



DIGEST OF CASE LAWS (August 2009)

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JOURNALS REFERRED

Taxman 181, 24, 25 DTR, 119 ITD, 31 SOT, 123 TTJ, 314 ITR, 224 CTR

1. Agricultural Income- Capital Gains- Sale of shade trees- s, 45

Sale proceeds of silver oak trees (shade trees) standing in the coffee estate is taxable as capital gains and not exempt as agricultural income.

C.Hanumantha Rao (Decd) & Anr v CIT (2009) 25 DTR (Mad) 108.

2. Appellate Tribunal- Additional ground- Limitation – s 254 (1).

Additional ground of appeal raised by the assessee as to whether the order passed by the AO was barred by limitation or not was admissible , evidence in support of the ground ie warrant of authorisation being available on record.

Asha Maritime (India) (P) ITD v Dy CIT

(2009) 25 DTR (Mumbai) (Trib) 249.

3. Appellate Tribunal – Rectification of Mistakes – General observations- s 254.

On the basis of general observation rectification of order under section 254 is not permissible.

Dhariwal Industries Ltd v DY CIT

**(2009) 31 SOT 10 (Pune) (SB).(2009) 123 TTJ (Pune) (SB) 613
(2009) 25 DTR (Pune) (SB) (Trib) 58.**

4. Bad Debts- writing off in books sufficient –s.36 (2) (iv).

Assessee is entitled to claim deduction if the debt had been written off as irrecoverable in the books of account and there is no obligation on the assessee to establish that debt had become bad.

**CIT v Rajendra Y S hah . S.L.P.(C) NO 8364 of 2009. Dt 2-4-2009.
(2009) 313 ITR (st) 3.**

Editorial – Judgement of Mumbai Tribunal Shri Rahendra Y. Shah v ACIT ITA no 1437/Mum/1999 Bench B dt 21-9-2006. (Asst year 1992-93) Judgement of Bomaby High Court ITA NO 1000 OF 2007 dt 10 th july 2008. DCIT v Oman



International Bank (2009) 313 ITR 128 (Bom), CIT v Star Chemicals (Bombay) P.Ltd (2009) 313 ITR 126 (Bom).

Matter is referred to special bench in case of share broker to decide the following questions of law.

Shri. Shreyas S. Morakhia ITA No. 3374/M/04. Ass. Year 1998-99 fixed for hearing on 1/9/2009.

“Whether on the facts and circumstances of the case and in law, the assessee, who is a share broker, is entitled to deduction by way of bad debts under section 36(1)(vii) read with section 36(2) of the income Tax Act.,1961 in respect of the amount which could not be recovered from its clients in respect of transactions effected by him on behalf of his client apart from the commission earned by him?”

5. Block Assessment- s 158 BD.

Assessing officer assessing person searched must give a categorical finding that searched material pertains to assessee.

Bhajan Das & Bros v Asstt .CIT (2009) 119 ITD 76 (Agra)(TM).

6. Block Assessment- Penalty- s. 158 BFA., 158 BD.

The factum of falsity can not be assumed or inferred but has to be proved on the basis of material or evidence. No adverse inference could be drawn merely because the appeal was not filed by the assessee against disallowance of interest expenditure .Mere reference of assessee’s name in statement under section 132 (4) was not sufficient to invoke proceedings under section 158 BD. Merely because the explanation is not satisfactory penalty under section 158 BFA (2) can not be levied.

Super Metal Industries v Dy CIT (2009) 119 ITD 153 (Mum) (TM).

7. Block Assessment- Notice- s 158BC, 143 (2).

Order passed without issuing the notice under section 143 (2) held bad in law and liable to be quashed.

CIT v Pawan Gupta (2009) 181 Taxman 299 (Delhi).

8. Block Assessment – Limitation – s 158 BE.

The name and change of the assessee was specifically mentioned along with the other group concern in the warrant of authorisation where search was carried out in the premises of the assessee was also subjected to search u/s. 132 and



limitation prescribed as per sub sec (1) of the s.158BE (1) and not sub sec. (2) thereof applied. Search was finally concluded the assesment order was barred by the limitation u/s. 158 BE (1).

