



Monthly Digest of Case Laws (April 2010)

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(JOURNALS REFERRED): BCAJ, CTR, DTR, ITD, ITR, ITR (Trib), Income Tax Review, SOT, Taxman, Taxation, TLR, TTJ, www.itatonline.org

CHAPTER I – PRELIMINARY

1. **S. 2(22)(e) : Deemed dividend - Receipts in the ordinary course of business**

Receipts which are in the ordinary course of business cannot be treated as deemed dividend.

ACIT vs. Sunil Chopra (2010) 2 ITR 469 (Trib.)(Delhi)

2. **S. 2(22)(e) : Deemed dividend - Misappropriation by share holder - Can be taxed in the hands of share holder and not in the assessment of company.**

Amount received from a company having been misappropriated by shareholder, there was no loan or advance, even assuming to be dividend it would have to be taxed in the hands of shareholder and not in the hands of assessee.

CIT vs. Universal Medicare (P) Ltd. (2010) 37 DTR 409 (Bom.)

Editorial Note:- Decision of Special Bench in CIT vs. Bhaumik Colour (P) Ltd. (2009) 120 TTJ 865 (Mumbai) (SB), (2009) 118 ITD 1 (SB) approved.

CHAPTER – II - BASIS OF CHARGE

3. **S. 5 : Accrual of income**

Timeshare membership fee is taxable only over the term of contract

ACIT vs. Mahindra Holidays & Resorts (ITAT Chennai Special Bench) www.itatonline.org

4. **S. 9(1)(i) : Income deemed to accrue or arise in india - International taxation – DTAA –India-Australia - Supply of equipment- (s. 5(2), art. 7)**

Where a transaction of off shore supply of equipment got completed outside India and the payment was also received by assessee in foreign country, no income accrued or arose in India, hence not taxable.

Xelo PTY Ltd. vs. Dy. CIT (2010) 37 DTR 154 (Mumbai)(Trib.)

5. **S. 9(1)(i) : Income deemed to accrue or arise in India – business connection**

Activities of identification of suppliers, quality control, preproduction meeting online inspection,



post manufacturing inspection, handling of logistic and co-ordination carried out by the Indian branch office the foreign company (assessee) under an agreement with another foreign company for providing assistance to its customers in connection with purchase of goods from India fall within the scope of Expl. 1(b) to section 9(1)(i) and therefore, no part of assessee's income from such services is taxable in India.

Mondial Orent Ltd. vs. ACIT (2010) 37 DTR 267 (Bang.)(Trib.)

6. S. 9(1) : Permanent establishment

To compute the PE 'duration test' under Article 5(2) of the DTAA, different project sites can be aggregated only if the test of interconnection and interrelationship is satisfied.

ADIT vs. Valentine Maritime (Mauritius) (ITAT Mumbai)
www.itatonline.org (2010) 38 DTR (Mumbai) (Trib) 117.

7. S.9(1)(vii) : Fees for technical services

Fees for technical services, even if rendered outside India, are taxable.

Ashapura Minichem vs. ADIT (ITAT Mumbai) www.itatonline.org

CHAPTER – III - INCOME DO NOT FORM PART OF TOTAL INCOME

8. S. 10A : Exemption - manufacture or production - blending of tea

Blending and packing of tea for export in industrial unit in special economic zone amounts to manufacture or production of an article qualifying for exemption under section 10A, for the Asst. Year 2004-05 even though the then existing provisions of section 10A, for the Asst Year 2004-05 did not contain definition clause.

Girnar Industries vs. CIT (2010) 36 DTR 402 (Ker.)

9. S. 10B : Exemption - Export oriented unit - Computer programmes - (S. 10BB)

Technical data received from overseas clients on basis of which designs drawings and layouts created by assessee's engineers using computer software is "management of electronic data" and the assessee is entitled to exemption under section 10B, 10BB.

Dy. CIT vs. Tecnimont ICB Pvt. Ltd. (2010) 2 ITR 480 (Trib.) (Mumbai)

10. S. 10(23FB) : Venture capital company

Interest income from FDR's was exempt for the Asst. Year 2002-03. The words "from investment" having been substituted the words "set up to raise funds for investment". By the Finance Act, 2007, w.e.f. 1st April 2008, cannot be read in the earlier provisions.

India Value Fund vs. ACIT (2010) 37 DTR 169 (Mumbai)(Trib.)



CHAPTER – IV - COMPUTATION OF TOTAL INCOME

C - INCOME FROM HOUSE PROPERTY

11. **S. 22 : Income from house property – Ownership - Company vis-à-vis shareholders – [S. 27(iii)]**

When the structure of the building is construed by the company out of its own funds and not on behalf of the shareholders and even the title to the property also shows the company as owner and in the rental agreement the company has shown as owner and entitled to receive the rent, the rental income is assessable in the hands of the company and not shareholders.

CIT vs. Monarch Citadel (P) Ltd. (2010) 37 DTR 1 (Kar.)

12. **S. 22 : Income From House Property – Rental Income**

Assessee company's main object being investment in properties, flats, shops, warehouses, commercial properties. Due to recession certain flats not sold & let out on licence basis for temporary period. Held, the rental income is taxable as income from property.

Mangla Homes (P) Ltd. vs. ITO (2010) 215 Taxation 511 (Bom.)

13. **S. 22 : Income from House Property – Lift Services Charges**

Where lift service charges received, Assessing Officer taxing the lift charges as income from house property holding the lift as an integral part of the house. Matter remanded to the Assessing Officer to examine the terms of tenancy agreement & decide the matter.

CIT vs. Mohan Enterprise (2010) 215 Taxation 575 (Ker.)

14. **S. 23 : Income from house property - brokerage payment (S. 24)**

Brokerage paid by assessee to different brokers for introducing parties for renting out premises is not a charge created on property and thus same can neither be deducted from rent under section 23 nor is it allowable as deduction under section 24.

