



**Digest of CASE LAWS (DEC., 2008) (Vol 1. Part 3.) KSA LEGAL.
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SUPREME COURT

1. APPEAL – S. 261, ARTICLE 136

Revenue having not filed any appeal in other assessment years. It is precluded from filing appeals in the relevant assessment years involving identical fact situations.

CIT vs. J. K. Charitable Trust (2008) 220 CTR 105 (SC)

2. CIRCULAR – BINDING – S. 119

It is for the court to declare what the particular provision of statute says and it is not for the executive. A circular cannot be given effect to in preference to the view expressed in a decision of the Supreme Court or the High Court. A circular which is contrary to the statutory provisions has really no existence in law.

CIT Central Excise vs. Ratan Melting & Wire Industries (2008) 14 DTR 324 (SC) / (2008) 220 CTR 98 (SC)

**3. MANUFACTURE - INDUSTRIAL UNDERTAKINGS - SHIP
BREAKING ACTIVITY – S. 80HH, 80I**

Ship breaking activity results in production of a distinct and different article and therefore assessee doing said activity would be entitled to deduction under sections 80HH and 80I.

Vijay Ship Breaking Corpn. vs. CIT (2008) 175 Taxmann 77 (SC)

4. PENALTY CONCEALMENT – MENS REA - S. 271(1)(c)



Mens rea is not an essential ingredient of section 271(1)(c), and there is no discretion with the authority competent to impose penalty below the prescribed minimum.

UOI vs. Dharamendra Textile Processors & Ors. (2008) 14 DTR 114 (SC) / (2008) 174 Taxmann 571 (SC)

Editorial Note: Full Bench of Three Judges

HIGH COURTS

A.

1. APPELLATE TRIBUNAL – PRECEDENT – S. 255

It is not only a matter of judicial propriety but also a matter of judicial discipline that when one Bench of the Tribunal takes a view, another Bench on disagreement does not pass a contrary order but refer to a larger Bench for getting the matter resolved.

DLF Universal Ltd. vs. CIT (2008) 306 ITR 271 (Delhi)

2. ASSESSMENT - ADDITIONS TO INCOME – STATEMENT - S. 143(3), 132(4)

Merely on the basis admission, the assessee could not have been subjected to additions, unless and until some corroborative evidence was found in support of such admission. Further statement recorded at such odd hours (at midnight) could not be considered to be voluntary statement, it was subsequently retracted and necessary evidence was led contrary to such admission. Addition was deleted.

Kailashben Mangarlal Chokshi vs. CIT (2008) 174 Taxmann 466 (Guj.) / (2008) 14 DTR 257 (Guj.)

Editorial Note: Refer Circular No. F. No. 286/2/2003-IT (Inv) of CBDT dt. 10th March, 2003 (AIFTP Journal April 2003 Page No. 25)



3. APPELLATE TRIBUNAL – POWERS - CANNOT DISMISS THE APPEAL - HAS TO DECIDE ON MERITS – S. 254

Tribunal invoking Rule 19(2) of 1963 Rules dismissed appeal solely on the ground that assessee had failed to appear before it on date fixed for hearing. The Court held that section 254 makes it incumbent on Tribunal to dispose of appeals on merit, Rule 24 of 1963 Rules as it stands, per se does not empower Tribunal to dismiss appeal for default in absence of assessee. Therefore the impugned order of Tribunal was quashed and matter remanded to the tribunal for disposal a fresh in accordance with law.

Rajendra Prasad Borah vs. ITAT (2008) 174 Taxmann 568 (Guwahati)

B.

4. BUSINESS EXPENDITURE –NEW BUSINESS – S. 37

Expenses incurred for exploring the possibility of setting up a new business which did not come up allowable as revenue expenditure.