Asha Maritime (India) (P) Ltd v DY CIT [2009] 25 DTR (Mumbai) (Trib) 249.

9. Block Assessment – Notice- Wrong status- s 158BD.

The status of petitioner was incorrectly mentioned in the impugned notice as there was no subjective and independent satisfaction to AO and as the transfer of jurisdiction by the respondent to the other respondent and consequent assumption of jurisdiction was de hors the provision of law, the impugned notice u/s. 158 BD cannot be sustained and is quashed.

Suhas Chandra Bhaniramka v Asstt CIT (2009) 25 DTR (Cal) 226.

10. Business Expenditure- Disputed liability- Contractual -s 37.

Assessee was not entitled to deduction of provision for excess bill raised by the supplier which has not been accepted by the assessee, liability being contractual ,it will arise only on settlement of dispute.

ITO v Sicgil India (p) Ltd (2009) 123 TTJ (TM) 462.

11. Business Expenditure- Year of allowability- Liability for damages- s 37 (1).

Liability to pay damages was incurred by the assessee on 28th may 1987, when the Trade Association made an award for damages for breach of contract , therefore , deduction is allowable in asst year 1988-89 notwithstanding the fact that the award was challenged in appeal by the assessee.

Navjivan Roller Flour &Pulse Mills Ltd v DY CIT (2009) 224 CTR (Guj) 55.

12. Business Expenditure- Technical service- s 37 (1).

Expenses incurred which was based on commercial consideration and business expediency ,no interference is warranted.

CIT v Udaipur Distilary Co Ltd (2009) 224 CTR (SC) 32.

13. Business Expenditure-Actual payment-s, 2 (24) (x),r.w.s,36 (1) (va).

Employer's contribution to provident fund if not paid within the due date the employer was not entitled to deduction. Omission of second proviso to section



43 B w.e,f 1-4-2004 is not retrospective in nature. Contribution of provident fund dues after closing of the accounting period, but before due date of filing returns are made, then it was not allowable as deduction.

CIT v Pamwi Tissues Ltd (2009) 313 ITR 137 (Bom).

14. Capital gains – Depreciable assets- Investment in Bonds- s.50 , s.54EC.

Section 54EC, is an independent provision not controlled by section 50, even in respect of consideration received for depreciable assets investment can be made in eligible bonds and assessee is eligible for exemption under section 54 EC.

When the assessee has neither claimed any depreciation nor the assessing officer has allowed the depreciation ,in respect of building in question the provision of section 50 can not be applied.

Dr . (Mrs) Sudha S. Trivedi v ITO (2009) 31 SOT 38 (Mum).

15. Capital Gains –cost of acquisition – Non compete fees- s 48, 55 (2)

Assessee being an investment company and not engaged in manufacturing cement, payment of non-compete fees made by it to the promoters investing company restraining them from carrying on any business in cement had no nexus with the acquisition of shares of that company by the assessee and therefore the said payment cannot be treated as cost of acquisition of that shares of that company by the assessee and therefore the said payment cannot be treated as cost of acquisition or cost of improvement of the shares for the purpose of computing the capital gain arising on sale of said shares.

Asstt CIT v ICL Securities Ltd (2009) 25 DTR (Chennai) (TM) 163.

16. Capital Gains- Accrual- Transfer of lease hold rights- s 2 (47) & 45.

Assessee has parted with constructive possession of leasehold rights to the transferee, its sister concern against the receipt of the part consideration subsequent reversal of entries and sub-division of land and sale of plots in the name of the assessee would not make any difference as assessee and its sister concern were situated in the same premises, hence there was transfer within the meaning of s.2(47)(v) and capital gain were chargeable in the hand of assessee in the year itself.

Atlas Automotive Components (P) Ltd v ITO (2009) 25 DTR (Mumbai) (Trib) 377.



17. Capital gains – Non Resident- Rate of tax- s 112, proviso.

The assessee being a non-resident is entitled to a concessional rate of tax @ 10 percent both on account of the originally held shares and bonus share. The benefit of proviso to s.112 to be allowed to the assessee non-resident and the capital gain tax is to be charged at the concessional rate of 10 percent.

