

**"Deductions u/s.36 and amounts not deductible or deductible
conditionally (Sections 40, 40A & 43B)"**

A} **Section 36(1)(ii).**

1) Sec. 36, sub-s. (1), cl. (ii) does not postulate that there should be any extra services rendered by an employee before payment of commission to him can be justified as an allowable expenditure. What it requires is only that commission paid to an employee should be for services rendered by him. For example, if an employee has not rendered any service at all during the relevant accounting year, no commission can be paid to him which would be an allowable expenditure. There must be some services rendered by an employee and where commission is paid for the services so rendered, s. 36, sub-s. (1), cl. (ii) would apply and the commission to the extent to which it is found reasonable would be an allowable expenditure under that provision. It is not necessary that the commission should be paid under a contractual obligation. It may be purely voluntary. But, it must be for services rendered. Further the fact that services of the employees during the relevant accounting year were in no way greater or more onerous than the services rendered by them in the earlier years, is

immaterial. It is obvious that no business can prosper unless the employees engaged in it are satisfied and contented and they feel a sense of involvement and identification and this can be best secured by giving them a status in the business and allowing them to share in the profits. What is the requirement of commercial expediency must be judged not in the light of the 19th Century Laissez Faire doctrine which regarded man as an economic being concerned only to protect and advance his self-interest but in the context of current socio-economic thinking which places the general interest of the community above the personal interest of the individual and believes that a business or undertaking is the product of the combined efforts of the employer and the employees and where there is sufficiently large profit, after providing for the salary or remuneration of the employer and the employees and other prior charges such as interest on capital, depreciation, reserves, etc., a part of it should in all fairness go to the employees.- ***Shahazada Nand 108 ITR 207 (SC)***.

2) Where Commission is paid for services rendered, it cannot be said that had the same not been paid, it would have been paid as dividend- ***AMD METPLAST PVT LTD vs. DCIT 341 ITR 563 (Delhi);Coil Co. Pvt. Ltd. ITA No.1389/Del/2009 & ITA No.2648/Del/2010 & ITA No.452/Del/2011***
dt. 25th May 2012.

If bonus is a reward for work, in addition to the salary paid and is in no way related to their shareholding, the same is allowable and cannot be characterised as a dividend payment in disguise.- Career Launcher 358 ITR 179 (Del.)

3) However, if the commission is paid to avoid taxes, then such payment can be treated as invalid- ***Dalal Broacha Stock Broking Pvt. Ltd. 10 ITR (Trib.) 357 (Mum.)(SB): 131 ITD 36.***

4) Section 36 and section 37-

The subject-matter of s. 10(2)(v) is "current repairs" and it appears difficult to agree that repairs which are not "current repairs" should not be considered for deduction on general principles or under s. 10(2)(xv). There must be very strong evidence that in the case of such repairs, the Legislature intended a departure from the principle that an expenditure, laid out or expended wholly and exclusively for the purposes of the business, and which expenditure is not capital in nature, should not be allowed in computing the income from business. There is nothing in the language of s. 10(2)(v) which declares or necessarily implies that repairs, other than current repairs, will not qualify for the benefit of that principle. We must remember that on accepted commercial practice and trading principles an

item of business expenditure must be deducted in order to arrive at the true figure of profits and gains for tax purposes. The rule was held by the Privy Council in CIT vs. Chitnavis AIR 1932 PC 178 to be applicable in the case of losses- ***Kalyanji Mavji 122 ITR 49 (SC.)***

-Interest paid by the assessee-company is a permissible deduction under s. 10(2)(xv) which permits "any expenditure not being an allowance of the nature described in any of the cls. (i) to (xiv) inclusive and not being in the nature of capital expenditure or personal expenses of the assessee laid out or expended wholly and exclusively for the purpose of such business, profession or vocation" as a permissible allowance in the computation of profits or gains of the business carried on in the year of account. Payment of interest is expenditure; but it is not an allowance of the nature described in cl. (iii) and there is no other clause in cls. (i) to (xiv) to which the payment of interest on unpaid balance of consideration for sale of assets may be attracted. It is in the capacity of a person carrying on business that this interest is paid.- ***Bombay Steam Navigation Co. 56 ITR 52 (SC)***.

Interest paid on mortgage claimed u/s. 36(1)(iii) & section 24.- Express Newspapers 124 ITR 117 (Mad.)

-assessee is entitled for deduction of ex-gratia payment made to the employees since bonus cannot be paid as the employees are excluded from the category of bonus under the Payment of Bonus Act- **CIT V/s. LAKSHMI VILAS BANK LTD2014-TIOL-797-HC-MAD-IT.**

-Section 36(1)(v) and section 37, - even if any payment is made to an unapproved gratuity fund, it has to be allowed under sec. 37;-**CAPITAL IQ INFORMATION SYSTEM (INDIA) PVT LTD. 2013-TIOL-528-ITAT-HYD.**

5) **Business Exigencies**-for making advances would not disentitle the assessee to the deduction so long as business expediency exists-**RELIANCE COMMUNICATIONS INFRASTRUCTURE LTD. 2012-TIOL-274-HC-MUM-IT.**

6) Section 36(1)(vii)- Bad debts- Shreyas Morakhia 342 ITR 285 (Bom.)

6) **Section 40(a)(ia)**-

-1st proviso to section 40(a)(ia) is retrospective.-**CIT V/s. Rajinder Kumar 260 CTR 113 (Del.); Naresh Kumar 262 CTR 389 (Del.)**

-second proviso to Section 40(a)(ia) is declaratory and curative in nature and it has retrospective effect from 1st April, 2005, being the date from

which sub clause (ia) of section 40(a) was inserted by the Finance (No. 2) Act, 2004.- RAJEEV KUMAR AGARWAL 2014-TIOL-289-ITAT-AGRA.

-Bonafide Belief- Kotak Securities 203 Taxman 86 (Bom.)- CIT V/s. Twenty First Century Shares & Securities 25 ITR (Trib.) 63 (Mum.)-no disallowance upto A.Y. 07-08.

-Delay in filing of certificates u/s. 197A & Form 15-J not fatal to deduction & does not trigger sec.40(a)(ia).

Section 43B- Employee's contribution also eligible u/s. 36(1)(va) r/w 43B, if paid before the due date of filing the return-**JAIPUR VIDYUT VITRAN NIGAM LTD.** (2014) 265 CTR (Raj) 62 : (2014) 98 DTR (Raj) 105; Spectrum Consultants 89 DTR (Kar.) 274; CIT V/s. Hindustan Organic Chemicals {Bom. HC}; **Strides Acrolab 138 ITD 323 (Mum.). Contrary view: GUJARAT STATE ROAD TRANSPORT CORPORATION(2014) 265 CTR (Guj) 64 : (2014) 98 DTR (Guj) 112.**

Section 43B-whether applicable to service tax- Pharma Search 53 SOT 1 (Mum.)-{followed in Ovira Logistic Pvt. Ltd. 21 ITR 436 (Mum.) filing before the due date of return}; Euro RSCG Advertising 53 SOT 90 (Mum.)