CIT vs. Vardhaman Spinning and General Mills Ltd. (2008) 37 IT Rep. 300 (P&H)

5. BUSINESS EXPENDITURE - FOREIGN EXCHANGE FLUCTUATIONS – S. 28

Increase in revenue liability on account of foreign exchange rate fluctuation is not notional or contingent, hence allowable as deduction.

CIT vs. Hughes Escorts Communications Ltd. (2008) 14 DTR 346 (Del.)

6. BUSINESS EXPENDITURE – DISALLOWANCE – S. 43B



Payment made to customs authorities under protest on account of special value branch deposit with the customs authorities could not be disallowed under section 43B.

CIT vs. Hughes Escorts Communications Ltd. (2008) 14 DTR 346 (Del.)

7. BLOCK ASSESSMENT - UNDISCLOSED INCOME - UNABSORBED DEPRECIATION AND LOSS – S. 158BB, 158BA

The provisions under Chapter XIV-B do not indicate for considering a claim of set-off of brought forward losses under Chapter VI or unabsorbed depreciation under section 32(2) to be considered in the determination of undisclosed income.

E. K. Lingamurthy vs. Settlement Commission (2008) 174 Taxmann 298 (Mad.)

8. BLOCK ASSESSMENT – LIMITATION - PROHIBITORY ORDER – S. 132 (3), 158 BE

Prohibitory order under section 132(3) passed on 31st October 2000, merely for continuing the search, possibility for the purpose of extending the limitation, Tribunal was justified in holding that the search stood concluded on 31st October 2000, itself and not 23rd December 2000 and therefore, the assessment order passed on 27th December 2002 was barred by limitation under section 158 BE.

CIT vs. Deepak Aggrawal (2008) 14 DTR 348 (Del) / (2008) 175 Taxmann 1 (Delhi)

Editorial Note: See Third Member case of Mumbai Tribunal in *Nandlal M. Gandhi vs. ACIT (2008) 13 DTR 35 (Mum.)* in favour of assessee.



Special Bench Delhi in Smt. Krishna Verma vs. ACIT (2008) 113 ITD 655 (SB) may require reconsideration.

Special bench is pending at Jodhpur in M/s. Shree Ram Lime Products Ltd., Jodhpur, Source: www.itatonline.org

C.

9. CAPITAL GAINS - BLOCK OF ASSETS - DEPRECIATION - S. 2(11), 50(2)

Section 50(2), comes in to play only if assets of the same class “cease to exist” for the reason that all assets in the block are transferred during the previous year. Assessee having purchased two premises after selling its office premises in the block at the end of the year and therefore, provisions of section 50(2) are not applicable.

CIT vs. Eastman Industries Ltd. (2008) 14 DTR 1 (Del.) / (2008) 174 Taxmann 344 (Delhi)

10. CAPITAL GAINS - EXEMPTION - CONSTITUTIONAL VALIDITY - S. 54EC

In view of amendment of section 54EC by Finance Act, 2007, retrospectively w.e.f. 1st April 2006. Incorporating the limit of Rs. 50 lakhs in long term specified assets for purposes of exemption under section 54EC and validating similar condition imposed by Notification No. 380 of 2006 dt. 22-7-2006, writ petitions filed before the amendment challenging the virus of said notification on the ground that it imposed limitation of Rs. 50 lakhs for said investment dismissed as in fractious.

Arevat & D India Ltd vs. ACIT (2008) 14 DTR 247 (Mad.)

I.



11. INDUSTRIAL UNDERTAKING - FIRM CONVERTED INTO COMPANY - PART IX - S. 80IA(4)(1)

Firm having been converted into company under Part IX of the Companies Act, and the assessee acquired all the assets and liabilities of the firm, assessee company fulfilled all the conditions laid down in section 80IA(4)(1) hence, entitled to deduction under section 80I.

CIT vs. Chetak Enterprises (P) Ltd. (2008) 14 DTR 233 (Raj.) / (2008) 220 CTR 55 (Raj.)

N.