Chicago Pneumatic Tool Company v. Dy, DIT [2009]25DTR 24 (Mum) (Trib)

18. Capital gains –Non Resident-Cost of Acquisition - s.55(2) (b)

Assessee is entitled to the benefit of adopting the fair market value as on 1st April 1981 as its cost of acquisition while computing the income for long term capital gain. Further the Assessee had adopted the value of the bonus share allotted in the years 1988 and 1998 at nil. Accordingly the matter is remitted back to the AO for the purpose of recalculating the amount of capital gain.

Chicago Pneumatic Tool Company v. Dy, DIT[2009]25DTR 24 (Mum) (Trib)

19. Capital loss- Transfer- 2 (47), 45.

Cancellation of allotment of shares on failure to deposit call money is “transfer “ within the meaning of section 2 (47) and consequent forfeiture of earnest money amounted to short term capital loss.

DCIT v BPL Sanyo Finance Ltd (2009) 223 CTR (Kar) 461.

20. Deduction – Export – New Industrial Undertaking- Computation -s- 80AB, 80H, 80 HHC, 80 IA, (9)80 IB(13).

Deduction to be allowed under any provision of chapter V1 A with heading “C” (80 H, 80 HHC ,etc) is to be reduced by an amount of deduction allowed under section 80 IA, /80 IB of the Act.

Asstt CIT v Hindustan Mint & Agro Products (P) Ltd (2009) 119 ITD 107 (SB).(2009) 123 TTJ (Del) (SB) 577.(2009) 25 DTR (SB) (Trib) 73.

Editorial.- View of CIT v Rogini Garments (2007) 108 ITD 49 (Chennai) is affirmed., ratio of SCM Creations v Asstt (2008) 304 ITR 319 (Mad) is explained.

21. Deduction –Computation-Adjustment of brought forward losses- s 80 IB



In view of the specific provision of sub-s (13) of s 80 IB r, w, s 80 IA (5), profit from eligible business for the purpose of quantification of deduction under section 80 IB has to be computed after deduction of notional brought forward losses of the eligible business even though they have been allowed to be set off against other income in the earlier year.

ITO v Sicgil India (P) Ltd (2009) 123 TTJ (Chennai) (TM) 462.

22. Deduction – Commercial information –shipping agent- s 80 –O.

Assessee a shipping agent, supplying information to foreign shipowners regarding availability of cargo is providing commercial information and is entitled to deduction under section 80 –O, mere deduction of the commission in foreign exchange by the assessee before sending the entire consideration to the foreign shipowners does not change the character of receipt of commission earned in foreign exchange.

CIT v Chakiat Agencies (P) Ltd (2009) 224 CTR (Mad) 286.

23. Deduction- Professional Income from foreign source- s 80 RR.

Any creative work done in any field has to be considered as an artistic work and the person doing the same has to be considered as an artist, work done by the assessee, a commercial artist includes drawing of figures, designing the layout of the art work and putting the same in a graphic form which involves creativity and therefore assessee can be said to be an artist and the remuneration received by her under the agreement for rendering advertising services to a company is eligible for deduction under section 80 RR.

DY CIT v MS Preeti Vyas (2009) 25 DTR (Mumbai) (Trib) 371.

24. Deduction –Housing Project- s. 80 IB.

Housing project does not mean that there should be group of buildings and only then same can be called housing project.

Additional housing project on existing housing project can qualify for deduction under section 80 IB (10) provided correct profit can be ascertained.

Vandana Properties v Asstt CIT (2009) 31 SOT 392 (Mum).

25. Deduction of tax at source- Trading in cassettes and production of feature films- s 194 C.

Obligation to deduct tax at source under section 194 C, arises when a payment is made for carrying out any work.. The expression "work" has been defined in the Explanation III to this section in an inclusive manner to include advertising



broadcasting and telecasting including production of programmes , carriage of goods and passengers and catering.Payment made to manufacturers of cassetts /enterprenurs for production of VCD /DVD of films and towards packing materials and design expenses , where property in goods passed over to the assessee provisions of section 194 C can not be applied.

Shemaroo Video (P) Ltd v ITO (2009) 31 SOT 65 (Mum).

26. Deduction at source- Film Financing- s 194C.

Provisions of section 194C would not apply to the film financing arrangements.

