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## ***LATEST IN JUDICIARY, 2011***

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### **1. CIT v. Japan Airlines Co. Ltd. (2010) 325 ITR 298 (Del.) - MOST IMPORTANT**

**What is the nature of landing and parking charges paid by an airline company to the Airports Authority of India and is tax required to be deducted at source in respect thereof?**

On this issue, the Delhi High Court referred to the case of United Airlines v. CIT (2006) 287 ITR 281, wherein the issue arose as to whether landing and parking charges could be deemed as rent under section 194-I. The Court observed that rent as defined in the said provision had a wider meaning than “rent” in common parlance. It included any agreement or arrangement for use of land. **The Court further observed that when the wheels of the aircraft coming into an airport touch the surface of the airfield, use of the land of the airport immediately begins.**

Similarly, for parking the aircraft in that airport, again, there is use of the land. Therefore, the landing and parking fee were definitely “rent” within the meaning of the provisions of section 194-I as they were payments for the use of the land of the airport.

### **2. Kanchanganga Sea Foods Ltd. v. CIT & ITO (2010) 325 ITR 540 (SC) - MOST IMPORTANT**

**Does payment of charter fee to a non-resident (for chartering fishing vessels), by way of percentage of fish catch done outside the territorial waters of India but brought to an Indian port for verification and valuation before dispatch of the same to the nonresident, attract the provisions of tax deduction at source under section 195?**

Where the assessee- company chartered two fishing vessels of non- resident company and charter fee was payable from earnings from sale of fish and for that purpose 85% of gross earnings from sale of fish was to be paid to non- resident company and accordingly 85% of catch was received after valuation by non- resident company in India, in sum and substance it amounted to receipt of value of money and **assessee was liable to deduct tax at source from such payment made to non- resident company.**

An Indian company engaged in the sale and export of sea foods entered into an agreement with a non-resident for chartering two fishing vessels (trawlers).

The charter fee was payable out of earnings from the sale of fish and for this purpose, 85% of the gross earnings from the sale of fish was to be paid to the non-resident company. The trawlers were delivered to the Indian company. The actual fishing operations were done outside the territorial waters of India but within the exclusive economic zone. The voyage commenced and concluded at the Chennai Port. The catch made at high seas were brought to Chennai where the surveyor of the Fishery

Department verified the log books and assessed the value of the catch over which local taxes were levied and paid. The Indian company paid the dues and arranged for customs clearance for the export of fish.

The trawlers, which were used for fishing, carried the fish to the destination chosen by the non-resident company. The trawlers reported back to the Chennai Port after delivering fishes to the destination and thereafter, commenced a fresh voyage.

The Indian company did not deduct tax at source from the payments to the non-resident and therefore, notice under section 201(1) of the Income-tax Act, 1961 was issued deeming the company as an assessee-in-default for failure to deduct tax at source under section 195. The Indian company, however, contended that it was not required to deduct tax at source since –

- i) no income accrued to the non-resident company in India since it did not carry on activities in India.
- ii) even if bringing the catch to the Chennai Port for customs appraisal and export to the non-resident results in an operation, it was an operation for mere purchase of goods and therefore, there is no assessable income.
- iii) even if 85% of the catch is considered as charter fee to the non-resident company, it was paid outside India.

The Apex Court observed that the chartered vessels with the entire catch were brought to the Indian Port, the catch were certified for human consumption, valued, and after customs and port clearance, the non-resident company received 85% of the catch. As long as the catch was not apportioned, the entire catch was the property of the Indian company and not of the non-resident company as the latter did not have any control over the catch.

**The control came into the hands of the nonresident only after it was given its share of 85% of the catch. Since the first receipt of 85% of the fish catch was in India, the non-resident effectively received the charter fee in the shape of 85% of the fish catch in India. The sale of fish and the realization of the sale consideration of fish by the non-resident outside India does not mean that there was no receipt in India.**

**When 85% of the catch is received after valuation by the non-resident in India, in sum and substance, it amounts to receipt of the value of money. Had it not been so, the value of the catch ought to have been the price for which the non-resident sold the fish catch at the chosen destination.**

**In light of the above, the income earned by the non-resident was chargeable to tax under section 5(2) of the Income-tax Act, 1961. The Indian company was, therefore, liable to deduct tax under section 195 on the payment made to the non-resident company. Since it had failed to deduct tax at source, it was an assessee-in-default under section 201.**

**Note – It may be noted that TDS provisions under section 195 are attracted even if the charter fees is payable in kind, for example, as a percentage of fish catch, as in this case.**

### **3. CIT v. Director, Prasar Bharti (2010) 325 ITR 205 (Ker) - IMPORTANT**

**Whether retention of a percentage of advertising charges collected from customers by the advertising agencies for payment to Doordarshan for telecasting advertisements would attract the provisions of tax deduction at source under section 194H?**

Prasar Bharti is a fully owned Government of India undertaking engaged in telecast of news, sports, entertainment, cinema and other programmes. The major source of its revenue is from advertisements, which were canvassed through agents appointed by Doordarshan under the agreement with them.