Tube Rose Estates (P) Ltd. vs. ACIT (2010) 123 ITD 498 (Delhi)

D - PROFITS AND GAINS OF BUSINESS OR PROFESSION

15. **S. 28 : Business income - compensation for infringement of copyright**

Amount received as compensation for infringement of copy right assessable as business income.

CIT v Eastern Book Company (2010) 322 ITR 605 (All).



16. S. 28(iv) : Business income - Benefit or perquisite - waiver of loan

Waiver or write off of part of principal amount of loan by sister concern is not taxable as Benefits or perquisites under section 28(iv) as benefits should be of the nature other than cash.

CIT vs. Jindal Equipments Leasing & Consultancy Services Ltd. (2010) 37 DTR 172 (Del.)

17. S. 32 : Depreciation - investment allowance - stand by spare parts - (S. 32A)

Depreciation and investment allowance are allowable on standby spare parts, even though they were not taken for use during the year.

CIT vs. SPIC Ltd. (2010) 37 DTR 177 (Mad.)

18. S. 32(2) : Unabsorbed depreciation - set off against income from house property

Unabsorbed depreciation could be set off against income from house property till the provision was amended w.e.f. 1st April, 2002.

CIT vs. Spic Ltd. (2010) 37 DTR 177 (Mad.)

19. S. 36(1)(vii) : Bad debt - Business expenditure – Bank - Bad and doubtful debts

The assessee debiting profit and loss account and creating provision for bad and doubtful debts reducing by corresponding amount from loans and advances debiting the said amount in the profit and loss account and reducing on the asset side of the balance sheet. The assessee was entitled to deduction under section 36(1)(vii), and it was not necessary to close the individual account of each debtor in the books.

Vijay Bank vs. CIT (2010) 231 CTR 209 (SC) 37 DTR 401 (SC) www.itatonline.org.

20. S. 37(1) : Business Expenditure – Deferred Revenue Expenses

Whether where an assessee writes off certain expenditure in its books of account over a period of say five years, it must be allowed in its entirety in year in which it was incurred, if it is revenue expenditure, and is wholly exclusively incurred for purpose of business.

ACIT vs. Core Healthcare Ltd. (2010) 37 SOT 383 (Ahd.)

21. S. 37(1) : Business expenditure - Penalty - fine - Regulation fee to municipality corporation

Regulation fee is an amount paid for compounding of the offence in terms of section 483 of Karnataka, Municipal Corporation Act, 1976, which is a penalty and therefore not allowable under section 37(1).

Millennia Developers (P) Ltd. vs. Dy. CIT (2010) 37 DTR 16 (Kar.)

22. S. 37(1) : Business expenditure - exchange rate fluctuation - year of allowability -Mercantile system of accounting



Assessee having maintained accounts on mercantile system of accounting, loss claimed by the assessee on account of fluctuation in the rate of foreign exchange as on the date of balance sheet in respect of loans taken for revenue purposes is allowable as business expenditure under section 37(1), notwithstanding the fact that the liability has not been discharged in the year in which the fluctuation in the rate of foreign exchange has occurred.

Oil & Natural Gas corporation Ltd. vs. CIT (2010) 36 DTR 345 (SC)(2010) 322 ITR 180 (SC)

23. S. 37(1) : Business expenditure - keyman insurance policy of partner

Keyman insurance policy is not confined to a situation where there is a contract on employment. Premium on the keyman insurance policy of a partner of the firm is wholly and exclusively for the purpose of business and is allowable as business expenditure.

CIT vs. B. N. Exports (2010) 37 DTR 381 (Bom.) 2010) 231 CTR 227 (Bom.)

24. S. 37(1) : Business expenditure - sales promotion - gifts - samples

Expenditure on the business promotion, including gifts, samples prizes, etc. to customers including officials of CSD canteens was allowable when the gifts were below Rs 340 and not expensive.

CIT vs. C. B. K. R. Enterprises (2010) 37 DTR 148 (Del.)

25. S. 37 (1) : Business expenditure-payment to police personnel and rowdies to ensure security.

Payment to police personnel and rowdies to ensure security of business premises as the payment being not legal not allowable as deduction.

CIT v Neelavathi and others (2010) 322 ITR 643 (Karn)

26. S. 37(1) : Business expenditure – Foreign tour expenses

Disallowance of foreign tour expenses in respect of certain persons cannot be made simply for the reason that such persons are not the employees of the assessee in a case wherein assessee establishes business connection with such persons.

DCIT vs. Gems Paradise, ITA No. 700/JP/2009, Bench – A, dt. 18th December, 2009 / Taxworld, Volume – XLIII – Part 3 – March, 2010 – page 80 (86).

27. S. 40(a)(ia) : Business Disallowance - no professional expertise

Payment made by actor to person for managing call sheets, cannot be called payment for professional services hence cannot be disallowed under section 40(a)(ia)(A).

R. S. Suriya vs. Dy. CIT (2010) 2 ITR 746 (Chennai)(Trib.)

28. S. 40(a)(ia) : Business Disallowance - Estimate of income



Once estimate of income is made, further disallowance under section 40(a)(ia) for non deduction of TDS is not warranted.

Teja Constructions vs. ACIT (2010) 129 TTJ 57 (Hyd.)(UO)

29. S. 40(b) : Firm – disallowance - book profit - interest on bank fixed deposit

For the purpose of computing deduction under section 40(b), interest on bank FDRs is not to be excluded from the net profit.

Allen Career Institution vs. Addl. CIT (2010) 37 DTR 379 (JP)(Trib.)

30. S. 40(b) – Firm – disallowance - salary to working partner - interest from deposit - book profit

A firm of solicitor is under obligation to keep the money received from its clients as deposit in a separate bank account, therefore, interest from such deposits will be assessable as profits and gains of business or profession hence, such interest has to be considered while computing book profits as per section 40 (b).

ACIT vs. Bilawala & Co. (2010) 37 DTR 335 (Mumbai)(Trib.)

