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LATEST IN JUDICIARY FOR NOVEMBER, 2012 EXAMS

S. NO.	*QUESTION RAISED BEFORE THE COURT*	*DECISION*	*NAME OF THE CASE*
1.	What is the nature of expenditure incurred on demolition and re-erection of a cell room and expenditure incurred on purchase of pumping set, mono block pump and two transformers, **which were parts of a bigger plant** – revenue or capital?	In this case, it was clear that after completely demolishing the old cell room, an entire new cell room was erected. The money spent was not merely on repairs of the cell room, but for constructing a new cell room. Thus, it was nothing but a complete demolition of the old cell room and construction/erection of a new cell room in its place. The expenditure incurred on the cell room was capital expenditure. However, so far as purchase of pumping set, mono block pump with HP motors and two transformers were concerned, they were not stand alone equipment, but were part of the bigger plant. Therefore, it would be treated as replacement of those parts and the expenditure would be eligible for deduction under section 37(1).	**CIT v. Modi Industries Ltd. (2011) (Del.)**
2.	In case the share capital is raised in a foreign country and repatriated to India on need basis from time to time for approved uses, can the gain arising on the balance sheet date due to fluctuation in foreign exchange, in respect of that part of share capital which is to be used as working capital, be treated as a revenue receipt?	Share capital is a capital account and therefore exchange fluctuations on share capital is a capital receipt not taxable. If exchange fluctuation are on capital account then exchange fluctuations are capital loss/ capital receipt. The High Court held that the capital raised, whether in India or outside, can be utilized both for the purpose of acquiring fixed assets and to meet other expenses of the organization i.e. as working capital. For determining the nature of receipts, due consideration should be given to the source of funds and not to the ultimate use of the funds. Therefore, the entire gain has to be treated as capital receipt as the source of fund in this case is capital in nature.	**CIT v. Jagatjit Industries Ltd. (2011) (Delhi)**

3.	In case there is no possibility of recovery of loan given by a NBFC, which is an NPA as per RBI guidelines, can the interest on such loan be treated as income of the NBFC, following mercantile system of accounting if assessee has not provided for such interest?	Since the loan was a NPA and was doubtful of being recovered, the assessee was correct in not accounting for the interest income as such loan. As per RBI Guidelines also such interest cannot be accounted. The Assessing Officer was not justified in adding interest income on such loan.	**DIT v. Brahamputra Capital Financial Services Ltd. (2011) (Delhi)**
4.	Can notional interest on interest free deposit received by an assessee in respect of a shop let out on rent be brought to tax as "Business income" or "Income from house property"?	The assessee had received interest free deposit in respect of shops given on rent. The Assessing Officer added to the assessee's income notional interest on the interest free deposit at the rate of 18 per cent simple interest per annum on the ground that by accepting the interest free deposit, a benefit had accrued to the assessee which was chargeable to tax under section 28(iv). Held that the notional interest is not assessable either as business income or as income from house property.	**CIT v. Asian Hotels Ltd. (2010) (Del.)**
5.	Can the provisions of section 41(1) be invoked both in respect of waiver of working capital loan utilized for day-to-day business operations and in respect of waiver of term loan taken for purchasing a capital asset?	The provisions of section 41(1) are attracted in respect of waiver of the working capital loan utilized for day-to-day business operations, since it amounted to remission of a trading liability. However, in the case of waiver of term loan for purchasing capital assets, the provisions of section 41(1) are not attracted since it cannot be treated as remission or cessation of a trading liability.	**Rollatainers Ltd. v. CIT (2011) (Del.)**
6.	Can a company engaged in the business of owning, running and managing hotels claim interest on borrowed funds, used by it for investing in the equity share capital of a wholly owned subsidiary company, as deduction where the subsidiary company was formed for exercising effective control of new hotels acquired by the parent company under its management?	The High Court held that the assessee was in the business of owning, running and managing hotels. For the effective control of new hotels acquired by the assessee under its management it had invested in a wholly owned subsidiary company. The expenditure incurred was for business purposes and was thus allowable under section 36(1)(iii). Under section 36(1)(iii), the amount of the interest paid in respect of capital borrowed for the purposes of the business or profession is allowable as deduction. In this case, it has been held that interest paid on capital borrowed for investment in a subsidiary company is allowable as deduction since the subsidiary company was formed to carry on the business of the parent company in a more effective manner.	**CIT v. Tulip Star Hotels Ltd. (2011) (Del.)**