The advertisement charges were recovered from the customers by the advertisement agencies in accordance with the tariff prescribed by Doordarshan and incorporated in the agreement between the parties. There was a provision in the agreement permitting advertising agencies to retain 15% of the advertising charges payable by them to Doordarshan towards commission from out of the charges received for advertising services from customers.

The issue under consideration is whether retention of 15% of advertising charges by the advertising agency is in the nature of commission to attract the provisions of tax deduction at source under section 194H. It was contended that the agreement between Prasar Bharti and the advertising agency is not an agency but is a “principal to principal” agreement of sharing advertisement charges and therefore, the provisions for deduction of tax at source under section 194H would not get attracted in this case.

In this context, attention was invited to a clause of the agreement between the parties which reads as follows –

“Agency agrees to pay the TDS/income-tax liability as applicable under the income-tax law on the discount retained by him. For this purpose, the agency agrees to make payment to Doordarshan Commercial Service by means of cheque/demand draft for the TDS on 15% discount retained by them. This cheque/demand draft will be drawn separately and should not be included in the telecast fees/ advertisement charges”.

The above provision makes it clear that the advertising agency clearly understood the agreement as an agency agreement and the commission payable by Prasar Bharati to such agency is subject to tax deduction at source under the Income-tax Act, 1961. The permission granted by Doordarshan under the agreement to the agencies to retain 15% out of the advertisement charges collected by them from the customers amounts to payment of commission by Doordarshan to agents, which is subject to deduction of tax at source under section 194H.

**It is clear from section 194H that tax has to be deducted at the time of credit of such sum to the account of the payee or at the time of payment of such income in cash or by the issue of cheque or draft or any other mode, whichever is earlier. When the agent pays 85% of the advertisement charges collected from the customer, the agent simultaneously gets paid commission of 15%, which he is free to appropriate as his income. TDS on commission charges of 15% has to be paid to the Income-tax Department with reference to the date on which 85% of the advertisement charges are received from the agent.**

#### 4. Lachman Dass Bhatia Hingwala (P) Ltd. v. ACIT (2011) 330 ITR 243 (Delhi)[FB] - IMPORTANT

**Can the Tribunal exercise its power of rectification under section 254(2) to recall its order in entirety?**

On this issue, the Delhi High Court observed that the justification of an order passed by the Tribunal recalling its own order is required to be tested on the basis of the law laid down by the Apex Court in Honda Siel Power Products Ltd. v. CIT (2007) 295 ITR 466, dealing with the Tribunal's power under section 254(2) to recall its order where prejudice has resulted to a party due to an apparent omission, mistake or error committed by the Tribunal while passing the order. Such recalling of order for correcting an apparent mistake committed by the Tribunal has nothing to do with the doctrine or concept of inherent power of review. **It is a well settled provision of law that the Tribunal has no inherent power to review its own judgment or order on merits or reappraise the correctness of its earlier decision on merits. However, the power to recall has to be distinguished from the power to review. While the Tribunal does not have the inherent power to review its order on merits, it can recall its order for the purpose of correcting a mistake apparent from the record.**

The Apex Court, while dealing with the power of the Tribunal under section 254(2) in Honda Siel Power Products Ltd., observed that one of the important reasons for giving the power of rectification to the Tribunal is to see that no prejudice is caused to either of the parties appearing before it by its decision based on a mistake apparent from the record. **When prejudice results from an order attributable to the Tribunal's mistake, error or omission, then it is the duty of the Tribunal to set it right.** In that case, the Tribunal had not considered the material which was already on record while passing the judgment. The Apex Court took note of the fact that the Tribunal committed a mistake in not considering material which was already on record and the Tribunal acknowledged its mistake and accordingly, rectified its order.

The above decision of the Apex Court is an authority for the proposition that the Tribunal, in certain circumstances can recall its own order and section 254(2) does not totally prohibit so. In view of the law laid down by the Apex Court in that case, the decisions rendered by the High Courts in certain cases to the effect that the Tribunal under no circumstances can recall its order in entirety do not lay down the correct statement of law.