31. S. 40(b) : Remuneration to working partner

The presence of a clause in the partnership firm that gave partners power to modify the terms of remuneration does not render remuneration unqualified for deduction

Shabro International vs. Addl. CIT, ITA No. 6629/Mum/2008, Bench – E, dt. 20th March, 2010 / BCAS Journal, Volume 42-A – Part 1 – April, 2010 – page 25.

32. S. 41(1) : Profits chargeable to tax - write back of loan liability - (S. 115JB)

Loan liability which was written back, which was subjected to tax as per section 115JB, cannot be taxed under section 41(1), as loan liability was not allowed as deduction as allowable expenditure.

CIT vs. Goyal M. G. Gases Ltd. (2010) 36 DTR 400 (Del.)

33. S. 43A : Actual cost – depreciation – exchange rate fluctuation - (S. 32)

Assessee is entitled to adjust the actual cost of the imported capital assets acquired in foreign, currency, on account of fluctuation in the rate of exchange at each of relevant balance sheet dates pending actual payment of varied liability for the assessment years prior to the amendment in section 43A, w.e.f. 1st April 2003.

Oil & Natural Gas Corporation Ltd. vs. CIT (2010) 36 DTR 345 (SC)

34. S. 43(5) : Speculation loss - Capital Gain



Claim of assessee for hedging loss in shares is not allowable, as, said shares were ultimately sold at capital gain.

Bengal & Assam Company Ltd. vs. CIT (2010) TLR 216 (Cal.) Vol. 40 Part 469

35. S. 43(5) : Speculative Transactions – Derivatives

Derivatives are speculative transaction if not for bona fide hedging.

ACIT vs. Dinesh K. Mehta HUF (ITAT Mumbai) www.itatonline.org

36. S.44BBB:Civil construction- Barge hire charges- DTAA-India –Mauritius- Royalty-(9(1) (vi), arts 5,7,12)..

Barge hire charges amounts to ‘royalty’ within the meaning of section 9(1) (vi) and under art 12 of DTAA, between India and Mauritius and is liable to tax in India under section 44BB.

Asstt Director of IT v Valentine Maritime (Mauritius) Ltd (2010) 38 DTR (Mumbai) (Trib) 117.www.itatonline.org.

E - CAPITAL GAINS

37. S. 45 : Capital Gains - capital asset - stock exchange card – [S. 2(14), 2(47), (47 xiiia)]

A membership card of stock exchange which confers right on the member to trade in stock and shares in exchange being a property falls within the definition of ‘capital asset’, in section 2(14) and therefore, capital gains are chargeable on the sale of assessee’s membership card in auction by the stock exchange pursuant to default committed by assessee in terms of the rules of stock exchange.

CD R. P. J. Mathew vs. ITO (2010) 36 DTR 352 (Ker.), (2010) 188 Taxman 376 (Ker.)

38. S. 45 : Capital gains - Transfer of land to developer – accrual - exemption - (S. 54EC)

Transferring development right to developer in Asst. Year 2000-01 would accrue capital gains and sale of flat in the Asst. Year 2005-06 will be long term capital gain which is eligible for exemption under section 54EC.

ITO vs. Vikash Behal (2010) 36 DTR 385 (Kol.)(Trib.)

39. S. 45 : Capital gains - cost of acquisition - indexed cost of inherited property – [S. 48, 49(1)(iii)(a)]

Assessee having inherited the property purchased by the previous owner, in the year 1974, cost of acquisition for the purpose of computing capital gains on sale of such property had to be computed by applying cost of inflation index of financial year 1981-82 and not financial year 1989-90 i.e. the year of inheritance by the assessee.



M. Siva Parvavathi & Ors. vs. ITO (2010) 37 DTR 124 (Visakha.)(Trib.)

40. S. 45 : Capital gains - business income - sale of shares – [S. 28(i)]

In respect of gain on sale of shares held for more than 365 days, when in the past the department has accepted the sale of shares holdings of more than a year as investment and profits thereon has been assessed under the head “capital gains” the gain should be assessed as long term capital gains in respect of other shares with frequent transactions where shares are held for more than a month they should be treated as investment and assessable as short term capital gains. Where the shares are held less than a month the same may be treated as profit from business.

Sugam Chand C. Shah vs. ACIT (2010) 37 DTR 345 (Ahd.)(Trib.)

Editorial Note:- Refer, Gopal Purohit (2009) 122 TTJ 87 (Mum.), affirmed (2010) 34 DTR 52 (Bom.) favour of assessee.

Mumbai Tribunal against Jayashree Pradip Shah vs. ACIT. ITA No. 3608/M/07 Asst. year 2004-2005 Bench ‘J’ dt. 24-2-2010. Shailesh L. Shah HUF vs. Dy. CIT ITA Nos. 3991 & 3992/M/2008 Asst. Year 2004-05, 2005-06 Bench ‘E’ dt. 13-1-2010, Rekha Khandelwal (Smt.) vs. ACIT. ITA No. 785/M/2009 Asst. year 2005-06. Bench ‘D’ dt. 17-3-2010.

41. S. 45 : Capital gains - business income - sale of shares – [S. 28(i)]

Principles to be applied while deciding whether sale of shares is capital gain or business income.

- (a) As per the **books of account**, the assessee has treated the entire investment in shares as an “investment” and not as “stock-in-trade”;
- (b) The assessee is **not a share broker** nor he is having a registration with any Stock Exchange;
- (c) Almost 83% of the capital gain is from shares that were held for a long period of time;
- (d) There were **no derivative transactions** by the assessee;
- (e) There were **no transactions without delivery**;
- (f) The assessee used his **own surplus funds** for investing in shares and not borrowed any money;
- (g) In the **preceding years**, the assessee consistently declared the gain/profit on the sale of the shares as ‘Capital Gains’ and the same has been **accepted** by the A.O. Though the rule of res judicata is not applicable to income-tax proceedings, in the absence of change in facts, there should be **consistency** in the approach of the Revenue;
- (h) The assessee received **substantial dividend** on the investments

Management Structure & Systems vs. ITO (ITAT Mumbai) www.itatonline.org

Also see : Smt Sadhana Nabera vs. ACIT (ITAT Mumbai) www.itatonline.org



42. **S. 45(1) : Capital gains – Cost of acquisition – Indexed cost of shares vis-à-vis set off of loss (S. 48, 70 & 112)**

Benefit of lower tax rate under Proviso to s. 112 is available to bonus shares despite no indexation

CIT vs. Anuj A. Sheth (HUF) (2010) 38 DTR 26 (Bom)

Editorial Note:- Refer Mohanlal N. Shah (HUF) vs. ACIT (2008) 26 SOT 380 (Mum.)