7.	Can "moneys payable" in respect of a building sold by the assessee (which has to be reduced from the opening written down value of the block of assets for calculating depreciation) be construed as the fair market value of the asset instead of the actual sale price?	The written down value of the asset falling within that block of assets at the beginning of the previous year has to be adjusted by the amount for which the asset is actually sold and not by its fair market value.	**CIT v. Cable Corporation of India Ltd. (2011) (Bom.)**
8.	Would the expenditure incurred for issue of convertible debentures be treated as revenue expenditure or capital expenditure?	Held that the expenditure incurred on the issue of debentures shall be treated as revenue expenditure even in case of convertible debentures, i.e. the debentures which had to be converted into shares at a later date.	**CIT v. ITC Hotels Ltd. (2011) (Kar.)**
9.	Can the Assessing Officer bring to tax the actual profits as per books of accounts, if the same is higher than 10% of receipts which are deemed to be the profits under section 44BBB in case of a foreign company engaged in turnkey projects?	If an assessee fulfils all the conditions mentioned in section 44BBB(1), the provisions of sections 28 to 44AA of the Act would not be applicable for computation of its business income, and a sum equal to 10% of the amount paid or payable to such foreign company would be deemed as its business income. The assessee has the benefit of declaring before the Assessing Officer that the actual profits earned by it were less than 10% but the Revenue cannot take recourse of this sub-section to claim that the profits earned by the assessee were more than 10%.	**DIT v. DSD Noell GmbH (2011) (Delhi)**
10.	Would expenditure incurred on feasibility study conducted for examining proposals for technological advancement relating to the existing business be classified as a revenue expenditure, where the project was abandoned without creating a new asset?	In such cases, whether or not a new business/asset comes into existence would become a relevant factor. If there is no creation of a new asset, then the expenditure incurred would be of revenue nature. In this case, since the feasibility studies were conducted by the assessee for the existing business with a common administration and common fund and the studies were abandoned without creating a new asset, the expenses were of revenue nature.	**CIT v. Priya Village Roadshows Ltd. (2011) (Delhi)**
11.	Is the assessee entitled to depreciation on value of goodwill considering it as "other business or commercial rights of similar nature"	Under section 32(1)(ii), depreciation is allowable on intangible assets, being know-how, patents, copyrights, trade-marks, license, franchise, or any other business or commercial rights of similar nature.	**B. Raveendran Pillai v. CIT (2011) (Kerala)**

	within the meaning of an intangible asset?	When goodwill paid was for ensuring retention and continued business, it was for acquiring a business and commercial right and it was comparable with trade mark, franchise, copyright etc., referred to in section 32(1)(ii) and so, goodwill was covered by the above provision of the Act entitling the assessee for depreciation.	
12.	Can the expenditure incurred for purchase of second hand medical equipment for use as spare parts for existing equipment be claimed as revenue expenditure?	In this case, since the machinery was purchased with the intention of using its parts as spare parts for existing machinery, the same has been allowed as revenue expenditure and the date of its purchase is material for determining the year in which the expenditure is allowable as deduction. However, if the intention was to use such machinery on a standalone basis, then the expenditure would be treated as a capital expenditure and the date on which it is put to use would determine its eligibility for depreciation in that year as also the quantum of depreciation	**Dr. Aswath N. Rao v. ACIT (2010) (Karn)**
13.	Can the amount incurred by the assessee for replacing the old mono sound system in its cinema theatre with a new Dolby stereo system be treated as revenue expenditure?	On this issue, the High Court observed held that the assessee had provided certain amenities to its customers by replacing the old system with a better sound system and by introducing such system, the assessee had not increased its income in any way. This had not benefited the assessee in any way with regard to the total income since there was no change in the seating capacity of the theatre or increase in the tariff rate of the ticket. In such a case, the expenditure on such change of sound system could not be considered capital in nature.	**CIT v. Sagar Talkies (2010) (Karn.)**
14.	Can payment to police personnel and gundas to keep away from the cinema theatres run by the assessee be allowed as deduction?	Any payment made to the police illegally amounts to bribe and such illegal gratification cannot be considered as an allowable deduction. Similarly, any payment to a gunda as a precautionary measure so that he shall not cause any disturbance in the theatre run by the assessee is an illegal payment for which no deduction is allowable under the Act.	**CIT v. Neelavathi & Others (2010) (Karn)**
15.	Can expenditure incurred on alteration of a dam to ensure adequate supply of water for the smelter plant owned by the assessee be allowed as revenue expenditure?	The assessee company owned a super smelter plant which required large quantity of water for its day-to-day operation, in the absence of which it would not be able to function. Since the object and effect of the expenditure incurred by the assessee is to facilitate its trade operation and enable the management to conduct business more efficiently and profitably, the expenditure is revenue in nature and hence, allowable as deduction.	**CIT v. Hindustan Zinc Ltd. (2010) (Raj.)**
16.	Is the amount paid by a construction company as regularization fee for	The amount paid to compound an offence is obviously a penalty and hence, does not qualify for deduction under section 37. Merely describing the payment as a	**Millennia Developers (P) Ltd.**

	violating building bye-laws allowable as deduction?	compounding fee would not alter the character of the payment. It is the actual character of the payment and not its nomenclature that determines the disallowance of such expenditure as deduction.	**v. DCIT (2010) (Karn.)**
17.	Is the expenditure incurred on payment of retrenchment compensation and interest on money borrowed for payment of retrenchment compensation on closure of one of the textile manufacturing units of the assessee-company revenue in nature?	In this case, the payment of compensation to workers on closure of a textile mill unit is treated as a revenue expenditure since after closure of the unit, the remaining business continued and there was inter-connection in the functioning of the different units. Therefore, it follows that if compensation is paid to workers on closure of the entire business, the same would be a capital expenditure. In this case, since one of the units was closed, the retrenchment compensation and interest on money borrowed to pay retrenchment compensation is allowed as deduction.	**CIT v. DCM Ltd. (2010) (Delhi)**
18.	Can an assessee manufacturing textile goods claim additional depreciation under section 32(1)(iia) on setting up of a windmill for power generation?	Held that in order to claim the benefit of section 32(1)(iia), what is required to be satisfied is that the new machinery or plant should have been acquired and installed by an assessee, who was already engaged in the business of manufacture or production of any article or thing. The provision does not state that the setting up of a new machinery or plant should have any operational connectivity to the article or thing that is already being manufactured by the assessee. Hence, it was held that the assessee is entitled to additional depreciation on setting up of a wind mill.	**CIT v. VTM Limited (2009) (Mad.)**
19.	Is the expenditure incurred by the assessee towards commitment charges for issuing debentures deductible as business expenditure, where the borrowing is for the purposes of meeting the working capital needs of the existing business?	Money borrowed by issue of debentures is in the nature of a loan. Therefore, the expenditure in the nature of commitment charges at the time of issuing such debentures would be on revenue account only. Hence, the commitment charges were allowable as deduction under section 37(1).	**CIT v. Mihir Textiles Ltd. (2009) (Guj.)**
20.	**Can the assessee claim exemption under section 54F, on account of capital gain arising on transfer of depreciable assets held for more**	Held that the deeming fiction created by section 50 that the capital gain arising on transfer of a depreciable asset shall be treated as capital gain arising on transfer of short-term capital asset is only for the purpose of sections 48 and 49 and not for the purpose of any other sections. Section 54F being an independent section will not be	**CIT v. Rajiv Shukla (2011) (Delhi)**

