INCOME TAX APPELLATE TRIBUNAL ORDER

2009-TIOL-758-ITAT-DEL

M/s ONGC Videsh Ltd Vs DCIT, New Delhi (Dated: October 30, 2009)

Income-tax - section 32, 37(1) - whether license acquired by ONGC Videsh for exploration in Sakhalin for 20 years is entitled to depreciation - whether the same can be treated as deferred revenue expenditure - whether expenditure of seismic data of foreign blocks amounts to capital expenditure

ONGC Videsh is a subsidiary of ONGC and is engaged in exploration of oil and gas in fields outside India. The income earned from such activities are governed by profit sharing contracts that are entered into by the company with the foreign governments. In so far as India is concerned, the same is governed by section 42 read with section 293A of the Income-tax Act. ONGC videsh, in the case under review had entered into a contract with other consortium members and the Russian Government for acquiring a 20% participating interest in Sakhalin islands belonging to Russia for a consideration of Rs.15,590.96 corres. By acquiring the participating interest, it acquired proportionate share in rights and licence granted by the Russian State for the Sakhalin Block and became entitled to carry on hydrocarbon operations in the Block. The contention of assessee before the Assessing officer was that the rights and licences, being intangible assets, were entitled to depreciation @ 25% in view of the amended provisions of section 32 of the Act. The claim was negatived by the A.O for the following three reasons:

+ Depreciation on intangible assets granted by section 32 should be for assets which are in the nature of intellectual property rights.

+ Acceptance of the claim of the assessee would amount to unwarranted broadening of the ambit of depreciation to even participation right in a business and even a partnership agreement between various entities would then fall within the purview of business rights and depreciation could be claimed on any amount of a capital nature including for investment made for the purpose of any partnership, joint venture agreement or any other agreement.

+ The commercial production did not start in the year of acquisition of interest and, therefore, the expenditure was pre-commencement.

In the first appeal, the CIT(A), considered the expenditure as deferred revenue and allowed 1/19th of the same to be amortised during the year. On further appeal, it was argued that the entire amount of Rs.1559.10 crores should have been allowed under section 42 of the IT Act along with the production sharing contract and the agreement entered into by the appellant with the Central Government. Without prejudice, it was argued that the claim of depreciation @25% should have been allowed.

Tribunal observed that,

++ hydrocarbons in their natural habitat embedded in a particular territory are the property of the state government and that jurisdiction over such hydrocarbons does not lie with any private person and that a person cannot carry out hydrocarbons operations unless the person had entered into a production sharing agreement with the government. By entering into the PCA, the Russian government granted rights to the assessee along with license for carrying on hydrocarbons operations. The business rights in the license are owned by the assessee entering into PCA and such right and license can be assigned and transferred to other parties subject to the terms and

conditions of the PCA and with the approval of the government. The assessee, by virtue of acquisition of 20% participating interest, became the member of the consortium and acquired proportionate share in rights and licenses granted by the Russian state for Sakhalin Block and became entitled to carry on hydrocarbon operations in the Sakhalin project.

++ The right had been granted to the assessee by way of licence and the assessee became owner of such right i.e. license to have an access and to carry on of business of exploration and development of mineral oil. Accordingly, such an asset is entitled to depreciation u/s.32(1)(ii) of the IT Act.

++ there being no concept of deferred revenue expenditure and the expenditure being capital in nature, the assessee was entitled to depreciation alone.

++ Purchase and evaluation of the seismic data of foreign blocks: The expenditure incurred by the assessee was for furtherance of activities undertaken by it in the normal course of its business. The same are incurred on continuous basis for evaluation of business activities. In view of the decision of Bombay High Court in the case of Essar Oil Ltd. 2008-TIOL-530-HC-MUM-IT , such expenditure is to be allowed as revenue expenditure.

Also see analysis of the Order

2009-TIOL-757-ITAT-MUM

Advantage Advisors Inc Vs DDIT, Mumbai (Dated: July 21, 2009)

Income Tax - Section 10(33) - assessee is incorporated in the USA and registered with SEBI as a FII - AO makes addition of compensation received on non -pari passu shares as dividend income - CIT(A) upholds the order of the AO - Held, in view of Tribunal's decision in assessee's own case the compensation on non- pari passu shares is a capital receipt not chargeable to tax and will only go to reduce the cost of acquisition of the shares.

Section 48 - On the issue of CIT(A) rejecting the contention of grating the benefit of indexation on the transactions resulting in long-term capital gain/loss under the provisions of section 48 – Held, in view of decision of AAR in Universities Superannuation Scheme Ltd., In re [2005] where AAR held that Foreign Institutional Investor has to be assessed with regard to capital gains/loss under section 115AD and the assessee is not entitled to opt out and claim to be assessed under section 48, read with section 112 with indexation provisions in case of assessment resulting into capital loss.

2009-TIOL-756-ITAT-MUM

Shri Ashok M Mehta Vs ITO, Mumbai (Dated: April 29, 2009)

Income Tax - Assessee, a prop of a firm, derives income from salary, warehousing charges, income from other sources and capital gain - files return –AO makes, on various counts, additions – CIT(A) partly allows assessee's Appeal but confirms disallowance of an adhoc amount out of salaries, conveyance & staff welfare expenses

- Held, merely because in earlier years, no such payment had been made, cannot be a basis for making disallowance unless it is found that the payment claimed by the assessee is bogus. Non-stamping of vouchers cannot be a basis for making the disallowance if the payment is genuine. Ground allowed.

Section 36(1)(iii) and 14A r.w. Rule 8D - On the issue of CIT(A) confirming the disallowance being the interest on borrowings for the business purpose including investments with business motive claimed u/s. 36(1)(iii) - Held, issue remanded to the file of the AO to make the disallowance u/s. 14A r.w. Rule 8D as per the decision of the of ITAT Mumbai (SB) in the case of *Daga Capital Management,*

On the issue of the proviso to Section 14A - Held, it is evident that for the assessment year beginning on or before 1st day of April, 2001, 147 proceedings cannot be taken for enhancing the assessment or reducing a refund or otherwise increasing liability of the assessee u/s. 147. Assessee ground allowed.

2009-TIOL-755-ITAT-BANG

ACIT, Bangalore Vs Smt Aarathi A Lad (Dated: May 29, 2009)

Income Tax - Assessee, engaged in the execution of transport contract, was unable to produce bills to support the authenticity of credits in the capital accounts and in respect of interest not shown on FD with some banks - AO made additions u/s 68 for unexplained credits and imposed penalty - CIT(A) deleted the penalty—Held, it is not necessary for the revenue to establish mens rea before imposing penalty u/s 271(1)(c) - Held, explanation offered during the course of assessment proceedings or during the course of penalty proceedings has not been substantiated with any evidence, an adverse inference can be drawn and penalty is imposable - Revenue's appeal partly allowed.

2009-TIOL-754-ITAT-DEL

DCIT, Dehradun Vs M/s Dolphin Drilling Pte Ltd (Dated: October 26, 2009)

Income tax - Sec 44BB(1), 32 & Rule 115(1) - Assessee is a non-resident company, incorporated in Singapore - gives on hire its drillship to its sister concern for execution of ONGC contract - files loss return after claiming depreciation - AO rejects the assessee's books of account on the ground of improper method of translating business transactions into currency of accounting and estimates the income u/s 44BB(1) - CIT(A) allows the appeal - held, Clause 2(c) of the Explanation to Rule 115(1) provides that the exchange rate as on the last day of the relevant financial year is to be adopted for the purpose of conversion of income from profits and gains of business or profession into Indian Rupees. There is no infirmity in the CIT(A)'s order

Depreciation on drillship u/s 32 - held, since the assessee has furnished relevant documents and established the ownership of the drillship, the CIT(A)'s findings are sustainable in allowing depreciation

Disallowance of expenses u/s 40(a)(i) - Matter restored to the AO to examine and allow the expenses incurred fully and wholly for the business.