43. **S. 50 : Capital gains - depreciable asset - short term capital gains - (S. 2(11), 2(42A), 50A)**

Building which was acquired by the assessee in 1974, and in respect of which depreciation was allowed to it as a business asset for 21 years, still continued to be part of depreciable asset even though the assessee discontinued claiming depreciation for two years before its date of sale, and therefore, profit on sale of the building was assessable under section 50 as short term capital gains.

C. N. Ramachandran Nair & V. K. Mohanna (2010) 37 DTR 153 (Ker.)

44. **S. 50C – Full valuation of consideration**

S. 50C does not apply to ‘rights’ in land and building like tenancy rights.

Kishori Sharad Gaitonde vs. ITO (www.itatonline.org)

45. **S. 51 : Capital or revenue - forfeited advance for breach of agreement of sale.**

The amount received by an owner of property from the agreement holder as advance was forfeited for breach of contract. Such amount was held to be a capital receipt.

S. Zoraster and Co v CIT (2010) 322 ITR 35 (Raj).

46. **S. 54F : Capital Gains – Investment within three years**

Capital Gains to be charged in the previous year after expiry of three years from the date of transfer.

Ranjit Narang vs. CIT (2010) 215 Taxation 674 (All.)

CHAPTER VI - AGGREGATION OF INCOME AND SET OFF OR CARRY FORWARD OF LOSS

47. **S. 69 : Unexplained investment – [S. 5(2)(b)]**

In the case of remittances through banking channel the nature and source of the funds get an such remittances cannot be taxed under section 5(2)(b).

Susila Ramasamy (Smt.) vs. ACIT (2010) 36 DTR 418 (Chennai)(Trib.)

CHAPTER – VIA - DEDUCTIONS TO MADE IN COMPUTING TOTAL INCOME



C – DEDUCTIONS IN RESPECT OF CERTAIN INCOMES

48. S. 80A : Set off Unabsorbed losses & Depreciation [S. 80A, 80B(5), 80HH & 80I]

Provisions of section 80A r.w.s. 80B(5) override other provisions in Chapter VI-A and, therefore, deduction under sections 80HHC, 80HHD and 80-I cannot be allowed where the gross total income of the assessee is nil after setting off brought forward losses and depreciation and the losses of other units against the profit earned by it from the eligible unit.

CIT vs. Arif Industries Ltd. (2010) 231 CTR 271 (All) / (2010) 37 DTR 185 (All)

49. S. 80HHC : Deduction – Export - sale of scrap - total turnover

Value of scrap cannot be excluded while computing the deduction under section 80HHC.

CIT vs. Motor Industries Co. Ltd. (2010) 37 DTR 94 (Kar.)

50. S. 80HHC : Deduction – other income

Receipts with no nexus to exports have to be excluded for s. 80HHC deduction

CIT vs. Dresser Rand India (Bombay High Court)
www.itatonline.org

51. S. 80HHC : Deduction – other income

EEFC A/c foreign exchange fluctuation and interest not eligible u/s 80HHC

CIT vs. Shah Originals (Bombay High Court) www.itatonline.org

52. S. 80I : Deduction - profits and gains from industrial undertakings - (S. 80HH)

Deduction under section 80I should be allowed on gross total income, without reducing from it the deduction allowed under section 80HH.

CIT vs. K. P. Solvex Ltd. (2010) 36 DTR 443 (All)

53. S. 80M : Deduction - Gross or net – [S. 36(1)(viii)]

Deduction under section 80M is allowable on gross amount of dividend without deducting the proportionate deduction available under section 36(1)(viii).

Dy. CIT vs. G. I. I. C. Ltd. (2010) 37 DTR 207 (Guj.)

54. S. 80P(2)(a)(i) : Co-operative society - Interest on refund - (S. 2(13), 28(i), 56, 244A)



Interest on refund constitutes gains of business hence eligible for deduction. Income tax refund constitute income from other sources.

Maharashtra State Co-operative Bank Ltd. vs. ACIT (2010) 2 ITR 543 (Trib.)(Mum.)(SB), (2010) 129 TTJ 521 (Mum.)(SB), (2010) 37 DTR 194 (Mum.)(SB) (Trib.)

CHAPTER – IX - DOUBLE TAXATION RELIEF

55. S. 90 : DTAA - India-USA - fees for included services (Arts. 7 & 12)

Consideration received for factory acceptance test and project management and engineering support services were not liable to tax in India, because such services were rendered overseas and non resident did not make technical services to Indian party.

Dy. Director of IT vs. Scientific Atlanta, INC (2010) 37 DTR 98 (Mum.)(Trib.)

CHAPTER – X - SPECIAL PROVISIONS RELATING TO AVOIDANCE OF TAX

56. S. 92C : Transfer pricing - Computation of arm's length price – opportunity of being heard - Alternative remedy - (S. 144, Art. 226)

Assessee having afforded proper opportunity and as the alternative remedy of filing objections to the order of the TPO through approaching the Dispute Resolution Panel under section 144C is available, the order of TPO could not be challenged by filing writ petition.

Messe Dusseldorf India (P) Ltd. vs. Dy. CIT (2010) 37 DTR 253 (Del.)

57. S. 92C : Transfer pricing - computation of arms length price

TNM method requires comparison of net profit margins realized by an enterprise from an international transaction and not comparison of operating margins of enterprises as a whole.

