



DIGEST OF CASE LAWS (APRIL 2009)

JOURNAL REFERRED

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SUPREME COURT

A.

APPEAL TRIBUNAL – POWER OF ENHANCEMENT – S. 254(1)

The Tribunal has no power enhancement and not empowered to take back the benefit granted to the assessee by Assessing Officer. Assessing Officer having granted depreciation in respect of 42,000 bottles leased out by the assessee, that benefit could not be withdrawn by the Tribunal.

Mcorp Global (P) Ltd. vs. CIT (2009) 19 DTR 153 (SC) / (2009) 178 Taxman 347 (SC)

B.

BUSINESS EXPENDITURE – 37(1)

Foreign Exchange fluctuation losses are allowable on accrual basis

CIT vs. Woodward Governor (Supreme Court) (Source : www.itatonline.org)

Editorial Note – The judgment of the ITAT Special Bench in **ONGC vs. ITO** 83 ITD 151 has the **unique distinction** of being **affirmed** by the Delhi High Court in **Woodward Governor** 294 ITR 451 and being **reversed** (after being termed “**perverse**”) by the Uttaranchal High Court in **CIT vs. ONGC** 301 ITR 415. With the present verdict of the apex court, the judgment of the Special Bench stands approved and that of the Uttaranchal High stands impliedly overruled

D.

DEPRECIATION – LEASE – S. 32(1)

Lessees having entered in to sub lease even before the date of alleged lease of bottles between the assessee (lessor) and the said Lessee and there being nothing in the lease deed indicating commencement of the lease from a prior date, the so called lease transaction can not be accepted as genuine, more so when the lessee is stated to be absolute owner of the bottles under the sub lease and therefore, depreciation could not be allowed to the assessee on said bottles.



Mcorp Global (P) Ltd. vs. CIT (2009) 19 DTR 153 (SC) / (2009) 178 Taxman 347 (SC)

E.

EXPORT - TELECASTING RIGHTS - S. 80HHC

Telecasting rights of movies recorded on beta cam tapes being articles of trade and commerce fall in the category of merchandise and “lease” is included in the meaning of the word “sale” under Rule 9A and explanation of the films outside India by way of lease is entitled to deduction under section 80HHC.

Judgement of Bombay High Court in Abdulgafar A. Nadiwala vs. ACIT & Ors. (2004) 267 ITR 488 (Bom.) approved.

CIT vs. B. Suresh (2009) 20 DTR 93 (SC) / (2009) 178 Taxman 457 (SC)

T.

TDS ON SALARY – S. 9, S. 192

TDS on foreign salary is required even though assessee is not the payer.

CIT vs. Eli Lilly (2009) 178 Taxman 505 (SC)

HIGH COURTS

A.

APPEAL – HIGH COURT – MONETARY LIMIT – S. 260A, 268A

In case of appeal against composite order of Tribunal, in view of para. 5 of the CBDT instruction No. 5 of 2008 dt. 15th May, 2008, if monetary limit exceeds in one assessment year and it is proposed by revenue to file an appeal before High Court in respect of such assessment year then appeal shall be maintainable in respect all the assessment years irrespective of tax effect and for that purpose, it is not necessary that the issue involved in appeals before Tribunal must be common.

CIT vs. Polycott Corporation (2009) 222 CTR 328 (Bom.)

APPEAL – HIGH COURT - MONETARY LIMIT – MAINTAINABILITY – S. 260A, 268A

Maintainability of appeal at the instance of revenue before the Tribunal and before the High Court being governed by different parameters as laid down in CBDT instructions, objection as



regards maintainability can be raised by assessee before High Court even though such an objection was not raised before the Tribunal. Appeal filed by the revenue having tax effect lower than that prescribed by the Board instructions, the appeal was not maintainable.

CIT vs. Oscar Laboratories (P) Ltd. (2009) 222 CTR 546 (P & H)

APPEAL - APPELLATE TRIBUNAL - PENALTY – FEES – S. 253(6), 271(1)(c)

Imposition of penalty having no nexus with total income of assessee. Fee payable would be only Rs. 500/- and not on assessed income. Hon'ble High Court considered the special bench judgment in Bidyut Kumar Sett vs. ITO (2005) 272 ITR (AT) 75 (Kol.)

Dr. Ajith Kumar Pandey vs. ITAT (2009) 310 ITR 195 (Patna)

Editorial Note:- All pending appeals before the Tribunal in respect of penalty if the assessee has paid the fees on assessed income can make the claim for refund at the time of hearing of appeal.