2009-TIOL-753-ITAT-KOL-TM

Sri Bimal Kumar Roy Vs ITO, Kolkata (Dated: June 19, 2009)

The issue raised in ground no.1 taken by the assessee relating to disallowance of expenditure of Rs.3 ,20,380 /- is remanded back to the file of the AO with the direction that the assessee be given one further opportunity to establish before the AO with evidence that he maintained office at Kolkata for profession and expenditure claimed were incurred for the purpose of his profession. Thus, on this issue the orders of the authorities below are set aside. The AO is to pass a fresh order as per law, after giving the assessee adequate opportunity of being heard.

Ground no.2 taken by the assessee is allowed. The AO is directed to treat the income of Rs.50 ,000 /- as income from business.

Ground no.3 taken by the assessee is decided against the assessee. It is held that the amount of Rs.26 ,167 /- was rightly added by the AO. Therefore, the addition is sustained

Also see analysis of the Order

2009-TIOL-752-ITAT-BANG

M/s Intel Technology India Pvt Ltd Vs DCIT, Bangalore Ltd (Dated: September 25, 2009)

Income tax - Sec 10A - Assessee is engaged in export of computer software - files return - AO allows expenditure incurred in foreign currency, on account of professional and consultancy charges and traveling and conveyance expenses, and the same were not reduced from the export turnover while calculating the deduction u/s 10A - CIT(A) invokes powers u/s 263 and directs the AO to reduce the expenses in foreign currency from export turnover before allowing Sec 10A benefits - held, issue is no longer res integra as it has been settled that if such expenses incurred in foreign currency are deducted from the export turnover, the same are also to be deducted from total turnover for allowing Sec 10A benefits - Assessee's appeal allowed

2009-TIOL-751-ITAT-MUM

DCIT, Mumbai Vs M/s Glenmark Laboratories Ltd (Dated: November 9, 2009)

Income tax - Sec 80HHC, 115JB - Assessee claims deduction u/s 80HHC even while computing the book profit u/s 115JB - AO disallows - CIT (A) follows several judicial decisions and allows the appeal - held, in view of the Special Bench decision in Syncome Formulations (I) Ltd. (2007-TIOL-96-ITAT-MUM-SB), there is no infirmity in CIT(A)'s order - Revenue's appeal dismissed

2009-TIOL-750-ITAT-MUM

ACIT, Mumbai Vs M/s Kalchuri Corpn (Dated: April 15, 2009)

Income tax - Sec 45 - Assessee shows income from sale of plot of land - declares capital gains - AO treats the same as business income on the ground that the assessee firm was engaged in the business of construction and land development and any investment of this nature is an adventure in the nature of trade - CIT(A) allows the appeal - held, no infirmity in the CIT(A) order as the plot was purchased by the partners of the firm before they joined the firm from their own funds and no fund was borrowed for the same and even bank account was opened after the sale - it is a case of long-term investment - such income to be treated as capital gains - Revenue's appeal dismissed

2009-TIOL-749-ITAT-DEL

M/s Business Engg & Software Vs ITO, New Delhi (Dated: October 20, 2009)

Income Tax - Assessee company files return - AO questions it on various grounds - AO disallows depreciation holding that no evidence was proffered showing the use of such assets in the concerned previous year and further the AO made addition to assessee's income on the ground that closing stock was undervalued - CIT(A) upheld the order AO has rightly declined to accept the work-in-progress which was computed on estimated basis - Held, similar addition was made in the earlier and assessee's claim was accepted, therefore, ordered AO to accept assessee's claim in this year too - Held, w.r.t. disallowance expenditure under the head legal & professional charge and also under the head 'salary', it has been rightly disallowed as no evidence was provided by assessee to show the actual nature of services rendered - Assessee's appeal partly allowed.

2009-TIOL-748-ITAT-MUM

ACIT, Mumbai Vs Blue Dart Express Ltd (Dated: October 20, 2009)

Income tax - deferred expenditure - Assessee is engaged in the business of integrated air and ground transporation of time sensitive shipments to various destinations - enters into sales alliance agreement with DHL Worlwide Express India Pvt Ltd for five years - incurs expenses and claims the same pro-rata basis over the period - claims the entire expenditure as deductible - AO disallows but CIT(A) allows the appeal - held, the expenditure incurred by the assessee is on account of travelling, professional fees, conveyance expenses, printing & stationery and others in connection with agreement entered into. This expenditure is of revenue in nature and incurred in the course of business. Therefore, the entire amount is allowable on the basis of incurrence of the liability. Revenue's appeal dismissed

2009-TIOL-747-ITAT-DEL

DCIT, New Delhi Vs M/s Bharti Aquanet Ltd (Dated: July 24, 2009)

Income Tax - Assessee is a company, engaged in the business of laying optical fibre cable and internet service - claims various expenses as revenue expenditure - also claims loss in the return of income - AO disallows loss on the ground that the business of the assessee had not been set up and consequently, the claim of the revenue expenditure not allowable - CIT(A) allows assessee's claim - Held, the assessee had no manpower during the relevant A.Y as no salary or wages were paid nor had any plant & machinery if one examines the balance sheet. The assessee also had no office premises as it had only paid advance for the same but did not get the possession. Assessee not entitled to claim revenue expenditure but the alternative claim for capitalising the same and claim for depreciation on the same is allowable - Revenue's appeal allowed

2009-TIOL-746-ITAT-BANG

Robert Bosch Engineering And Business Solutions Ltd Vs ACIT, Bangalore (Dated: September 11, 2009)

Income tax - 90% of service income is to be excluded from the profit of the business for computing deduction u/s 80HHE ; what is to be excluded is 90% of the service income and not the 90% of gross receipts. During the course of proceedings it was clarified by the AR that the gross receipts represent the service income as there are no direct expenses incurred against service income. Hence, following the order of this Bench in the case of *Maini Precisions Products Ltd.* and considering that Explanation (baa) to section 80HHC is similar to Explanation (d) to section 80HHE , it is held that the CIT(A) was justified in holding that 90% of service income is to be excluded from the profit of the business for computing deduction u/s 80HHE .

90% of other income to be excluded for the purpose of determining the profit of the business; The Apex Court in the case of *K Ravindranathan Nair* observed that profit incentives and items like rent, commission, brokerage charges etc. though they formed part of the gross total income, had to be excluded as they were independent incomes which had no element of export turnover. Therefore, the lower authorities were justified in excluding 90% of other income for the purpose of determining the profit of the business to ascertain deduction allowable u/s 80HHE .

Computer software – capital or revenue expenditure? Functional test to be applied; When the assessee acquires a computer software or for that matter the licence to use such software, he acquires a tangible asset and becomes the owner thereof Once the tests of ownership and enduring benefit are satisfied, the question whether expenditure incurred on computer software is capital or revenue has to be seen from the point of view of its utility to a businessman and how important an economic or functional role it plays in his business. Once the tests of ownership and enduring benefit are satisfied, the question whether expenditure incurred on computer software is capital or revenue has to be seen from the point of view of its utility to a businessman and how important an economic or functional role it plays in his business.

Interest – Sec. 234D has no retrospective application : The assessment year under consideration is asst.year 2003-04. The Special Bench in the case of ITO vs Ekta Promotors P. Ltd. - *(2008-TIOL-337-ITAT-DEL-SB)* held that provisions of section 234D is substantive and cannot be applied retrospectively. It was held that provision of section 234D will be applicable for the asst. year 2004-05. Following the decision of the Special Bench, it is held that the learned AO was not justified in charging interest u/s 234D .

Also see analysis of the Order

2009-TIOL-745-ITAT-BANG

M/s Mcdowell & Co Ltd Vs ACIT, Bangalore (Dated: August 21, 2009)

Income Tax - Section 36(1)(vii) r.w.s. 36(2) and 37(1) - assessee writes off bad debts and advances - AO declines to allow deduction on the ground that no effort shown to have been made for recovery - assessee's claim of expenditure towards research and development also not allowed on the premise that the assessee has not furnished any other details. The assessee's claim of exchange fluctuation loss also not allowed. A total income determined and tax demanded which includes levy of interest u/s 234B and 234C – Held, actual bad debts written off in accordance with the provisions of section 36(1)(vii) r.w.s. 36(2) are allowable following the decision of ITAT, Special Bench in the case of DCIT Vs. Oman International Bank (2006-TIOL-118-ITAT-MUM-SB) .

