were also adopted for preparing the block return, which shows that the documents belong to the assessee. The seized documents depict the affairs of the company and the figures of interest payments tallied with the column 'Interest on temporary loan' shown on the seized document and the assessee admitted that interests on temporary loans were paid by it and the principal amount in some cases also tallied with entries on seized document. Therefore, it can reasonably be held as belonging to the assessee.

2009-TIOL-559-ITAT-MUM

ITO, Mumbai Vs M/S P & R Automation Products Pvt Ltd (Dated: March 25, 2009)

Income tax - Sec 32 - Assessee is into exports - buys machineries and gives them to sister concern for manufacturing of goods for the assessee which in turn exports them - AO for partly disallowing depreciation as the sister concern also sells the goods locally - held, as long as it is established that the machineries were used by the sister concern to manufacture expors goods, it was utilised by the assessee for business and depreication cannot be denied - Revenue's appeal dismissed

2009-TIOL-558-ITAT-BANG

ITO, Bangalore Vs M/s Cepha Imaging Pvt Ltd (Dated: July 24, 2009)

Income tax - Indo-UK DTAA - Assessee is a 100% EoU - provides customised publishing related solutions - enters into a comprehensive agreement with a UK-based company for providing promotion of business and marketing of its services - agrees to make payments comprising of commission and reimbursement of expenses - TDS u/s 195 - AO holds that what the non-resident company has been providing to the exporter are technical and managerial consultancy services and any payments made for such services are taxable as fees for technical services as per Explanation 2 to Sec 9(1)(vii) and also under Article 13(4)(c) of the DTAA - AO takes the simplistic meaning of the word 'make available' enshrined in the DTAA and observes that since technical services are made available to the exporter, such payments are taxable in India - CIT(A) disagrees with the AO - held, the payments made by the Indian exporter to non-resident cannot be brought to tax because no technical knowledge, expertise, skill, knowhow or process consisting of the development and transfer of technical plan or technical design has been transferred to the assessee so that the assessee could use that knowledge, expertise and skill in the future - no TDS u/s 195 - Revenue's appeal dismissed

Also see analysis of the Order

2009-TIOL-557-ITAT-BANG

M/s Intel Tech India Pvt Ltd Vs ITO, Bangalore (Dated: July 31, 2009)

Income tax - TDS - Tribunal cancels demand u/s 201(1) but upholds the interest u/s 201(1A) till the date the duductee files the return - Assessee files misc application to know whether interest is to be paid upto the date when taxes are paid or till the day the return is filed by the deductee - held, the petition u/s 254(2) filed by the assessee seeks review of the order which is not permissible - Assessee's appeal dismissed

2009-TIOL-556-ITAT-PUNE

ITO, Aurangabad Vs Lukas Fole (Dated: February 27, 2009)

Income tax - Sec 16 - Assessee is an expat employee from Czechoslovakia, hired by an Indian subsidiary of a non-resident company - claims deduction for social security charges and hypothetical tax paid by the employer from basic salary - AO disallows them as they are not eligible deductions u/s 16 - CIT(A) allows the appeal - held, social security charges are paid by the employer on behalf of the employee and are eligble deduction for the employee as decided by the Tribunal in an earlier case

Hypo tax - it is a settled law that it is an allowable deduction from tax perquisite and not from basic salary - Assessee's appeal allowed

Also see analysis of the Order

2009-TIOL-555-ITAT-MUM

DCIT, Mumbai Vs Smt Darshana M Jatania (Dated: January 20, 2009)

Income tax - Sec 145 - Assessee earns interest income on FDRs with banks - TDS benefit is claimed as per bank certificate - AO insists since TDS credit is availed, the interest income on accrual basis be added to the income - assessee argues it follows cash account method and interest income not to be added on accrual basis - CIT(A) deletes additions - held, as per Sec 145 the method of accounting is a choice with the assessee, and when the assessee has been following cash method since inception, the Revenue cannot force the assessee to switch over other method of accounting - as per cash method of accounting the interest income to be taxed only on maturity and TDS credit cannot be denied - Revenue's appeal dismissed

2009-TIOL-554-ITAT-DEL

ITO Budaun, UP Vs Pandit Vijay Kant Sharma (Dated: May 29, 2009)

Income Tax Act – Section 271(1)(c) – Limitation u/s 275 – assesse argued that in terms of the proviso to clause (a) of sub-section (1) of section 275, the AO was bound to pass penalty order within one year from the end of the financial year in which the order of the CIT(A) was received by the CIT – department argued that the order was

in time in terms of the main provision contained in the aforesaid clause (a) – Held that clause (a) contains the general rule, to which only exceptions can be provided by way of proviso to the clause. This proviso places an outer limit of one year from the end of the financial year in which the order of the CIT(A) was received by the Commissioner. If assessee's plea is accepted the consequence will be that this provision overrides a part of the provision contained in clause (a) relating to the time limit in a case where the order of assessment was made subject matter of appeal before the Tribunal. Proviso is meant to carve out an exception and not to abrogate a part of the main provision. Thus the only meaning which can be placed on the proviso is that in a case where the assessment proceeding come to an end with the order of the learned CIT(A), then, the outer limit of passing the order will be one year from the end of the financial year in which the order of the learned CIT(A) was received; and in cases where the matter is carried further in appeal to the Tribunal, the time limit shall be six months from the end of the month in which the order of the Tribunal is received by the CIT – Held therefore penalty order was passed within the time prescribed by the statute u/s 275(1)(a).