	than 36 months i.e. a long term capital asset, though the same is deemed as capital gain arising on transfer of short-term capital asset by virtue of section 50?	bound by the provisions of section 50. The depreciable asset if held for more than 36 months shall be a long-term capital asset as per the provisions of section 2(29A). Therefore, the exemption under section 54F on transfer of depreciable asset held for more than 36 months cannot be denied on account of fiction created by section 50.	
21.	**Whether indexation benefit in respect of the gifted asset shall apply from the year in which the asset was first held by the assessee or from the year the same was first acquired by the previous owner?**	As per Explanation 1 to section 2(42A), in case the capital asset becomes the property of the assessee in the circumstances mentioned in section 49(1), inter alia, by way of gift by the previous owner, then for determining the nature of the capital asset, the aggregate period for which the capital asset is held by the assessee and the previous owner shall be considered. In the present case, the Bombay High Court held that by way of 'deemed holding period fiction' created by the statute, the assessee is deemed to have held the capital asset from the year the asset was held by the previous owner and accordingly the asset is a long term capital asset in the hands of the assessee. Therefore, for determining the indexed cost of acquisition under Section 48, the assessee must be treated to have held the asset from the year the asset was first held by the previous owner and accordingly the CII for the year the asset was first held by the previous owner would be considered for determining the indexed cost of acquisition. Hence, the indexed cost of acquisition in case of gifted asset has to be computed with reference to the year in which the previous owner first held the asset and not the year in which the assessee became the owner of the asset.	**CIT v. Manjula J. Shah (Bom.)**
22.	Can exemption under section 54B be denied solely on the ground that the new agricultural land purchased is not wholly owned by the assessee, as the assessee's son is a co-owner as per the sale deed?	The assessee claimed deduction under section 54B in respect of the land purchased by him along with his son out of the sale proceeds of the agricultural land. Merely because the assessee's son was shown in the sale deed as co-owner, it did not make any difference. Therefore, the assessee was entitled to deduction under section 54B.	**CIT v. Gurnam Singh (2010) (P&H)**
23.	Can exemption under section 54EC be denied on account of the bonds being issued after six months of the	In this case, the Bombay High Court observed that in order to avail the exemption under section 54EC, the capital gains have to be invested in a long-term specified asset within a period of six months from the date of transfer. Where the assessee has made	**Hindustan Unilever Ltd. v. DCIT (2010) (Bom.)**

	date of transfer even though the payment for the bonds was made by the assessee within the six month period?	the payment within the six month period, and the same is reflected in the bank account and a receipt has been issued as on that date, the exemption under section 54EC cannot be denied merely because the bond was issued after the expiry of the six month period or the date of allotment specified therein was after the expiry of the six month period.	
24.	Can an industrial undertaking engaged in manufacturing or producing articles or things treat the persons employed by it through agency (including contractors) as "workers" to qualify for claim of deduction under section 80-IB?	One of the conditions to be fulfilled by an industrial undertaking engaged in manufacturing or producing articles or things to qualify for claim of deduction under section 80-IB is that it should employ ten or more workers in a manufacturing process carried on with the aid of power or twenty or more workers in a manufacturing process carried on without the aid of power. The expression "worker" in section 80-IB(2)(iv) of the Act is referable to the persons employed by the assessee directly or by or through any agency (including a contractor) in the manufacturing activity carried on by the assessee. The employment of ten or more workers is what is relevant and not the mode and the manner in which the workers are employed by the assesee.	**CIT v. Jyoti Plastic Works Private Limited (2011) 339 ITR 491 (Bom.)**
25.	Can an assessee not claiming deduction under section 80-IB in the initial years claim the said deduction for the remaining years during the period of eligibility, if the conditions are satisfied?	The deduction under section 80-IB should be allowed to the assessee for the remaining years up to the period for which his entitlement would accrue, provided the conditions mentioned under section 80-IB are fulfilled. It is immaterial that the assessee has not claimed deduction in the earlier years.	**Praveen Soni v. CIT (2011) (Delhi)**
26.	Can long-term capital gain exempted by virtue of erstwhile section 54EC be included in the book profit computed under erstwhile section 115JB?	As long as long-term capital gains are part of the profits included in the profit and loss account prepared in accordance with the provisions of Parts II and III of Schedule VI to the Companies Act, 1956, capital gains cannot be excluded. Long term capital gains exempt u/s 54EC are part of book profits under section 115JB and are liable to MAT.	**N. J. Jose and Co. (P.) Ltd. v. ACIT (2010) (Ker.)**
27.	Can transfer fees received by a co-operative housing society from its incoming and outgoing members be exempt on the ground of principle of	High Court observed that under the bye-laws of the society, charging of transfer fees had no element of trading or commerciality. Both the incoming and outgoing members have to contribute to the common fund of the assessee. The amount paid was to be exclusively used for the benefit of the members as a class. The High Court, therefore,	**Sind Co-operative Housing Society v. ITO (2009) (Bom)**