On the issue of foreign exchange loss on conversion - Held, assessee himself rendered income on gain from exchange fluctuation on identical nature of revenue from loans remaining unpaid. The same is to be allowed.

On the issue of disallowance of R & D expenses - Held, the assessee not claiming any weighted reduction thereupon, was to claim the same in its normal course of business which is allowed. Levy of interest under section 234B & 234C is mandatory as has been held by the Tribunal and is consequential to merit additions considered. Assessee's appeal allowed.

2009-TIOL-744-ITAT-BANG

ACIT, Bangalore Vs M/s E 4 E Application Services Pvt Ltd (Dated: July 31, 2009)

Income tax - Sec 10A(2)(iii) - AO disallows Sec 10A benefits on the ground that the assessee was an existing DTA unit but the benefits are available only to a newly-established unit - CIT(A) allows the appeal - held, issue is no longer res integra as it has already been settled that if the status of a DTA unit is changed to a STPI unit, the assessee is eligible for the benefits - Revenue's appeal dismissed

2009-TIOL-743-ITAT-DEL

Basu Distributors Pvt Ltd Vs ACIT, New Delhi (Dated: August 1, 2009)

Income Tax - Section 40A(3), rule 6DD- In the first round of appeals before the ITAT the Tribunal set aside the original assessment orders and restored the matter to the AO for re-consideration specially relating to additions made u/s 40A(3) relating to sister concern. After consideration, the AO gives major relief relating to sister concern while additions in respect of other parties re-made. AO comes to the conclusion that cash payments made to other parties are without any business expediency and there is no sufficient cause for such cash payments besides none of the payments are

covered by exceptions under rule 6DD. This results in additions - CIT(A) confirms additions – Held, assessee never genuinely intended to make the payments initially by crossed cheques/drafts in compliance with the provisions of sub-section (3) of section 40A read with rule 6DD and simply adopted this route to get protection under clause (j) of rule 6DD. The explanation of the assessee cannot be accepted being not bona fide and genuine and is accordingly rejected. CIT(A) order upheld and Assessee's appeals dismissed.

2009-TIOL-742-ITAT-DEL

M/s Turkmenistan Airlines Vs ADIT, New Delhi (Dated: October 16, 2009)

Income tax - Sec 44BBA - Assessee is a non-resident airlines - collects foreign travel tax (FTT) on behalf of the tax authorities - AO for taxing the same as taxable income - Assessee argues FTT is not an income, that FTT belongs to revenue and diversion by overiding title should apply - CIT(A) goes with the AO - On appeal to the Tribunal, held, the issue is squarely covered against the assessee by the Uttranchal HC decision in the case of Reading and Bates Exploration Co.

Interest u/s 234D - held, it is settled issue that the Sec 234D which was brought on the statute from 1.6.2003, will have application only with effect from the AY 2004-05 - A.O directed to delete the interest levied.

Interest u/s 234B - Following S.C decision in Anjum M H Ghaswala, levy of interest is mandatory, granting off opportunity is not necessary. A.O directed to levy interest up to the date of original assessment following the decision of the coordinate Bench in Freigtship Consultants P.Ltd

2009-TIOL-741-ITAT-COCHIN-TM

Society Of Presentation Sisters Vs ITO, Calicut (Dated: September 22, 2009)

Income tax – Charity and/or religious – the or /and dilemma? Benefits to assessees carrying on activities of charitable as well as religious nature, no provocation to read down the law and state that the benefits will be available only if the assessee is carrying on charitable purposes alone or religious purposes alone. It is clear from plethora of authorities where after considering provisions of section 11(1)(a) that so for as aforesaid provision is concerned, no distinction is made between charitable and religious purposes. A charitable institution can have religious purposes; whereas a religious institution may be partly charitable Even otherwise relief and help to the poor, medical help to the needy, looking after of deity and temples (mosque, church included) are no doubt religious purposes but these are also considered as charitable in India. Therefore, the view taken in the two cases before me that exemption u/s 11(1)(a) cannot be allowed to a charitable trust as it is also carrying some purposes which are termed as 'religious' is totally unwarranted.

Also see analysis of the Order

2009-TIOL-740-ITAT-DEL

M/s Bharti Comtel Limited Vs DCIT Circle-2(1), New Delhi (Dated: October 9, 2009)

Incomne tax - Sec 147 - Assessee files loss return - AO accepts the same by sending an intimation u/s 143(1)(a) - later AO invokes Sec 147 to disallow pre-operative expenses claimed as revenue expenditure - CIT(A) goes with the AO - held, since the material in the possession of the AO in the form of Director's report and Notes of account clearly reveal that though the assessee had not commenced commercial operation but the expenses were claimed as revenue expenditure which is not allowable, and such information is sufficient to invoke Sec 147 - Assessee's appeal dismissed

2009-TIOL-739-ITAT-BANG

M/s Karnataka Power Transmission Corpn Ltd Vs DCIT, Bangalore (Dated: July 3, 2009)

Income tax - Sec 133A, 194A - Assessee is engaged in the business of power purchase - Survey conducted to verify the compliance regarding TDS provisions – AO finds that Assessee had made provisions for interest on belated payments from power suppliers without deducting tax at source - Assessee contends that amounts accounted in earlier year was reversed in subsequent year - AO invokes provisions u/s 194A(A) & 201(1) and holds the assessee as assessee in default - CIT(A) upholds the AO's order - held, since the assessee has failed to prove that the tax has been paid by the payee on the sum paid, the CIT(A) order is sustainable - Assessee's appeal dismissed

2009-TIOL-738-ITAT-BANG

M/s Altair Engineering India Pvt Ltd Vs CIT, Bangalore (Dated: July 3, 2009)

Income Tax - Sec 10A, 263 - AO allows deduction u/s 10A – CIT invokes jurisdiction u/s 263 on the ground that assessee company was earlier claiming deduction u/s 80HHC up-to the AY 03-04 and since there is no change in the assessee company's business activity, AO wrongly allowed the claim u/s 10A - Held, the assessee company had fulfilled all the conditions in toto. Contrary to the CIT's claim, the AO had, in fact, gone through the issue in depth and also analyzed it thoroughly which is evident from the wordings of the AO. The AO had applied his mind and also examined the pros and cons of the issue and having been satisfied, came to the conclusion, which require no interference. Assessee's appeal allowed.

2009-TIOL-737-ITAT-KOL-TM

Shri Shanti Ram Mehata, Purulia Vs ACIT, Asansol (Dated: March 12, 2009)

Disallowance u/s. 40A (3) is applicable for each payment and not for the aggregate of the various payments made to same party during one day: The Assessee's plea

against the disallowance u/s. 40A (3) was that each payment was below, Rs.20,000 /- , and, therefore, Sec. 40A (3) is not applicable. However, as per the A.O., since the payment of one day exceeded Rs. 20,000/-, therefore, Sec. 40A (3) was applicable. The C.I.T. (A) also sustained the disallowance upholding the views of the A.O. Unfortunately, both the Members either while confirming the disallowance or while deleting the disallowance have not considered the aspect on which disallowance was made by the A.O.

Sec. 69C cannot be applied on mere presumption or suspicion. Addition of Rs. 50,000/- for alleged payment of transportation charges Apart from disbelieving the assessee's explanation, the A.O. has not brought on record any evidence with regard to payment of transportation charges by the assessee. Sec. 69C would be applicable where in any financial year an assessee has incurred an expenditure for which the assessee is unable to offer any explanation for the source of such expenditure. Thus the A.O. has to first find the evidence of incurring the expenditure.

