LATEST IN JUDICIARY FOR NOVEMBER 2012

S. NO.	QUESTION RAISED BEFORE THE COURT	DECISION	*NAME OF THE CASE*
1.	**Can the Duty Entitlement Passbook Scheme (DEPB) benefits and Duty Drawback be treated as profit derived from the business of the industrial undertaking to be eligible for deduction under section 80-IB?**	On this issue, the Supreme Court observed that DEPB / Duty drawback are incentives which flow from the schemes framed by the Central Government or from section 75 of the Customs Act, 1962. Section 80-IB provides for the allowing of deduction in respect of profits and gains derived from eligible business. However, incentive profits are not profits derived from eligible business under section 80-IB. They belong to the category of ancillary profits of such undertaking. Profits derived by way of incentives such as DEPB/Duty drawback cannot be **credited** against the cost of manufacture of goods debited in the profit and loss account and they do not fall within the expression "profits derived from industrial undertaking" under section 80-IB . **Hence, Duty drawback receipts and DEPB benefits do not form part of the profits derived from the eligible business for the purpose of the deduction under section 80-IB.**	***Liberty India v. CIT (2009) (SC)***
2.	**Can the reimbursement of expenses towards customs duty be included for computing profits under section 44BB?**	In this case assessee (a non-resident company) assessed under **section 44BB**, had not paid tax on the reimbursement of expenses, which include customs duty also received from ONGC. The Assessing Officer taxed these sums. The Commissioner (Appeals) partly allowed the appeal holding that the customs duty paid in importing the equipment for rendering services does not form part of the amount taxable under section 44BB. ONGC, who had hired the services of the assessee-(company in contract) for import of machinery or equipment, so liability to pay the customs duty was on them (ONGC)and there could not be any element of profit in reimbursement of the customs duty, paid by the assessee. **The High Court** held that reimbursement of expenses towards the customs duty paid by the assessee, being **statutory** in nature, could not form part of amount for the purposes of **deemed profits**, unlike the other amounts received towards	***Director of Income Tax (International Taxation) V. Schlumberger Asia Services Ltd. (2009) (Uttrakhand)***

		reimbursement. **Therefore, same would not form part of the amount taxable under section 44BB.**	
3.	**Would the provisions of deemed dividend under section 2(22) (e) be attracted in respect of financial transactions entered into in the normal course of business?**	Under **section 2(22)(e)**, loans and advances made out of accumulated profits of a company (in which public are not substantially interested) to a beneficial owner of shares **holding not less than 10%** of the voting power; or to a concern in which such shareholder has substantial interest is deemed as dividend. However, this provision would not apply in the case of advance made in the course of the assessee's business as a trading transaction. The assessee, a travel agency, has regular business dealings with the two concerns dealing with holiday resorts and tourism industry. The High Court observed that the assessee was involved in booking of resorts for the customers of these companies and entered into normal business transactions as a part of its day-to-day business activities. The High Court held that financial transactions cannot under any circumstances be treated as loans or advances received by the assessee from these concerns for the purpose of application of section 2(22)(e).	***CIT v. Ambassador Travels (P) Ltd. (2009) (Del.)***
4.	**Would the payments made by the assessee to MTNL / other companies for the services provided through interconnect / port / access / toll attract TDS under section 194J?**	The assessee-companies engaged in providing cellular telephone facilities to their subscribers, had been granted licences by the Department of Telecommunication for operating in specified circles. The licences stipulated that the Department of Telecommunication/MTNL/BSNL would continue to operate in the service areas in respect of which licences were issued. Where calls were to be made by subscribers of one network to another network, such calls were to be routed through MTNL/BSNL through interconnection points known as ports. For providing interconnection, the assessee entered into agreements with MTNL/BSNL, which were regulated by the Telecom Regulatory Authority of India. Under the agreement the assessee had to pay interconnection, access charges and port charges to the interconnection providers. The Department was of the view that interconnect/port access charges were liable for tax deduction at source in view of the provisions of section 194J on the understanding that these charges were in the nature of fee for technical services. The High Court held that the services rendered relating to interconnection, port	***CIT v. Bharti Cellular Ltd. (2009) (Del.)***