Penalty u/s 271(1)(c) – Held that the law in regard to levy of penalty, as enunciated in the case of Dharmendra Textile's case is that the Explanations appended to section 271(1)(c) indicate the element of strict liability on the assessee for furnishing inaccurate particulars of income while filing the return. The object behind the section and the Explanations is to provide for a remedy for loss of revenue. Therefore, the penalty is a civil liability and willful concealment is not an essential ingredient for attracting civil liability as is the case in the matter of prosecution u/s 276C of the Act. Clause (B) of Explanation-1 enjoins upon the assessee not only to offer an explanation, but also to substantiate it - The case of assessee was that the evidence filed before the AO substantiates its explanation - However held that the assessee has not substantiated its case by the evidence on record. Misrepresentation of facts in the return of income, showing certain receipts as gifts, does not amount to disclosing truly and fully all material facts relating to assessment – Levy of penalty upheld.

ITAT – Rule 27 - The respondent, though he may not have appealed, may support the order appealed against on any ground decided against him – Rule not applicable if the assessee had not taken any ground to this effect before the learned CIT(A) - However Bombay High Court in the case of B.R. Bamsi Vs. CIT (1972) 83 ITR 223 held that the respondent in a case can support the order appealed against by taking any plea including the plea that the order is bad in law. If such a plea succeeds, it will not render the order appealed against as nugatory, but the effect will be that the order shall stand as it is. In other words, a defensive plea can be taken but such a plea cannot be taken to offend the order appealed against.

2009-TIOL-553-ITAT-BANG

Shree Public Charitable Trust Vs DIT, Bangalore (Dated: May 29, 2009)

Income Tax - Sec 2(15) - DIT (Exemptions) holds that the objects of the trust set out in clauses are not charitable in nature in view of the insertion of proviso to Sec. 2(15) w.e.f. 01.04.2008 - Assessee contends that the purpose of the Trust is to provide Medical relief, Education and Relief to the poor which are charitable in nature - Held, the trust should be encouraged in the interest of general public. The trust is a charitable trust as defined u/s. 2(15). The DIT (Exemptions) is hereby directed to renew the approval u/s 80G of the appellant.

2009-TIOL-552-ITAT-BANG

Chief Accounts Officer , Mysore Vs ITO (TDS), Mysore (Dated: May 15, 2009)

Income Tax - Section 201(1) and 201(1A) - appellant is Chief Accounts Officer of Mysore City Corporation, a local body to administer and manage the Mysore City - assessee pays interest to Karnataka Urban Infrastructure Development Finance Corporation (KUIDFC), a Govt Company involved in funding the various developmental work of the infrastructure project in the State of Karnataka - No TDS deduction made on interest payments - AO raises demands for several A.Ys – CIT(A) confirms charging of interest - Held, the matter requires consideration afresh in the light of the provisions of section 194A read with section 197 as applicable to the assessee as defined therein. Issue restored to the file of AO for bringing on record the facts which directly holds the assessee as assessee in default for these A.Ys and grant an opportunity of being heard to the assessee in order to establish that the provisions of section 194A be not applicable to them. Assessee's Appeal allowed.

2009-TIOL-551-ITAT-DEL

DCIT, New Delhi Vs M/s Seil Aircon Ltd (Dated: April 30, 2009)

Income Tax - Assessee pays commission on sales - AO observes that the assessee's sales in quantity terms have reduced and there is no justification for the higher expenditure in the year under consideration - makes addition - CIT(A) confirms disallowance and the Tribunal, remands the matter for fresh adjudication – CIT(A) deletes addition - Held, the rate of commission would be higher on the ACs which is of a higher value compared to the cooler. Be that as it may, the rate of commission, if compared with the value works out to 10.14% in the year consideration as against 12.72% in the last year, and, therefore, no reasons remain for the disallowance of the commission on the ground that a higher commission is paid in the year under consideration.

2009-TIOL-550-ITAT-MUM

Shri Popatlal Fulchand Vs ACIT, Mumbai (Dated: May 6, 2009)

Income Tax - Section 22 - house property owned by partners of the firm in individual capacity are utilised by a partnership firm, constituted of HUFs through its partners - assessee do not disclose any notional income from the house property on ground that same being used for assessee's own business - AO is of the view that partnership firm is a distinct entity than the individual partners and therefore the firm having utilised the premise for its business is not sufficient to give the benefit of section 22 to the individual partners - Held, in view of Delhi High Court decision in CIT vs. H S Singhat & Sons the assessee is not liable to tax in respect of the notional income of the house property used by the firm for its business. Addition deleted and Appeal of the assessee allowed.