	mutuality?	held that transfer fees received by a co-operative housing society, whether from outgoing or from incoming members, is not liable to tax on the ground of principle of mutuality since the predominant activity of such co- operative society is maintenance of property of the society and there is no taint of commerciality, trade or business.	
28.	Is it necessary that there be a written agreement between persons to prove the status of association of persons, in a case where the accounts seized from the persons prove joint investments and sharing of profits in business?	The High Court held that the status of association of persons need not be proved through an agreement. The business carried on by the members together was proved through accounts recovered on search, which justifies the assessment of the assessees in that status.	**CIT v. T. George and M. Syed Alavi (2009) (Ker.)**
29.	Does the Central Board of Direct Taxes (CBDT) have the power under section 119(2)(b) to condone the delay in filing return of income?	The assessee filed his return of income, which contained a claim for carry forward of losses, a day after the due date. The delay of one day in filing the return of income was due to the fact that the assessee had not reached the Central Revenue Building on time because he was sent from one room to the other and by the time he reached the room where his return was to be accepted, it was already 6.00 p.m. and he was told that the return would not be accepted because the counter had been closed. Board has the power to condone the delay in case of a return which was filed late and where a claim for carry forward of losses was made. The delay was only one day and the assessee had shown sufficient reason for the delay of one day in filing the return of income. If the delay is not condoned, it would cause genuine hardship to the petitioner. Therefore, the Court held that the delay of one day in filing of the return has to be condoned. ***<u>CIRCULAR NO. 8/2001 ISSUED BY CBDT</u>*** **It has been decided to condone the delay in filing of returns having a claim of carry forward of Losses. If a return having a claim of carry forward of Losses is filed late, then the delay in filing of loss return in case of genuine hardships can be condone by:** **1. CIT if the returned loss is upto ₹ 10,000.** **2. Chief CIT if the returned loss exceeds ₹ 10,000 but is upto ₹ 1,00,000.** **3. CBDT if the returned loss exceeds ₹ 1,00,000.**	**Lodhi Property Company Ltd. v. Under Secretary, (ITA-II), Department of Revenue (2010) (Del.)**

30.	Can extension of the maximum period of retention of 10 days of books of accounts and documents impounded be granted indefinitely?	On this issue, the High Court observed that section 131 confers on the income-tax authorities the power to impound and retain books of account or other documents for a maximum period of 10 days, after recording of reason for doing so. Extension can be granted with the prior approval of the higher authority for a reasonable period and not for an indefinite period. The High Court held that the extension can only be a one time exercise and supplementing the outer limit of 10 days for few more days depending on the circumstances. Since the outer limit is specified in days, the period can be extended only in days and not in months or years.	**Subha and Prabha Builders P Ltd. vs. ITO (2009) (Karn).**
31.	In case of change of incumbent of an office, can the successor Assessing Officer initiate reassessment proceedings on the ground of change of opinion in relation to an issue which the predecessor Assessing Officer, who had framed the original assessment, had already applied his mind and come to a conclusion?	On this issue, the Gujarat High Court referred to the ruling of the Apex Court in CIT v. Kelvinator of India Ltd. (2010) 320 ITR 561, wherein it was held that the Assessing Officer has the power only to reassess and not to review. Reassessment is not possible if there is a change in opinion of the successor Assessing Officer. Change in opinion does not amount to reasons to believe.	**H. K. Buildcon Ltd. v. Income-tax Officer (2011) (Guj.)**
32.	Can the Assessing Officer issue notice under section 154 to rectify a mistake apparent from record in the intimation under section 143(1), after issue of a valid notice under section 143(2)?	Held that rectification of an intimation cannot be made after issuance of notice under section 143(2) and during the pendency of proceedings under section 143(3). It was held that if any change was permissible to be effected, the same can be done in the assessment under section 143(3) and not by exercising the power under section 154 to rectify the intimation issued under section 143(1).	**CIT v. Haryana State Handloom and Handicrafts Corporation Ltd. (2011) (P&H)**
33.	Can the Assessing Officer reassess issues other than the issues in respect of which proceedings were initiated under section 147 when the original "reason to believe" on basis of which the notice was issued	As per section 147, the Assessing Officer may assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice in the course of proceedings under this section. The Delhi High Court observed that the words "and also" used in section 147 are of wide amplitude. The assessment or reassessment must be in respect of the income, in respect of which the Assessing Officer has formed a reason to believe that the same has escaped assessment	**Ranbaxy Laboratories Ltd. v. CIT (2011) (Delhi)**