Applying the above-mentioned decision of the Apex Court to this case, the Delhi High Court observed that the **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.**

#### 5. CIT VS. SAURASHTRA CEMENT LTD. [2010] (SUPREME COURT) – MOST IMPORTANT

The assessee, engaged in the manufacture of cement, entered into an agreement with the supplier for purchase of additional cement plant for certain consideration. As per terms of the agreement, in the event of delay caused in the delivery of the machinery, the assessee was to be compensated by the supplier at the rate of 0.5 per cent of the price of the respective portion of the machinery for delay of each month by way of liquidated damages without proof of actual loss. The supplier defaulted and failed to supply the plant and machinery on the scheduled time and, therefore, as per the terms of the contract, the assessee received certain amount from the supplier by way of liquidated damages.

Compensation paid for the delay in procurement of capital asset amounted to sterilization of the capital asset of the assessee as supplier had failed to supply the plant within time as stipulated in the agreement. The amount received by the assessee towards compensation for sterilization of the profit-earning source and not in the ordinary course of its business, was a **capital receipt in the hands of the assessee.**

**6. CIT VS. SMT. NEENA JAIN [2010] (PUNJ. & HAR.)**

**Incomplete building** neither falls within the definition of a building, as contemplated under section 2(ea) of the Act, nor within the purview of 'urban land' as excluded by Explanation 1(b). Hence, in such a case, the value of house under construction including investment on construction, is not liable to wealth-tax. **Therefore, land and incomplete building thereon is not an asset.**

**7. BRIJ LAL VS. CIT [2010](SUPREME COURT) – MOST IMPORTANT**

Sections 234A, 234B and 234C are applicable to proceedings of Settlement Commission upto stage of section 245D(1) and not beyond that and, therefore, **terminal point for levy of interest under section 234B would be upto date of order under section 245D(1) and not upto date of order of settlement under section 245D(4).** (Students may please ignore the case of Hindustan bulk Carriers in Module 2)

**8. BRIJ LAL VS. CIT [2010](SUPREME COURT) – MOST IMPORTANT**

Under section 245-I, the order of the Settlement Commission is made final and conclusive on matters mentioned in the application for settlement, except in the two cases of fraud and misrepresentation in which case the matter can be reopened. **Settlement commission cannot reopen its concluded proceedings by invoking section 154. Therefore, the Settlement Commission cannot reopen its concluded proceedings by invoking section 154 so as to levy interest under section 234B, particularly, in view of section 245-I.**

**9. CIT VS. JET AIRWAYS (I) LTD.[2010](BOM.) – MOST IMPORTANT**

Section 147 has the effect that the Assessing Officer has to assess or reassess the income ('such income') which escaped assessment and which was the basis of formation of belief and if he does so, he can also assess or reassess any other income which has escaped assessment and which comes to his notice during the course of the proceedings. **However, if after issuing a notice under section 148, he accepts the contention of the assessee and holds that the income for which he had initially formed a reason to believe that it had escaped assessment, has, as a matter of fact, not escaped assessment, it is not open to him to independently assess some other income, and if he intends to do so, a fresh notice under section 148 would be necessary, the legality of which would be tested in the event of a challenge by the assessee.**

**10. CIT VS. ROHIT ANAND[2010](DELHI) – MOST IMPORTANT**

Where assessee invested in shares and treated shares as investment in his books of accounts, intention was manifested by treatment given to such investment that (i) investment was out of own fund and not from borrowed funds, (ii) that the investment was not rotated frequently, (iii) total number of transactions were very few and (iv) all such shares purchased were not sold and rather held for quite a number of days; in such circumstances Tribunal was justified in holding that respondent-

assessee was not a trader in stock but only a investor and further his income on sale of shares was capital gain and not business income.

**11. CIT VS. GOPAL PUROHIT[2010](BOM.) – MOST IMPORTANT**

The Tribunal had given a pure finding of fact that the assessee was engaged in two different types of transactions that the first set of transactions involved investment in shares and the second set of transactions involved dealing in shares for the purposes of business.

Held that, the tribunal had correctly applied the principle of law in accepting the position **that it was open to an assessee to maintain two separate portfolios, one relating to investment in shares and another relating to business activities involving dealing in shares.** The Tribunal held that the delivery-based transactions and the profit received therefrom should be treated either as short- term or, as the case may be, long-term capital gain, depending upon the period of the holding, A finding of fact had been arrived at by the Tribunal as regards the existence of two distinct types of transactions, namely, those by way of investment on one hand and those for the purposes of business on the other hand.

