

**CIT, Panaji Vs M/s Orient Goa Pvt Ltd (Dated: October 16, 2009)-
Bombay High Court**

Income tax - Sec 195, 40(a)(i), 44B & 172 - Assessee makes payment to a non-resident company - Mitsui & Co Ltd of Japan - towards demurrage charges - deducts no TDS on the ground that the demurrage payments debited in the hands of the non-resident recipient are in the nature of profits from occasional shipping business u/s 44B read with Sec 172 - AO disagrees and disallows the expenditure u/s 40(a)(i) - CIT (A) refers to CBDT Circular No 723 of 1995 and deletes the disallowance - Tribunal goes with the CIT(A) - held,

++ The assessee is a company incorporated in India. It cannot be said to be a non-resident. It also cannot lay fingers on section 172, since we are not dealing with profits of non-residents. The other aspect is that such profits of non-residents should be from occasional shipping business. It is not the case that the respondent assessee has earned some profit from occasional shipping and is a non-resident.

++ Section 172 does not have application in relation to the respondent assessee. The company from Japan viz. Mitsui & Co. Ltd., Japan, recipient of demurrage amount is not before the bench. The HC is not examining the tax liability of the foreign company i.e. Mitsui & Co. Ltd., Japan. There is no dispute about interpretation of Section 172 or Section 195. Crucial point is as to how Section 172 applies to the facts of the present case wherein the respondent assessee is an Indian company, incorporated under the provisions of Indian Companies Act, 1956. The ITAT has recorded a perverse observation/finding regarding application of Section 44B and 172 of the Act 1961.

++ In the case on hand, the Commissioner of Income-tax (Appeals) and the appellate Tribunal have wrongly interpreted the Circular dated 19.9.1995 issued by the CBDT. This circular cannot be considered in the facts and circumstances of the present case, in aid to the respondent assessee. The AO has passed a legal, proper and reasoned order, holding that the provisions laid down under Section 40(a)(i) of the Act 1961 apply to the case on hand.

And the Bench finally quashes the Tribunal's order and allows the Revenue's appeal