Addl. CIT vs. Tej Diam (Mum.) (2010) 37 SOT 341 (Mum.)

58. S. 94 (7) : Tax avoidance - Tax planning-loss incurred in purchase and sale of units (s. 73)

Once the transaction is genuine merely because it has been entered into with a motive to avoid tax, it would not become a colourable devise and consequently earn any disqualification. Loss incurred on purchase

Porrits and Spencer (Asia) Ltd. vs. CIT (2010) 231 CTR 294 (P & H)

CHAPTER – XII-B - SPECIAL PROVISIONS RELATING TO CERTAIN COMPANIES

59. S. 115JAA : Minimum alternate tax - Refund - Interest - (S. 244, 244A)

MAT payment is not refundable and it can only be used as a credit. The year in which MAT credit is given and credit for other tax payments i.e. TDS, Advance Tax, etc., is also given, refund becomes due, not because of MAT credit but because of other tax payments hence the assessee is



entitled interest under section 244 and 244A.

Hyundai Motor India Ltd. vs. Dy. CIT (2010) 123 ITD 445 (Chennai)

60. S. 115JB : Minimum alternative tax - fringe benefit tax – [S. 2(43)]

Payment or provision for “fringe benefit tax” is not required to be added back for the purpose of computing book profit under section 115JB as clause (a) of explanation to section 115JB uses the term “income tax” which does not include “fringe benefit tax”

ITO vs. Vintage Distillers Ltd. (2010) 37 DTR 303 (Del.) (Trib.)

CHAPTER – XIII - INCOME TAX AUTHORITIES

C - POWERS

61. S. 133(6) : Power to issue notices - pendency of proceedings

Income tax authorities have power to issue notices under section 133(6), on any person including private banks, co-operative societies and even nationalized banks calling for information useful or relevant to any enquiry, if no proceedings are pending, such information can be called with prior approval of Director or CIT.

The Chavassery Service Co-Operative Bank Ltd. vs. ITO (2010) 37 DTR 102 (Ker.)

62. S. 133A : Power of survey - addition on the basis of statement - Income from undisclosed source – [S. 69, 145(3)]

Without any material to correlate, additional income surrendered during survey under section 133A, to any discrepancy, addition cannot be made, when surrender is retracted.

Dy. CIT vs. Premsons (2010) 37 DTR 150 (Mum.)(Trib.)

CHAPTER - XIV - PROCEDURE FOR ASSESSMENT

63. S. 142(1) : Assessment - Notice - Jurisdiction - (S. 143(2), 144)

Assessment made by the Assessing Officer who had no jurisdiction over the assessee, that too without issuing a notice under section 143(2) is null and void and is liable to be quashed.

Pravin Balubhai Zala vs. ITO (2010) 129 TTJ 373 (Mum.)

64. S. 142(2C) : Special audit - limitation - (S. 153)

Prior to amendment in section 142(2C), the Assessing Officer had no power to suo motu to extend the period for furnishing the report by special auditor and therefore, excluding such period, assessment was barred by limitation, Income tax being a special Act, the General Clauses Act, may not generally apply to limitation period.



Dy. CIT vs. Ramachandra Dashrath Hande & Co. (2010) 36 DTR 431 (Mum.)(Trib.)

65. S. 142A : Estimate by valuation officer - Reference to determine lower figure

A reference to Department valuation officer under section 142A, can be made by assessing officer only in cases where assessee has made more investment or is owner of bullion, jewellery or any other valuable article etc. at a higher figure than that recorded in his books of account, it no where contemplates a situation in which assessee has shown a higher value of assets owned by him, where as in opinion of assessing officer, such value should be at a lower figure, hence, reference made was void ab initio.

Saraswati Devi Gehlot (Smt.) vs. ITO (2010) 123 ITD 605 (Jd.)

66. S. 143(2) : Assessment - Notice - limitation

Notice under section 143(2), though issued within 12 months but served after the expiry of 12 months from the end of the month in which the return was furnished is invalid and the assessment completed on the basis of such notice cannot be sustained.

Servite Sisters Society vs. ACIT (2010) 37 DTR 371 (Ind.)(Trib.)

67. S. 143(2) : Assessment - valid service of notice - (S. 282, 292BB)

Notice under section 143(2), having been served on an employee of the assessee firm and not on any partner of the firm, who was not authorized to accept notices on behalf of the assessee, there was no valid service of notice, the assessment is invalid. For the Asst. Year 2003-04, section 292BB is not applicable though the assessee participated in the assessment proceedings.

ACIT vs. Vision Inc. (2010) 37 DTR 263 (Del.)(Trib.)

68. S. 145 : Accounts - Rejection

When the assessee contractor carried out contract work in three different ways, when the books of account rejected income is estimated, the assessee is entitled to depreciation, remuneration to partners and interest to partners.

Teja Constructions vs. ACIT (2010) 129 TTJ 57 (Hyd.)(UO)

69. S. 147 : Reassessment - Reason to believe - change of opinion - depreciation on obsolete assets

Assessing Officer having disallowed the depreciation claimed by the assessee on obsolete assets @ 20 percent in the assessment, the reason recorded for reopening the assessment that depreciation was to be disallowed @ 20 percent constitutes a mere change of opinion as there was no tangible material before the Assessing Officer to hold so and therefore, reopening of assessment on this ground is not sustainable.

Aventis Pharma Ltd. vs. ACIT (2010) 37 DTR 353 (Bom.)



Editorial Note:- Reference made to CIT vs. Jagdish C. Sheth (2007) 101 ITD 360 (Mum.) (2007) 106 TTJ 911 (Mum.). The Tribunal held that even if an asset is discarded or becomes defunct, it would still form part of block assets and entitled depreciation.

70. S. 147 : Reassessment - Protective addition

Assessment cannot be reopened for making protective addition and also on mere suspicion.

Dy. CIT vs. Bullion Investments & Financial Services (P) Ltd. (2010) 123 ITD 568 (Bang.)