2009-TIOL-549-ITAT-MAD

Shri Mustaq Ahmed Vs ADIT, Chennai (Dated: May 22, 2009)

India-Singapore DTAA - Sec 80HHC benefits - Assessee is a non-resident - carries on exports of gold from its PE - claims deduction u/s 80HHC - AO allows it - CIT invokes powers u/s 263 and directs AO to deny the benefits as the same cannot be granted to non-resident as claimed by the assessee during the relevant period - Assessee invokes Clause (4)(a) of the non-discrimination clause of Article 26 of the DTAA - held, Section 80HHC clearly mandates that deduction under this section cannot be granted to non-residents. Clause (4)(a) of the non-discrimination clause of Article 26 of the DTAA clearly provides that the said Article cannot oblige India to grant such deduction to the assessee, being resident of Singapore - Assessee's appeal dismissed

Also see analysis of the Order

2009-TIOL-548-ITAT-MUM

Rev Father Trust Oscar Colasco Memorial Medical Association Vs CIT, Thane (Dated: March 18, 2009)

Income Tax - Assessee organization applies for registration u/s 12AA vide Form 10A filed before CIT - CIT refuses registration stating that application filed after expiry of one year of formation of the trust and very nominal income was expended to further the objects of the trust - Held, CIT has failed to initiate the enquiry in-time to complete the proœss of grant of registration within the stipulated period of six months and as the order has not been passed within the time limit prescribed, the application is deemed to have been granted - Assessee's appeal allowed.

2009-TIOL-547-ITAT-MUM

First State Investments (Hongkong) Ltd Vs ADIT, Mumbai (Dated: July 23, 2009)

Income-tax - sections 111A, 115AD, 70 - assessee FII had both short term capital gains and short term capital loss upto 30.9.2004 and after 1.10.2004 - Regime of taxation of short term capital gains changed by the Finance (No2) Act, 2004 w.e.f 1.10.2004-Whether short term captial loss suffered after 1.10.2004 could be set off against short term capital gains earned before 30.9.2004 - Held, yes.

There is a difference between computation section and the rate of tax. The Tribunal observed that it is simple and plain that the matter of computation of income is a subject which comes anterior to the application of the rate of tax. Only when the income is computed as per the provisions of the Act, that the question of the applicability of the correct rate of income tax comes into being. There being no prohibition in section 70 in the matter of set off of short term capital loss before and after the cut off period of 1.10.2004, the claim of the assessee was alllowed.

Also see analysis of the Order

2009-TIOL-546-ITAT-MUM

Precitex Rubber Components Pvt Ltd Vs ACIT, Mumbai (Dated: June 22, 2009)

Income Tax - penalty u/s 271(1)(c) - Assessee company is engaged in manufacturing and selling of aprons and cots which are used by textile industries - files revised return after including a sum on account of difference in closing stock of finished goods - No notice, intimation or communication from the department regarding the discrepancy in stock served on the assessee - AO levies penalty on an amount being additional amount disclosed by the assessee in the revised return and on an amount being amount of addition on account of undervaluation sustained by ITAT – CIT(A) confirms it - Held, the assessee has rectified mistake before detection and filed revised return voluntarily before issue of any notice or intimation. Therefore, the intention to defraud the revenue cannot be imputed to the assessee. Amount assessed pursuant to revised return cannot be said to represent income in respect of which particulars have been concealed. Therefore penalty u/s. 271(1)(c) cannot be imposed. Secondly, difference in the revised return and assessment is due to difference in valuation of stock and the valuation is based on estimates. Assessee's Appeal allowed.

2009-TIOL-545-ITAT-MUM

Gateway Hotels & Geteway Resorts Ltd Vs DCIT, Mumbai (Dated: April 13, 2009)

Income Tax - deduction u/s 80HHD - assessee runs hotel business - receives major portion of foreign currency by way of Credit card payments - When foreign tourists pay by way of credit cards, the amount is received through collection agents who in turn deduct their commission before making payments to the assessee - AO takes the view that the commission amount has to be reduced from the turnover for the purpose of calculating deduction u/s. 80HHD – CIT(A) holds that the net receipts has to be taken into consideration for the purpose of computing deduction u/s. 80HHD - Held, the issue is squarely covered by the decision of the ITAT in case of J.B. Boda and Co. Pvt. Ltd. Vs. CBDT. AO to compute the deduction eligible u/s. 80HHD on the gross receipts. Assessee ground allowed.

2009-TIOL-544-ITAT-BANG

M/s Mac Charles (India) Ltd Vs ACIT, Bangalore (Dated: April 30, 2009)

Income Tax - Assessee company, engaged in hotel business files its IT return which is assessed u/s 143 - Subsequent order is passed without any notice u/s 148(1) beyond the period of 4 years - AO disallows revenue expenses on building by holding it as a capital expenditure - CIT(A) confirms AO's order - Held, the reassessment was not bad in law - whether capital or revenue expenditure emerges from circumstances peculiar to the situation and surroundings of each individual assessee - Held, the assessee has been an established hotel business procuring business under international chain brands which are crucial to such business requiring the maintenance of a required standard - Assessee's appeal partly allowed.