APPELLATE TRIBUNAL – PRECEDENT – S. 254(1)

Once the Tribunal comes to the conclusion that the fact situation in the case before it is identical to the one obtaining in an earlier matter decided by the Tribunal, it has no right or jurisdiction to record a decision entirely contrary to one reached by another Co-ordinate Bench on the same set of facts and circumstances.

Aceropolish Investments Ltd. & Ors. vs. ACIT (2009) 222 CTR 383 (Guj.)

APPELLATE TRIBUNAL – RECTIFICATION OF MISTAKE – S. 254(2)

If the Tribunal has committed an inadvertent error which results in injustice to one or other side, the Tribunal is entitled to recall the order in given set of facts and circumstances of the case and decide the matter in accordance with law, facts and evidence on record.

CIT vs. Niranjana K. Zaveri (2009) 20 DTR 153 (Guj.)

APPELLATE TRIBUNAL – RECTIFICATION OF MISTAKE – NON CONSIDERATION OF JUDGMENT OF SUPREME COURT – S. 254(2)

Non consideration by the Tribunal of a judgment of Supreme Court relevant to point in issue give rise to a mistake apparent from record which can be rectified under section 254(2).

CIT vs. V. L. S. Finance Ltd. (2009) 178 Taxman 433 (Delhi)

ASSESSMENT – SEARCH – STATEMENT – LETTER – S. 132(4)



Letter of assessee, could not be made use of by Revenue as an admission under section 58 of the Evidence Act 1872. Letter can not be considered as a statement made under section 132(4). Assessment has to be made on the basis of revised return.

CCIT vs. Pampapathi (2009) 310 ITR 64 (Karn.)

B.

BAD DEBTS – S. 36

Post amendment of s. 36 (1)(vii) & 36 (2), the burden is **not** on the assessee to show the debt is “bad”. In order to disallow, the AO **must** show that the decision of the assessee was not bona fide. The decision of an assessee to treat a debt as a bad debt in his books has to be a business or commercial decision and not whimsical or fanciful and must be based on material that the debt is not recoverable.

DIT vs. Oman International Bank (Bombay High Court)

(Source : www.itatonline.org)

BLOCK ASSESSMENT - SEARCH AND SEIZURE - SATISFACTION – S. 158BD

Conditions precedent for invoking provisions of section 158BD are that satisfaction of Assessing Officer of searched party must be recorded to effect that there is undisclosed income belonging to any person other than person in respect of whom search was made under section 132, and that books of account or other documents or assets seized or requisitioned have to be handed over to Assessing Officer having jurisdiction over such other person.

CIT vs. Dawn View Farms (P) Ltd. (2009) 178 Taxman 15 (Delhi)

BUSINESS DISALLOWANCE – TDS - INTEREST - COMMISSION - NOT ULTRA VIRES - S. 40(a)(ia)

Provisions of section 40(a)(ia) cannot declared ultra vires only on the basis of harsh and discriminatory. The Legislature, in exercise of its taxing power, can provide for penal action for enforcing the charge, if there is evasion of tax or statutory liability.

Rakesh Kumar & Co. vs. UOI (2009) 178 Taxman 481 (P & H)

BUSINESS EXPENDITURE - STUDY REPORT ON REORGANIZATION OF BUSINESS – S. 35D(2)(a)(iii), 37

Expenditure incurred on reorganization of core business of the assessee and improving its market share and profitability cannot be treated as an expenses incurred for conducting market survey or



any other survey necessary for the business of the assessee. It cannot fall within the purview of sub-section 2(a)(iii) of section 35D, hence, the expenses were deductible as revenue expenditure.

CIT vs. Majestic Auto Ltd. (2009) 310 ITR 90 (P & H)

BINDING NATURE – CIRCULARS ISSUED BY CBDT – S.119

Though the Circulars issued by the CBDT are not binding on the court, it is binding on the authorities and while it is for the Court to read the section in its proper context, while so reading the Court will bear in mind the circular issued by the CBDT. Circulars are sometimes issued to obviate difficulties in the operation of the provisions and these are aspects which Courts do bear in mind while considering the Circulars. Accordingly, Circulars have to be taken into account.

DIT vs. Oman International Bank (Bombay High Court)

(Source : www.itatonline.org)

R.

RECOVERY – STAY – HIGH-PITCHED ASSESSMENT – S. 220(6)

Assessment at a figure 350 times the returned income is unreasonably high pitched, hence, recovery needs to be stayed in view of CBDT instruction No. 96 dt. 21st Aug., 1969.