71. S. 147 : Reassessment - Time limit for issue of notice – [S. 143(2)]

When time limit for issue of notice under section 143(2) has not expired, Assessing Officer cannot initiate proceedings under section 147.

Super Spinning Mills Ltd. vs. Addl. CIT (2010) 37 DTR 1 (Chennai)(TM)(Trib.) / 129 TTJ 305 (Chennai)(TM) / 38 SOT 14

72. S. 147 : Reassessment - Subsequent amendment retrospectively - Change of opinion - (S. 115JB)

Computation of book profit under section 115JB, on the basis of the Supreme Court and other High Courts, reopening of the assessment on the grounds that the provisions of doubtful debts, advances etc were not considered in the process of computing book profit can not be justified on the basis of subsequent retrospective inserting cl. (i) in explanation 1 to section 115JB w.e.f. 1st April, 2001.

Rallies India Ltd. vs. ACIT (2010) 37 DTR 33 (Bom.)

73. S. 147 : Reassessment - Disallowance of expenditure - Exempted income - (S. 14A)

Assessing Officer has no jurisdiction to reopen case prior to assessment year beginning on or before 1st April, 2001.

Jt. CIT vs. Bombay Dyeing Mfg. Co. Ltd. (2010) 2 ITR 733 (Trib.)(Mum.)

74. S. 147 : Reassessment - beyond four years - disallowance of such expenses in later years

Only on the basis that some disallowances were made in later years the reopening of assessment beyond four years is bad in law as there was no failure on the part of the assessee to disclose fully and truly.

Multiscreen Media (P) Ltd. vs. UOI (2010) 38 DTR 8 (Bom.)

75. S. 147 : Reassessment - valuation report subsequent to the passing of the order

Notice under section 147/148 could not be issued on the basis of valuation report received subsequent to the passing of the order.



Hotel Regal International vs. ITO (2010) 37 DTR 360 (Cal.)

76. S. 147 : Reassessment - Change of opinion

Assessing Officer having made the assessment, after obtaining elaborate explanation of the assessee regarding, its claim of loss vis-à-vis nil surplus/deficit as reflected in form I, reopening of assessment on the same ground in the absence of any tangible material was based on mere change of opinion and therefore is not sustainable.

ICICI Prudential Life Insurance Co. Ltd. vs. ACIT (2010) 37 DTR 322 (Bom.)

77. S. 147 : Reassessment - Full and true disclosure - merger of order with the order of CIT(A)

The original order of the Assessing Officer was merged with the order of CIT(A) and the Assessing Officer has not given any reason that there was failure or omission on the part of the assessee hence the reopening held to be bad in law.

Vodafone Essar Gujarat Ltd. vs. ACIT (2010) 37 DTR 259 (Guj.)

78. S. 148 : Reassessment - Jurisdiction - Issue of notice

In absence of any fresh or new materials Assessing Officer lacked jurisdiction to issue notice for reassessment.

Berger Paints India Ltd. vs. ACIT (2010) TLR 223 (Cal.) Vol. 40 Part 469

79. S. 149 : Reassessment – Limitation - finding or direction in appeal - (S. 150, 153)

Reassessment made to tax the unexplained investment for earlier year in pursuance of a finding or direction in the order of Tribunal was saved by Explan. 2 to section 153 and not barred by limitation.

Maina Shetty (Mrs.) vs. Dy. CIT (2010) 37 DTR 457 (Bang.)(Trib.)

80. S. 153A : Search and Seizure - Assessment Abate - (S. 153C)

Where, none of the assessments are pending on the date of action under section 153C, such assessments do not abate.

Meghmani Organics Ltd. vs. Dy. CIT (2010) 129 TTJ 255 (Ahd.)

CHAPTER XIV-B – SPECIAL PROCEDURE FOR ASSESSMENT OF SEARCH CASES

81. S. 158BB : Block assessment - computation of undisclosed income - telescoping

In the case of assessee's brother, the Tribunal having accepted the plea that unaccounted advances made out of undisclosed income are irrecoverable and allowed telescoping of the unrecovered amount against the undisclosed income assessed on the basis of unencashed cheques which were



found in the course of search, similar addition of undisclosed income made in the case of assessee on identical facts cannot be sustained.

ACIT vs. M. N. Rajendran (2010) 37 DTR 263 (Chennai)(TM)

82. S. 158BC : Block Assessment – Survey – Search - (S. 132, 132(4), 133A)

Where during continuation of survey proceedings under section 133A, search proceedings section 132 are initiated on basis of information obtained in survey, it can be said that survey proceedings has lost to be assessed in block assessment proceedings only. Statement taken under section 133A, during survey cannot have same value as evidence recorded during search under section 132(4).

ACIT vs. Mangaram Chaudhary (HUF) (2010) 123 ITD 359 (Hyd.)

83. S. 158BC : Block assessment- search and seizure-natural justice.right to cross examination.

Where oral evidence of any party is sought to be used against an assessee ,it is necessary that information relating to such statement or the copy of deposition should be furnished to the assess with opportunity to cross examination the deponent ,if required by the assessee .if it is not done ,it is violation of principle of natural justice,,hence order will be bad in law.

CIT v Ashwani Gupta (2010) 322 ITR 396 (Delhi)

84. S. 158BFA(1) : Search and seizure - Cash seized - Interest

Assessee's contention that cash seized during the course of search lying with the department has to be adjusted towards tax payable and levy of interest would arise only after such assessment. Since fact was not considered the matter remanded back to the Assessing Officer for verification.

CIT vs. N. Leela Kumar (2010) 37 DTR 70 (Kar.)

CHAPTER – XVII - COLLECTION AND RECOVERY OF TAX

B- DEDUCTION AT SOURCE

85. S. 194H : Deduction of tax at source - commission or discount - Sim card – [S. 201(1), 201(IA)]

Margin money earned by the assessee company on supply of prepaid SIM cards and recharge coupons, etc was in the nature of commission and therefore, the assessee service provider is liable to deduct tax at source under section 194H.

Vodafone Essar Cellular Ltd. vs. ACIT (2010) 129 TTJ 222 (Coch.)