2009-TIOL-543-ITAT-DEL

ITO, New Delhi Vs M/s Orbital Communication Pvt Ltd (Dated: July 29, 2009)

Income tax - Sec 68 - Assessee receives share application money - AO makes additions for the same in the assessee's hand, alleging that the identity of the share applicant not established - CIT(A) examines the bank statements of the share applicant and finds the returns of income credible and deletes the additions - held, once the creditworthiness of the applicant is established, merely because the applicant was not produced before the AO, the application money does not become the sum of the assessee - in view of the Apex Court decision in the case of Lovely Exports, CIT(A) order upheld and Revenue's appeal dismissed

2009-TIOL-542-ITAT-KOL-SB

Shree Capital Services Ltd Vs ACIT, Kolkata (Dated: July 31, 2009)

Income Tax - the term 'derivatives' in which underlying asset is shares, will fall within the meaning of 'commodity' used in Sec. 43(5) of the Act; In this case, it is admitted that the underlying asset is shares. Therefore derivatives will also fall within the meaning of 'commodity' used in Sec. 43(5). Finance Act, 2005 has provided that certain transactions in respect of trading in derivatives shall not be deemed to be speculative transactions within the meaning of Sec. 43(5). If the transaction in derivatives does not fall within the definition of 'speculation transaction' u/s. 43(5), then there was no question of exempting certain type of transaction in derivatives from the scope of speculative transaction u/s. 43(5). If it is held that the transaction in derivatives does not fall in Sec. 43(5), it will make clause (d) and Explanation thereto below Sec. 43(5) introduced by Finance Act, 2005 to be redundant. It cannot be presumed that the Government has introduced a clause, i.e. clause (d) as well as Explanation thereto, which was redundant and infructuous .

Exempting certain derivatives by Finance Act only prospective: in this case, the Legislature made the amendment because of the technological advancement introduced by the stock markets resulting in more transparency in the dealings. Therefore, the circumstances under which amendment was brought into existence do not lead to the inference that it was retrospective.

Also see analysis of the Order

2009-TIOL-541-ITAT-MUM

TCI Reality Pvt Ltd Vs ITO, Mumbai (Dated: April 22, 2009)

Income Tax - Assessee is a lessee under a long term lease agreement of 7.5 years which is further extended - claims the income from the property as income under the head house property - AO treats the income as ''Income from other sources'' - CIT(A) confirms the order - Held, if a person acquires right in or with respect to any building or part thereof then if the conditions as specified in clause (f) of section 269UA are satisfied then such person shall be deemed to be the owner of the building or part thereof - held, the lease agreement mentions only land with structures and there is no

mention of building, therefore, rent received should be treated as income from other sources - Matter remanded back to AO for fresh determination.

2009-TIOL-540-ITAT-DEL

Oracle India Pvt Ltd Vs ACIT, New Delhi (Dated: August 5, 2009)

Transfer Pricing- section 92, 92CA(4)- Income-tax- Sections 40A(2)-Royalty paid to the parent corporation whether can be disallowed under section 40A(2)-Whether section 40A(2) overrides chapter X (special provisions relating to avoidance of tax)-whether the A.O is bound to follow the order of the TPO.

Assesse pays royalty to its parent corporation for duplication and distribution of software - TPO does not make any adjustment in respect of royalty - A.O makes addition under section 40A(2) - CIT(A) confirms the addition- Held, following the appeals in the assessee's own cases for earlier years- section 40A overirdes only provisions relating to computation of income under the head 'profits and gains of business and profession'-The TPO having accepted the price , the Assessing Officer is required to compute the total income of the assessee having regard to the arm's length price determined by the TPO - A.O directed to determine the income of the assessee as per the value of services determined by the TPO-assessee's appeal allowed.

2009-TIOL-539-ITAT-DEL

ACIT, New Delhi Vs Cargo Motors Pvt Ltd (Dated: May 19, 2009)

Income tax - Sec 2(22)(e) - held, deemed dividend cannot be assessed in the hands of a person other than a shareholder of the lender company - since the assessee is not a shareholder, Sec 2(22)(e) is not applicable in this case - Revenue's appeal dismissed

2009-TIOL-538-ITAT-MUM

M/s Gupta Gemhouse Pvt Ltd Vs ITO, Mumbai (Dated: January 29, 2009)

Income Tax - Penalty u/s 271(1)(c) - Assessee is a private limited company engaged in the business of export of processed diamonds. The assessee files loss return - AO makes disallowances - CIT(A) gives partial relief to the assessee. AO initiates penalty proceedings u/s 271(1)(c) for four items which are confirmed by the CIT(A) - Held, merely because the assessee has not filed any appeal before the Tribunal, no penalty can be levied u/s. 271(1)(c). Penalty proceedings are quasi criminal in nature and are different from assessment proceedings. The authorities have to bring in something more for visiting with levy of penalty u/s. 271(1)(c). Since in the instant case, the assessee had sufficient capital and free reserves which far exceeds the amount of advances recoverable, therefore, the explanation of the assessee that there should not be any disallowance on account of notional interest is a valid and bonafide explanation. No penalty is leviable on the above two items. As regard to the levy of