Taneja Developers & Infrastructures Ltd. vs. ACIT (2009) 222 CTR 521 (Del.)

T.

TDS – VALIDITY OF CIRCULAR NO. 681 - S. 194C

The word ‘carrying out any work’ in section 194C is limited to any work which on being carried out culminates into a product or result. The word ‘work’ in s.194C is limited to doing something with a view to achieving the task undertaken or carry out an operation which produces some result. The facilities/amenities made available by a hotel to its customers is not covered under any of the categories specified in the term ‘work’ in Explanation III to section 194C; consequently, the Circular No.681, dated 08-03-1994 to the extent it holds that the services made available by a hotel to its customers are covered u/s 194C must be held to be bad in law.

East India Hotels Ltd. vs. CBDT, Writ Petition No.2104 of 1994, dt. 06.03.2009, Bombay High Court – Unreported.

W.

WEALTH TAX - VALUATION – RULE 1BB – SELF OCCUPIED HOUSE – S. 7, RULE 1BB



While applying provisions of Rule 1BB for valuing the self occupied property, Municipal rateable value with addition of statutory deductions, if any, may be adopted of standard rent for arriving at gross maintainable rent.

Smt. Smitaben N. Ambani vs. CWT (2009) 19 DTR 160 (Bom.)

WEALTH TAX – JURISDICTION – S. 8, 8AA OF WEALTH TAX ACT AND S. 127 OF INCOME TAX ACT

Once a notification is issued under section 127 of the Income Tax Act, the Assessing Officer notified under section 127(1) would exercise jurisdiction in the matter of Wealth Tax also as WTO. A separate notification is not required under section 8AA of Wealth Tax Act thereafter.

CWT vs. A. M. Bhiwandiwalla (2009) 20 DTR 229 (Bom.)

WEALTH TAX - LAND USED FOR INTERNAL ROADS AND PLAY GROUNDS – S. 40(3)(vi) OF FINANCE ACT, 1983

Land used for internal roads of the factory and play ground for workers was taxable as wealth of assessee company and not eligible for exemption under section 40(3)(vi) of the Finance Act, 1983.

Motwane Manufacturing Co. (P) Ltd. vs. CWT (2009) 222 CTR 462 (Bom.)

TRIBUNALS

A.

APPELLATE TRIBUNAL – POWERS – RECTIFICATION OF MISTAKE – S. 254 (2)

The Assessee filed a miscellaneous application to rectify the mistake in the Special decision. It was found that the High Court held that the order of Special bench was not sustainable. When the order of Tribunal merged with the order of High Court in appeal the miscellaneous application of assessee was dismissed.

Dy. CIT vs. Padam Prakash (HUF) (2009) 117 ITD 129 (Delhi) (SB)

APPELLATE TRIBUNAL – RIGHT OF RESPONDENT - RULE 27 OF RULES 1963

As per Rule 27 of ITAT Rules, 1963, even if the respondent has not filed any appeal or cross objection, he can still agitate the points which were decided against him. When the issue was not adjudicated by the CIT(A), than it shall be deemed to have been decided against the appellant.

ACIT vs. India Cements Ltd. (2009) 121 TTJ 568 (Chennai).



ASSESSMENT - SERVICE OF NOTICE BY AFFIXTURE ON A CHARTERED ACCOUNTANT – S. 143(2), 144

Service of notice under section 143(2) by affixture on an earlier Chartered Accountant and not latest Chartered Accountant is invalid. Consequently best assessment was also invalid.

ACIT vs. Kewalchand Darkalia (2009) 19 DTR 317 (Jd.) (Trib.) / 121 TTJ 273 (Jd.)

ASSESSMENT - AGENT OF NON-RESIDENT – S. 149(3), 160(1)(3), 163

Time limit provided under section 149(3), would not apply to an assessee who has voluntarily filed return of his non-resident principal and in whose case no order under section 163 has been passed treating him as an agent of non-resident.

J. M. Baxi & Co. vs. Dy. DIT (2009) 117 ITD 131 (Mum)(SB)

ASSESSMENT - BUSINESS EXPENDITURE - REVISED RETURN – S. 37(1), 139

Assessee made the claim at the time of assessment. The assessee has not filed the revised return. The tribunal held that Assessing Officer is obliged to give due relief to the assessee as per law even though the assessee has not filed the revised return.