86. S. 194I : Deduction of Tax at source - Certificate not showing the date - (S. 205)

Credit for tax deducted at source must be given to the assessee, though the certificate furnished by the deductor has not shown the date of payment to Central Government.



Ahluwallia and Associates vs. ITO (2010) 2 ITR 582 (Ahd.)(Trib.)

87. S. 194J : Payment of professional fees

Though a hospital by itself, being an artificial entity, is not a “medical professional”, yet it provides medical services by engaging the services of doctors and qualified medical professionals. These are services rendered in the course of the carrying on of the medical profession. S. 194J applies to payments made to non-professionals such as hospitals. CBDT Circular on TPA liability is valid except for view on penalty

Dedicated Health Care Services TPA vs. ACIT (Bombay High Court) www.itatonline.org

88. S. 195 : Technical services - Activity of conducting impact tests by UTAC – India-France – DTAA – [S. 9(1)(vii), 90, Art. 13(4)]

Activity of conducting impact tests by UTAC a French company, on the cars manufactured by the assessee company in the presence of the assessee’s representative and submission of test reports which were utilized for product development in India was in the nature of technical services and therefore, payment made to UTAC for such tests was for technical services with in the meaning of Art. 13(4) of India-France DTAA, as well as section 9(1)(vii) and fees payable were chargeable to tax in India hence, the assessee is liable to deduct tax at source under section 195.

Maruti Udyog Ltd. vs. Asst. DIT (2010) 37 DTR 85 (Del.)(Trib.)

89. S. 195 : Reimbursement of costs - payments not chargeable to tax in India

Obligation to deduct tax at source under section 195 is attracted only when the payment is chargeable to tax in India. When tax authorities have accepted that the non-resident recipient is not liable to pay tax in India, the assessee payer not liable to deduct tax at source under section 195(1), in respect of mobilization and demobilization costs reimbursed by it the non-resident company.

Van oord Acz India (P) Ltd. vs. CIT (2010) 36 DTR 425 (Del.)

90. S. 195 : Deduction at source - purchase of Air Craft - fees for technical services - (S. 90, 9, 201(1), 201(IA), DTAA , India and Russia Art. 12)

Payment made to foreign company for purchase of air craft engines, could not be regarded as “fees for technical services” hence, provisions of section 195 cannot be applied.

Hindustan Aeronautics Ltd. vs. ITO (2010) 123 ITD 575 (Bang.)

D - COLLECTION AND RECOVERY

91. S. 220(6) : Recovery - stay - garnishee notices

Garnishee notice even after stay of demand by CIT was not valid, further CIT was not justified in



rejecting stay for one year without giving proper reasons and ignoring the principle laid by the Court.

Paramount Heath Services (TPA) (P) Ltd. vs. ACIT (2010) 37 DTR 377 (Bom.)

92. S. 220(6) : Recovery - Pendency of appeal before Tribunal – stay - (S. 222)

Quantum appeal was pending before the Tribunal. Dy. CIT refused stay further without giving any reason. Department was directed to refrain from coercive proceedings for recovery till the disposal of the application made before Addl. CIT.

ONGC Videsh Ltd. vs. Dy. CIT (2010) 37 DTR 158 (Del.)

F - INTEREST CHARGEABLE IN CERTAIN CASES

93. S. 234B : Interest – TDS – Non-resident - (S. 234C, 209)

There cannot be any interest liability under section 234B or 234C, for non-resident assessee where all payments received from Indian sources are subject to TDS.

Cable News Network LP LLLP vs. Asst. Director (2010) 129 TTJ 177 (Del.)

94. S. 234B : Interest – TDS - Advance tax – Non-resident

In case of a non resident assessee when all payments received in terms of an agreement with Indian company for rendering of services were subjected to TDS, interest under section 234B cannot levied for non-payment of advance tax.

Dy. Director of IT vs. Scientific Atlanta Inc. (2010) 37 DTR 98 (Mum.)(Trib.)

95. S.234B : Interest leviable on bonafide mistake

Levy of interest under section 234B is compensatory and interest is chargeable notwithstanding the fact that default is bona fide.

CIT vs. Insilco Ltd. (Del.) (2010) 231 CTR 247 (Del.)

CHAPTER – XIX - REFUNDS

96. S. 244A : Refund - Self Assessment tax - (S. 140A)

Assessee is entitled to interest under section 244A, on the refund of self assessment tax paid under section 140A.

CIT vs. Sutlej Industries Ltd. (2010) 37 DTR 25 (Del.)

CHAPTER XX - APPEALS AND REVISION



A – APPEALS TO THE DEPUTY COMMISSIONER (APPEALS) AND COMMISSIONER (APPEALS)

97. S. 251 : Stay Application – CIT(A) – Discharge of Statutory Obligation

Where CIT(A) sitting tight on stay application with regard to penalty demand challenged in appeal. Court condemns the inaction on the part of CIT(A) in strongest words and directs to dispose of the stay petition judiciously in accordance with law.

Smita Agarwal vs. CIT (2010) 215 Taxation 657 (All)

B - APPEAL TO APPELLATE TRIBUNAL

98. S. 253(1)(b) : Appeal Tribunal – maintainability – non-payment of admitted tax – [S. 249(4)]

The provisions of section 249(4)(a) cannot be read in to section 253(1)(b), and in the absence disenabling provision in section 253(1)(b) appeal was maintainable despite non-payment of full of admitted tax.

CIT vs. Pawan Kumar Laddha (2010) 38 DTR 3 (SC)

99. S. 253(4) : Appellate Tribunal – Powers - Right of respondent – [S. 254(1)]

The respondent can support the order of CIT(A), by taking any ground, though no cross objection is filed.

Cable News Network LP. LLLP vs. Asst. Director (2010) 129 TTJ 177 (Del.)