Mukta Arts v Asstt CIT (2009) 31 SOT 244 (Mum).

27. Export- Deduction – separate books- s 80 HHC.

Where the assessee was maintaining separate books of accounts for its export business and local business, deduction under section 80 HHC of the Act, is to be determined on the basis of the total turnover and profit of export division alone and not on the total turnover and the profits of the entire business of the assessee, including local business.

CIT v Sivagami Match Industries (2009) 24 DTR 109 (Mad).

28. HUF-Assessment – s 171 (3).

When a person is assessed in status of an HUF, it shall be deemed to have remained as an HUF for purpose of assessment of tax under Act, unless there is a finding of partition in terms of provisions of section 171 (3) in respect of properties of such HUF.

Gaurikanta Barkatky v CIT (2009) 181 Taxman 316 (Gauhati).(2009) 29 DTR (Gau) 75.

29. Income from other sources- Construction period-Interest-rent. S 4 & 56.

Interest and rent received from employees and oustees in dam area had a nature of capital receipt , not chargeable to tax as the construction process was still on and the assessee had yet not started the business activity.

CIT v Tehri Hydro Development Corporation (2009) 25 DTR (Uttarakhand) 100.

30. Income – Cessation of trading liability- 28 (iv) & 41 (1)

Waiver of loan under a scheme formulated by Reserve Bank of India known as “ One time Settlement Scheme’ assessee credited said waiver amount in general



reserve account .The tribunal held that loan amount waived could not be treated as its income either under section 28 (iv) or under section 41 (1).

Loans availed by assessee from Banks were not in the nature of trading liability but were in nature of capital liability and, therefore waiver, of loan liability was not waiver of any trading liability hence the provision of section 41 (1) was not applicable.

Accelerated Freez & Drying Co Ltd v Dy CIT (2009) 31 SOT 442 (Cochin).

Editorial note- Judgement of Bombay High Court in Solid Containers v Dy CIT(2009) 308 ITR 417 (Bom) considered and distinguished.

31. Income from Undisclosed Source- seized letters from third party- s.69

Merely on the basis of some letters seized from a third party in the absence of any corroborative evidence and without issuing summons to the concerned persons or making available for cross examination, the order passed by the tribunal upholding the addition is set a side.

Bangodaya Cotton Mills Ltd v CIT (2009) 224 CTR 62 (Cal).

32. International Taxation – Transfer pricing – s 92 C.

Assessee having determined ALP of its international transactions with AEs by applying CUP/cost plus method by offering the comparison of gross profit mark up margin on transactions with unrelated companies, TPO was not justified in rejecting the method adopted by assessee and making adjustments by applying TNMM on the ground that assessee incurred loss in transactions with AEs and that the method employed by assessee was complex.

Asstt CIT v Miss India (P) Ltd (2009) 123 TTJ (Pune) 657. (2009) 25 DTR (Pune) (Trib) 1.

33. International Taxation – Permanent establishment- Double taxation agreement- India and Mauritius- s 90, arts , 5 & 7.

Minimum period for continuance of construction or installation project set out in cl. (i) of para 2 of art 5 of India Mauritius DTAA has to be projected into para1 for the purpose of determining whether there is a fixed place of business within the meaning of para 1; for counting the period of nine months duration under Article 5 (2) (i) neither the date of signing the contract nor the actual commencement of active phase of construction/ installation is the starting point and can be counted from the preparatory stages leading to the actual commencement of the work such as gathering the equipment and arranging the infrastructure for



carrying out the work such as gathering the equipment and for carrying out the work in full swing the applicant activities lasted for nine months and therefore it has no PE in India.

Cal Dive Marine Construction (Mauritius) Ltd , IN RE. (2009) 25 DTR (AAR) 59.

34. International Taxation –Royalty or fees for technical services- Double taxation agreement – India – UK. S. 9 (1) (vi) 9 (1) v ii) 90, & 195 , arts 12 & 13.

Payment made by applicant to the UK company for providing international leg of the service in transmitting voice/data to places outside India using its international infrastructure and equipments is neither royalty nor fees for technical services: payment is in the nature of business profits and in the absence of PE of UK company in India, same is not taxable in India.

Cable & Wire less Networks India (P) Ltd ,IN RE Authority for Advance Rulings. (2009) 25 DTR (AAR) 49.