Emerson Net work Power India (P) Ltd. vs. ACIT (2009) 19 DTR 441 (Mumbai) (Trib.)

B.

BLOCK ASSESSMENT - SEARCH AND SEIZURE - UNDISCLOSED INCOME - ADMISSION AS PER STATEMENT – S. 132(4)

No addition can be made only on the basis of admission in statement under section 132(4), however, any expenses deduction or allowance claimed under the Act which is found to be false and admitted so by the assessee can be added as undisclosed income. As the Assessing Officer has failed to bring any evidence in support of the addition, the additions were deleted.

Contech Transport Services (P) Ltd. & Sons vs. ACIT (2009) 19 DTR 191 (Mum.) (Trib.)

BUSINESS DISALLOWANCE - SALARY PAYABLE OUTSIDE INDIA – S. 40(a)(iii) r. w. s. 200(1)

Mere delay in payment of tax after deduction at source in terms of section 200(1) cannot be considered as a criteria to attract rigors of provisions of sub clause (iii) of clause (a) of section 40, so long as taxes are paid or deducted under chapter XVII-B.



In the amended sub-clause (i) of section 40(a), it is categorily stated that the deduction would be allowed only when tax has been deducted from such income or after deduction has been paid before the expiry of the time prescribed under sub-section (1) of section 200, where as the amendment to sub-clause (iii) in regard to deduction of tax from salary has not been so worded, where it is merely provided that “if tax has not been paid thereon nor deducted there from under Chapter XVII-B of the Act”. On comparison of the provisions contained in section 40(a)(iii) with section 40(a)(i) it would be noticed that sub-clause (iii) does not mention that the deposit has to be made before the expiry of the time prescribed under sub section (1) of section 200 as mentioned in sub clause (i) of the 40 (a).

Dy. CIT vs. Dolphin Drilling Ltd. (2009) 28 SOT 141 (Delhi) / (2009) 19 DTR 531 (Del.)(Trib.)

CAPITAL GAINS - TRADE MARK - BRAND – S. 45, 55(2)

Sale receipts on account of transfer of ‘Trade mark’ or ‘brand’ would not be liable to Capital Gains tax in relevant year i.e. Assessment Year 2001-02 as amendment to section 55(2) was introduced with effect from 1-4-2002.

Bombay Oil Industries Ltd. vs. Dy. CIT (2009) 28 SOT 383 (Mum.)

C.

CAPITAL GAINS OR BUSINESS INCOME - TRANSACTION IN SHARES – S. 28(1), 45

Assessee’s claim of short-term and long term Capital Gains from transactions in shares having been allowed on identical facts in earlier assessment years, could not be disallowed merely because in the year under consideration, the Finance Act, 2004 had conferred certain benefits on the assessee on such transaction, modus operandi of assessee remaining the same, assessee’s claim deserved acceptance by following the rule of consistency.

Gopal Purohit vs. Dy. CIT (2009) 20 DTR 99 (Mum.) (Trib.)

Editorial Note:- Refer, J. M. Shares and Stock Brokers. Source: www.itatonline.org

CAPITAL GAINS – FAMILY SETTLEMENT - COST OF ACQUISITION – S. 45, 49(1)

Family settlement is analogous to partition attracting section 49(1) hence, in case of property acquired by way of family settlement dt. 1st September, 1997 effective from 31st July 1992, for purposes of computing capital gains, diction has to be allowed on indexed cost of acquisition by taking in to account its fair market value as on 1st April, 1981, the property having been acquired by previous owner in 1966.



ACIT vs. Baldev Raj Charla & Ors. (2009) 121 TTJ 366 (Del.)

D.

DEEMED DIVIDEND - INTER - CORPORATE DEPOSITS - S. 2(22)(e)

Inter Corporate Deposits (ICDs) are different from loans or advances and would not come within purview of deemed dividend under section 2(22)(e).

Bombay Oil Industries Ltd. vs. Dy. CIT (2009) 28 SOT 383 (Mum.)

DEDUCTION – HOUSING PROJECTS – S. 80IB(10)

S. 80 IB (10) is aimed at promoting construction of housing projects so as to address the problem of shortage of *dwelling units*. It cannot be said that the object is to encourage *house building* activity per se, irrespective of whether these are dwelling or commercial units. The commercial use of area must be regarded as an integral part of a housing project and does not vitiate the character of a housing project. The approval by the local authority of a project as a “housing project” is conclusive and no further enquiry is required. Where commercial built up area does not exceed 10% of the total area eligible for the benefit, are predominantly residential in nature. Where the commercial area is more than 10% will not be eligible for deduction unless it can be shown that income from the residential dwelling units can be worked out separately and even after excluding the commercial use of plot, the project satisfies all the requirements of section 80IB (10).