Also see analysis of the Order

2009-TIOL-736-ITAT-BANG

Bosch Ltd Vs CIT, Bangalore (Dated: August 31, 2009)

Income Tax - Section 32(1)(ii) and 263 - assessee claims an amount as depreciation on 'payment for goodwill' - AO allows it - CIT(LTU) invokes jurisdiction u/s 263 on the ground that the assessee's claim is illegal and excessive which has not been considered by the AO - Held, the finding of the Tribunal in case of Skyline Caterers (P) Ltd (2007-TIOL-517-ITAT-MUM) is directly applicable in this case- following the said decision, the assessee company is entitled to claim depreciation on 'business information' under the category of 'other identifiable intangibles (goodwill) which has been rightly claimed by the assessee and allowed by the AO - CIT order assailed - Assessee's appeal allowed.

2009-TIOL-735-ITAT-DEL

ACIT, Haridwar Vs M/s S K Dynamics Pvt Ltd (Dated: May 8, 2009)

Income Tax - Deduction u/s 80IB(8A) - Assessee claims deduction - AO disallows claim on the ground that the assessee is an existing industrial undertaking, since the year 1992 and, therefore, not a new industrial undertaking. It had also been claiming deduction u/s 80-O since inception and, therefore, the amendment in the MOA is merely to avail the benefit of deduction u/s 80IB(8A) when the benefit u/s 80-O got exhausted and that the assessee did not satisfy the requirement of Rule 18D(1)(e) and Rule 18D(2)(a) - CIT(A) allows assessee's Appeal - Held, assessee is entitled to deduction u/s 80-IB in respect of income derived from transfer of technology developed by itself.

On the issue of interpretation of the expression "initial assessment year" - Held, the initial assessment year in the case of assessee will be A.Y 2003-04. Revenue Appeal dismissed

2009-TIOL-734-ITAT-MUM

Niyosi Trading & Inv Pvt Ltd Vs DCIT, Mumbai (Dated: August 21, 2009)

Income Tax - Section 43(5) and Explanation to section 73 - Assesses engaged in the business of shares and stock - claims loss incurred on sale and purchase of shares - AO holds that the transactions of purchase and sale of the shares resulting into loss not genuine and hence such loss not eligible to be adjusted against the profits earned - CIT(A) upholds AO's order - Held, CIT (A) not justified in approving the view of the AO. The assessee enters into contract for purchase and sale of shares. The contract is settled without taking actual delivery of the shares. Nothing has been shown that the assessee is covered by the exception to the Explanation to section 73. AO's view upheld to the extent that the said transaction is speculative in nature and the resultant loss is speculation loss. AO directed to recompute the income accordingly. Assessee 's appeal partly allowed.

2009-TIOL-733-ITAT-MUM

DDIT, Mumbai Vs Alcatel USA International Marketing Inc (Dated: October 8, 2009)

India-USA DTAA - Assessee is a tax resident of the USA - engaged in developing designs - enters into three contracts with Indian telecom company for supply of customised software - whether payments received for supply of software is royalty income taxable as per Article 12(3) of DTAA

Indian company makes payments to the assessee for granting right to operate software for its business and also make copies of the same but for its own business only - Revenue treats the payment received by the assessee for allowing the Indian company to use the software as royalty as per the provisions of the DTAA - CIT(A) holds that the payment made for acquisition of copyrighted article does not amount to royalty - -On appeal by the Revenue, held:

++ The issue stands squarely covered by the decision of the ITAT, Delhi, (Special Bench) in the case of Motorola Inc., Ericsson Radio Systems AB and Nokia Corporation vs. DCIT (2005-TIOL-103-ITAT-DEL-SB).

++ The Tribunal in the case of Infrasoft Limited vs. ADIT (2009-TIOL-21-ITAT-DE L) has held that the Apex Court decision in the Tata Consultancy Services (2004-TIOL-87-SC-CT-LB) has limited application and the principle therein cannot be applied to the peculiar facts of the instant case inasmuch as the amount received by the assessee under the license agreement was in lieu of allowing the use of software and thus it cannot be termed as a royalty either under the Income Tax Act or under DTAA.

2009-TIOL-732-ITAT-DEL

Parivar Sewa Sanstha Vs Asstt/Dy Director Of Income Tax , New Delhi (Dated: August 28, 2009)

Income Tax – salary of Rs. 14 Lakhs in 1997 to employee of charitable Trust held to be excessive: The intent is to ensure that the funds of the trust is not spent on prohibited persons, which have otherwise to be used for the benefit of public at

large. The salary paid to her amounted to Rs.11 ,17,600 /- in assessment year 1998-99. As against this amount, she was paid an amount of Rs.14 ,06,500 /- in assessment year 1999-00. There was an increase of 25.85% as against increase in revenue by 19.46% and surplus by 14.23%. It may be interesting to examine similar figures for assessment year 1998-99. In that year, the increase in salary was 58.70% against increase in revenue by 21.26% and increase in surplus by 49.51%. The aforesaid increase of 58.70% was held to be excessive by the Tribunal in that year and it was mentioned that there was nothing on record to show that Mrs. Sudha Tewari rendered extraordinary service for which substantial increment was allowed to her in salary. Her salary has been further increased disproportionately vis -a- vis the increase in the revenue and the surplus.

Also see analysis of the Order

2009-TIOL-731-ITAT-DEL

M/s Oil Industry Development Board Vs ACIT, New Delhi (Dated: March 31, 2009)

Income Tax - Section 36(1)(xii), 37(1) - assessee is a Public Sector Undertaking constituted by an Act of Parliament - grants financial assistance to various entities - AO disallows payment of grants and royalty on the ground that these grants are mere application of income - Held, the grants given by the assessee even though they are in accordance with the objects stated in the Act and even if they are made or disbursed as per directions of Central Government and in the public interest, but the same does not fulfill the criteria as laid down in Section 37 to come within the purview of allowability as the same cannot be said to be an expenditure incurred wholly and exclusively for the purpose of business. The assessee's claim of allowability u/s 37(1) cannot be accepted. The grants and payment of royalty claimed under the head "expenses on direct operations, grants are not allowable u/s 37(1), but they are allowable u/s 36(1)(xii). Assessee's appeal partly allowed.

2009-TIOL-730-ITAT-MUM

DDIT, Mumbai Vs M/s Chubb Pacific Underwriting Management Services Pte Ltd (Dated: October 15, 2009)

Income tax - TDS u/s 195 - Assessee is a tax resident of Singapore - Chubb Corporation USA holds stake in the assessee's share capital and also HDFC Chubb in India - Assessee offers income from technical services and network charges to tax - From Audit Report, AO notices purchase of software licences for HDFC Chubb - whether payments made on behalf of HDFC Chubb is taxable income for the assessee

Assessee, a promoter of HDFC Chubb pays for the software purchase to a third party on behalf of HDFC Chubb - argues although it was a purchase of software, TDS was deducted and deposited for this transaction - CIT(A) finds that since HDFC Chubb had not got IRDA licence to operate in India, it had requested the assessee to make the payment on its behalf to the software company in Singapore and after commencement of its business, HDFC Chubb reimbursed the same to the assessee - holds reimbursement is not taxable - On department's appeal held,

++ The payment is made on behalf of HDFC Chubb and it is a case of reimbursement.

++ Further tax has also been deducted and if the software selling company is to be taxed in India, the payment has already been subjected to withholding tax.

2009-TIOL-729-ITAT-BANG

United Distilleries Vs ACIT, Bangalore (Dated: July 24, 2009)

Income Tax - Section 40A(7) - Assessee is in the business of manufacture and sale of IMFL - AO disallows gratuity paid to the employee who is 99% partner in the assessee firm - CIT(A) agrees with the AO - Held, the expenditure is allowable to the employer in respect of his employee in case the payment is made by an approved gratuity fund. It is not disputed that the payment to the gratuity fund has been made in respect of the employees of a company and not that of the assessee. If the assessee is not an employer then the expenditure relating to gratuity cannot be allowed in the case of the assessee.

Assessee debits a sum paid to a marketing agent as sales promotion remuneration and expenses - AO disallows on the ground that the payment is in the nature of commission and TDS is required to be deducted u/s 194H – CIT(A) confirms AO's order - Held, it is seen that such bills are being raised at the fixed rate. If it was reimbursement of expenses then the assessee could have asked the marketing agent to furnish the details for which the reimbursement is being sought. No evidence produced before the lower authorities to establish that the amount paid was the reimbursement of expenses. CIT(A) justified in holding that the amount paid is commission though it is termed as Scheme/Marketing Expenses in the bill. Assessee's appeal dismissed.