35. International Transaction-Income deemed to accrue or arise in India –Income deemed to accrue or arise in India – Royalty- DTAA-India – USA. S 9(1) (vi) &90.

Subscription fee received by applicant from the licensee (customer) for providing database containing financial and economic information of companies worldwide was not royalty within the meaning of s. 9 (1) (vi) , Expln.2 or art 12 of DTAA between India and USA as no exclusive right or copyright was made over to customer and it did not amount imparting of information concerning the applicant's own knowledge, experience or skill in commercial and financial matters.

Factset Research Systems Inc, IN RE. Authority for Advance Rulings (2009) 25 DTR (AAR) 146.

36. International Taxation – DTAA- India –Sweden- Fees for technical services- s 90. Art. 3(3).

Management charges, whether relating to business management or technical management would be outside the scope of exemption under art, of DTAA. Management charges are not to be treated as commercial profits.

CIT v Swedish Telecoms International AB . (2009) 224 CTR (Bom) 418.



37. Interest tax, 1974- Chargeable interest- Hire purchase – Finance- s 2 (7).

Transaction of financing of motor vehicles by credit Institutions which are in the form of loan so called finance charges are liable to interest tax.

CIT v Kallur Chit Funds & Finance (P) Ltd (2009) 25 DTR (Ker) 44.

38. Interest Tax Act , 1974- Vyaj Badla- s.2 (7) , 5.

Essence of Vyaj Badla transaction is to provide finance for smooth carryover of the transactions on the settlement date in respect of persons who are in over bought or over- sold position and thus the income from Vyaj Badla transactions is interest from loan and is includible in chargeable interest.

Tulip Star Hotels Ltd v ITO (2009) 25 DTR (Del) (Trib) 429.

39. Loss – Set off- loss on sale of units- Tax avoidance – Transaction in securities. s 70, &94 (7).

Conditions laid down in cls.(a) to (c) of Sub- sec (7) of s.94 are cumulative; while the purchase of units of mutual funds by the assessee was within the statutory period of three months , the sale of said units was made beyond the statutory period of three months from the record date and therefore s.94(7) was not attracted and loss could be disallowed.

CIT v Shambhu Mercantile Ltd (2009) 25 DTR (Del)164.

40. Manufacture or Production – Exemption - s 10B (7), 10BB.

Assessee firstly receiving the input data from its clients in the form of electronic file format and then after doing the job, handing over the final design in the electronic data satisfying the condition of ‘manufacture or production” of an article or thing within the meaning of s 10B r/w s 10BB hence eligible for relief under section 10B.

Dy CIT v Tecnimont ICB (P) Ltd (2009) 123 TTJ (Mumbai) 680.

41. Manufacture or Production –Processing of raw material- s 10B.

Assessee having purchased raw material as well as semi finished goods and articles transformed them into artistic and marketable commodity which was completely distinct from the original item in character and use by carrying out the activities of smoothening , shaping, engraving , embossing, fixing metallic parts and accessories polishing and painting etc can be said to have undertaken manufacture or production of articles and therefore, its income is eligible for exemption u/s.10B.



Kwal Pro Exports v ITO (2009) 25 DTR (Jd) (Trib) 113.

42. Manufacture or production – s 10B.

Assessee unit involved in developing test programs that would automate the function of verifying the functioning of complete designs involving millions of transistors on a single chip which chip verification requires development of highly sophisticated test programs in very special high level languages and also involved in software development and manufacturing of such programs from scratch and designing developing for its clients and testing it to ensure precision, is engaged in software development activity for purpose of grant of relief u/s. 10 B

ITO v E-Infochips Ltd (2009) 25 DTR (Ahd) (Trib) 299.

43. Notice- Service- Wife- s. 282,Civil Procedure code-Rule order 5 rule 15.

Service of notice on the wife of assessee in the absence was in accordance with law as laid down in order 5, rule 15 of CPC read with section 282 of the Income tax Act.

ITO v Gurubax Singh Gill (2009) 25 DTR (Asr) (Trib) 198.