	ceased to exist?	and also in respect of any other income which comes to his notice subsequently during the course of the proceedings as having escaped assessment. If the income, the escapement of which was the basis of the formation of the "reason to believe" is not assessed or reassessed, it would not be open to the Assessing Officer to independently assess only that income which comes to his notice subsequently in the course of the proceedings under the section as having escaped assessment. If he intends to do so, a fresh notice under section 148 would be necessary.	
34.	Can the unabsorbed depreciation be allowed to be carried forward in case the return of income is not filed within the due date?	The High Court held that the unabsorbed depreciation will be allowed to be carried forward to subsequent year even though the return of income of the current assessment year was not filed within the due date.	**CIT v. Govind Nagar Sugar Ltd. (2011) (Delhi)**
35.	Can the Assessing Officer reopen an assessment on the basis of merely a change of opinion?	The power to reopen an assessment is conditional on the formation of a reason to believe that income chargeable to tax has escaped assessment. The existence of tangible material is essential to safeguard against an arbitrary exercise of this power. In this case, the High Court observed that there was no tangible material before the Assessing Officer to hold that income had escaped assessment within the meaning of section 147 and the reasons recorded for reopening the assessment constituted a mere change of opinion. Therefore, the reassessment was not valid.	**Aventis Pharma Ltd. v. ACIT (2010) (Bom.)**
36.	Can the Commissioner initiate revision proceedings under section 263 on the ground that the Assessing Officer's order not initiating penalty proceedings was erroneous and prejudicial to the interest of the Revenue, in a case where non-initiation of penalty proceedings was a pre-condition for surrender of income by the assessee?	Penalty for concealment of income can be levied only if Assessing Officer has initiated the penalty proceedings before passing the assessment order. If Assessing Officer has not initiated the penalty proceedings before completion of assessment because he had promised the assessee not to levy penalty in case assessee surrenders the income, then penalty cannot be levied. The order of Assessing Officer cannot be said to be erroneous and prejudicial to the Revenue. Therefore, the Commissioner of Income-tax cannot invoke proceedings under section 263.	**CIT v. Subhash Kumar Jain (2011) (P&H)**
37.	Does the Appellate Tribunal have the power to review or re-appreciate the correctness of its earlier decision	Power under section 254(2) is limited to rectification of a mistake apparent on record and therefore, the Tribunal must restrict itself within those parameters. Tribunal cannot change its own view by substituting a view which it believes should have been	**CIT v. Earnest Exports Ltd. (2010) (Bom.)**

	under section 254(2)?	taken in the first instance. Section 254(2) is not a mandate to unsettle decisions taken after due consideration.	
38.	Can the Tribunal exercise its power of rectification under section 254(2) to recall its order in entirety, where there is a mistake apparent from record?	Tribunal, while exercising the power of rectification under section 254(2), can recall its order in entirety if it is satisfied that prejudice has resulted to the party which is attributable to the Tribunal's mistake, error or omission and the error committed is apparent.	**Lachman Dass Bhatia Hingwala (P) Ltd. v. ACIT (2011) (Delhi)(FB)**
39.	Can penalty under section 271(1)(c) for concealment of income be imposed in a case where the assessee has raised a debatable issue?	The assessee company, after discontinuing its manufacturing business, leased out its shed along with fittings and disclosed the income as income from business, whereas the Revenue contended that the same be assessed as "Income from house property. The issue under consideration is whether penalty under section 271(1)(c) can be imposed in such a case. On this issue, the High Court observed that, mere raising of a debatable issue would not amount to concealment of income or furnishing inaccurate particulars and therefore, penalty under section 271(1)(c) cannot be imposed.	**CIT v. Indersons Leather P. Ltd. (2010) (P&H)**
40.	Can the penalty under section 271(1)(c) be imposed where the assessment is made by estimating the net profit at a higher percentage applying the provisions of section 145?	On this issue, the High Court held that the particulars furnished by the assessee regarding receipts in the relevant financial year had not been found inaccurate and it was also not the case of revenue that the assessee concealed any income in his return. Thus, penalty could not be imposed.	**CIT v. Vijay Kumar Jain (2010) (Chhattisgarh)**
41.	Can the payment made to contractors for hiring dumpers, by an assessee engaged in transportation of building material, be treated as rent for machinery or equipment to attract provisions of tax deduction at source under section 194-I?	The High Court observed that the assessee had given contracts to the parties for the transportation of goods and had not taken machinery and equipment on rent. The Court observed that the transactions being in the nature of contracts for shifting of goods from one place to another would be covered as works contracts, thereby attracting the provisions of section 194C. Since the assessee had given sub-contracts for transportation of goods and not for the renting out of machinery or equipment, such payments could not be termed as rent paid for the use of machinery and the provisions of section 194-I would, therefore, not be applicable.	**CIT (TDS) v. Shree Mahalaxmi Transport Co. (2011) (Guj.)**