Bhrama Associates vs. JCIT (Pune Special Bench) (Source : www.itatonline.org)

Editorial Note : The Mumbai Tribunal Decision in case of Laukik Developers vs. DCIT 105 ITD 657 (Mum) **overruled**. The Bombay High Court has admitted the appeal of Laukik Developers

E.

EXEMPTED INCOME - EXPORT – ORIENTED UNDERTAKING - UNABSORBED DEPRECIATION – S. 10B, 32

Deduction under section 10B is to be allowed from total income of assessee after adjusting unabsorbed depreciation.

ACIT vs. Jewellery Solutions International (P) Ltd. (2009) 28 SOT 405 (Mum.)

EXEMPTED INCOME - FREE TRADE ZONE - MAINTENANCE OF SOFTWARE – S. 10A



Maintenance of software being inherent part of development of software is eligible for relief under section 10A.

Direction Software Solutions vs. ITO (2009) 28 SOT 35 (Mum) (URO)

EXEMPTED INCOME - COMPUTATION OF TOTAL TURNOVER - EXPORT ORIENTED UNDERTAKING - S. 10B

For the purpose of applying the formula under sub-section (4) of section 10B, the freight, telecom charges or insurance attributable to the delivery of articles or things or computer software outside India or the expenses, if any, incurred in foreign exchange in providing the technical services outside India are to be excluded both from the export turnover and from the total turnover, which are the numerator and the denominator respectively in the formula.

ITO vs. Sak Soft Ltd. (2009) 20 DTR 514 (Chennai)(SB)

I.

INCOME DEEMED TO ACCRUE OR ARISE IN INDIA – FEES FOR TECHNICAL SERVICES – WEBSITE HOSTING – PAYMENT TO NON RESIDENTS – BUSINESS DISALLOWANCES – S. 9, 40(a)(i), 195

Payments made to non-residents on account of rentals for hosting of websites on servers are not in nature of interest of royalties or fee for technical services or other sum chargeable to tax in India.

Provisions of Article 26(3) DTAA between India and USA neutralizes rigor of provisions of section 40(a)(i).

Millennium Infocom Tech Ltd. vs. ACIT (2009) 117 ITD 114 (Delhi)

L.

LOSS – CARRY FORWARD AND SET OFF – DEFECTIVE INVALID RETURN – S. 80, 139(1), 139(3) & 292B

Assessee company having filed four returns in respect of its four units correctly disclosing all relevant information without causing any prejudice to Revenue, such mistake or defect stood removed by operation of section 292B and consolidated revised return filed by assessee will relate back to the date of filing original returns entitling assessee to claim carry forward and set off of loss as claimed in original returns and consolidated in revised return.



Nichoas Appellate South East Asia Fund Ltd vs. Asst. Director (International Taxation) (2009) 20 DTR 1 (Mum.) (TM) (Trib.) / (2009) 121 TTJ 289 (Mum.) (TM)

T.

TDS – ON COMMISSION RETAINED BY AGENT

Where the assessee-airline supplied blank tickets to the travel agent, on terms that the same be sold at a minimum price and the difference between the said minimum price and the price at which the tickets were sold to the passenger was retained by the travel agent, Court held the amount so retained by the agent was “commission” and the assessee was required to deduct tax thereon u/s 194-H of the Act as there was a principal and agent relationship, the monies retained was ‘commission’ and not ‘discount’

CIT vs. Singapore Airlines (Delhi High Court) (Source : www.itatonline.org)

Editorial note - The Bombay High Court has taken a *contrary* view in CIT vs Qatar Airways.

TDS - DISCOUNT TO MARKET ASSOCIATES – SIM CARDS – RECHARGE COUPONS - PAYMENT TO INTERCONNECT CHARGES – S. 194H, 194 J

As per various terms of agreement between assessee and PMA, legal relationship between them being seller and purchaser and not of principal and agent ,provisions of section 194H were not attracted and no tax under section 194H is required to be deducted at source on discount given by assessee to PMA on SIM cards / recharge coupons. Payment of interconnect charges to BSNL, MTNL, etc. cannot be treated as payment for technical services as provided under section 194 J.

IDEA Cellular Ltd. vs. Dy. CIT (2009) 121 TTJ 352 (Del.)