44. Penalty- Concealment- Surrender of NRI gift- s, 153 A, 271 (1) (c).

Voluntary offer of income in order to buy peace and avoid litigation before taking up assessment by the AO de hors any material with the AO cannot amount to concealment .Assessee having surrendered amount of NRI gift on a general query raised by A.O. on the condition of not initiating penalty proceedings before assessment was taken up, A.O. could not have imposed penalty under section 271 (1) (c), when there was no material with the AO to arrive at satisfaction about concealment.

Addl CIT v Prem chand Garg (2009) 123 TTJ (Del) (TM) 433.

Editorial note- UOI v Dharmendra Textile Processors (2008) 306 ITR 977 (SC), considered.

45. Penalty – Concealment- Surrender of gift- s . 271 (1) (c).Expl 1.

Assessee surrendering the amounts allegedly received as gifts from one S as they could not produce the donor since he had died before assessments were reopened but having filed confirmatory documents like memorandum of gift , affidavit of the donor , copy of return and balance sheet of the donor as well as the copy of ration card of the donor , assessee's explanation was bonafide and



penalty under section 271 (1) (c) could not be imposed by invoking explanation 1 there to.

Puneet Sehgal & Ors v ITO (2009) 123 TTJ (Del) 566.

46. Penalty – concealment- rejection of claim s 271 (1) (c)

Penalty under section 271 (1) (c) cannot be levied simply because the claim was disallowed.

CIT v. Haryana Warehousing Corporation (2009)25DTR (P&H)194.

Editorial- UOI v Darmendra Textile Processors & Ors(2008) 306 ITR 277 (SC) distinguished.

47. Plant – Road- Depreciation – s-32 (1) (ii) , 43 (3).

Road is not plant but after asst year 1988-89 is included in the category of building for depreciation as such.

Tamil Nadu Road Development Company Ltd v Asst CIT (2009) 24 DTR 618 (Chennai) (2009) 123 TTJ (Chenna) 702.

48. Precedent- Appeal (Tribunal)- special Bench . S 254 (1)

Special Bench decision has to be followed notwithstanding the fact that decision of Division Bench is a conscious decision not to follow the Special Bench (larger bench) decision after noticing that decision.

Asstt CIT v Miss India (P) Ltd (2009) 123 TTJ Pune 657. (2009) 25 DTR (Pune) (Trib) 1.

49. Revision – two views- s 263.

An order passed by the assessing officer cannot be revised only because another view is possible.

CIT v Greenworld Corporation (2009) 181 Taxman 111 (SC)

50. Revised return- loss- s 139 (3), 139 (5).

Original return filed in time without audited accounts. The revised return filed along with audited balance sheet. Since revised return took place of original return and original return had been admittedly filed within time allowed under section 139 (1) ,loss in question was allowed to be carried forward.

Esorts Mahle Ltd v DY CIT (2009) 119 ITD 119 (Delhi).

51. Reassessment- Primary objection – s.148.



Reassessment framed by the assessing officer without disposing of the primary objection raised by the assessee to the issue of reassessment notice issued by him was liable to be quashed.

MCM Exports v DY CIT (2009) 23 DTR 356 (Guj).

52. Search and Seizure- Seizure of Chartered Accountant's Laptop- Block assessment -s, 132 (i) (iib) .,153 C, 158BD.

In terms of section 132 (I) (iib) , revenue is not entitled to demand an unrestricted access to and /or right to acquire electronic records present of original in laptops, that belong to auditor of assessee and not to assessee himself , including electronic records pertaining to third parties unconnected with the assessee. "A person" as occurring in section 153 C of the Income Tax Act ,1961, "other person" as occurring in section 158 BD of the income tax Act 1961.

S.R.Botlibhoi & co v Department of Income tax (Investigation)

(2009) 181 Taxman 9 (Delhi).

53. Settlement Commission-Validity of provision - s 245D (4).

The Court held that,

1)Date of 31-3-2008 for passing final orders is arbitrary,

li)That except where the delay in passing the order is occasioned due to applicant ,the proceedings shall not abate,

lii)ITSC shall decide each case as to whether delay is occasioned by applicant,

lv)ITSC to dispose off the case by passing orders under section 245D(4).

Star Television News Ltd. www.Itatonline.org.

Editorial- more than 245 matters disposed by grouping.