2009-TIOL-728-ITAT-MUM

ADIT, Mumbai Vs Mckinsey & Co Inc (Dated: October 20, 2008)

Income tax - Indo-USA DTAA - Article 12, 7 - Assessees belong to McKinsey & Co Inc Group - receive money from the Indian branch for services rendered - whether payments made for such services are 'fees for included services' as per Article 12(4) of the DTAA, or whether the same are business profits taxable in terms of Article 7 of the DTAA.

Assessees claim they provide strategic consultancy and other services to the Indian branch - insist that since their advisories do not include any transfer of technical knowhow or specialised knowledge, the payments made in this regard cannot be considered as fees for included services as per the treaty - AO observes that since the assessees have failed to furnish any information pertaining to the relevant assessment year it cannot be concluded on the basis of information filed for the FY 1997-98 before the Department that the services rendered are not technical in nature - in the absence of non-submission of relevant documentary evidence, AO treats the payments as fees for included services, taxable as per the treaty - CIT(A) goes by the earlier decision of the Tribunal and allows the appeal - on furhther appeal to the Tribunal,held:

++ No e-mail, correspondence, bill or any other documents or evidence pertaining to the impugned assessment year 2003-04 has been furnished before the AO during the assessment proceedings despite requests to do so. The assessees want the Tribunal to

rely on the copy of the e-mail correspondence of 27.10.1997.

++ The AO had called for information which is in the exclusive possession of the assessees. When certain documentation and evidence could be furnished for the assessment years 1997-98 and also for the assessment year 2006-07 there is no reason why similar evidence or documentation cannot be furnished by the assessee to the assessing officer for the impugned assessment years.

++ The assessment order in the case of the Indian branch of McKinsey & Co, Inc, also does not come to the rescue of the assessee because, the fact whether the services received by the Indian branch of the assessee is directly relatable to the services rendered by the Indian branch has also to be verified by the assessing officer and it is for the assessee to lead evidence to that extent.

++ The submissions made by the assessee are only submissions and not facts. Submissions cannot take the place of evidence. It is the duty of the assessee to lead evidence, so as to prove that his submissions are in tune with the facts. When evidence cannot be furnished, the same cannot be made up.

++ The assessing officer should not be prevented from calling for details, under the pretext of "the world knows what McKinsey & Co, Inc does". Even if, the burden is, on the assessing officer to prove that a particular item of income is taxable, at the same time when the assessee does not co-operate or give any information or documentation whatsoever when specifically asked for and when it is undisputed that these documents are in its exclusive possession and only relies on its history and facts that were submitted in the earlier assessments, the assessing officer can draw an adverse inference.

++ Nobody could refuse to furnish any information which is exclusively in their possession and then argue that the revenue has not discharged the burden of proof. The onus is also on the assessee to lead the evidence to prove that the receipt is not taxable because it falls within a provision or it is exempt.

++ Accepting the assessee's plea that the case be decided on the basis of informatin furnished in 1997, would amount to laying down a very wrong precedent. The departmental representative was correct in pointing out that if such a view is taken by the Tribunal, the assessees would not in future also produce any document before any assessing officer on the argument that the facts are same as in the earlier years and the proposition for the law laid down by the Tribunal in earlier years should be followed.

++ The case needs to be examined afresh ; assessees directed to furnish relevant e-mail and other documentary evidences to the AO for arriving at correct conclusion.

Also see analysis of the Order

2009-TIOL-727-ITAT-BANG

Shri K C Rajashekaraiah Vs ITO, Bangalore (Dated: April 30, 2009)

Income Tax - Capital Gains - sale of property - assessee claims exemption u/s 54EC on capital gains earned on the transaction - on account of having invested the said amount in capital gains bonds AO re-computes the capital gains and brings the additional amount after giving exemption u/s 54EC to tax - Assessee's appeal fails at

CIT(A) and dispute related to outhouse continues - Held, neither the AO nor the CIT(A) made any effort to summon the tenant, claimed to have occupied the property at the relevant point of time. The AO had option to call for the sanctioned plan from the concerned competent authorities as well. The AO also had the option to look into the concerned records for ascertaining the details of construction. Even the concept of rent claimed under the head 'Other sources" could have been analysed by confronting the same to the tenant. Matter remanded.

2009-TIOL-726-ITAT-MAD

Smt Susila Ramasamy Vs ACIT, Chennai (Dated: April 2, 2009)

Income Tax - Section 5(2)(b), 69 - Assessee is a non-resident Indian, holding an Indian passport - Assessee has made substantial NRNR (Non-Resident Non-Repatriable), FCNR (Foreign Currency Non-resident), and NRO SB deposits with Indian Bank - AO initiates proceedings u/s 147 - Assessee files return in Form No. 2D showing total income as nil - AO assesses the deposits as the income of the assessee u/s 69 - CIT(A) confirms AO order - Held, the assessee, who is a non-resident, brings money into India through banking channel. Because of the mode of banking channel, admittedly, used for the remittance in this case, the onus on the assessee u/s 69 stands discharged, and therefore it is not taxable in India u/s 5(2)(b). The CBDT Circular squarely supports the case of the assessee. Addition made by AO deleted. Assesee's appeal allowed.

2009-TIOL-725-ITAT-MAD

ACIT, Chennai Vs M/s W S Industries (India) Ltd (Dated: August 21, 2009)

Income Tax - Section 37(1) - Assessee engaged in the business of manufacturing electro porcelain products - claims deduction for business expenditure incurred for discharge of corporate guarantee obligation and advances not recoverable - AO allows the write off of advances but observes on the issue of corporate guarantee that it has nothing to do with business activity of the assessee - CIT(A) observes that if the assessee had given corporate guarantee for the purpose of business on grounds of commercial expediency, the amount paid for discharge of corporate guarantee would be allowable as deduction u/s 37(1) - Held, giving corporate guarantee is not only one of the objects of the assessee company but the same was given for its subsidiary company and it was in the interest of the assessee company and hence it is a commercially expedient decision. CIT(A) order upheld. Revenue's appeal dsmissed.

2009-TIOL-724-ITAT-MAD-TM

M/s Dynavision Ltd Vs ACIT, Chennai (Dated: July 3, 2009)

The prescription of sec.43B (*Certain deductions to be only on actual payment* .) can be invoked only if the assessee claims deduction from the taxable income. Since the assessee has not reduced its profits by making deduction/allowance of the customs duty from the taxable profits, the provisions of sec.43B cannot be applied. The basic fact that entire amount was not claimed as

deduction, was not considered by the Assessing Officer. When the amount is not claimed, there is no question of applying the prescription of sec.43B .

Also see analysis of the Order

2009-TIOL-723-ITAT-AHM

Gujarat Toll Road Investment Co Ltd Vs ACIT, Gandhinagar (Dated: May 15, 2009)

Income Tax - Section 43B - Assessee is a public limited company engaged in the business of providing infrastructure facility - claims that the interest accrued on deep discount bonds, even though not actually paid, is deductible in view of the CBDT Circular - AO observes that the details of the CBDT Circular not produced before him and hence the claim is not correct and the amount is disallowed u/s 43B - CIT(A) upholds disallowance - Held, neither the AO is justified in disallowing the deduction nor the CIT (A) is justified in confirming such disallowance. The amount of provision made by the assessee in respect of interest accrued on Bonds is not in dispute as excessive or not relating to the year under consideration. Disallowance deleted. Assessee's ground allowed.

2009-TIOL-722-ITAT-MUM

Shri Prerak Goel Vs ACIT, Mumbai (Dated: August 10, 2009)

Income Tax - Section 2(24)(iv) - AO treats the amount as deemed income in the hands of the assessee and makes addition in respect of expenses incurred by a Company on higher studies of the assessee abroad and on business party thrown after the marriage of the assessee who happen to be a relative of the Director - CIT(A) upholds the AO's order - Held, the expenditure met by the company on the education of the assessee squarely falls within the scope of Section 2(24)(iv).