42.	Do the tips collected by hotel and disbursed to employees constitute salary to attract the provisions for tax deduction at source under section 192?	When the tips were charged to the bill either by way of a fixed percentage, say 10%. or so on the total bill, or where no percentage was specified and the amount was indicated by the customer on the bill as a tip, the tip went into the receipt of the employer and was subsequently disbursed to the employees. As soon as such amounts were received by the employer, there was an obligation on the part of the employer to disburse them to the rightful persons, namely, the employees. Simultaneously, a right accrued to the employees to claim the tips from the employer. By virtue of the employer-employee relationship, a vested right accrued to the employee to claim the tips. The High Court, therefore, held that the tips would constitute income and thus, taxable as salary. It was obligatory upon the company to deduct tax at source from such payments under section 192.	**CIT (TDS) v. ITC Ltd [2011] (Del.)**
43.	Can discount given on supply of SIM cards and recharge coupons by a telecom company to its distributors under a prepaid scheme be treated as commission to attract the TDS provisions under section 194H?	There was no sale of any goods involved as claimed by the assessee and the entire charges collected by the assessee from the distributors at the time of delivery of SIM cards or recharge coupons were only for rendering services to ultimate subscribers. The assessee was accountable to the subscribers for failure to render prompt services pursuant to connections given by the distributor. Therefore, the distributor only acted as a middleman on behalf of the assessee for procuring and retaining customers and therefore, the discount given to him was within the meaning of commission under section 194H on which tax was deductible.	**Vodafone Essar Cellular Ltd. v. ACIT (TDS) (2011) (Kerala)**
44.	Whether the best judgment assessment order passed without giving the assessee an opportunity of being heard is valid in a case where the notice under section 16(4) has already been given?	In the present case, the assessee did not file the wealth-tax return under section 14(1)[Similar to section 139(1)]. The Assessing Officer issued a notice to the assessee under section 16(4) [Similar to section 142(1)], calling upon it to furnish the return. On the failure of the assessee to comply with the terms of the notice issued, the Assessing Officer proceeded to make the assessment to the best of his judgment without issue of any further notice under section 16(5) [Similar to section 144]. The assessee questioned upon the validity of the assessment done on the ground that the mandatory notice under section 16(5), giving opportunity of being heard to the assessee, was not issued by the Assessing Officer. On the above issue the Delhi High Court held that, as per section 16(5) the Assessing Officer can resort to making best judgment assessment, after giving an opportunity of being heard to the assessee by issue of notice, in case where:	**CWT v. Motor and General Finance Limited (2011) (Delhi)**

		(a) where a person fails to make the return under section 14(1) or under section 15, or (b) where he fails to comply with all the terms of notice issued under section 16(2) or section 16(4). Further, according to the second proviso to section 16(5), no notice or opportunity of hearing is required where a notice under section 16(4) has been issued prior to the making of the best judgment assessment. In the present case, since the Assessing Officer has duly served the notice under section 16(4) on the assessee upon failure of the assessee to file the wealth-tax return, no separate notice under section 16(5) giving opportunity of being heard is required to be issued before making a best judgment assessment.	

VODAFONE INTERNATIONAL HOLDINGS B.V. VS. UNION OF INDIA (BOMBAY HIGH COURT)

Hutchison Essar Limited (HEL) is an Indian Company which is the Joint venture of Hutchison Group and Essar Group. HEL is carrying on the business of providing telecommunication services in India.

Hutchison Telecommunication International Limited (HTIL) is a foreign company, registered in Hong Kong. This foreign company has a wholly owned subsidiary company CGP Investments Ltd. (CGP) which is also a foreign company registered in Cayman Islands, Mauritius. The Company CGP holds 51.95% shares in HEL and through its foreign subsidiary companies, CGP also holds 15.05% shares in HEL. Essar Group holds 33% shares in HEL.

A company Vodafone International Holdings B.V. (Foreign Company registered in Netherland) with a view to acquire the controlling interest in HEL purchased the 100% shares in CGP from HTIL. The agreement of sale of shares of CGP took place outside India.

Mainly two issues arise on sale of CGP shares by HTIL to Vodafone. Firstly, whether HTIL by reason of instant transaction, had earned income liable for capital gains tax in India as this income was earned towards sale consideration of transfer of its business/ economic interests in India as a group in favour of the Vodafone. Secondly, whether, on payment made by the Vodafone to HTIL on such transaction, Vodafone was liable to deduct tax at source under section 195 from the sale consideration paid to HTIL.

The Income tax department issued a show cause notice under section 201 to Vodafone as to why it should not be treated as an assessee in default for not deducting TDS under section 195 on the payment made to HTIL which is taxable in India in hands of HTIL as capital gains. Vodafone filed a writ petition in Bombay High Court challenging the legal validity of the show cause notice.

The Bombay High Court held as under:

1. **The transfer of shares of CGP by HTIL to Vodafone amounts to transfer of controlling interest in Indian Company HEL to Vodafone. The dominant purpose of sale of shares of CGP was to transfer the controlling interest of Indian Company.**

2. **Vodafone has acquired a source of income in India, HTIL by reason of this transaction has earned capital gains taxable in India as the income was earned towards sale consideration of transfer to Vodafone of its Indian business/ economic interests as a group.**

3. **In the instant case, the subject matter of transfer as contracted between the parties is not actually the shares of a Cayman Island Company, but the assets situated in India.**

4. **Vodafone was therefore liable to deduct TDS on the payment made to HTIL and therefore show cause notice under section 201 is a valid notice.**

BOMBAY HIGH COURT DISMISSED THE WRIT PETITION of Vodafone and the court rejected the argument of Vodafone that what was transferred was only shares of an Cayman Island Company i.e., CGP, and therefore, the argument that no capital gains will arise on sale of shares in CGP was rejected.

The very purpose of entering into agreements between the two foreign companies is to acquire the controlling interest which one foreign company held in the Indian company. This being the dominant purpose of the transaction, the transaction would certainly be subject to municipal laws of India, including the Indian Income Tax Act.