12. NON-COMPETE FEES – SALARY – S. 4, 17(3)(i) & 17(3)(iii).

Payment received by the assessee from his former employer as compensation for his agreement not to take up any competitive employment / assignment in future cannot be termed as “profit in lieu of salary” and is not taxable.

CIT vs. Shyam Sunder Chhaparia (2008) 14 DTR 309 (MP)

P.

13. PENALTY – CONCEALMENT - LEGAL REPRESENTATIVES – S. 18(1)(A), 18(1)(C), 19

In order to make legal representative of deceased assessee liable for penalty under section 19(1), it is not enough that penalty proceedings should be initiated during life time of deceased, but it is also necessary that such penalty proceedings must result in to penalty orders during his life time.



ACIT vs. F. P. Gaekwad (2008) 174 Taxmann 551 (Guj)

14. PENALTY – CONCEALMENT - LEGAL ADVICE – S. 271(1)(c)

The assessee made a claim for exemption on the basis of legal advice from his counsel. The court held that assessee could not be made to suffer for the wrong claim made on the advice of his counsel, more so when he had made full disclosure of income subject to exemption in the return of income.

CIT vs. Amar Nath (2008) 173 Taxmann 395 (P & H)

R.

15. REASSESSMENT - FULL AND TRUE DISCLOSURE - AFTER FOUR YEARS - S 147

Assessee having made full disclosure of material facts in the return which was accompanied by several enclosures, assessment could not be reopened beyond four years from the end of the relevant assessment year for the reason that certain income has been wrongly assessed under the head “capital gains of business or profession”.

Gujarat Fluoro Chemicals Ltd. vs. Dy. CIT (2008) 15 DTR 1 (Guj)

16. REASSESSMENT - REASON TO BELIEVE – S. 148

Merely because the block assessment made under section 158BC, has not been upheld, it can not be said that assessee's income has escaped assessment and therefore, the same cannot be reason enough to invoke section 147, more so, when the reasons make no reference to the block assessment or the proceedings pursuant thereto.

Smt. MRA Ananta Naik & Ors. vs. Dy. CIT (2008) 15 DTR 8 (Bom.)



17. RECOVERY – STAY - S. 220(6)

The Court held that stay application must be disposed of by a speaking order after consideration of all relevant factors having bearing on demand raised as well as having regard to the Instruction No. 1914 dt. 2-12-1993.

Subhash Chander Sehgal vs. Dy. CIT (2008) 173 Taxmann 412 (Delhi)

18. RECOVERY – STAY – S. 226(3)

Demand raised in High pitched assessment need to be stayed, as its recovery would cause genuine hardship. Instruction No. 1914 of 1993 talks of one such exception of highly pitched assessment, where recovery should be kept in abeyance necessarily.

Soul vs. Dy. CIT (2008) 173 Taxmann 468 (Delhi) / (2008) 14 DTR 267 (Del.) / (2008) 220 CTR 211 (Del.)

19. REVISION – DEBATABLE – MERGER - S. 263

Issue regarding levy of surcharge under proviso to section 113 inserted w.e.f. 1st June 2006, in cases of search conducted before that date being debatable as on that date the revision under section 263 was not justified.

Once the issue of levy of surcharge under proviso to section 113 has been decided by CIT(A), CIT has no jurisdiction to initiate proceedings under section 263.

CIT vs. Ansal Properties & Ind. (P) Ltd. (2008) 14 DTR 227 (Del.)

20. RECTIFICATION OF MISTAKES – S. 154

Power of ITO to amend assessment in consequence of decision.



In an appeal / revision / reference or by a High Court or Supreme Court is not traceable to section 154, but is inherent and traceable to section 143 and 144 and therefore, limitation, as contained in section 154(7) would not apply to passing of such order.

Peninsula Land Ltd. vs. CIT (2008) 175 Taxmann 58 (Bom.)