penalty on provision for gratuity and as regard to penalty on disallowance of depreciation - The explanation given by the assessee, of clerical oversight and calculation error is a bonafide and valid explanation no penalty u/s. 271(1)(c) is leviable on this amount. Assessee Appeal allowed.
2009-TIOL-537-ITAT-BANG
Gokaldas Images Pvt Ltd Vs ACIT, Bangalore (Dated: May 28, 2009)
Income Tax - Section 263 - CIT takes the view that the loss of non-10B units and brought forward losses and allowances need to be set off against profits of the 10B units for allowing exemption under section 10B - Held, CIT order u/s 263 suffers from infirmity as he has not been able to spell out factually both the limbs of the reversionary powers. In the view of the earlier decision of the Tribunal, assessee's appeal allowed.
2009-TIOL-536-ITAT-BANG
M/s Endeavour Estates Pvt Ltd Vs DCIT, Bangalore (Dated: May 29, 2009)
Income Tax - Assessee filed a revised return claiming capital gains on sale of land - AO levied impugned penalty holding that no balance sheet or audited accounts along with the return and receipt of towards 'right to access' was also not disclosed - CIT(A) confirmed AO's order - Held, agreement states that it is an agreement for grant of right of way but only permission to use the property - Held, capital gains arises only from the transfer of a capital asset and there is no sale in the present case - Held, penalty not justified - Assessee's appeal allowed.
2009-TIOL-535-ITAT-MUM
Smt Padma D Gandhi Vs ITO, Mumbai (Dated: June 4, 2009)
Income Tax - Section 254(2) – Search u/s 132 - Assessee's diary seized - On questioning relating to the entries in the diary, the husband of the assessee explains that the figures perhaps indicate the value of assets that she intends to lease through her will to some of her relatives - Assessee reiterates the same explanation - A.O. rejects the explanation and holds that the figures found in the seized document either show loans given by the assessee or the amount received back by her on such transactions - additions made - CIT(A) takes the view that the notings in the diary are not explicit and that there are no corroborative evidence to indicate that the entries therein represented cash or loan transactions which have not been accounted for - additions deleted - Tribunal reverses the order of CIT(A) - Assessee points out mistake apparent in arriving at such conclusion in M.A - Held, there are apparent errors in the order of Tribunal which can be corrected only by recalling the order so that the issue can be adjudicated afresh based on the correct facts and after taking into account all the evidences filed by the assessee - Order recalled - assessee's M.A allowed.

2009-TIOL-534-ITAT-BANG

M/s Max Healthscribe Ltd Vs ITO, Bangalore (Dated: June 12, 2009)

Income tax - Sec 10A - Assessee is a BPO - claims exemption u/s 10A and also sets off brought forward losses - files Nil returns - argues that it had suffered losses during the previous year relevant to the assessment year 1998-99 and 2000-01 - For these AYs the assessee had opted out of section 10A by invoking the provisions of sub-section (8) of section 10A. Since the assessee had exited the amit of Sec 10A, the assessee argues that the embargo of Sec 10A(6) would not apply - held, it is settled law that the restrictions of Sec 10A(6) will apply only from the AYs after the expiry of the tax holiday period

2009-TIOL-533-ITAT-MUM

Jacobs Engineering India Pvt Ltd Vs ACIT,Mumbai (Dated: May 26, 2009)

Income Tax – Assessees claim of foreseeable losses to be allowed irrespective of method of accounting in terms of AS-7 – Issue restored to A.O. to quantify and calculate losses in accordance with AS-7

Disallowance of deduction of expenditure on computer software – Issue restored to A.O. in view of Special Bench decision in ***Amway India Enterprises vs. DCIT*** ***2008-TIOL-97-ITAT-DEL-SB***

Reduction of unabsorbed depreciation of earlier years while computing profits from business when granting deduction under Section 80 HHE – Deductions under Chapter VIA are to be allowed only on net income and not on gross income – Assessee can claim deduction u/s. 80 HHE after considering brought forward depreciation and brought forward loss i.e. deduction eligible only on net income

Also see analysis of the Order

2009-TIOL-532-ITAT-MUM-SB

Tata Communications Limited Vs JCIT, Mumbai (Dated: July 10, 2009)

I-T Act - Section 254(2) - Mistake apparent from the order of the Tribunal - Whether separate orders by the members can be passed in case of multiple member benches - whether the order was passed after due discussion and joint conference - whether separate reasons need to be recorded when one member agrees with another - Whether Tribunal can entertain new ground not agitated before the lower authorities.

Against the order of the Special Bench of the Tribunal in the case of VSNL (2007-TIOL-261-ITAT-MUM-SB) , the assessee files a miscellaneous petition on the ground

that there were mistakes apparent from record.

Held, dismissing the petition that in case two Members agree on a draft, it is not at all necessary for the second Member to give his separate reasons.

Held, Joint conference and discussion are integral and significant parts of the decision making process in the multiple member benches. It is essentially a decision of the Members constituting the Special Bench as to whether or not joint conference is necessary before draft can be finalized.

Held, once the Tribunal is called upon to examine as to whether or not the assessee is entitled to a claim of deduction, there is no escape from its duty to ensure that the requirements of the section are fully complied with and the Tribunal cannot shun away from its duty to examine all the eligible conditions merely on the ground that some of these conditions are not specifically rejected by the authorities below.

Held, question of law having been admitted by the High Court, Tribunal is functus officio.