On the issue of marriage expenditure - Held, the dinner is hosted on the occasion of marriage of the assessee by giving it the colour of business meet. The said expenditure cannot be termed as a business expenditure. The initial booking was done at a personal level towards marriage reception, which was later converted into a company's obligation by passing a resolution. CIT(A) order upheld. Assessee's appeal dismissed.

2009-TIOL-721-ITAT-DEL

Ajanta Raj Proteins Ltd Vs DCIT, New Delhi (Dated: June 30, 2009)

Income Tax - Section 145A - Assessee is a limited company, engaged in the business of manufacturing of condensed milk, ghee and butter - AO observes the assessee has not complied with the requirement of Sec 145A as it has valued opening stocks at cost but closing stocks at net realisable value and disallows losses - CIT(A) confirms the order - Held, the AO as well as the CIT(A) have correctly disallowed the resultant loss, which was mainly on the basis of change in the method of valuation of the

inventories. The provisions of section 145A disable the assessee from frequently changing the method of valuation of the stocks.

2009-TIOL-720-ITAT-MUM

Shri Brij Securities P Ltd Vs ITO, Mumbai (Dated: April 4, 2009)

Income Tax - Section 2(22)(e) - Assessee deals in shares and securities - AO disallows part of motor car expenses on account of personal use - CIT(A) enhances the income by applying the provisions of Section 2(22)(e) and directs the AO to initiate the penalty proceedings u/s. 271(1)(c) - Held, the transaction of purchase of car in the name of, Director of the Company, was in the ordinary course of business of the company. Obtaining loan for the car, repayment of the installment of loan, showing loan as secured liability and the car as an asset in the books of the company do not suggest that the transaction of the company with the Director was in a way arranged to give any benefit to the Director of the company, and accordingly the amount cannot be considered as deemed dividend in the hands of the assessee and hence deleted.

2009-TIOL-719-ITAT-DEL

ACIT, New Delhi Vs Shri Ajay Jadeja (Dated: July 25, 2008)

Income Tax - Section 147/143(3) - Assessee is a renowned cricketer - claims exemption in respect of award money and cricketing income for AY 1995-96 - AO accepts the exemption - For A.Y 1998-99 the claim of the assessee for exemption in respect of cricketing income and award money held to be not admissible on the ground that the assessee being a professional cricketer is not eligible for the benefit of Circular No 447 and Instruction No. 1432 issued by the CBDT. – CIT (A) confirms AO order - On the basis of this outcome of the assessment in assessee's own case for AY 1998-99, the assessment for AY 1996-97 reopened. – AO disallows the claim of the assessee for such exemptions to the extent in respect of cricketing income and award money respectively and adds the same to the total income in the assessment completed u/s 147/143(3) - CIT(A) following the order of his predecessor for AY 1995-96 cancels the assessment order passed for AY 1996-97 holding that the same is based on a mere change of opinion - Held, the initiation of reassessment proceedings for AY 1996-97 was bad in law and the assessment made in pursuance thereof by the AO was invalid - CIT(A) order upheld. Revenue's appeal dismissed.

2009-TIOL-718-ITAT-MUM

J P Morgan Services India Pvt Ltd Vs DCIT, Mumbai (Dated: June 26, 2009)

Income tax - Sec 10A - Assessee is 100% EoU - engaged in development and export of computer software - sets up STPI unit - claims deduction u/s 10A - AO disallows a sum received as exports proceeds six months after the end of previous year - Assessee pleads the six months period stipulated to bring in the exports proceeds was extended by the RBI as per Regulation 9 - held, Regulation 9 is a deeming provision which cannot be extended to Sec 10A. However, since a major part of exports

proceeds was received within six months, the same is allowable deduction. As regards deduction for interest claimed by the assessee, it has been decided by the jurisdictional HC that if the surplus exports income is deposited in banks, and interest earned, such income is also eligible for Sec 10A benefits - Assessee's appeal partly allowed

2009-TIOL-717-ITAT-MUM

Panatone Finvest Ltd Vs DCIT-2(2), Mumbai (Dated: October 5, 2009)

Income tax - Sec 57(iii), 37 - Assessee is a subsidiary of Tata Sons Ltd - engaged in the business of investment and finance - borrows funds in order to buy shares of VSNL to attain controlling stake for the Tata Sons - claims deduction for interest expenditure incurred - AO disallows on the ground that the assessee does not treat the same as stock-in-trade nor earns any income from the same as it gets nothing from the telecom business and it is simply used as a special purpose vehicle by the Tata Sons to acquire controlling stake in the VSNL - CIT(A) agrees with the AO - held, it is evident that the assessee-company acquired controlling stake of VSNL only to serve the holding company's interest by acting as Special Purpose Vehicle to bid for the acquisition of shares of VSNL and not with a dominant object of earning income, either directly or indirectly. Since the investment was not for earning dividend income, deduction is not allowable - assessee's appeal dismissed

2009-TIOL-716-ITAT-BANG

M/s ABB Limited Vs CIT, (LTU), Bangalore (Dated: August 13, 2009)

Income tax - Sec 32(1)(iia) - Assessee is a manufacturer - claims additional depreciation on technical knowhow - AO allows it but CIT invokes powers u/s 263 to disallows the same - held, since neither the AO nor the CIT(A) has made inquiry as to whether it was a technical knowhow for manufacture of goods or relating to installation of machinery which is treated as 'plant', the matter is remanded for fresh examination

2009-TIOL-715-ITAT-BANG

24/7 Customer Pvt Ltd Vs CIT, Bangalore (Dated: August 7, 2009)

Income tax - Sec 10A - Assessee has two STPI units at Bangalore and Hyderabad - since the Hyderabad unit was making losses it opted out of exports benefits scheme by filing a declaration u/s 10A(8) - claims deduction of Bangalore STPI units u/s 10A - AO allows it - CIT invokes powers u/s 263 and directs the AO to adjust the unabsorded depreciation and brought forward business losses of earlier years - Assessee argues that since the Hyderabad unit had opted out to be non-STPI unit and had filed a declaration for assessment under normal provisions of the I-T Act, their losses cannot be set off against the profits of the STPI units - held, in view of the settled laws that the losses of non-STPI units cannot be adjusted against the profits of STPI units for claiming deduction u/s 10A, the CIT order u/s 263 is not sustainable - Assessee's appeal allowed

2009-TIOL-714-ITAT-DEL

M/s Mesco Exports Ltd Vs DCIT, New Delhi (Dated: September 30, 2009)

Income tax - Sec 201(1), 201(1A) - Assessee is a Group company - search - Revenue finds the assessee had deducted TDS on various transactions but never deposited the same in the Govt account - Orders u/s 201(1) and 201(1A) passed - Assessee pleads limitation as the case pertains to FY 1993-94 - held, since this is a mala fide act of the assessee, no time limit can be applied - even vide amendment by Finance Act 2009, the time limit for such cases has been extended upto 2011 - Assessee's appeal dismissed

2009-TIOL-713-ITAT-DEL

LG Electronics India Pvt Ltd Vs ACIT, New Delhi (Dated: September 30, 2009)

Income tax - Sec 271(1)(c) - Assessee is in business of manufacturing, sales and marketing of electronic products - claims deduction for provision of expenses during the year - AO diallows and initiates penalty - CIT(A) confirms the same - held, as long as liability has been incurred and only the quantification of the same is to be done and an estimate is made in this regard, and when the provision made is more because of requantification of liability, the excess sum is written back to the P&L Account, there is no ground for levying penalty - Assessee's appeal allowed

2009-TIOL-712-ITAT-MUM

JCIT, Mumbai Vs M/s State Bank Of Mauritius Ltd (Dated: October 16, 2009)

Income tax - Indo-Mauritius DTAA - applicability of tax rate - whether lower income tax rate applicable to domestic company would be applicable to a non-resident company or the higher rate provided for in the relevant Finance Act would apply - If higher tax rate is applied, will it be hit by the limitation of non-discriminatory provisions provided vide Article 24 of the DTAA - whether there is any cap provided in the tax treaty on travelling and entertainment expenses

Assessee is incorporated as a company in Mauritius - has a Permanent Establishment (PE) in India - claims as per non-discriminatory clause under Article 24 of the DTAA its status is equivalent to a 'domestic company' as defined in Sec 2(22A) in the I-T Act, and hence higher rate of tax prescribed for non-resident companies and also surcharge will not be applicable in its case - AO holds that non-resident company has to pay taxes at the rate provided in the Finance Act - CIT(A) observes that there is no limitation to non-discriminatory provision of the DTAA and once it prevails in a conflict situation, lower rate of 40% will apply and not the higher rate of 50% in this case - held,

in view of insertion of Explanation 1 to Sec 90 vide Finance Act 2001 with retrospective effect from 1.4.1962 which provides that the charge of higher rate of tax in the case of non-resident companies shall not be regarded as less favourable, the

application of 55% rate by the AO is valid - CIT(A) order set aside and Revenue's appeal allowed.