21. RETURN – SIGNATURE OF DEAD PERSON – S. 139, 140

Return filed with the signatures of assessee after his death can not be taken as a valid return by assessee himself and assessment invalid.

CIT vs. Moti Ram (2008) 175 Taxmann 27 (P & H)

22. TAX DEDUCTION AT SOURCE – SALARY – PERQUISITE – S. 17(2)(III)(C), 192, 201(1), 201(1A) & 271C

Non transferable meals coupons distributed by the assessee company to its employees of the value of Rs. 50 per day which were usable only at specified eating joints not being taxable as perquisites in the hands of the employees in view of proviso to Rule 3(7)(iii) no default can be ascribed to the assessee for not deducting tax at source in respect of said meal coupons merely because some employees misused the facilities.

Any expenditure incurred by employer for journey by the employee from residence to the office or other place of work and back is not to be regarded as taxable perquisite in the hands of the employee, even if the vehicle is owned by the employee and, therefore, assessee was not required to deduct tax in respect of reimbursement of conveyance expenses paid to the employees.

CIT vs. Reliance Industries Ltd. (2008) 14 DTR 150 (Guj.)

TRIBUNAL



A.

1. APPEAL (TRIBUNAL) – PRONOUNCEMENT VIS-À-VIS PASSING OF ORDER – S. 254(1)

Pronouncement made by the tribunal immediately after hearing both the sides cannot be an order passed under section 254(1) and hence, there was no rectifiable mistake in the written order passed subsequently for the reason that it was not in conformity with the said pronouncement, however, Tribunal committed apparent mistake as the statement under section 132(4) made by the party was not considered vis-à-vis an order of the Supreme Court claimed to be cited.

CIT vs. Jinendra Smelting & Rolling Mills (2008) 15 DTR 22 (Pune) (Trib.)

2. ASSESSMENT – LIMITATION – S. 153(2A), 153(3)(ii)

When the order is set aside by the CIT(A) the AO had to pass fresh assessment orders within the time limit prescribed under section 153(2A)

Raghava Health Care Ltd. vs. Dy. CIT (2008) 14 DTR 341 (Visakhapatnam) (Trib.)

B.

3. BUSINESS EXPENDITURE - MUTUAL FUND LAUNCH PROMOTION – S. 37

Assessee, an asset management company, managing a mutual fund having incurred mutual fund launch expenses and mutual fund promotion expenses in view of contractual obligation under the tripartite arrangement, same were allowable.

First India Asset Management (P) Ltd. vs. Dy. CIT (2008) 14 DTR 402 (Chennai) (Trib.)



4. BUSINESS EXPENDITURE - PREPAID LEASE RENT – S. 37

The assessee was not entitled to get deduction in respect of prepaid lease rent pertaining to the next financial year in the year of payment.

Dy. CIT vs. FAG Bearings India Ltd. (2008) 115 ITD 53 (Ahd.)(SB) / (2008) 306 ITR 60 (AT) (Ahd.) (SB)

5. BUSINESS EXPENDITURE - HIGHER EDUCATION OF DIRECTOR - NOT ALLOWABLE – S. 37

Expenses on higher education of director aged 18 years No proof that director working for assessee. No nexus, between expenditure incurred and business of assessee. Expenditure not allowable.

Mustang Mouldings P. Ltd. vs. ITO (2008) 306 ITR 361 (AT) (Mum.)

Editorial Note: See Mumbai Tribunal in ITO vs. Sefttech India Pvt. Ltd., Bench – A, ITA No. 4407 & 6119 /Mum/2003, dt. 22th July, 2005, in favour of the assessee.

6. BUSINESS LOSS - LOSS FROM NON RECOVERY OF MONEY FROM CLIENTS BY SHARE BROKERS – S. 28

The matter was remanded to the assessing officer to decide the allowability of loss under section 28(1).

India Infoline Securities (P) Ltd. vs. ACIT (2008) 25 SOT 123 (Mum.)