**12. ASSTT. CIT VS. ELECON ENGINEERING CO. LTD [2010](SUPREME COURT) - IMPORTANT**

Roll- over premium charges paid by assessee in respect of foreign exchange forward contracts relating foreign currency loan taken by assessee shall be added to the WDV of Block of Assets as per section 43A.

**13. T.R.F LTD. VS. CIT [2010] (SUPREME COURT) - IMPORTANT**

After 1.4.1989, it is not necessary for the assessee to establish that the debt, in fact, has become irrecoverable. It is enough if the bad debt is written off as irrecoverable in the accounts of the assessee.

**14. CIT VS. AIMIL LTD. [2010] (DELHI) - IMPORTANT**

Employees' contribution towards provident fund and ESI would qualify for deduction even though it was paid after due date prescribed under the Provident Fund Act/ESI Act but before due date of filing of return under section 139.

**15. TECHNO SHARES & STOCKS LTD. VS. CIT [2010](SUPREME COURT) – MOST IMPORTANT**

**The Supreme Court considered the definition of an "intangible asset" in section 32(1)(ii). Right of membership conferred upon a member under BSE membership card in terms of rules and Bye-laws of BSE, as they stood during relevant assessment years, was a 'business or commercial right' which gave a non-defaulting continuing member a right to access exchange and to participate therein and, in that sense, it was a licence or akin to a licence in terms of section 32(1)(ii). It has been held that a stock exchange card is a "license" and eligible for depreciation under section 32(1)(ii).**

**16. CIT V. K. THANGAMANI (2009) 309 ITR 015 (MAD.)**

The assessee was engaged in tax consultancy and audit work. During the search conducted at the residential premises and office of the assessee certain incriminating documents were seized. From the documents seized it was revealed that the assessee had been claiming and receiving income-tax

refunds by filing bogus TDS certificates with returns of income prepared by him even in the names of non-existing persons. The Assessing Officer treats the deposits, being the TDS certificates encashed by the assessee during the previous year, as professional income during the previous year. The Commissioner (Appeals) reduced the income on account of the refunds received by him and held it taxable under residuary head instead of Profession. The Tribunal held that the amount of refunds received by the assessee by fraudulent means could not be assessed as income of the assessee.

The High Court held that when the Tribunal found that the assessee had indulged in fabricating TDS certificates and got refunds from the Department it should not have come to the conclusion that such income was not taxable.

**17. CIT V. HUGHES ESCORTS COMMUNICATIONS LTD. (2009) (DEL)**

The expenses incurred in the previous year, prior to the commencement of the business but after the setting up its business, which two dates need not be the same, would be deductible as revenue expenditure.

**18. SOLID CONTAINERS LTD. V. DCIT (2009) (BOM.)**

The assessee had taken a loan for business purposes which was written back and directly credited to the reserves account, as a result of consent terms arrived at in a suit. The assessee claimed this amount as capital receipt, even though it had offered the interest on the said loan as its income by crediting the same to its profit and loss account. The Assessing Officer added the amount to the total income of the assessee as its income and this was upheld by the Tribunal. The High Court held that it was a loan taken for trading activity and ultimately, upon waiver the amount was retained in the business by the assessee. The amount had become the assessee's income and was assessable.

**19. DCIT V. BPL SANYO FINANCE LTD. (2009) 312 ITR 63 (KAR.)**

The assessee company is engaged in non-banking financial business and applied for allotment of one lakh equity shares of the IDBI in response to the public issue of shares and remitted the share application money. The IDBI allotted 89,200 shares to the assessee as against one lakh equity shares applied for. Thereafter, the IDBI called the assessee to pay the balance sum for issuance of shares in its favour. As the assessee company failed to remit the balance outstanding allotment money, the IDBI cancelled the allotment and forfeited the share application money. The assessee claimed it as a short term capital loss in its return of income. The Assessing Officer disallowed the claim. The Commissioner (Appeals) confirmed the order passed by the Assessing Officer. The Tribunal allowed the appeal filed by the assessee. The High Court held that consequent to the assessee's default in not paying the balance of money on allotment, its right in the shares stood extinguished on forfeiture by the IDBI. The loss suffered by the assessee, i.e., the non-recovery of share application money was consequent to the forfeiture of its right in the shares and was to be understood to be within the scope and ambit of transfer. It would amount to short-term capital loss to the assessee.