Ground no 2 & 3:

AO notices some administrative and entertainment expenses incurred by the company and disallows part of them in view of the restrictions of Sec 37(2) and Rule 6D - CIT(A) holds that the restrictions prescribed in the Income Tax Act will not apply to the non-resident company as no such restrictions are prescribed in Article 7(3) of the DTAA - held,

++ Article 7 of the DTAA prescribes the methodology for computation of business income and the deductions allowable under the treaty;

++ since there is no restriction incorporated in the DTAA with Mauritius, the restrictions provided by Sec 37(2) in the I-T Act cannot be enforced in this case.

CIT(A)'s order upheld and Revenue's appeal dismissed.

Also see analysis of the Order

2009-TIOL-711-ITAT-MUM

Kotak Forex Brokerage Ltd Vs ACIT, Mumbai (Dated: August 1, 2009)

Income Tax - Sec 32(1)(ii) - Assessee acquires foreign exchange broking business from M/s Uday S Kotak for a consideration - pays for goodwill as well and claims depreciation - Revenue disallows on the ground that 'goodwill' does not figure in the list of intangible assets enumerated in clause (ii) of Sub-Section (1) of Sec 32 - held, by applying the principles of ejusdem generis , the meaning has to be extended to the phrase 'other business or commercial rights of similar nature'. The name 'Kotak' has tremendous reputation and importance as the assessee company has benefited by the usage of the said name. Therefore, it is of commercial value for which the assessee has paid huge sum as goodwill payment. The goodwill is also an intangible asset of the similar nature referred to in clause (ii) of section 32(1) of the Act, the depreciation is allowable on the same. Assessee's appeal allowed

2009-TIOL-710-ITAT-MAD

ACIT, Chennai Vs TVS Finance & Services Limited (Dated: August 24, 2009)

Income Tax – Claiming Depreciation on the basis of fabricated documents and with no machine to install – Penalty of Rs. 6 Crores upheld The assessee has clearly admitted that depreciation was wrongly claimed on the basis of bogus invoice and on non existing assets. It is clear that it is not assessee alone but even public limited companies are involved in making false claim of depreciation through hire purchase of non-existing assets. Many cases go scot free. Some are caught and then a surrender of depreciation is made. Like in the case in hand, evidence of insurance policy, transportation and installation of goods etc. etc. is fabricated and forged in support of the claim. This is quite natural as a claim of deduction of crores of

rupees cannot be falsely made without fabricating evidence. It is not expected that assessee would not manufacture some evidence to give it some authentic appearance.

Also see analysis of the Order

2009-TIOL-709-ITAT-DEL

M/s Citi Financial Consumer Finance (I) Ltd Vs ACIT, New Delhi (Dated: October 9, 2009)

Income tax - Sec 147, 36(1)(vii) - Assessee is NBFC - finances purchases of automobile and home - files return - order u/s 143(3) passed - AO invokes Sec 147 to disallow loss arising on account of sale of re-possessed assets - CIT(A) agrees with the AO - held, since the AO has initiated reassessment merely on the ground that the such a loss was disallowed in the previous year and it escaped similar treatment in the current year, it amounts to mere change of opinion without having any fresh material or any change in the legal position decided by any court decision, reassessment is vitiated and cannot be allowed - Assessee's appeal allowed

2009-TIOL-708-ITAT-MUM

DCIT, Mumbai Vs M/s Euro Rscg(S) Pte Ltd (Dated: October 8, 2009)

Income tax - India-Singapore DTAA - Assessee company acts as communication interface between multinational clients and various group entities - sets up a centralised group of persons to coordinate between the clients and the local group entities - AO treats it as technical service, covered under Article 12 of the DTAA - CIT(A) holds that there is no question of the assessee providing right to use and the payment being royalty in nature - the coordination fee paid to the assessee is to be treated as business profit - held, the AO has himself noted that the assessee has no PE in India. He also fails to establish that the fee received is either royalty or fee for technical services covered by the DTAA. Assessee's income not taxable in India. Revenue's appeal dismissed.

2009-TIOL-707-ITAT-MUM

Cipla Investments Ltd Vs ITO, Mumbai (Dated: August 28, 2009)

Income Tax - Section 28, 41(1) - Assessee shows closing balance of unsecured loans taken from the holding company - AO notices that the holding company has written off the entire amount as irrecoverable from the assessee, but the assessee has not written back the said amount as cessation of liability u/s 41(1) – CIT(A) while accepting that provisions of section 41(1) does not apply, and the AO not justified, in making the addition of loan liability as income, holds that the provisions of section 28 would apply - Held, the amounts were utilised in investments and the incomes thereon were offered under the head 'capital gains' and not as 'business income'. Provisions of section 41(1) invoked by the AO does not apply. CIT(A)'s order to this extent upheld. The loans availed for acquiring the capital asset, when waived cannot be treated as assessable income for invoking the provisions of section 28, the amount

is not taxable under the provisions of the Act. Assessee's appeal allowed.
2009-TIOL-706-ITAT-MAD
M/s Ahill Knit Exports Vs ACIT, Tirupur (Dated: March 31, 2009)
Income tax - Revision u/s 263 – AO allows deduction u/s 80IB on duty drawback included in income – CIT holds that since duty drawback is not derived from the industrial undertaking, assessee is not eligible for deduction u/s 80IB following recent decision of Madras High Court in Sakthi Footwear Vs ACIT - On appeal, Tribunal held that on the date of passing of the order u/s 263 the order of the jurisdictional HC was available and since no contrary view of jurisdictional High Court was available on that date, it was not a debatable issue and hence upheld the action u/s 263.
2009-TIOL-705-ITAT-DEL
ACIT, New Delhi Vs Shri Hidechito Shiga (Dated: September 25, 2009)
Income tax - Sec 10(10CC) - Employer pays tax on behalf of employee - AO includes the same in the employee's income by treating the same as monetary perk - held, issue is no longer res integra as it is decided by the Special Bench in the case RBF Rig. Corpn. LIC in favour of the assessee - Revenue's appeal dismissed
2009-TIOL-704-ITAT-MUM
M/s Fundtech India Ltd Vs DCIT, Mumbai (Dated: April 24, 2009)
Income tax - Sec 10B - Assessee is engaged in the business of computer software - registered with STPI as 100 % EOU - claims exemption u/s 10B but the same denied by AO as the assessee fails to produce any evidence that it had commercial business in STPI - CIT(A) goes with the AO – held, the issue has been mechanically decided by the Revenue, without examining the issue on merits - Matter remanded
2009-TIOL-703-ITAT-MAD-TM
Shri G Venkateswaran Vs ACIT, Chennai (Dated: March 5, 2009)
Income Tax – Stay of Penalty – when High Court had granted conditional stay, same proceedings cannot continue in Tribunal – Stay petition dismissed after 18 years: In this case, 17/18 years have passed without any grant of stay. This clearly shows that nobody is interested on behalf of the assessee in the stay of recovery of demand. Otherwise all possible steps would have been taken by the legal representatives. It is well settled that stay of demand is a discretionary relief and is to

be granted to persons seeking the same. Therefore, this is not a fit case in which the discretionary power should be exercised.