Cases Referred: ITO vs. GDB Share & Stock Broking Services Ltd. (2004) 3 SOT 569 (Kol.); Mahesh J. Patel vs. ACIT (2007) 109 ITD 35 (Mum.)(TM)

Editorial Note: Claim as bad debt was disallowed.

7. BLOCK ASSESSMENT – S. 132A, 158 BC



When books of account, other documents and assets belonging to assessee are taken in to custody by any officer or authority under any other law of land for time being in force, jurisdiction to complete block assessment in case of such an assessee under section 158BC is conferred on assessing officer only on physical handing over of all books of account / documents / assets requisitioned under section 132A.

ACIT vs. Sonu Verma (2008) 115 ITD 37 (Asr.)(SB)

8. BUSINESS EXPENDITURE - NON PERFORMING ASSETS – S. 37

Provision made for non performing assets as per the directives of RBI is not allowable.

Gujarat Gas Financial Services Ltd. vs. ACIT (2008) 14 DTR 481 (Ahd.)(SB) (Trib.)

C.

9. CAPITAL GAINS – COST OF ACQUISITION – INTEREST ON BORROWED CAPITAL – S. 14A & 48

Interest on funds borrowed for acquisition of shares is to be taken in to account towards the cost of acquisition of shares for the purpose of computation of capital gains as prescribed under section 48(ii). Capital gain on sale of shares being part of the total income of the assessee and not an exempt income, section 14A has no application.

S. Balan Alias Shanmugam Balakrishna Chettiar vs. Dy. CIT (2008) 15 DTR 60 (Pune) (Trib.)

Editorial Note: Judgements are contrary. Application can be made to refer larger bench.

D.



10. DEPRECIATION – INTANGIBLE - NON COMPETE FEE – S. 32(II)

Commercial right comes in to existence whenever the assessee makes payment for non compete fee and after obtaining no compete right, the assessee can develop and run his business without bothering about the competition and therefore non compete right is intangible asset eligible for depreciation.

ACIT vs. Real Image Tech. (P) Ltd. (2008) 14 DTR 138 (Chennai) (Trib.)

11. DEDUCTION OF TAX AT SOURCE - PAYMENT TO STOCK EXCHANGE - S. 40(a)(ia) ,194 J.

Transaction fee paid to stock exchange can not be said to be a fee paid in consideration of stock exchange rendering any technical services to the assessee. The provisions of section 194J were not attracted, therefore, there was no obligation on the part of the assessee to deduct tax at source consequently, the provisions of section 40(a)(ia) were also not attracted.

Kotak Securities Ltd. vs. Addl. CIT (2008) 25 SOT 440 (Mum.)

12. DISALLOWANCE – S. 14A

In case of mixed accounting, expenditure incurred in tax exempt dividend income not being identifiable, interest of justice will be served if 10% of expenditure is allocated for earning dividend and disallowed under section 14A.

Gujarat Gas Financial Services Ltd vs. ACIT (2008) 14 DTR 481 (Ahd.)(SB)(Trib.)

13. DIVIDEND STRIPPING AND BONUS UNIT STRIPPING – S. 94(7), 94(8)



The assessee purchased certain bonds on 9-12-2002 at rate of Rs. 15.54 and sold the same on 16-12-2002 at rate of Rs. 10.40 and claimed as short term capital loss. The assessee had also received certain additional units as bonus units on holding aforesaid bonds. The AO disallowed the loss applying the provision of 94(7). In appeal the CIT(A) held that provision of section 94(8) will be applicable. As the provision was inserted by the Finance Act (No. 2) Act 2004 with effect from 1-4-2005 since case under consideration was for the Asst year 2003-04, the provision of section 94(8) were not applicable. The Hon'ble Tribunal confirmed the view of the CIT(A) and held that provision of section 94(7) can not be applicable for bonus unit stripping.