It was held that Income of HTIL was deemed to have accrued or arisen in India and therefore, it squarely fell within the ambit of section 9 and hence, chargeable to Income tax under the head capital gains.

VODAFONE INTERNATIONAL HOLDINGS B.V. VS. UNION OF INDIA (SUPREME COURT)

Vodafone filed a review petition in Supreme Court and Supreme Court in January, 2012 reversed the Bombay High Court decision. Supreme Court held that Assessing Officer in India had no jurisdiction to tax the transaction which took place outside India and what was transferred was the shares of a foreign company namely CGP of Cayman's Island and not the Indian business.

The Supreme Court **reversed** the Bombay High Court judgment in the case of Vodafone International Holdings B.V. and held that capital gains arising to Hutchison Hong Kong from sale of shares of CGP located in Cayman's Island is not taxable in India. The Supreme Court held as under:

1. Transfer of shares of a foreign company (CGP) which has an Indian company as its subsidiary does not amount to transfer of capital asset situated in India within the meaning of 4^{th} limb of section 9(1)(i). The legal fiction in section 9(1)(i) does not mean that if foreign company has a subsidiary in India, then shares of a foreign company are deemed to be situated in India.

2. Section 9(1)(i) covers only the income arising from transfer of a capital asset situated in India and does not cover the income arising from **indirect transfer** of capital asset situated in India.

3. The source of income in relation to a transaction is construed to be where the transaction of sale takes place and not where the item of value, which was subject of transaction, was acquired or derived from. Where a foreign holding Company sells the shares of its foreign subsidiary company, then it cannot result in extinguishment of holding company's right of controlling the Indian company nor it can be said that it constitutes extinguishment and transfer of asset / management and control of property situated in India.

4. The Bombay High Court had held that Vodafone on purchase of shares of CGP got indirect interest in HEL. Vodafone acquired controlling right of HTIL in HEL namely the right to appoint directors in HEL, the right to use Hutch brand in India and non-compete agreement with Hutch brand in India, which all constituted a capital asset as per section 2(14). The Supreme Court reversing the Bombay High Court judgement held that controlling interest is not an identifiable or distinct capital asset independent of holding of shares and therefore does not satisfy the definition of capital asset in 2(14).

   Supreme Court held that subsidiary company is not a puppet of holding company and it has a separate existence. The controlling interest of holding company in subsidiary company is not a capital asset.

   Supreme Court held that since the capital gains was not taxable in India, Vodafone was not required to deduct TDS on the said capital gains.

The Finance Act, 2012 has retrospectively amended the definition of:

- Transfer under section 2(47)
- Capital asset under section 2(14)
- Deemed **accrual** of income under section 9

to affirm the judgment of Bombay High Court in the case of Vodafone International Holdings B.V. and to nullify the Supreme Court judgment in the said case.

GOODYEAR TYRE AND RUBBER CO.

Goodyear is an American Company. Singcell is a Company incorporated in Singapore and is a wholly owned subsidiary of Goodyear. Goodyear is a promoter of an Indian Company GEL and Goodyear holds 74% shares of GEL. GEL is listed on stock exchange in India.

Goodyear wants to make Singcell financially strong and an important entity of the Group. Goodyear, therefore, enters into a Share Contribution Deed (SCD) to contribute voluntarily the entire 74% shares it holds in GEL to Singcell WITHOUT ANY CONSIDERATION.

Held that it is settled law that section 45 must be read with section 48 and if the computation provision cannot be given effect to for any reason, the charging section 45 fails. In the instant case, no consideration would accrue or arise to the Goodyear by the transfer of shares and the Goodyear cannot be said to have derived any profit or gain from the transaction. As the consideration is incapable of being valued in definite terms or it remains unascertainable on the date of occurrence of taxable event, the question of applying section 45 read with section 48 would not arise.

As no consideration will pass on transfer of shares of GEL by Goodyear, no income will arise. The provisions of transfer pricing will not be applicable in the absence of liability to pay tax.

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LATEST CIRCULARS & NOTIFICATIONS 2012

Section 139 of the Income-tax Act, 1961 - Return of Income - Exemption to specified persons from requirement of furnishing a return of income under section 139(1) for assessment year 2012-13

NOTIFICATION NO. 9/2012 [F. No.225/283/2011-ITA(II)], dated 17-2-2012

In exercise of the powers conferred by sub-section (IC) of section 139 of the Income-tax Act, 1961, the Central Government hereby exempts the following class of persons, subject to the conditions specified hereinafter, from the requirement of furnishing a return of income under section 139(1) for the assessment year 2012-13, namely:-

1. Class of persons. -An individual whose total income for the relevant assessment year does not exceed ₹ 5 lakhs and consists of only income chargeable to income-tax under the following head,-

   (A) "Salaries";

   (B) "Income from other sources", by way of interest from a saving account in a bank, not exceeding ₹10,000.

2. Conditions,- The individual referred to in para 1,-

   (i) has reported to his employer his Permanent Account Number (PAN);

   (ii) has reported to his employer, the incomes mentioned in sub-para (B) of para 1 and the employer has deducted the tax thereon;

   (iii) has received a certificate of tax deduction in Form 16 from his employer which mentions the PAN, details of income and the tax deducted at source and deposited to the credit of the Central Government;

   (iv) has discharged his total tax liability for the assessment year through tax deduction at source and its deposit by the employer to the Central Government;

   (v) has no claim of refund of taxes due to him for the income of the assessment year, and

   (vi) has received salary from only one employer for the assessment year.