Also see analysis of the Order

2009-TIOL-531-ITAT-MUM-SB

M/s Topman Exports Vs ITO, Mumbai (Dated: August 11, 2009)

IT – Computation of deduction u/s80 HHC - entire amount received on sale DEPB not to be taken – only profit on sale of DEPB to be considered – Whether the entire amount received on sale of DEPB entitlements represents profit chargeable under section 28(iiid) of the Income Tax act, is concerned, answered in negative and the second part of the question or the profit referred to therein requires any artificial cost to be interpolated is replied in affirmative to the extent that the face value of DEPB shall be deducted from the sale proceeds.

The subsequent sale of DEPB is a step divorced from export and such profits are not export profits: It is noticed that export incentive is provided by way of the face value of DEPB. It is this value, which has relation with the export business. The subsequent sale of DEPB is a step divorced from export. The relation between the act of exporting goods and DEPB exists only upto the stage of its acquisition and not thereafter. Once the DEPB is acquired pursuant to exports, the subsequent events of its utilization for self consumption or making imports for resale or the sale of DEPB as such, are independent transactions unrelated to export.

Profit on transfer of DEPB well as the DEPB entitlement itself is in the nature of income Section 80HHC provides deduction in respect of income from export business. Considering the text of section 80HHC and the manner of computation of deduction it has been noticed that though the face value of DEPB is profit from export business, but the profit on sale of DEPB is not covered within the scheme of this section inasmuch as the DEPB has only a local market from the point of view of its sale. When DEPB is sold, the sale proceeds will form part of total turnover but not export turnover for the reason that the sale proceeds are not received in or brought into India in convertible foreign exchange. In that situation the sale proceeds of DEPB will be included in the total turnover but not the export turnover and resultantly the deduction to the extent of profit on sale of DEPB will be automatically denied when the profits of business are proportionately reduced in the ratio of export turnover to total turnover. Since profit on transfer of DEPB well as the DEPB entitlement itself is in the

nature of income, the same requires to be included within the general meaning of income even if it is not specifically enshrined in section 2 (24).

Also see analysis of the Order

2009-TIOL-530-ITAT-MUM

MIG Cricket Club Vs ACIT, Mumbai (Dated: April 24, 2009)

Income tax - Assessee, a registered society, applies for grant of registration u/s 80G - Revenue grats it and also renews it later - AO reopens assessment and holds that assessee is not a charitable trust and, therefore, not entitled for exemptions u/s. 11 & 12 - CIT(A) sustains reopening of assessment - Held, no exemption u/s. 11 can be allowed in respect of interest, dividend, rent, capital gains and income from other sources if such income are received from non-members of mutual concerns of clubs - Held, receipt on account of sports sponsorship is not tainted with commerciality and it only goes to reduce the cost of the members on a particular event and such reduction of cost cannot be termed as income and brought to tax - Assessee's appeal partly allowed.

2009-TIOL-529-ITAT-DEL

DDIT, New Delhi Vs M/S Saraswati Holding Corpn Inc (Dated: July 10, 2009)

India-Mauritius DTAA - Assessee, a company incorporated in Mauritius and holdding a tax residency certificate - makes investments in shares and securities in India - taxability of capital gains in India

Assessee earns short-term and long-term capital gains - claims exemption as per Article of DTAA and also CBDT Circular No 789 - AO brings the assessee's income to tax on the ground that it was effectively managed from India - CIT(A) disagrees with the AO and allows the claim - held, in view of the Apex Court decision in Azadi Bachao Andolan case and the validity of the CBDT Circular No 789 being upheld, the assessee's capital gains tax is exempt under the DTAA and the CIT(A)'s order does not call for interference - Revenue's appeal dismissed

2009-TIOL-528-ITAT-MUM

Shapoorji Pallonji Power Co Ltd Vs ITO, Mumbai (Dated: April 20, 2009)

Income tax - Assessee is into setting up power project - enters into agreement with SEB for power purchase - incurs pre-operative expenses and capitalises the same - project is abandoned due to subsequent developments - assessee reclassifies expenses as business expenditure - AO disallows - held,

++ business activities may be classified into two broad categories, firstly the activities which are in furtherance of setting up of a business and secondly the activities which

are in furtherance of commencement of business after it has been set up. Business is set up when it is ready for take off but the activities following the setting up of business prior to its commencement constitute the essential activities for commencement of business and the expenditure incurred in carrying on such activities is allowable deduction under the head "income from business".

++ However, the expenditure incurred prior to the setting up of business is only in capital field and cannot be treated as business expenditure. The assessee had only entered into agreement with MPEB but MPEB finally backed out from the said agreement. This was only an assurance to the assessee for purchasing power from it subject to fulfillment of series of activities. It cannot be said that the assessee's business had been set up when the agreement had been entered into with MPEB. Entering into agreement with MPEB can at best be said to be an activity in furtherance of setting up of business but per se, cannot lead to the conclusion that the business had been set up.

++ it is well settled commercial principle of accounting that the nature of expenditure is determined at the first instance when it is incurred and its nature cannot be altered on account of subsequent events. Once the expenditure has been classified as capital in nature, it cannot partake the character of revenue on account of supervening circumstances.

Also see analysis of the Order

2009-TIOL-527-ITAT-BANG

Bangalore Water Supply & Sewerage Board, Bangalore Vs ITO, Bangalore (Dated: May 12, 2009)

Income Tax Act – Section 10A – Computation of deduction – Held, that all profits which have a direct nexus with the profits of the undertaking will qualify for deduction u/s 10A – Held further that assessee had given FDR's to bank for obtaining credit facilities and thus interest income earned on such FDR's had nexus with business of the undertaking and fell under the head “Profit and Gains from Business and Profession” as having relation with carrying on of the business – Accordingly held that assessee was entitled to claim benefit u/s 10A in respect of said interest income.