Dy. CIT vs. Ghanshyam Dass Seth (2008) 26 SOT 166 (Delhi)

14. EXPORT – DEPB - S. 80 HHC

In view of insertion of clause (iiid) and (iiie) in section 28 as well as insertion of a new proviso to section 80HHC(3) with retrospective effect from 1st April 1998, for including DEPB receipts as part of business income, the issue is to be processed a fresh in accordance therewith for computation of deduction under section under 80HHC(3).

Dy. CIT vs. Zaveri & Co. Exports & Ors. (2008) 14 DTR 334 (Ahd.)(SB)(Trib.)

15. ESTOPPEL - CONCESSION BY ASSESSES COUNSEL – S. 153(2A), 153(3)(iii)

Department cannot invoke the principle of estoppels by acting on the request made by assesses counsel to postpone assessment proceedings for giving effect to CIT(A)s order till the receipt of order of the Tribunal. AO should have acted strictly in accordance with the law.

Raghava Health Care Ltd vs. Dy. CIT (2008) 14 DTR 341 (Visakha) (Trib.)



16. HOUSING PROJECT – S. 80IB(10)

Where some of the residential units in a bigger housing project, treated independently, are eligible for relief under section 80IB(10) relief should be given pro rata and should not be denied by treating the bigger project as a single unit, more so when assessee obtained all sanctions, permissions and certificates for such eligible units separately.

Dy. CIT vs. Brigade Enterprises (P) Ltd. (2008) 14 DTR 371 (Bang.)(Trib.)

I.

17. INCOME - LOAN OUTSTANDING – S. 41(1)

Loan outstanding for more than 10 years not covered by section 41(1) if there is no transfer to profit and loss account.

Inderson Leathers (P) Ltd. vs. Addl. CIT (2008) 114 ITD 242 (Asr.)

18. INTEREST TAX

Bill discounting charges are chargeable interest under Interest Tax Act.

Interest on inter corporate deposits is not interest on loan or advances and therefore would not be includible in chargeable interest under the Interest Tax Act.

Gujarat Gas Financial Services Ltd. vs. ACIT (2008) 14 DTR 481 (Ahd.)(SB) / (2008) 119 TTJ 73 (Ahd.)(SB)

M.



19. MANUFACTURE - NEW INDUSTRIAL UNDERTAKINGS – S. 80I, 80HHA

Process of standardization and pasteurization of milk does not amount to manufacture / production for purpose of claiming deduction under section 80I and 80HHA.

B. G. Chitale vs. Dy. CIT (2008) 115 ITD 97 (Pune)(SB)

20. PENALTY – CONCEALMENT – S. 153A, 271(1)(c) EXPLN. 5

Section 153A is a specific for making assessment or reassessment in the course of search under section 132 has been initiated. The section is materially different from section 147 in respect of this regard only. If the assessee has already filed a return under section 139 or in response to notice under section 148 and he is served with the a notice under section 153A, then there can be a case of concealment, if the assessment is made in pursuance to return filed under section 153 A. It is noticed that there was concealment in the earlier return. Penalty under section 271(1)(c) can be levied in an assessment under section 153 A.

Assessee having admitted undisclosed income representing bogus gifts recorded in the books in his statement under section 132(4) during search, declared the same in return under section 153A and paid taxes thereon, was eligible for immunity from penalty under section 271(1)(c) Expln. 5, thereof, however, as regards declaration of commission for purchasing bogus gifts which was an outgoing not representing any asset, such immunity was not available.

Dy. CIT vs. S. Kumar & Ors. (2008) 15 DTR 34 (Bang.)(Trib)

Editorial Note: First judgement on section 153A read with section 271(1)(c)



21. PRECEDENT - SUPREME COURT DECISION

When the Supreme Court passes an order in SLP and also gives reasons, such an order is a binding precedent.

ACIT vs. Changepond Technologies (P) Ltd. (2008) 14 DTR 336 (Chennai) (Trib.)