100. S. 254 (1) : Appellate Tribunal – Precedent - Principle of consistency

Principle of consistency qua judicial forums is not unexceptionable, if the subsequent Bench finds it difficult to follow the earlier view due to any convincing reasons, the earlier view cannot be thrust upon it, when a matter is referred to larger Bench, the appeal needs to be decided on merits rather than following the earlier view taken by the Tribunal in assessee's own case.

The Maharashtra State Co-operative Bank Ltd. vs. ACIT (2010) 129 TTJ 521 (Mum.)(SB), (2010) 37 DTR 194 (Mum.)(SB)(Trib.)

101. S. 254(1) : Appellate Tribunal - Additional ground

Any party can raise an additional ground before the Tribunal for the first time, provided the necessary material for the adjudication of the additional ground is available on record.

Dy. Director of IT vs. Scientific Atlanta Inc. (2010) 37 DTR 98 (Mum.)(Trib.)

102. S. 254(1) : Appellate Tribunal – Resjudicata - Precedent

Non applicability of rule of res judicata in to be followed on factual matters repeated from



assessment year to assessment year. Chord of consistency can be cut off only if facts are substantially different from earlier asst. years, capable of leading to a different finding. The Tribunal can take different view.

Arvind Fashions Ltd vs. ACIT (2010) 37 SOT 369 (Ahd.)

103. S. 254(2A) : Power to grant stay

ITAT should dispose off stay granted appeals within s. 254(2A) period

Shri Jethamal Faujimal Soni vs. ITAT (Bombay High Court) www.itatonline.org

CC - APPEALS TO HIGH COURT

104. S. 260A : Appeal to High court - question of law

A pure question of law can be allowed to be raised by amendment to the appeal memo if the facts on which Tribunal has given its decision are not disputed.

CIT vs. Jindal Equipments and Leasing & Consultancy Services Ltd. (2010) 37 DTR 172 (Del.)

E – REVISION BY THE COMMISSIONER

105. S. 263 – Time limit for revision of orders

Assessment order is not affected in respect of items that are not subject of reassessment. Time limit for s.263 begins from date of original order for such items

Ashoka Buildcon vs. ACIT (Bombay High Court) www.itatonline.org

106. S. 263 – Revision of orders

AAR rulings are binding despite contrary rulings of AAR. Assessment order following binding precedent is not amenable to s. 263 revision

The Prudential Assurance Company vs. DIT (Bombay High Court) www.itatonline.org

107. S. 264 – Order revisable

The expression “order” for purposes of s. 264 has a wide connotation and includes a determination by the AO on an application u/s 197

Larsen & Toubro Ltd. vs. ACIT (Bombay High Court) www.itatonline.org

CHAPTER XXI - PENALTIES IMPOSABLE

108. S. 271(1)(c) : Penalty – Concealment - disclosure of income - estimate of income



An assessee can never be held to be guilty of non disclosure of income which is determined by applying the provisions of section 40A(2)(b), because form in which return of income is to be filed by corporate assessee does not contemplate any disclosure of income earned by assessee which could be subject to scrutiny under section 40A(2)(b). Provisions of section 271(1)(c), are not attracted to cases where income of an assessee is assessed on as estimated basis.

Jhavar Properties (P) Ltd. vs. ACIT (2010) 123 ITD 429 (Mum.)

109. S. 271(1)(c) : Penalty – Concealment - withdrawal of claim

When claim for deduction under section 80HHD was withdrawn prior to assessment, levy of penalty under section 271(1)(c), was not justified.

Banyan Tours & Travels (P) Ltd. vs. ITO (2010) 129 TTJ 422 (Mum.)

CHAPTER XXII - OFFENCES AND PROCEEDINGS

110. S.276CC : Failure to furnish return - only Karta could be liable for tax offence of the HUF.

Member of HUF can not be held liable for delay in filing of the return of HUF, though he has participated in the assessment proceedings.

Rosahlal v Special Chief Magistrate (2010) 322 ITR 353 (All).

CHAPTER – XXIII - MISCELLANEOUS

111. S. 282 : Services of notice generally - Minor son - validity - (S. 148)(R. 17, Order 5 of CPC)

There being nothing on record to show that the erstwhile accountant of the assessee to whom notice under section 148 was served was an agent empowered to accept the service and service of fresh notice upon minor son of the assessee was not valid service.

Bhagirath Rajput vs. CIT (2010) 36 DTR 372 (MP)

112. S. 282 : Notice – Service - Reassessment - (S. 148)

Notice sent by registered post to correct address, notice not returned. Fact that notice not sent with “acknowledgement due” not conclusive. Power of attorney issued to Chartered Accountant after date of notice and subsequent notices issued, notice valid.

Avneesh Kumar Singh vs. ITO (2010) 2 ITR 663 (Agra)(Trib.)(TM)

113. S. 282 : Service of notice generally

Service of notice by affixture without following the procedures laid down under order V of Rule 12 to 20 of CPC is invalid. The A.O. has to record a reasoning that despite best and reasonable efforts, the notice could not be served in the ordinary course before directing to invoke the substituted



mode of service through affixture. Further the assessment completed on the basis of an invalid service of notice shall also be invalid.

M/s Dwarka Construction pvt. Ltd. vs. ITO, ITA No. 1688/JP/2008, Bench – B, dt. 25th February, 2010 / Taxworld, Volume – XLIII – Part 3 – March, 2010 – page 98.

OTHER DECISIONS

114. COD Approval

Supreme Court doubts law requiring PSUs to obtain COD approval and refers the matter to a larger bench for reconsideration.

CCE vs. Bharat Petroleum Corporation (Supreme Court) www.itatonline.org

115. Company Law Tribunal

Parliament is competent to constitute Tribunals for special Acts. However, the failure to ensure independence of judiciary and separation of judicial and executive power renders the Company Law Tribunal unconstitutional. Suggestions given on how to remedy the defects

UOI vs. R. Gandhi (Supreme Court – 5 Judges) www.itatonline.org

116. Speaking orders

Detailed guidelines laid down as to how judgements should be written

JCIT vs. Saheli Leasing & Industries (Supreme Court) www.itatonline.org

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