Also see analysis of the Order

2009-TIOL-526-ITAT-MUM

Livingstones Jewellery (P) Ltd Vs DCIT, Mumbai (Dated: May 12, 2009)

Income Tax Act – Section 10A – Computation of deduction – Held, that all profits which have a direct nexus with the profits of the undertaking will qualify for deduction u/s 10A – Held further that assessee had given FDR's to bank for obtaining credit facilities and thus interest income earned on such FDR's had nexus with business of the undertaking and fell under the head “Profit and Gains from Business and Profession” as having relation with carrying on of the business – Accordingly held that assessee was entitled to claim benefit u/s 10A in respect of said interest income.

2009-TIOL-525-ITAT-DEL

Sabre Inc Vs DDIT (Dated: June 19, 2009)

Indo-USA DTAA - Assessee owns and runs a CRS - has a PE in India - pays commission to agents for promoting its business - attribution of a part of total global receipt to Indian operations - in the absence of any statutory formula for attribution of revenue, how much of global receipt can be attributed to India, and after paying commission to agents, is there any income left to be taxed in India?

Assessee's CRS software is gloablly known as 'Sabre' - Six players like customer, travel agent, main distributor, airlines and the assessee are linked in a chain to do this business - main computers which process the requests for ticket or hotel reservation are located in the USA - assessee also has a PE which trains and monitors Indian operations - business connection u/s 9(1)(i) - AO takes the view that since the entire business is done in India, the total receipt of the assessee is taxable in India - since no expenditure is claimed, Revenue does not allow any deduction - held, as a similar issue has been decided by the Delhi HC in Galileo International case, and the Tribunal's decision to attribute only 15% of total receipts to the Indian PE as the main database is located outside India which does the final processing and is also updated through computer networks with airlines, has been upheld, in the instant case the assessee pays 60% commission to its agent in India, no income is left to be taxed in the hands of the assessee - Assessee's appeal allowed

2009-TIOL-524-ITAT-DEL

ACIT, New Delhi Vs Jai Parabolic Springs Ltd (Dated: July 6, 2009)

Income Tax Act – Section 37(1) – Advertisement Expenditure - Assessee in its books of account had shown advertisement expenses under the head "deferred revenue expenses" and only part thereof was claimed in the books but for tax purposes it was claimed in the year in which expenses were incurred – AO held that the same are allowable as an expense over a period of six years – AO also held that development of samples for new products was an expenditure which was likely to benefit the company, not only in the year in which expenses were incurred but also in the following years – Held that it is well settled preposition that question whether claim of expenditure is to be allowed or not, has to be considered as per statutory provision and not on the basis of entry made in the books of account – Also held that there is no dispute in the present case that expenditure in question was incurred for development of samples used by the assessee for carrying on its business more effectively and more efficiently. Expenses were incurred for purposes of business. Samples like advertisement may be beneficial to the assessee not only in the year in which expenses are incurred but in other years also. But on that account, expenses cannot be treated as of capital nature – Held revenue appeal dismissed.

2009-TIOL-523-ITAT-DEL

JDIT, New Delhi Vs A T Kearney Ltd (Dated: March 06, 2009)

Indo-UK DTAA - Articles 5 and 7 - Expatriates working exclusively for the Indian Branch - continued to be employed by the Head Office - salary expenses booked to the branch - whether allowable - estimated addition based on a mark up of the expenses - whether sustainable - alternate plea of applicability of Section 44C - whether maintainable - claim of loss whether can be made in a return under section 139(3) - provisions of section 80

Expatriate Salary – UK Firm's employees working in Delhi Branch – fully deductible business expenditure: As per A.O. these employees continue to draw their salary from the overseas office from which they are being seconded. It is the claim of the assessee that as these expatriate employees are working wholly and exclusively for the branch office, their expenses have been claimed as fully deductible business expenditure in computing taxable income on A T K (UK) from its Indian operations. By the impugned order CIT(A) deleted the disallowance of expenses by observing that since the Indian branch is said to be a PE of a non resident's company as per Article 5 of DTA , for the purpose of computing business profits of the assessee under Article 7, the expenses attributable to such PE are required to be allowed. No infirmity in this order.

Also se analysis of the Order

2009-TIOL-522-ITAT-BANG

Citizen Co-Operative Bank Ltd Vs ITO, Bangalore (Dated: May 29, 2009)

Income Tax - deduction u/s 80P(2)(a)(i) - Assessee a co-operative society carrying on the business of banking - scrutiny - AO makes additions - CIT(A) gives relief to some extent and directs the assessee to apply for rectification u/s 154 and directs the AO to consider the facts of the case at the time of rectification U/S 154 –AO REJECTS RECTIFICATION APPLICATION - Originally the assessee files the return of income indicating a loss return without specifying deduction available to it u/s 80P (2)(a)(1) - CIT(A) on appeal restricts itself to rectification application rejection by AO - Held, the whole of the income is from banking business and is allowable as a deduction u/s 80P(2)(a)(i). The assessee had in fact filed the return of income indicating a loss return did not require claim of deduction u/s 80P(2)(a)(i) separately therefore was entitled to get the claim thereof in the first place was also dealt with by the Tribunal in assessee's own case. The said miscellaneous income cannot be brought to tax in the hands of the assessee merely because the assessee having income from its members and from non-members when the nature of income is such that it pertains to its banking business only. Issue stands covered in favour of the assessee. Assessee Appeal allowed.