		access did not involve any human interface and, therefore, the services could not be regarded as "technical services" as contemplated under section 194J. The interconnect/port access facility was only a facility to use the gateway and the network of MTNL/other companies. MTNL or other companies did not provide any assistance to the assessee in managing, operating, setting up their infrastructure and networks. Even though the facility of interconnection and port access provided by MTNL/other companies was "technical" in the sense that it involved sophisticated technology, the expression "technical service" is not to be construed in the abstract and general sense but in the narrower sense as circumscribed by the expressions "managerial service" and "consultancy service" under Explanation 2 to section 9(1) (vii). The expression "technical service" would have reference to only technical service rendered by a human. It would not include any service provided by machines or robots. The interconnect charges/port access charges could not, therefore, be regarded as fees for technical services, and hence TDS provisions under section 194J are not attracted.	
6.	**Can freight subsidy arising out of the scheme of Central Government be treated as a “profit derived from the business” for the purposes of section 80-IA?**	Section 80-IA provides for deduction in respect of profits and gains derived from eligible business. In this case, the Central Government had framed a scheme whereby freight/transport subsidy was provided to industries set up in remote areas where rail facilities were not available and some percentage of the transport expenses incurred to transport raw material/finished goods to or from the factory was subsidized. The issue under consideration is whether such freight subsidy arising out of the scheme of Central Government can be treated as a “profit derived from the business” for the purposes of section 80-IA. On appeal, the High Court held that the transport subsidy received by the assessee was not a profit derived from business since it was not an operational profit. **The source was not the business of the assessee but the scheme of Central Government**. The words “derived from” are narrower in connotation as compared to the words “attributable to”. **Therefore, the freight subsidy cannot be treated as profits derived from the business for the purposes of section 80-IA**.	***CIT v. Kiran Enterprises (2010) (HP)***

7.	**Where the hotel industry was established based on subsidy announced by the State Government, can such subsidy received be treated as a revenue receipt solely due to the reason that the same is received by the assessee after completion of the hotel projects and commencement of the business?**	The assessee-company treated the amount of subsidy received from the State Government, as a capital investment. The subsidy was granted by the State Government to encourage the hotel industry. The Assessing Officer opined that the same was a revenue receipt. The Commissioner (Appeals) held that the subsidy had been granted to the assessee by the State Government as per the package of incentives and concessions and that it was towards investment and not a revenue receipt. The Tribunal confirmed the order passed by the Commissioner (Appeals). The Revenue filed an appeal to the High Court contending that since the subsidy is received by the assessee after completion of the hotel project and commencing of the business, such receipt has to be taken as a revenue receipt and not a capital investment. The High Court held that the hotel industry was established based on the subsidy announced by the State Government to encourage tourism and the State Government was in the habit of releasing the subsidy amount depending upon the budgetary allocation in each year. In several cases, the State Government had released the subsidy amount even after ten years of the commencement of the project. **Therefore, the subsidy received has to be treated as a capital receipt and would not be liable to tax.**	***CIT v. Udupi Builders P. Ltd. (2009) (Kar.)***
9.	**In a case where the partnership deed does not specify the remuneration payable to each individual working partner but lays down the manner of fixing the remuneration, would the assessee-firm be entitled to deduction in respect of remuneration paid to partners?**	The partnership deed of the assessee firm provided that in case the book profits of the firm are up to Rs. 75,000, then the partners would be entitled to remuneration up to Rs. 50,000 or 90 per cent of the book profits, whichever is more. In respect of the next Rs. 75,000, it is 60 per cent and for the balance book profits, it is 40 per cent. Thereafter, it is further clarified that the book profits shall be computed as defined in section 40(b) of the Income-tax Act, 1961, or any other provision of law as may be applicable for the assessment of the partnership firm. It has also been clarified that in case there is any loss in a particular year, the partners shall not be entitled to any remuneration. Clause 7 of the partnership deed laid down that the remuneration payable to the partners should be credited to the respective accounts at the time of closing the accounting year and clause 5 stated that the partners shall be entitled to equal remuneration.	***CIT v. Anil Hardware Store (2010) 323 ITR 0368 (HP)*** **Relevant section: 40(b)(v)**