Also see analysis of the Order

2009-TIOL-702-ITAT-DEL

ACIT, New Delhi Vs Sh Hidechito Shiga (Dated: September 25, 2009)

Income tax - Sec 10(10CC) - Assessee is an employee - employer pays tax on his behalf - AO grosses up the income and treats the tax paid as monetary perk - held, the issue is no longer res integra as decided by the Tribunal in favour of the assessee in an earlier case and also by the Special Bench in the case of RBF Rig Corpn - Revenue's appeal dismissed

2009-TIOL-701-ITAT-DEL

ACIT, New Delhi Vs M/s Centitech India Pvt Ltd (Dated: April 22, 2009)

Income tax - capital expenditure vs revenue expenditure - assessee enters into an agreement with a non-resident company for the exclusive use of technical knowhow - agrees to pay 1.8% of net sales of products as running royalty - AO holds 25% of the expenditure is of capital nature - CIT(A) disagrees - held, it is settled law now that since it is not a lumsum payment but a running royalty which is to be paid to the non-resident and is allowable expenditure - Revenue's appeal dismissed

2009-TIOL-700-ITAT-DEL

ACIT, New Delhi Vs M/s Cargill Global Trading (I) (P) Ltd (Dated: October 9, 2009)

Income tax - Sec 195, 40(a)(i) - Assessee is a trader-exporter - discounts bill of exchange - pays discounting charge to Singapore-based company - whether discounting charges are interest payments u/s 2(28A) on which TDS is deductible u/s 195 - whether it is a business income for the non-resident as per India-Singapore DTAA

The assessee-exporter exports goods to foreign buyers - in place of waiting to realise full exports proceeds, the assessee discounts the bill of exchange for immediate realisation of payment - AO treats the discount paid to the non-resident as interest under Sec 2(28A), and since the assessee fails to deduct TDS, the AO disallows the payment u/s 40(a)(i) - CIT(A) holds that the discounting charges paid by the assessee is not an interest as neither any money is borrowed nor any debt is incurred - held,

++ The word “Interest” is differently defined under Interest Tax Act. As per section 2(7) of Interest Tax Act, “interest” means interest on loans and advances made in

India and includes - (a) commitment charges on unutilized portion of any credit sanctioned for being availed of in India; and (b) discount on promissory notes and bills of exchange drawn or made in India.

++ Thus where the legislature was conscious of the fact that even the discount of bills of exchange is to be included within the definition of interest, the same was basically so provided for.

++ However, under the scheme of Income-tax Act, the word “Interest” defined under section 2(28A) does not include the discounting charges on discounting of bills of exchange. Though the circular No.65 was rendered in relation to deduction of tax under section 194A, in respect of payment to a resident, the same will be relevant even for the purpose of considering whether the discount should be treated as interest or not. The CBDT has opined that where the supplier of goods makes over the usance bill/hundi to his bank which discounts the same and credits the net amount to the supplier's account straightaway without waiting for realization of the bill on due date, the property in the usance bill/hundi passes on to the bank and the eventual collection on due date is a receipt by the bank on its own behalf and not on behalf o the supplier.

++ For such cases of immediate discounting the net payment made by the bank to the supplier is in the nature of a price paid for the bill. Such payment cannot technically be held as including any interest and therefore, no tax need be deducted at source from such payment by the bank.

++ The discounting charges are not in the nature of interest paid by the assessee. Rather after deducting discount the assessee received net amount of the bill of exchange accepted by the purchaser.

++ The CFSA, not having any permanent establishment in India, is not liable to tax in respect in respect of such discount earned by it and hence the assessee is not under obligation to deduct tax at source under section 195 of the Act. Accordingly, the same amount cannot be disallowed by invoking section 40(a)(i) of the Act.

Also see analysis of the Order

2009-TIOL-699-ITAT-DEL

DCIT, Dehradun Vs M/s Hundai Heavy Industries Co Ltd (Dated: October 9, 2009)

Income tax - Indo-Korea DTAA - assessee is a Korean company - enters into contract with the ONGC for commissioning and installation work - No PE exists at the time of signing of the contract - payments made for designing and fabrication required for the contract taken on turnkey basis - Whether such income is taxable in India - whether any income arising from such activities carried out outside India can be attributed to the PE

Assessee is an engineering company - undertakes heavy duty engineering contract in oil exploration - gets turnkey project to be carried out for the ONGC - work involves designing and fabrication which is carried outside India - No PE exists - after the work begins, installation PE comes into picture - Revenue for attribution of all profits arising in India and also the income arising from works done outside India - held, in view of the Apex Court decision in the case of assessee itslef, the income arising from works done outside cannot be taxed, and there is no dispute about the quantum of profit, arising from the Indian operations, attributable to the PE - Revenue's appeal

dismissed

2009-TIOL-698-ITAT-MUM-SB

DCIT, Mumbai Vs Manjula J Shah (Dated: October 16, 2009)

Income tax - 45, 47, Explanation (iii) to section 48 & 2(42A) - Assessee receives a flat from his daughter under gift deed - after few years assessee sells off the flat - computation of long-term capital gains - assessee works out cost of acquisition of flat by applying cost inflation index in relation to the year in which the preivious owner had first held the asset - AO disagrees and works out the cost of acquisition by applying the cost inflation index from the year in which the gift deed was registered - CIT(A) allows the appeal - conflicting decisions by Tribunal - issue referred to the Special Bench - held,

++ there is no capital gain chargeable to tax as a result of transfer of a capital asset under gift since the transaction involving a gift of capital asset is not regarded as transfer for the purpose of Section 45.

++ However, if such capital asset becoming the property of the assessee under gift is subsequently transferred as per Section 45, the capital gain arising from such transfer is made chargeable to tax and the date and cost of acquisition of the previous owner are adopted as a cost and date of acquisition of the assessee for the purpose of computation of income from such capital gains.

++ The entire capital gain including the capital gain which would have been chargeable as a result of transfer of a capital asset by the previous owner to the assessee as a result of gift but for the provisions of section 47 thus is made chargeable to tax at the second stage when the capital asset becoming the property of the assessee under gift is transferred by him. This is the scheme of the Act as laid out in the relevant provisions which treat the cost and date of acquisition of the previous owner as the cost and date of acquisition of the assessee.

++ The importance is assigned to the period of holding of the capital asset in as much as Explanation (iii) to section 48 refers to the first year in which the asset was held by the assessee whereas Explanation 1(b) to section 2(42A) provides for inclusion of the period for which the asset was held by the previous owner in determining the period for which any capital asset is held by the assessee.

++ The legislative intention behind enacting these provisions is very clear to treat the date as well as cost of acquisition of capital asset of the previous owner to be the date and cost of acquisition of the assessee for the purpose of computing capital gain in terms of Section 48. This is the scheme of the Act as laid out in the relevant provisions and this is the context in which the same has to be understood and appreciated.

Also see analysis of the Order

2009-TIOL-697-ITAT-MUM

Excellent Exports Pvt Ltd Vs ITO, Mumbai (Dated: April 28, 2009)

Income Tax - Section 36(1)(iii) - Assessee engaged in the business of trading in steel and financing - AO makes disallowance of the sum paid as interest on borrowed loans on the ground that as the interest had not been charged by the assessee in respect of the advances given to the firm in which the Directors are interested, the assessee has utilised the funds for non-business purpose - Held, presuming that the assessee has diverted the funds but assessee's own funds in the forms of own share capital and reserves i.e. share premium is much more than the funds diverted for the non-business purpose. There is no justification to make the disallowance. Addition deleted - Assessee's ground allowed.

2009-TIOL-696-ITAT-DEL

B G International Ltd Vs DCIT, Dehradun (Dated: October 12, 2009)

Income tax - Sec 10(10CC) - Employer pays tax on behalf of employees - employee-assessees claim exemption u/s 10(10CC) by treating the same as non-monetary perquisite - AO for including the same in taxable income - held, income-tax paid by the assessee on perquisites of employees would constitute non monetary benefit u/s 10(10CC). Agent-employer's appeal allowed on the basis of Special Bench decision in the case of RBF Rig Corpn decided in favour of assessees