2009-TIOL-521-ITAT-MUM

M/s Indermal D Parmar (HUF) Vs ITO, Mumbai (Dated: May 13, 2009)

Income tax - gift - Assessee receives USD 8000 from a person in the USA - AO asks the assessee to establish the authenticity of the gift - makes addition as the assessee fails to produce the donor - held, it is well established principle of law that the mere receipt of the gift by banking channels from any country outside India and by filing the confirmation, the burden of proof of the assessee does not get discharged absolutely. In this case, the donor is claimed to be friend of the assessee. But there is nothing on record to establish the claim. Moreover, the source of income of the donor

has also not been established. The occasion for making the gift is also not indicated. The donor could not be produced, as according to the assessee, he was in USA - AO is justified in making additions - Assessee's appeal dismissed
2009-TIOL-520-ITAT-MUM
Dr Sudha S Trivedi Vs ITO, Mumbai (Dated: February 20, 2009)
Income tax - Assessee is a Doctor by profession - follows cash system of accounting - sale of business premises - capital gains - claims exemption u/s 54EC - AO takes the view that capital gains are taxable u/s 50 - Assessee contends since she never claimed depreciation on the premises, Sec 50 does not apply to her case - AO rejects Sec 54EC benefits - CIT(A) goes with the AO - held, Sec 54EC is an independent provision and not controlled by Sec 50 – if any capital asset is held for 36 months, benefit of sec 54EC is allowed – Sec 50 is restricted only to computation of capital gain contained in sec. 48 & 49 – exemption u/s 54EC be allowed – Assessee's Appeal allowed.
2009-TIOL-519-ITAT-DEL
M/s Ahujasons Shawlwale Pvt Ltd Vs DCIT, New Delhi (Dated: April 30, 2009)
Income tax - Penalty u/s 158-BFA(2) - Assessee is a trader - Revenue conducts search & seizure u/s 132 - finds excess stock, unaccounted purchases and cash - Assessee asked to file block return - return filed but NIL undisclosed income shown - AO makes additions and initiates penalty u/s 158-BFA(2) - held, the first proviso to section 158-BFA (2) offers a concession to the assessee to escape penalty by admitting undisclosed income in the block return and paying taxes. Since the assessee had filed Nil undisclosed income and the AO had rightly make additions for undisclosed income through unaccounted stocks, the second proviso to the Sec 158-BFA(2) comes into force as what is required to be established is only the undisclosed income in excess to the one disclosed in the block return - concealment of income like in Sec 271(1)(c) is not a pre-condition under this Section for imposing penalty - this is more so in view the Apex Court decision in Dharmendra Textiles case where it is held that penalty is a civil liability and no mens rea is required to be established for imposing it - Assessee's appeal dismissed
Also se analysis of the Order
2009-TIOL-518-ITAT-BANG
ACIT, Hubli Vs M/s BDK Process Equipments Inc (Dated: June 26, 2009)
Income Tax - Section 80HHC - AO makes additions on the ground that the assessee, which is a trader exporter and is entitled to the DEPB benefits, passed on the DEPB entitlements to its manufacturer sister concern for availing the benefits - CIT(A) deletes the addition - Held, AO is to verify that no income arose or accrued to the assessee on the basis of the very same licences which stood transferred to the sister

concern and were fully utilized for their own purpose of manufacturing the goods ultimately exported by the assessee - Revenue's Appeal allowed.

2009-TIOL-517-ITAT-MUM

ITO, Mumbai Vs M/s Encon Fan [India] Pvt Ltd (Dated: April 15, 2009)

Income Tax - Assessee company pays commission to sister concern pursuant to an agreement - AO disallows on the ground of diversion of income through commission route - CIT(A) deletes disallowance - Held, payment of commission is based on an agreement which has been accepted by the AO as no disallowance was made in earlier years - Held, assessee proved that the payment of commission was made on account of commercial expediency and since AO partly allows the commission, it indicates that the agreement is genuine - just because payment of commission is partly paid, it doesn't mean that it's not genuine - Revenue's appeal dismissed.

2009-TIOL-516-ITAT-MUM

M/s Aristocrat Luggage Limited Vs DCIT, Mumbai (Dated: April 27, 2009)

Income Tax - Additions made for foreign travel expenses, closing stock and Y2K expenses - AO initiates penalty u/s 271(1)(c) - CIT(A) cancels penalty for first two types of expenses but confirms the same for the third one - held, penalty is levied where Assessee has concealed or furnished inaccurate particulars of income. In the present case, the Assessee has disclosed all the material facts relating to Y2K expenses and the same were disclosed at the time of filing of return along with certificate issued by the Auditor in form 3BA - so no concealment of material facts - Assessee's appeal allowed