3. The exemption from the requirement of furnishing a return of income tax shall not be available where a notice under section 142(1) or section 148 or section 153A or section 153C of the Income-tax Act has been issued for filing a return of income for the relevant assessment year.

4. This notification shall come into force from the date of its publication in the Official Gazette.

Section 203 of the income-tax Act, 1961 - deduction of tax at source - Certificate for tax deducted - Issuance of TDS Certificates In Form No. 16A downloaded from TIN website

CIRCULAR NO. 01/2012 [F.No. 275/34/2011-IT(B)], DATED 9-4-2012

1. Section 203 of the Income-tax Act, 1961 ("the Act") read with the rule 31 of the Income-tax Rules, 1962 ("the Rules") provides for furnishing of certificate of tax deduction at source (TDS) by the deductor to the deductee specifying therein the prescribed particulars like amount of TDS, permanent account number (PAN), tax deduction and collection account number (TAN), etc. The relevant form for such TDS certificate is Form No. 16 in case of deduction under section 192 and Form No. 16A for deduction under any other provisions of Chapter XVII-B of the Act TDS certificate in Form No. 16 is to be issued annually whereas TDS certificate in Form No. 16A is to be issued quarterly.

2. For deduction of tax at source made on or after 01.04.2011, Circular No. 03/2011 dated 13.05.2011 stipulated mandatory issue of TDS certificate in Form No. 16A generated through TIN Central System and which is downloaded from the TIN website (www.tin-nsdl.com) with the unique TDS certificate number in cases of company including a banking company to which the Banking Regulation Act, 1949 applies and any bank or banking institution, referred to in section 51 of that Act or a cooperative society engaged in carrying the business of banking. For other deductors, such stipulation was optional. Moreover, pursuant to the issue of the said circular, a deductor issuing Form No. 16A generated through TIN Central System and which is downloaded from the TIN website had an option to authenticate such TDS certificate by using digital signature.

3. With a view to further strengthen the administration of the issue of TDS and for proper administration of the Act the Board have, in exercise of powers under section 119 of the Act, decided the following:-

4.1 Issue of TDS Certificate in Form No. 16A

For deduction of tax at source made on or after 01.04.2012: All deductors (including Government deductors who deposit TDS in the Central Government Account through book entry) shall issue TDS certificate in Form No. 16A generated through TIN central system and which is downloaded from the TIN website with a unique TDS certificate number in respect of all sums deducted on or after the 1st day of April, 2012 under any of the provisions of Chapter XVII-B other than section 192.

In other words, the issuance of duly verified TDS certificate in Form No. 16A, by the deductor of any category shall henceforth be only through TIN Central System. The deductor shall therefore, download such certificate from the TIN Central System, verify the correctness of the contents mentioned therein and authenticate the correctness of the contents before issue of the said certificate.

4.2 Authentication of TDS Certificate in Form No. 16A

(i) The deductor, issuing the TDS certificate in Form No.16A by downloading from the TIN website shall authenticate such TDS certificate by either using digital signature or manual signature.

(ii) Where the deduction has been done between 1st April, 2011 and 31st March, 2012 and the deductor being other than a company/bank or banking institution/a cooperative society engaged in carrying the business of banking and who do not issue the TDS certificate in Form No.16A by downloading from the TIN website shall authenticate such TDS certificate in Form No.16A by manual signature only.

5. The Director General of Income-tax (Systems) shall specify the procedure, formats and standards for the purpose of issuance of TDS certificate in Form No.16A which is downloaded from the TIN website and shall be responsible for the day-to-day administration in relation to the procedure, formats and standards for issuance of TDS certificate in Form No.16A in electronic form.

6. It is further clarified that TDS certificate issued in Form No. 16A by the deductors in terms of para 4.1 read with para 4.2 above and in accordance with this circular alongwith procedure, format and standards specified by the Director General of Income-tax (Systems) shall only be treated as a valid TDS certificate in Form No. 16A for the purpose of section 203 of the Act read with rule 31 of the Rules.

MANDATORY e-FILING OF INCOME TAX RETURN

PRESS RELEASE [No. 402/92/2006-MC (12 of 2012)], dated 2-7-2012

ELECTRONIC FILING OF RETURN: It is mandatory for the following assessees to file the return electronically. (Electronic Returns are paperless returns):

(i) All **Companies** (with digital signatures)
(ii) **Firm** requiring audit under section 44AB (with digital signatures)
(iii) An **Individual or HUF to whom provisions of section 44AB** are applicable (with digital signatures)
(iv) An **Individual or HUF whose total Income exceeds ₹ 10 lakh** (Digital signatures are optional)

CLARIFICATIONS BY FINANCE ACT, 2012

ADDITIONAL DEPRECIATION 32(1)(iia)

Additional depreciation under section 32(1)(iia) is **not available to power generating units** upto Assessment Year 2012-13. It shall be available from next year.

PRESUMPTIVE SCHEME UNDER SECTION 44AD

It has been clarified that this presumptive scheme under **section 44AD is not applicable to**:

(i) a person carrying on **profession** as referred to in section 44AA(1);
(ii) persons earning income in the nature of **commission or brokerage income**; or
(iii) a person carrying on **any agency business**.