		The High Court held that the manner of fixing the remuneration of the partners has been specified in the partnership deed. In a given year, the partners may decide to invest certain amounts of the profits into other venture and receive less remuneration than that which is permissible under the partnership deed, but there is nothing which debars them from claiming the maximum amount of remuneration payable in terms of the partnership deed. **The method of remuneration having been laid down, the assessee-firm is entitled to deduct the remuneration paid to the partners under section 40(b) (v) of the Income-tax Act.** ***Note –*** *(1) Payment of remuneration to working partners is allowed as deduction if it is authorized by the partnership deed and is subject to the overall ceiling limits specified in section 40(b) (v). The limit for partners' remuneration under section 40(b) (v) has revised upwards and the differential limits for partners' remuneration paid by professional firms and non-professional firms have been removed. On the first Rs.3 lakh of book profit or in case of loss, the limit would be the higher of Rs.1, 50,000 or 90% of book profit and on the balance of book profit, the limit would be 60%.* *(2) The CBDT had, vide Circular No. 739 dated 25-3-1996, clarified that no deduction under section 40(b) (v) will be admissible unless the partnership deed either specifies the amount of remuneration payable to each individual working partner or lays down the manner of quantifying such remuneration.* *In this case, since the partnership deed lays down the manner of quantifying such remuneration, the same would be allowed as deduction subject to the limits specified in section 40(b) (v).*	
10.	**In determining the period of holding of a capital asset received by a partner on dissolution of firm, can the period of holding of the firm be taken into account?**	The assessee was a partner in a firm which owned a hospital building and land. The firm was dissolved and the entire assets including the hospital building and land were taken over by the assessee. The assessee sold the hospital building and the land within three days of dissolution. He, however, claimed that the period of holding should be reckoned by including the period when he was a partner of the firm. He contended that since the total period has more than 36 months, the capital gain was to be treated as a long-term capital gain. The High Court held that the benefit of taking the cost of acquisition as the cost to	***P. P. Menon v. CIT (2010) (Ker.)***

		the previous owner under section 2(42A) read with section 49(1) (iii) (b) can be availed only if the dissolution of the firm had taken place at any time before April 1, 1987. In this case the firm was dissolved on April 15, 2001 and therefore the benefit of these sections was not available to the assessee. **Therefore, the period of holding of the asset by the assessee in this case was only from the date of dissolution of the firm**. Since the assessee sold the property within three days of acquiring the same the gains have to be treated as short-term capital gain.	
11.	**Can an AOP be constituted by inheritance under will?**	An association of persons is a voluntary association of two or more persons who join together for a particular purpose which may not necessarily be with the object of deriving of income or profits or gains. The association should be voluntary on the part of the persons forming the same irrespective of the object of associating. **Forced association of persons** on account of inheriting joint property under a will (or such other circumstances) not being voluntary would not constitute such joint legatees as "association of persons" for the purpose of **section 2(31)**.	***CIT v. Laxmi Pd. and Sons (2009) (All.)***
12.	**Would the doctrine of merger apply for calculating the period of limitation under section 154(7)?**	The issue under consideration is whether the time limit of 4 years as per section 154(7) would apply from the date of original assessment order or the order of the Appellate Authority. The High Court held that once an appeal against the order passed by an authority is preferred and is decided by the appellate authority, the order of the Assessing Officer merges with the order of the appellate authority. After merger, the order of the original authority ceases to exist and the order of the appellate authority prevails. Thus, the period of limitation of 4 years for the purpose of section 154(7) has to be counted from the date of the order of the Appellate Authority. *Note - In this case, the Delhi High Court has followed the decision of the Supreme Court in case of Hind Wire Industries v. CIT (1995) 212 ITR 639.*	***CIT v. Tony Electronics Limited (2010) (Del.)***